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CHALLENGES TO JURY COMPOSITION IN NORTH CAROLINA

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INTRODUCTION

The law applicable to challenges for discrimination in the selection of a jury (grand or petit) has frequently been reviewed.¹ The starting point for any analysis is the basic principle that a jury must fairly represent a cross section of the community.

There is a constitutional right to a jury drawn from a group which represents a cross section of the community. And a cross section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy, or the most successful, nor of the least intelligent, the least wealthy, or the least successful. It is a democratic institution, representative of all qualified classes of people.²

Given this tenet, the practical question in jury challenge cases involves the quantum and nature of the proof required to show discrimination in the selection process.

Generally, the decisions of the United States Supreme Court have

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1. *E.g.*, Kairys, *Juror Selection, The Law, A Mathematical Method of Analysis, and A Case Study*, 10 AMER. CRIM. L. REV. 771 (1972); Comment, *Grand Jury Selection: Voter Registration Lists as a Cross-Section of the Community*, 52 ORE. L. REV. 482 (1973).

2. *Fay v. New York*, 332 U.S. 261, 299-300 (1947) (Murphy, Black, Douglas and Rutledge, dissenting).

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established four alternate methods of showing discrimination.³ First, the sources of names of prospective jurors may be discriminating as to certain identifiable and legally cognizable classes of people. For example, if names are taken from tax lists or voter registration lists which are maintained separately for blacks and whites, a prima facie case of discrimination is shown.⁴ Second, if the process of selection itself is discriminatory, a constitutional challenge will succeed.⁵ Third, if the results of the process reveal a significant disparity between the proportion of the challenged class and the community cross section, these results may tend to establish discrimination.⁶ This method, however, must be qualified in light of the decision in *Alexander v. Louisiana*,⁷ in which the Court refused to find discrimination solely on the basis of statistical imbalance, but did find discrimination by means of an examination of both the process and the results.⁸ There would thus seem to be some doubt as to whether a numerical disparity by itself is sufficient to establish a prima facie case.⁹ Finally, a successful challenge can be based upon violation of the specific and statutory provisions governing selection of the venire.

The fact that race is not the only cognizable classification is made clear by *Taylor v. Louisiana*,¹⁰ which struck down a Louisiana statute which automatically excluded women from jury service unless they filed a written notice of their desire to serve. The effect of the statute was virtually total exclusion of women from juries; the case reversed an earlier decision,¹¹ and, as the court recognized, was the first square holding that exclusion of women from jury panels in a criminal trial denies a defendant's sixth amendment right to trial by a representative cross section of the community. However, an attempt to identify a specific age group as cognizable is far less likely to succeed.¹²

3. This analysis is taken from Kairys, *supra* n.1, at 596-597.

4. *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Whitus v. Georgia*, 385 U.S. 545 (1966).

5. *E.g.*, *Williams v. Georgia*, 349 U.S. 375 (1965); *Avery v. Georgia*, 345 U.S. 559 (1963).

6. *Turner v. Fouche*, 396 U.S. 346 (1970); *Sims v. Georgia*, 389 U.S. 404 (1967).

7. 405 U.S. 625 (1972).

8. *Id.* at 630.

9. In *Turner v. Fouche*, 396 U.S. 346 (1970), the Court noted that a significant under-representation had been shown, and added,

... we cannot say that the under-representation reflected in these figures is so insubstantial as to warrant no corrective action by a federal court. . . . p. 359. [However, the Court also based its decision on the opportunity to discriminate in the process used]. They [appellant-plaintiffs] further demonstrated that the disparity originated at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. *Id.*

10. 43 U.S.L.W. 4167 (Jan. 21, 1975).

11. *Hoyt v. Florida*, 368 U.S. 57 (1961) (rational basis for such exemption).

12. See *Hamling v. United States*, 94 S. Ct. 2887 (1974), in which Justice Rehn-

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Against this background, an examination of cases involving challenges to jury composition in the Fourth Circuit is instructive as to the quantum of the proof necessary to establish discrimination. These cases illustrate the factual showing which the above principles require.

THE LAW IN THE FOURTH CIRCUIT

There are three particularly important Fourth Circuit cases dealing with attacks upon the racial composition of grand and petit juries, all originating in the District Court for the Western District of Virginia. The first is *Hariston v. Cox*.¹³ The defendant was convicted of first degree murder in 1942, and brought a habeas corpus action in 1969 on the grounds of systematic exclusion of blacks from the grand and petit juries. The District Court held that no prima facie case had been shown.¹⁴ The Fourth Circuit reversed. The evidence showed: (1) 20% of the population of the county from which the grand and petit juries were drawn was black;¹⁵ (2) no blacks were on petitioner's grand or petit jury;¹⁶ and (3) that voting lists containing racial designations were the source of names used.¹⁷

The Fourth Circuit held that the 0/20% disparity and the use of racially designated lists constituted a prima facie case of systematic exclusion, that particular acts of discrimination need not be shown, and that the use of racially designated lists was an opportunity to discriminate.¹⁸ On remand, the state was given an opportunity to rebut the prima facie case made out by petitioner, but the District Court Judge found that the evidence presented showed, at best, that a black might have occasionally slipped in. This was not enough: "That such token inclusion will be condemned as readily as total exclusion is well established,"¹⁹ and the writ was granted.

The second case is *Fuller v. Cox*.²⁰ The petitioner was convicted of robbery in 1966 and sentenced to 28 years.²¹ A habeas action was filed alleging, among other grounds, that blacks had been systematically

quist, although not so holding, strongly indicated that "young people" (those 18-24) are not an "identifiable group."

13. 311 F. Supp. 1084 (W.D. Va. 1969), *rev'd and remanded*, 459 F.2d 1382 (4th Cir. 1972), *cert. denied*, 411 U.S. 986 (1972), *on remand*, 361 F. Supp. 1180 (1973).

14. 311 F. Supp. at 1086.

15. 459 F.2d at 1383.

16. *Id.*

17. *Id.*

18. *Id.* at 1384-85.

19. 361 F. Supp. at 1183. The court cited *Cassell v. Texas*, 339 U.S. 282 (1950) and *Brown v. Allen*, 334 U.S. 443 (1953).

20. 315 F. Supp. 867 (W.D. Va. 1970), *rev'd in an unreported decision, on remand*, 356 F. Supp. 1185.

