July 5, 2011

Statistical Criticism of Jury Selection Procedures in U.S. District Court

Brett M. Stingley
Bob Darcy, PhD., Oklahoma State University

Available at: https://works.bepress.com/brett_stingley/1/
STATISTICAL CRITICISM OF JURY SELECTION METHODS IN THE WESTERN DISTRICT OF OKLAHOMA

Article

R. Darcy,\textsuperscript{a1} Brett M. Stingley\textsuperscript{aa1}

INTRODUCTION

Too often in federal court an all-white jury convicts a black defendant. Lawyers, commentators, and judges have criticized jury selection in federal courts,\textsuperscript{1} and many litigants have challenged the governing law and selection procedures in order to change the non-inclusive jury wheels. The Tenth Circuit case \textit{United States v. Orange}\textsuperscript{2} was one such challenge. In \textit{Orange}, the court was presented with statistical evidence that showed consistent under-representation of blacks and other minorities on jury wheels in the Western District of Oklahoma. This under-representation was linked to specific procedures employed by the District, and cost-effective alternatives that should improve the inclusiveness of jury wheels were proposed. The court, however, was not persuaded and ordered no changes. This Article argues that courts should make every reasonable effort to ensure juries are representative. Changes to the governing law and selection procedures are overdue.

Part I examines the law governing jury selection in federal court. Part II presents statistical evidence that shows consistent under-representation of minorities on jury wheels, and how that under-representation is linked to procedures currently used by many federal districts. Finally, Part III proposes a new statistical measure to govern jury selection, and also three changes to selection procedures that would significantly enhance inclusiveness of jury wheels.


\textsuperscript{aa1} J.D. Candidate 2012, Oklahoma City University School of Law; B.A. 2009, Oklahoma State University.


\textsuperscript{2} 447 F.3d 792 (10th Cir. 2006).
I. HISTORY AND BACKGROUND OF FEDERAL JURY SELECTION

Federal jury selection is a heavily-litigated issue in federal court; prisoners commonly file pro se motions challenging the constitutionality of jury venires. Generally, jury selection is governed by the Sixth Amendment’s guarantee of an impartial jury and the “equal protection component” of the Due Process Clause of the Fifth Amendment. Some of the principles created by the Supreme Court pursuant to these two amendments have been codified in the Jury Selection and Service Act, which guides each federal district in its promulgation of selection procedures. Although there is much attention and case law surrounding jury selection, procedures adopted by some districts remain inadequate.

A. Constitution: Fifth and Sixth Amendments

1. The Sixth Amendment’s Guarantee of an Impartial Jury

The Sixth Amendment of the U.S. Constitution guarantees an impartial jury trial in all criminal prosecutions. In Taylor v. Louisiana, the Supreme Court held that a jury pool must consist of a “fair cross section of the community” to be within constitutional bounds. Stated generally, Taylor prohibits systematic exclusion of “distinctive groups in the community” from wheels, pools, panels, or venires from which juries are drawn. In Duren v. Missouri, the Court held that a prima facie violation of the fair-cross-section requirement is established if the defendant meets three requirements: (1) that the group allegedly excluded is a distinctive group in the community; (2) that representation of the group in jury pools is not reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is the result of systematic exclusion of the group during the jury-selection process.

In applying Duren’s second prong—that a group must be represented in a jury pool in reasonable relation to the group’s population in the community—the circuit courts have resorted to statistics. Most circuits base their analysis on absolute disparity, which measures the

---

4 U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”).
6 U.S. Const. amend. VI.
8 Id. at 526. A criminal defendant challenging the composition of his jury need not be a member of the class allegedly being excluded.
9 Id. at 538.
11 A criminal defendant challenging the composition of his jury need not be a member of the class allegedly being excluded. Taylor, 419 U.S. at
12 Duren, 439 U.S. at 363.
13 See United States v. Royal, 174 F.3d 1, 6 (1st Cir. 1999).
14 Id. at 7; United States v. Orange, 447 F.3d 792, 798 (10th Cir. 2006); United States v. Rioux, 97 F.3d 648, 655-56 (2d Cir. 1996); United States v. Ashley, 54 F.3d 311, 313 (7th Cir. 1995); United States v. Rodriguez-Lara, 421 F.3d 932, 943 (9th Cir. 2005).
difference between a group’s representation in the community with its representation in the jury pool. To show a disparity, defendants are generally allowed to consult census figures that measure the percentage of a group’s population in the population as a whole. After a disparity is determined, the court must set an allowable range. Many circuits, including the Tenth Circuit, allow an absolute disparity of 10% or less. Other circuits judge disparities on a case-by-case basis. For instance, the Ninth Circuit in one instance rejected absolute disparities of 7.7% or less, but in another allowed a disparities of 14.55% and higher. Even though the thresholds vary, making a prima facie case with an absolute disparity that is less than 10% is improbable.

There is widespread skepticism among federal judges regarding the reliance on absolute disparity, especially when the group allegedly excluded represents a small percentage of the population. As mentioned earlier, absolute disparities lower than 10% are unlikely to constitute evidence of unconstitutional underrepresentation. However, if a group only makes up 5% of the population, then the maximum absolute disparity can only be 5%. Therefore, absolute disparity does not allow defendants to show underrepresentation of small groups.