21. 315 F. Supp. at 868.

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excluded from the grand and petit juries. The petition was dismissed and relief denied on all grounds.²² The Fourth Circuit reversed in an unreported decision. The grounds for reversal, however, are fairly clear from the decision on remand. The evidence of discrimination was (1) a black population of 25%, (2) in the period from 1960 to 1966, 39 grand juries, of seven members each, were convened, (3) 33 of these had only one black, (4) the other six were "similar", and (5) the Clerk of Court was shown to be able to identify racially the members of the grand juries.²³ The Court of Appeals held that "opportunity for systematic exclusion and results consistent with systematic exclusion"²⁴ made out a prima facie case.

On remand, the state argued in rebuttal that some blacks had in fact served, but, as in *Hariston*, this was dismissed as "token inclusion."²⁵ The state then argued good faith—that is, that blacks had not purposely been excluded—but this was held insufficient to overcome the statistical showing of an unconstitutional result,²⁶ and the conviction was reversed.²⁷ The case is particularly interesting by virtue of the manner in which the opportunity to discriminate was shown—by having the clerk of court identify members of the various grand juries by race. Thus, even if a juror selection system appears facially neutral, a challenge to the composition of the jury may be successful if those responsible for picking jury members can be shown to know potential jurors well enough to identify them racially.

The third case is *Carrington v. Slayton*.²⁸ This was yet another habeas action, this time from rape and abduction convictions.²⁹ The District Court applied the standards of the Court of Appeals on its own in this case, and stated the test for a prima facie case as a substantial numerical disparity, coupled with either additional positive indicia of discrimination or a showing that the selection process provided an opportunity for discrimination.³⁰ The court added that a presumption of discrimination in fact where an opportunity is shown, is not only permissible but required. "From the cases, it seems that the question of whether there is an opportunity to discriminate must be asked initially, assuming that, if

22. *Id.* at 870.

23. 356 F. Supp. at 1186.

24. *Id.*

25. *Id.* at 1188.

26. *Id.* at 1189. The district court relied on *Norths v. Alabama*, 294 U.S. 587 (1935) for the proposition that "mere generalities" that "blacks had not purposely been excluded and that race and color had not been considered" were insufficient to rebut the prima facie case.

27. *Id.* at 1192.

28. 359 F. Supp. 189 (W.D. Va. 1973), *aff'd. per curiam*, 493 F.2d 1355 (4th Cir. 1974).

29. 359 F. Supp. at 190.

30. *Id.*

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possible, the public officials in the locality in question *are* going to discriminate.”³¹

The evidence in the case was: (1) that there were five jury commissioners, one of whom was black, (2) the population was 24.8% black, (3) the master grand jury list was 11.55% black and (4) the particular venire from which petitioner’s petit juries were selected were 10% and 5% black for the first and second trials, respectively.³² Thus, a 2/1 disparity between the population and the jury list was shown. However, further evidence revealed not only that the grand jury which indicted petitioner was 33% black,³³ but also that those blacks who were stricken from the list were normally stricken by the black jury commissioner.³⁴ For these reasons, the court concluded that if an opportunity to discriminate existed, it had not been exercised, and denied relief. The Fourth Circuit affirmed *per curiam*.³⁵

Other decisions in the Fourth Circuit are consistent with these. In one case, the Court of Appeals held that where a petitioner was only able to show a 2/1 disparity and a possible opportunity to discriminate, he was at least entitled to a hearing at which both he and the state would produce more evidence.³⁶ Despite the fact that there was no other evidence of racial discrimination, the court seemed to feel that the imbalance and opportunity to discriminate were sufficient to make out a *prima facie* case unless valid reasons for the imbalance were presented at the hearing.

In one case in which a 2/1 disparity was shown, the fact that the trial judge himself picked the grand jurors was held to be an opportunity to discriminate, and a *prima facie* case was made out.³⁷ And, in a fairly typical case in which the quantum of evidence was held sufficient to show discriminatory jury selection, a population of 45.5% blacks in which jurors were picked from tax lists maintained separately for whites and “colored”, with a resulting jury list 4.5%, was sufficient to make out a *prima facie* case.³⁸

The Court of Appeals indicated its position with respect to age and

31. *Id.* at 191 (emphasis in original).

32. *Id.* at 191-92.

33. *Id.* at 192.

34. *Id.* at 181.

35. 493 F.2d 1355 (4th Cir. 1974).

36. *Stephens v. Cox*, 315 F. Supp. 821 (W.D. Va. 1970), 449 F.2d 657 (4th Cir. 1971). This decision was heavily relied on by the district court in *Carrington v. Slayton*, *supra* n.28.

37. *Wansley v. Miller*, 353 F. Supp. 42, 43 (E.D. Va. 1973).

38. *Parker v. Ross*, 330 F. Supp. 13, 14 (E.D.N.C. 1971). The decision was reversed, not because the court of appeals disagreed that a *prima facie* case was shown, but on the ground that an intelligent guilty plea was a waiver of any defects in the grand and petit juries, 470 F.2d 1092 (4th Cir. 1972).

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sex and grounds for attacking jury composition in a 1968 case.³⁹ The court stated first: "As to age as a measure of representation, we do not believe that members of arbitrarily drawn age brackets necessarily constitute valid categories for measuring the legality of jury selection."⁴⁰ This position seems inconsistent with the majority view.⁴¹ With respect to women, the court states that "substantial representation" is sufficient.⁴² Whether this position will change as a result of *Taylor v. Louisiana*, *supra*, is unclear. On the one hand, *Taylor* was a case of total exclusion. On the other, *Taylor* explicitly affirmed that a fair cross section of the community is constitutionally required. Whether this standard is met by "substantial representation" or whether the proper test is that applied in race cases (significant underrepresentation) has yet to be decided. A strong case can be made that a fair cross section requires more than substantial representation and that any significant underrepresentation of women is unconstitutional.

In sum, the federal cases in the Fourth Circuit require the following elements for a successful challenge to the composition of grand or petit juries on the grounds of discrimination in their selection:

1. A significant numerical disparity between the percentage of a cognizable group—definitely blacks, probably women, probably not a specific age group—in the population as a whole and the percentage appearing on the grand or petit jury. The cases seem to require a disparity of about 2 to 1, and

2. Proof of actual discrimination, or

3. A showing that the selection procedure provides an opportunity for discrimination. This opportunity may arise in various ways, including the use of lists with racial designations, or by a showing that the jury commissioners knew the race of the people selected. Allegations of good faith on the part of the commissioners is insufficient to rebut a *prima facie* case.

If these requirements are met, then a *prima facie* case of discrimination is made out. The burden then shifts to the state to justify the disparity for valid, non-discriminatory reasons, or to show that no discrimination was in fact practiced.

THE LAW IN NORTH CAROLINA

The North Carolina courts have been reluctant to approve challenges to the composition of grand or petit juries. It appears that in only one instance has such a challenge been upheld and that decision was re-

39. *United States v. DiTommaso*, 405 F.2d 385 (4th Cir. 1968).

40. *Id.* at 391.

41. *See*, *Hamling v. United States*, *supra* n.12, and cases cited therein.

42. *United States v. DiTommaso*, 405 F.2d at 390.

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versed in the North Carolina Supreme Court.⁴³ The standard to be applied to such challenges has been held by the Court of Appeals to require proof of *intentional* discrimination: "To constitute unlawful discrimination, defendant must establish that the mode of jury selection is arbitrarily, systematically *and* intentionally discriminatory."⁴⁴ (emphasis added) It appears that the Court of Appeals was overstating the requirement; the decision of the North Carolina Supreme Court on which it relied requires "intentional, arbitrary *or* systematic discrimination" (emphasis added) to establish a *prima facie* case.⁴⁵

If the Court of Appeals meant to require proof of intentional discrimination, however, it appears that such an analysis cannot stand review. In a case reviewing New Jersey's "key man"⁴⁶ system of choosing juries, the state contended, like the Court of Appeals, that a showing of deliberate discrimination was necessary.⁴⁷ This view was given short shrift in the Third Circuit Court of Appeals—" . . . there is no support for that review."⁴⁸ The standard enunciated by the state supreme court—"intentional, arbitrary or systematic discrimination"—would therefore appear to be the law in North Carolina, although the matter is not free from doubt.

Even if intentional discrimination is not required, however, the cases show extreme difficulty in bringing successful jury challenges in North Carolina. For example, in *State v. Cornell*,⁴⁹ the supreme court quashed the indictment against the defendants on the basis of evidence showing that approximately 20% of the population of the community as a whole was black, but that only about 10% of those called for jury duty were black.⁵⁰ The supreme court reversed, principally on the ground the purposeful discrimination is not shown merely by numerical underrepresentation.⁵¹

The *Cornell* decision is anomalous in two respects. First, the court recognized as "well-established" the proposition that the mere denial by officials responsible for preparing jury lists where discrimination was practiced will not overcome a *prima facie* case.⁵² The defendants intro-

43. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

44. *State v. Tant*, 16 N.C. App. 113, 116, 191 S.E.2d 387 (1972) (emphasis added).

45. *State v. Cornell*, *supra* note 43 (emphasis added).

46. In a "key man" system, the jury commissioners located strategically placed members of the community—"key men"—to suggest prospective jurors.

47. *Smith v. Yeager*, 465 F.2d 272 (3rd Cir. 1972).

48. *Id.* at 281.

49. *Supra* note 43.

50. *Id.* at 27.

51. *Id.* at 33-34. The court relied on *Swain v. Alabama*, 380 U.S. 202 (1964).

52. *Id.* at 31. The court cited *State v. Wilson*, 262 N.C. 419, 137 S.E.2d 109 (1964); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Smith v. Texas*, 311 U.S. 128 (1940); and *Norris v. Alabama*, 294 U.S. 587 (1935).

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duced testimony of all the members of the jury commission that no discrimination had been practiced.⁵³ Obviously, the purpose of this testimony was to attack the credibility of the commissioners, since no explanation whatsoever for the disparity was offered by the state. The supreme court, however, held that, since the defendant had called all the officials who might be able to explain the imbalance, the state was relieved of the exclusion occurred: "By offering this testimony defendants exhausted the state's sources of information and affirmatively showed that the officials assiduously complied with the provisions of Article I, Chapter 9 of the General Statutes."⁵⁴

Certainly the officials testified that they performed their duties impartially, but if they had done so, some non-racial explanation of the exclusion of large numbers of blacks would have been forthcoming. The argument of the supreme court here seems to be as follows: A numerical imbalance has been shown. If it were the result of discrimination, these officials would know it. But since these officials testified they did not discriminate, then, despite the fact that no other explanation has been offered, no discrimination occurred. The denial by the officials, however, is obviously amenable to more than one interpretation.

Second, and directly contrary to *Fuller v. Cox*,⁵⁵ the court rejected the evidence that the commissioners knew the race of some of the prospective jurors as showing an opportunity to discriminate. "We note in passing that a person who would qualify to serve on a jury commission would of necessity possess this knowledge of his county in order to impose the objective statutory criteria in preparing the jury list."⁵⁶ The statement is, of course, correct but it in no way deals with the problem that such knowledge on the part of the commissioners *is* an opportunity to discriminate, whether exercised or not. The court seems to argue that proof of opportunity to discriminate requires proof of actual discrimination.

Defendants' evidence further shows that there was no such 'opportunity for discrimination' in the selection of the Forsyth County jury list as was found in *Whitus* and that the individual jury commissioners did not remove any name from the raw jury list solely on the basis of suspected race or the named person.⁵⁷

In *Whitus*,⁵⁸ the jury list was taken from tax records which distinguished blacks from whites.⁵⁹ There was no testimony that individuals

53. *Id.* at 35.

54. *Id.*

55. *Supra* note 21-27.

56. *Supra* note 43, at 35.

57. *Id.*

58. *Whitus v. Georgia*, 385 U.S. 545 (1967).

59. *Id.* at 549.

were removed from the jury list because of their race; indeed, all three commissioners denied that anyone was included or excluded because of his or her race.⁶⁰ The United States Supreme Court reversed the conviction because "the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners."⁶¹ It is difficult to see how the North Carolina Supreme Court concluded that no comparable opportunity for discrimination existed and was resorted to where the evidence showed that the commissioners knew the race of some prospective jurors, blacks were significantly underrepresented, and the only explanations offered were conclusory denials by the jury commissioners of any wrongdoing.