Some courts do not prefer any one statistical measure to determine if there is a “substantial underrepresentation” in jury pools. These courts accept any statistical evidence provided and judge each district plan on a case-by-case basis. Many circuits consider comparative disparity, which measures the decreased likelihood that group members, when compared to the population as a whole, will be called for jury service. This is determined by dividing the absolute disparity by the percentage of the group in the total population. Courts generally distrust comparative disparity as a statistical measure because it tends to exaggerate disparities when the group makes up a small percentage of the total population. Consequently, comparative disparities as high as 59.84% have been rejected as evidence of substantial underrepresentation. Given the weaknesses of absolute and comparative disparity measures, some courts use standard deviation measurements in their analysis. However, the Supreme

---

15 For example, if qualified blacks make up 8% of the population, but only make up 5% of the jury pool, the absolute disparity would be 3%.
16 See Rodriguez-Lara, 421 F.3d at 942-43.
17 Orange, 447 F.3d at 799; Ashley, 54 F.3d at 314.
18 See Royal, 174 F.3d at 10-11 (concluding that an absolute disparity of 2.97% is not high enough to satisfy the Duren test but not announcing a cutoff number).
19 Rodriguez-Lara, 421 F.3d at 944.
21 See Rioux, 97 F.3d 648, 656; Shinault, 147 F.3d 1273.
22 Orange, 447 F.3d at 798.
23 Id.
24 See, e.g., United States v. Hafen, 726 F.2d 21, 24 (1st Cir. 1984) (“in an area that had 500,000 whites and only one black eligible to serve as jurors, a random selection system that failed to place the single black on the master wheel would produce a 100 percent comparative disparity, even though an all-white jury would clearly form a “fair cross section” of the community.”).
25 See Orange, 447 F.3d at 798-99.
Court has acknowledged that this method has never been the principal statistical tool for any federal court.26

If a defendant can establish that a distinctive group is substantially underrepresented in the jury pool, he or she must finally show that the disparity was caused by systematic exclusion in the jury-selection process.27 The defendant must prove that the exclusion was “inherent in the particular jury-selection process utilized.”28 This has translated into requiring some intentional act by the district that systematically excludes a group from jury pools. For instance, the selection procedure in Duren allowed any female who received a jury questionnaire to voluntarily exempt herself from jury service without question.29 Further, women who did not return summons or show up for jury service were automatically exempted.30 This resulted in females making up only 14.5% of jurors on the defendant’s jury venires.31 More recently, in United States v. Ovalle,32 the Sixth Circuit rejected a jury selection plan that automatically exempted one fifth of the non-African-Americans from the qualified jury wheel.33 Although the plan was designed to assure racial balance on jury wheels, the court held that overt exclusion based on race will be subjected to strict scrutiny.34 Thus, to prove “systematic exclusion” under Duren’s third prong, the selection procedure in question must be passed, at least in part, to exclude a particular group from jury service. In Duren itself the automatic exemption sought to ease the burden of homemakers by allowing them easily forgo jury service, and in Ovalle the procedure sought to create diverse jury venires by overtly excluding jurors based solely on their race. Likewise, if a group is underrepresented because of its members’ “private choices”-like not registering to vote or not returning questionnaires-then systematic exclusion is lacking because there is no overt government motive to exclude a group from serving on juries.35

A common charge among defendants challenging jury selection is that certain groups are underrepresented on voter registration lists, which serve as the sole source of potential jurors in many federal districts. Although registered voters are generally older and whiter than the general population, federal courts uniformly agree that use of voter lists as a sole source of jurors is not problematic.36 Courts view this practice as “benign” and require a more overt method of exclusion.37

27 Duren, 439 U.S. at 363.
28 Id. at 366.
29 Id. at 361-62.
30 Id. at 362.
31 Id.
32 136 F.3d 1092 (6th Cir. 1998).
33 Id. at 1105.
34 Id.
35 Orange,
36 United States v. Test, 550 F.2d 577, 586 n.8 (10th Cir. 1976); United States v. Biaggi, 909 F.2d 662, 678 (2d Cir. 1990); United States v. Ross, 468 F.2d 1213, 1216 (9th Cir. 1972).
37 Biaggi, 909 F.2d at 678.
2. The Fifth Amendment’s Right to Due Process

Defendants challenging jury selection methods can also argue that discriminatory procedures violated the “equal protection component” of Fifth Amendment due process. Here, courts import Fourteenth Amendment equal protection case law into federal jury selection procedures. Generally, an equal protection violation in the context of jury selection requires that distinct class be substantially underrepresented on jury pools for a “significant period of time.” Courts recognize that the Fifth Amendment requires a “substantially similar showing” as the Sixth Amendment in this area. Therefore, given the expansive case law on the Sixth Amendment, courts generally ignore the Fifth Amendment argument or mention it alongside the Sixth Amendment analysis.