With this judicial hostility toward challenges to jury selection methods, it is hardly surprising that *Cornell* is unique in that a successful challenge was made. Thus, in a case involving age discrimination, a flat statement from the sheriff that no 18-21 year olds were included in the jury panel was dismissed as a "casual expression."⁶² And, in a case in which the jury list was prepared from voter registration lists with "W" and "C" designating racial classifications, the court held no discrimination was shown, and defended the racial classifications.⁶³

In North Carolina, then, the standard may not be as stringent as that of intentional discrimination, as held by the Court of Appeals. But it is clear that a mere showing of a numerical disparity and an opportunity to discriminate will not suffice. What is required is proof of "systematic" discrimination. What quantum of proof is required for such a showing is unclear, since jury challenges have been uniformly unsuccessful. It is clear, however, that evidence which would be sufficient proof of discrimination in the selection of grand and petit juries in federal courts is not enough. As a practical matter, then, the Court of Appeals may have accurately stated the North Carolina standard.

Considering the difficulties which will confront compositional challenges in North Carolina, it is essential that those who would seek to raise the question of under-representation be well grounded in both the theoretical and practical problems to be faced. The remainder of this article will address itself to some methodological considerations and to some specific findings which have already been discovered.

THE METHODOLOGY OF A COMPOSITIONAL CHALLENGE

In North Carolina, the procedures for selecting a jury pool which would result in a pool that theoretically assures defendants of represent-

60. *Id.*

61. *Id.* at 552.

62. *State v. Barnwell*, 17 N.C. App. 299, 194 S.E.2d 63 (1973).

63. *State v. Carroll*, 282 N.C. 326, 193 S.E.2d 85 (1972).

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ative juries are set forth in N.C. General Statutes §§9-1 *et seq.* A three-member jury commission is appointed for a two-year term by: 1. the senior regular resident superior court judge; 2. the clerk of superior court; and 3. the board of county commissioners. The jury commissioners are required to be qualified voters of the county.⁶⁴ The jury commission is charged with: 1. the preparation of a jury pool list; and 2. the delivery of the list to the Register of Deeds at least 30 days prior to January 1 in odd-numbered years.⁶⁵ Such a list must be adequate to supply jurors for a period of two years. The names of prospective jurors are to be systematically drawn from both property tax lists and voter registration lists and may, in addition, be drawn from a third source such as a telephone book. The list must contain not less than 1 1/4 times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous biennium.⁶⁶ The actual number of names for the pool must never be less than 500 names.

Persons eligible for jury duty are required to be citizens of North Carolina and residents of the county from which they are to be drawn. Those individuals who served during the previous biennium are exempt from service, as are those who are less than 18 years of age. Jurors must be physically and mentally competent and must not have been convicted of a felony.⁶⁷ All others are eligible to serve as jurors.

The jury pool list is placed upon separate cards which give the name of the juror and give his or her permanent address. These cards are placed in alphabetical order, given a permanent number, and filed numerically. Such cards are retained by the Register of Deeds and are available for public inspection during normal office hours.⁶⁸

In order to be excused from jury duty, individuals must show compelling personal hardship or that their service may be deemed to be contrary to the public welfare, health, or safety. Such excuses are to be given by the chief district judge or any district judge designated by the chief district judge. Discretionary authority of a presiding judge to excuse persons at the beginning or during a court session is also allowed. When such excuses are granted, the clerk of court must notify the Register of Deeds who in turn notes the excuse on the juror's card and then files that card separately. The cards of those persons who are called on jury duty are withdrawn from the file and filed separately with the date of service inscribed upon the card.⁶⁹

64. N.C. GEN. STAT., § 9-1.

65. N.C. GEN. STAT., § 9-2.

66. N.C. GEN. STAT., § 9-2.

67. N.C. GEN. STAT., § 9-3.

68. N.C. GEN. STAT., § 9-4.

69. N.C. GEN. STAT., § 9-6.

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Thus, on its face, the statute appears to be non-discriminatory. In fact, it severely limits the categories of non-service but the result of the vague wording allows for considerable discrimination against such groups as blacks, women, young, and old to occur in fact. The major charge against the statute is its lack of delineation of an affirmative responsibility on the part of the jury commissioners particularly, and the judges to a lesser extent, to obtain a jury pool which represents an adequate cross section of the community from which it was drawn. At a minimum the population characteristics of the jury pool should be compared with the census data as a routine matter by the jury commission.

Secondly, the primary use of property tax rolls and voter registration lists discriminates immediately against cognizable groups, most particularly poor people, and in this state poor is synonymous with blacks. Many other lists exist which would be readily available to provide a more adequate representation of all of the people. Welfare lists, social security lists, and high-school student lists are among the kinds of lists that could be used. Telephone books normally exclude the very people who are also excluded in property tax and voter lists and therefore they do not offer any remedy to the problem.

The exclusion of particular groups by the jury commission represents a major source of jury discrimination. When embarking upon a compositional challenge, it is important to investigate as thoroughly as possible all levels of the jury selection process. The first step in this procedure is to obtain the jury commissioners report, filed with the Register of Deeds office. In this report the method of systematic selection used and the source lists used should be indicated. Thus a determination can then be made as to whether the requirements of the statute have been followed, *i.e.*, the use of proper lists and a true random selection of every *n*'th name plus the use of all books or a random selection of these books. All lists should be examined for any indication of the race of the individual. The actual or "raw" list should be obtained from the jury commission, as well as a list of those who were stricken or culled from the raw list. It is possible then to make an actual comparison of the names on the raw list with those on the source list to determine whether or not the selection was carried out properly. The examination of the list of those who were culled may result in the determination of any patterns of discrimination, such as against blacks, women, women with small children, persons over a given age limit, professional persons, persons who reside in particular areas, such as in housing projects or other poor sections of the town. Finally there should be a comparison of the list retained by the Register of Deeds and the raw list to determine that all persons appear on both lists, *i.e.*, that more persons were not culled than those appearing on the culled list.

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At this point, a survey may be undertaken to determine the exact population characteristics of both the raw uncultured list and the jury pool itself. This may be accomplished by means of a random selection of these lists of 100 persons. The age, race, and sex of these individuals should then be determined. Population characteristics may be obtained from census data for each county. A comparison can then be made by means of a Chi-Square statistical test to determine whether or not the differences detected in the jury pool population and the population of the county are occurring by chance alone or whether such differences could not occur by chance alone and must be the result of systematic discrimination. A cook book description of the use of the Chi-Square test need not be as frightening as it might appear at first blush.

The Chi-Square formula should be used wherever the characteristic being examined is definable by more than two categories, as in this example where you are comparing the number of people selected from various regional divisions within a community.

The formula is:

$$\frac{\left[X_i - n \left(\frac{N_i}{N} \right) \right]^2}{n \left(\frac{N_i}{N} \right)}$$

where, for the example of a geographical disparity,

N = the total population;

N_i = the number of people living in each of i geographical divisions (for example, using voting wards, N_1 is the number living in ward 1, N_2 is the number living in ward 2, etc.);

n = the number of persons in the sample or pool; and

X_i = the number of persons in the sample or pool who live in each of the geographical divisions.

The value $\frac{\left[X_i - n \left(\frac{N_i}{N} \right) \right]^2}{n \left(\frac{N_i}{N} \right)}$ is computed for each geographic

division, and the sum of these results is converted into a probability value with the use of another standard table.

This equation is also understandable in a more common sense way.

$n \left(\frac{N_i}{N} \right)$ is the expected number of persons that should come from each geographical division. Thus, if 500,000 people out of a total of 1,000,000 came from division 1, we would expect a sample of 200 jurors to contain 100 from division 1, or

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$$N_1 = 500,000$$

$$N = 1,000,000$$

$$n = 200, \text{ and}$$

$$n \left(\frac{N_1}{N} \right) = 100.$$

The numerator is the disparity.⁷⁰

Some discussion should occur at this point in defense of the use of the sample size of 100 and the testing of the two populations by means of the Chi-Square test. Such a small sample size appears immediately to be suspect as to its validity. However, if a random selection of the populations, *i.e.*, jury pool, is conducted, then differences of at least 10 percentage points can be detected by a sample of 100. Federal courts have held that 10 percentage points discrepancy between the pool and the population may be considered discriminatory to the point that new jury pools must be constituted. However, it should be pointed out that 10 percent is probably the bare minimum, and the greater the difference that can be detected, the more probable the chances for a successful challenge to the composition of the pool.⁷¹ Thus, it is apparent that the courts are interested only in rectifying the gross discrepancies between the pool and the general population. In this regard, the use of the Chi-Square test is highly recommended, as it is designed in such a manner as to ensure that only large discrepancies will be detected by this test.

Chi-Square tests are extremely sensitive to the sample size; when they are used with a sample size of 100 the test can be expected to point up only the grossest differences. Thus when the sample size is increased to say 1000, the probability of finding significant differences between the two measured populations is heightened. When differences between the two populations are detected with a large sample size, it is not possible to determine whether gross differences or small differences exist. This problem is alleviated by using the 100 sample size wherein only gross differences are detected.

In the past the courts have been satisfied to hear the percentage difference between the jury pool population and the general population. This method is erroneous and should be discarded immediately in favor of a sampling method and comparison of the two by a Chi-Square test. The problem with seeking to find absolute percentage differences is that it is absolutely impossible to determine the percentage of WHAT. We

70. THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE (D. KAIRYS ed. 1975).

71. D. Kairys, *Jury Selection: The Law, A Mathematical Method and a Case Study*, 10 AMER. CRIM. L. REV. 771 (1972); R. Copeland, *Introduction to Challenging Jury Composition*, Guild Notes, Vol. 3, No. 2 (1974).

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have no adequate measures to absolutely determine such differences. Statistical theory is based upon the premise that a random sample reflects the population from which it is drawn and that it is possible to generalize from this sample to the population from which it is drawn.

It may seem incredible to you at first that, regardless of the shape of the population being sampled, the means of 'sufficiently large' samples will have a normal distribution, *i.e.*, bell-shaped curve. Such is the case, however. This is one of the reasons why the normal distribution is so important in statistics. Just how large the n , or sample size, must be before the sampling distribution of X , the mean, is nearly normal depends on the shape of the population. Samples of size 100 are probably large enough to yield nearly normal sampling distributions of X for most populations one might meet in practice.⁷²

Therefore it is possible to compare the sample with another measure, in this case with the census data, to determine whether the sample from the jury pool reflects the overall population of the county. When this has been accomplished, it is possible to attach a probability level of such a difference as the one detected by the test occurring simply by chance alone. The point set by scientists as the minimum level at which there is confidence that differences do exist, is five chances out of one hundred, ($P = .05$), or that such a difference as the one detected could occur only in five chances out of 100, and 95 times out of 100 you are measuring actual differences. Differences found at the .05 level of probability can generally be considered to be actual differences between the two measured populations. Thus in this case the fact that such differences occur is correct 95% of the time. Statisticians recommend the drawing of a sample in preference to an actual counting as a superior and more accurate method of determining differences between two populations.

The term population takes on genuine meaning when coupled with the definition of a sample of a population. A sample is a part, or subset, of a population. The sample is generally selected in a deliberate fashion from the population in order that the properties of the population can be studied. . . . A random sample . . . is randomly representative of the population in all respects.⁷³

In Chi-Square test with a sample of 100, a difference which is found to occur by chance alone only five times out of 100 may be considered extremely reliable information that indeed gross differences do in fact

72. GLASS AND STANLEY, *STATISTICAL METHODS IN EDUCATION AND PSYCHOLOGY*, p.245 (1970).

73. *Op. Cit.* at 240.

74. N.C. GEN. STAT. § 9-5.

exist between the jury pool and the population in general. Were you to draw an even larger sample, it is probable that the chances of such differences occurring would drop to extremely low levels such as 6 chances in 10,000,000, which may impress the court but does not necessarily meet the requirement of the court that there be gross differences between the pool and the population.

It is possible by this method to determine whether or not the source lists adequately represent the population of the county and whether or not the sample drawn by the jury commission from these source lists also adequately represents the population of the county. Differences between the population characteristics of the jury pool and the source lists indicates, *de facto*, the discriminatory process used by the commissioners in the culling of the lists. Thus it is possible that an adequate number of women may be on the source lists, but the culling process of the commissioners may result in detectable under-representation of women in the jury pool.

The next step in the selection process is the random selection of jurors to meet the court needs during particular sessions of court. The most common method of selecting such jurors is to draw numbered disks from a vat which contains a disk for each individual in the jury pool.⁷⁴ The numbers on the disks correspond with the numbers affixed to the cards which are filed with the Register of Deeds. Thus the drawing occurs without the knowledge of the names of the particular persons who are being drawn. The numbers are transferred to the Register of Deeds office which attaches the names of the persons whose cards have the same numbers as those drawn. A list is made indicating the names and addresses of those who are to be served summons to appear for jury duty by the sheriff's office. Having received this list, the sheriff's office normally either mails out the summons to the prospective jurors or hand delivers such summons. Individuals who wish to be excused from jury service are directed to present their excuses to the presiding district judge.⁷⁵ Those who are not excused are directed to appear in court on a given day for their jury duty. At such time as the jurors arrive at the courtroom, the judge may excuse them at his discretion.

It is at this stage further opportunity for biasing of the pool of jurors who are actually available to sit occurs. First, the summons mailed out by the sheriff's office may not reach particular groups of people. For example, the in and out migration of blacks and/or poor may be such that many of them are not reachable by a mailing system. Objections by challenges to the array may be based on partiality, misconduct of the

75. N.C. GEN. STAT., § 9-6.

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sheriff, or irregularity in making our jury lists.⁷⁶ Finally, there is a possible source of bias in the excuses allowed by the judge. In particular, judges tend to excuse young mothers on the basis of extreme hardship.

It is possible to obtain both the summons lists and the list of those who actually were eligible to sit as jurors from the clerk of court's office. By taking a random sample of both of these lists and by making a comparison of the population characteristics of the individuals appearing on the summons list, with and without those excused or not found by the sheriff, and the list of those individuals who actually were present to serve for jury duty, it is possible to determine the discrepancies between these people and the characteristics of the general population and to attach a probability level to this difference so as to obtain a reliability measure of whether this difference occurred as a result of chance or whether it occurred as a result of systematic discrimination. Thus it is possible to indicate the bias appearing at particular levels of the selection process and to finally indicate the differences of the total selection procedure by a comparison of the population characteristics of those who actually were eligible to serve on juries and the population characteristics of the county from which they were drawn. Of course requirements of time and money, or perhaps the availability of the required records may cause a comparison to be made at only one level of the selection procedure rather than at all levels.

Customarily in compositional challenges, evidence concerning the numerical percentage of under-representation of certain cognizable groups has been presented to the court. Though this may meet the traditional requirements of the court, the argument can be strengthened by showing that the numerical differences are indicative of important attitudinal differences.⁷⁷ The law requires that jury pools be constituted of a fairly representative cross section of the community from which they are drawn. Thus the law implicitly recognized that cognizable groups of people hold attitude and belief systems that are unique and not entirely overlapping and that the accomplishment of justice depends upon the representation of all such attitude and belief structures within the jury pool itself. To have the attitudes of a single particular cognizable group appearing on juries thwarts the premise on which the concept of justice rests. The legal system of jury selection procedures provides for such overall representation in that names are randomly selected both from source lists and for actual summoning. Thus theoretically a sample is derived from the overall population and such a sample should, as was explained earlier, be adequately representative of the population from which it is drawn.

76. *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973).

77. *THE JURY SYSTEM*, *supra* note 70, at 31.

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Therefore, it is recommended that attitudinal measurements be taken via a survey technique so as to provide data showing the attitudinal differences that exist between cognizable groups, for example, males and females, whites and blacks. Thus the argument becomes: not only are these people numerically unrepresented on juries, but also, since these groups hold attitudes that are in part unique to them, the infusion of such attitudes upon judgmental process by juries of the guilt or innocence of defendants is being denied, that defendants have the right to be judged by a jury of their peers, meaning a representative cross section of their community and the accompanying attitude and belief structures held by this cross section of people.

A telephone survey of 100 randomly selected individuals is an entirely appropriate approach. Care should be exercised to poll only people who would be eligible for jury service under the statute; the questionnaire used should contain commonly used personality measures as well as measures of attitudes toward the issues surrounding your particular case. The use of an experienced survey leader is highly recommended to ensure that proper scientific controls are exercised to ensure validity and reliability of results.

Such a person, normally a sociologist, could then testify during the hearing of the motion challenging the composition of the pool. This testimony includes a description of the methodology employed in the survey, the results of the survey in detecting differences of attitude between cognizable groups and discussion of the implications of these results upon the verdicts rendered by juries. Such testimony should include a discussion of the dynamics of group process. It is wise to offer the judge an affidavit containing this information prior to the testimony of the expert witness to facilitate his understanding and comprehension of the material. This witness may also explain the statistical tests used if qualified or a statistician may be employed.

Another expert witness who may be extremely helpful to the argument is a demographer. This individual not only presents the census data into evidence but is also capable of interpreting this data to render it more meaningful to the court. For example, undercount of blacks by the census may be rectified to more accurately represent the true population numbers of blacks. A demographer can also be used to make inferences re the probable population characteristics of the source lists in cases in which prior sampling from these lists is not feasible. The exclusion of poor people from property tax lists becomes explicit through census data on the ownership of automobiles, homes, and home rentals. It is possible for the high correlation between minority group status and the designation as being "poor" to be pointed out. The

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extensiveness of the testimony by a demographer depends entirely upon thorough yet creative research on the part of both lawyer and demographer.

One final suggestion for presentation of evidence within the courtroom is the use of charts depicting the testimony of the experts. These charts should be quite large in size and should be easy to understand. Bar graphs are most common but circle graphs or some other form may be used instead. The cost of such charts is quite high, but well worth the money when one considers the fact that the judge is being presented with considerable amounts of unfamiliar information which must be made absolutely clear to him within a relatively short space of time. Any prop that can be used to clarify the argument should be used.

SOME SPECIFIC FINDINGS OF UNREPRESENTATION

This section will report on a study of jury representation in six large urban counties of North Carolina conducted in 1974-75. The purpose of this section is to indicate the seriousness and wide-spread nature of the problem of achieving a representative jury.

Six county jury systems were examined: Mecklenburg, Guilford, Wake, Forsyth, Cumberland, and Durham. In the 1970 Census these six contained 28 percent of the total state population and 30 percent of its Black population. The key findings indicate that each county's jury pool significantly underrepresents Blacks, the poor, and women—no matter which of the two sources required by North Carolina law was used, voting or county tax lists, or in what proportion.

A random sample ranging from 500 to 900 jurors drawn from each county jury pool was obtained from the offices of the Clerks of Superior Court. Then, from each address given on the jury list, the U. S. Bureau of the Census tract in which that person lived was plotted using official maps, Census geographic files, commercial directories, and postal information. The lowest rate of placing addresses was for Mecklenburg County, where more than 95 percent of the 894 jurors were located by tract. For the other five counties the placement rate exceeded 97 percent. Addresses which were not found normally were either post office boxes or nonexistent streets.

Next, the number of jurors each tract would be expected to have if the jury pool contained a cross section of the county was computed. The number of persons eligible for jury duty in each tract was taken to be the tract's number of persons over 17 years old reported in the 1970 Census.

Therefore, the expected number of jurors called or served equaled a tract's proportion of the county's population of people over 17, multi-

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plied by the number of jurors called or served in the county sample. For example, if Tract X had 10 percent of the over 17 population in the county, and there were 700 jurors called in our sample, Tract X's expected number of jurors called would be 70.

The tracts expected and observed numbers of jurors were then compared using a standard statistical technique, the Chi-Square test. The Chi-Square test shows the mathematical probability of the distribution of jurors by tract found in the sample occurring if the base population (the full county jury pool) was a reasonable cross section of the adult population.

Next, a percentage rate of jury representation for each tract was computed by subtracting the expected number of jurors from the observed number and then dividing by the expected. Four separate rates were created: persons called, those who actually served as a juror, women called, and women served. Sex was determined by the first name or honorific shown on the jury list; service was counted by using the notation of the jury clerks on each list.

Jurors called covered all names drawn from the jury pool, including those who served or were excused, or who court officials marked as not found, moved, or deceased. Jurors served covered all persons who recorded as having shown up for jury service at least one day during the period; it does not necessarily mean the person sat on a trial jury. The same definitions applied to the female population determined the females called and females served measures.

Each of the four rates was examined statistically by comparing it with major social, economic, and demographic differences between the tracts to see what factors were most strongly associated with over or underrepresentation.

All data not taken from official jury records came from either the 1970 Census of Population and Housing, Census Tracts, PHC (1), publication, or from 1970 Census computer tapes.

The study found that in each of the six counties on each of the four measures of jury representation it is highly unlikely that the jury pool is a representative cross section of the communities they are drawn from.

Table 1 shows the Chi-Square value for each of the six counties of the four jury representation categories plus the total number of Census tracts per county. The Chi-Square values indicate the probability of the observed sample of jurors by tract occurring if the full two-year jury pools reflected a cross section of the eligible population shown by the Census. Every one of the 24 values is statistically significant beyond the .05 level. That is, there is less than one chance in twenty that any of the jury pools or any of the categories is a cross section of the county.

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Table 1: Chi-Square Values for Jury Representation in Six North Carolina Counties.

	DUR- HAM	CUMBER- LAND	GUIL- FORD	FOR- SYTH	MECKLEN- BURG	WAKE
Jurors Called	147	118	168	122	185	222
Jurors Served	107	151	111	93	110	104
Females Called	107	81	217	180	249	257
Females Served	72	73	128	110	140	127
Number of Tracts	34	36	77	58	74	54

All of the 24 probability levels are from less than 1-in 1000 to less than 1-in-1,000,000.

Moreover, the fundamental test of a jury system's representativeness is the composition of the total group called for jury service. For this category—jurors called—the study found for all six counties a less than 1-in-1,000,000 probability of the jury pool being made up of a cross section of the population.

The second step of the study examined rates of jury representation for the four categories and a variety of social, economic, and demographic characteristics of the tracts. Among the factors looked at were the percent black, income levels, housing values, rental levels, the occupational structure, education, and labor force characteristics. Some variables operated similarly in all counties, while others changed direction from county to county. An example of the latter was the percentage of the tract's labor force engaged in agriculture. In Cumberland County this was associated with overrepresentation on the four jury rates, while in Mecklenburg the proportion of the labor force in agriculture was related to underrepresentation on all four rates.

Throughout, however, on all four jury measures for all counties, variables related to race and social class behaved consistently: underrepresentation was associated with the tracts' percent of adult blacks, with low levels of income and education, and with the proportion of the labor force working in low-status jobs, such as household and service work. Most often these associations were substantial and statistically significant.

Conversely, overrepresentation was consistently related to the tracts' percent of adult whites, with higher income and education, and with larger proportions of the labor force employed in higher-status jobs, such as professional, technical, and managerial work. These associations in general were also substantial and statistically significant.

CHALLENGES TO JURY COMPOSITION**21****Table 2: Rates of Jury Representation in Six North Carolina Counties for Census Tracts with More Than 1000 Blacks over 17 years of age.**

	DUR- HAM	CUMBER- LAND	GUIL- FORD	FOR- SYTH	MECKLEN- BURG	WAKE
Jurors Called	-40%	-23%	-36%	-20%	-32%	-23%
Jurors Served	-32%	-28%	-40%	-21%	-16%	-15%
Females Called	-53%	-61%	-69%	-55%	-62%	-66%
Females Served	-43%	-53%	-73%	-53%	-54%	-64%
All persons 18+ Yrs.	22946	20564	33611	26408	51231	42809
Blacks 18+ Yrs.	19720	12378	27830	24140	38017	20192
Percent Black	86%	60%	83%	91%	74%	47%
% of Total County Adult Blacks	67%	52%	84%	82%	82%	66%
Tracts	9	7	11	12	19	10

Tables 2, 3, and 4 illustrate the pattern of representation and suggest its magnitude for the four jury rates. Table 2 shows the rates of representation for all tracts in each county with more than 1000 18-year-old blacks; Table 3 deals with the same information for all tracts with less than 50 adult blacks; and Table 4 shows tracts which have more than 30 percent of all families with income below the federal poverty line.

As shown in Table 2, on every jury measure for every county these groups of heavily black tracts are sharply underrepresented, ranging from a low of -15 percent for jurors served in Wake to a high of -73 percent for females served in Cumberland. It should be noted that all data for Cumberland has been computed with the Fort Bragg Census tract and juror counts deleted to insure a conservative estimate of representation.

The overall impact on blacks of the pattern of misrepresentation can clearly be gauged by Table 2. Line eight indicates the percentage of the total county black population that lives in the heavily black tracts covered by the table. Thus, for Durham, more than two-thirds of that county's eligible Blacks live in areas that are underrepresented by 40 percent in jurors called, 32 percent in jurors served, 53 percent in females called, and 43 percent in females served.

More than half of Cumberland's adult blacks live in the tracts covered the jury representation percentages of Table 3, two-thirds for Wake, and more than four-fifths in Guilford, Forsyth, and Mecklenburg.

Largely the reverse representation pattern can be observed in Table 3, the group of tracts with less than 50 adult blacks. In each county no

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more than one percent of the county's adult blacks and residents of those areas, and each tract group is overrepresented in jurors called and jurors served, ranging from +14 percent for jurors called in Guilford to +100 percent in jurors served in Cumberland. For the two female jury categories the pattern is not as sharply the opposite of Table 2, with some counties' heavily white tract groups underrepresented and other overrepresented in women called and served. However, while in Guilford, Forsyth, Mecklenburg, and Wake counties the groups of white tracts show substantial underrepresentation, in each case the underrepresentation is less for the white tracts than the comparable heavily black tracts in Table 2.

Table 3: Rates of Jury Representation in Six North Carolina Counties for Census Tracts with Less Than 50 Blacks Over 17 Years of Age.

	DUR- HAM	CUMBER- LAND	GUIL- FORD	FOR- SYTH	MECKLEN- BURG	WAKE
Jurors Called	27%	15%	14%	15%	21%	39%
Jurors Served	25%	100%	23%	22%	16%	43%
Females Called	19%	-38%	-49%	-40%	-30%	-32%
Females Served	51%	25%	-38%	-43%	-34%	-35%
All Persons 18+ Yrs.	11239	1838	21030	55388	107268	39201
Blacks 18+ Yrs.	143	37	400	283	561	345
Percent Black	1%	2%	2%	1%	1%	1%
% of Total County Adult Blacks	1%	0%	1%	1%	1%	1%
Tracts	5	1	26	23	31	18

Table 4 shows the jury representation rates for all tracts with greater than 30 percent for the families with income below the federal poverty line in 1970. A similar pattern to that of the heavily black tracts is evident. Every county for every jury category shows underrepresentation. The minimum is -7 percent for persons served in Wake to -79 percent in females called in Guilford.

The broad overlap of these who are poor and those who are black is also illustrated by Table 4. These tract groups are from 48 to 89 percent black and contain from 22 to 35 percent of the total adult black population of the counties. This high interrelationship of income and race makes it difficult to assess which of the two factors is most important in the various counties. However, it is clear both are important factors.

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Table 4: Rates of Jury Representation in Six North Carolina Counties for Census Tracts with Greater Than 30 Percent of Families with Income Below the Poverty Level.

	DUR- HAM	CUMBER- LAND	GUIL- FORD	FOR- SYTH	MECKLEN- BURG	WAKE
Jurors Called	-50%	-37%	-45%	-27%	-47%	-13%
Jurors Served	-42%	-62%	-32%	-38%	-57%	-7%
Females Called	-59%	-64%	-79%	-58%	-70%	-55%
Females Served	-49%	-69%	-75%	-59%	-71%	-61%
All persons 18+ Yrs.	12517	11934	9806	11706	16700	13590
Blacks 18+ Yrs.	5945	7629	8767	10180	14653	10374
Percent Black	48%	64%	89%	87%	88%	76%
% of Total County Adult Blacks	22%	32%	26%	35%	30%	34%
Tracts	5	7	4	6	10	7

The final question this project sought to study was which sources or mix of sources of juror names might yield a representative community cross section. All six counties used only the two sources required by law, the voters and county tax lists; no other sources were included. From the jury commissions reports it was possible to determine for all but Cumberland what proportion of names came from each list. The ratio of voter to tax names for the five are: Durham 9-91 voter to tax; Guilford 48-52; Forsyth 89-11; Mecklenburg 94-6; Wake 99-1.

The answer to the question seems to be that neither of the two sources by themselves used randomly, no matter what proportions are taken, will yield a good cross section. Durham and Wake, two adjacent counties, took diametric approaches to the question of the best source. Durham used 91 percent tax names while Wake took 99 percent from the voter list. The study indicates that both have high rates of underrepresentation of blacks, the poor, and women—although the Durham levels appear to be somewhat higher on jurors called and jurors served.

Table 2 seems to hint that, at least in a relative sense, the voter lists may be better than the tax lists. After Wake, Forsyth and Mecklenburg relied most heavily on the voter lists, using 89 and 84 percent respectively, while Guilford took roughly an even number from each. For the predominantly black groups, the three counties taking names mainly from the voter lists showed lesser rates of underrepresentation of persons called and persons served than the two counties, Durham and Guilford, using substantial numbers of tax names. However, further analysis would be needed before any confident judgment can be made on the relative merits of the two lists.

CONCLUSION

This article is not meant to be definitive but rather is in the nature of a preliminary exploration. It is fairly apparent that the average jury in North Carolina does find women, blacks, young people and the poor underrepresented. Since it is apparent that these groups have significantly different attitudes from white, middle-class, middle-aged males, the differences mean that the average criminal defendant is not getting a hearing before a cross-section of the community.

It is not the purpose of this article to establish what is probably apparent to most defense lawyers, that middle income white males are not the most favorable jurors for the average defendant. The intention here is simply to establish that a cross-section of potential jurors should be called as jurors and that is not being accomplished presently. The right to a jury which is representative of the demographic characteristics of the community is a constitutionally protected right.

In order to achieve such a cross-section, a number of steps might be taken either by legislative or administrative action. First, the jury commissioners should be informed that they are under an affirmative duty to devise methods which will result in proportionate representation of identifiable groups. Second, methods should be utilized to obtain and maintain adequate records by race, sex, age and occupation of those jurors who are actually called and who eventually serve. Third, the present data would indicate that counties should rely more heavily on the voter lists and less heavily on tax lists. Fourth, in order to increase the number of blacks, women and young people, additional lists should be used including school lists, welfare roles, telephone directories and census information. Fifth, the results should be monitored so that the necessary adjustments can be made after each two year period.

This problem could most suitably be addressed by the legislature. Either in combination with legislative action or alone, the individual counties can move administratively to improve the situation. If all else fails, some remedial action may be encouraged by litigation.