B. The Jury Selection and Service Act

In 1968, Congress enacted the Jury Selection and Service Act (JSSA). The Act codifies the requirement that juries represent a “fair cross-section of the community,” and it directs each federal district to promulgate selection procedures that are consistent with this principle. The Act encourages the use of voter registration lists as the primary source of potential jurors, and it makes supplemental lists optional. This partially explains the reluctance of the federal judiciary to deem the use of voter lists “systematic exclusion” in the face of strong statistical evidence to the contrary.

C. Procedures in the Western District of Oklahoma

In light of constitutional standards and the JSSA, the Western District of Oklahoma judges (District) promulgated their procedures for selecting juries. The District is divided geographically into four divisions. After each presidential election, the Clerk of the Court maintains a Master Jury Wheel for each division by randomly selecting names from voter registration lists from each county in the division. The District maintains that voter lists represent a “fair cross section of the community in the Western District of Oklahoma.” Over the next four years, the Clerk randomly selects names from the Master Jury Wheel and sends out questionnaires to create a Qualified Jury Wheel, from which any district judge may direct the Clerk to assign names to grand and petit juries.

40 Orange, 447 F.3d at 797.
46 Id.
47 Id. at 5.
II. BLACK UNDERREPRESENTATION

The problems with the current regime are apparent. The Tenth Circuit allows absolute disparities up to ten percent; the entire black population in the District is below ten percent. Therefore, 100% exclusion of blacks from jury venires would result in an absolute disparity below ten percent. This gives the District free reign to employ selection procedures that have the effect of systematically exclude blacks and other minorities from jury pools. With the current governing law and minority population proportions, disparities are a only a function of what the District judges will tolerate.

In March of 1998, Keith Lamar Orange was indicted for filing fraudulent income tax returns in violation of 18 U.S.C. §§ 286, 287, and 2(b). He was convicted and sentenced to two concurrent terms of seventy-eight months and sixty months imprisonment. His convictions were upheld on direct appeal. In October 2001, Orange filed a pro se motion pursuant to 28 U.S.C. § 2255 claiming, inter alia, that the jury selection methods were unconstitutional and ineffective assistance of counsel. At first, the claim was summarily denied, but the Tenth Circuit remanded the case for further findings. In its order for rehearing, the court ordered that Orange be allowed to access the Western District’s jury-selection records to further investigate the merits of his jury composition claim. However, Orange was again denied by the district court. On his third appeal to the Tenth Circuit, Orange argued that statistics prove that Blacks are underrepresented on jury wheels, and that this disparity rendered his trial unconstitutional.

A. Statistics

Orange provided the following statistical evidence to the Tenth Circuit. In 1993 and 1997 the University of New Mexico processed the juror questionnaires and prepared juror questionnaire status reports (JS-12 Reports). The race of persons mailed juror questionnaires and those who qualified as jurors can be examined in the University of New Mexico’s JS-12 database. The racial proportions in this data can then be compared with racial proportions in the appropriate counties using the 1990 U.S. Census and the 1997 U.S. Census population estimates. An analysis of the data shows that Blacks and other minorities are consistently underrepresented in each division in the Western District.

1. 1993 Wheel

49 Id.
50 Id.
51 See United States v. Orange, 49 F. Appx. 815, 816 (10th Cir. Oct. 18, 2002).
52 Id. at 818.
53 United States v. Orange, Case No. 02-6112, Order at 4 (10th Cir. Apr. 17, 2003).
54 Id.
56 United States v. Orange, 447 F.3d 792 (10th Cir. 2006).
In 1993 the staff at the University of New Mexico report mailing 47,746 juror questionnaires to persons selected from voter registration rolls. Forty-five percent of the juror questionnaires mailed were either undeliverable, the addressee was deceased or the questionnaire was not returned.57 The U.S. Census counted the 1990 population of each county by race and age. Whites make up 85.29 percent of all persons age 18 and over living in the counties making up the Western District. Blacks are 7.4 percent.58

Race was not determined for 39.6 percent of prospective jurors who returned questionnaires while another half percent had 'Other' as their race. Therefore, almost forty percent of the jurors could not be compared to the population racial proportions. But there is no particular reason to assume the racially unidentified prospective jurors are all or predominately from one racial group.59 If we assume the racially unidentified prospective jurors are in the same racial proportions as the racially identified prospective jurors, an adjusted percent of qualified jurors can be calculated.

Overall, the white prospective juror adjusted proportion are 107 percent of the white population proportion age eighteen and over, Black qualified jurors are 62 percent, Asian qualified jurors are 45 percent and American Indian qualified jurors are 59 percent. With the same assumption we can ask if the assumed random sample from juror lists is a random sample of persons age 18 and over as counted by the U.S. Census. Whites are significantly more likely to be sent (or return) a juror questionnaire and Blacks less likely in each division. Overall, whites returned 1,466 more juror questionnaires than their population proportions among those age 18 and over would merit and Blacks 659 fewer. The difference cannot be attributed to chance or sample variation.

The differences between the perspective juror proportions and the population age 18 and over proportions are significant. The Black adjusted proportion of 1993 perspective jurors was

---

57 The usable return rate varied from fifty-two percent in the Enid - Ponca City Division to sixty percent in the Woodward Division.
58 Blacks vary from eight percent of the age 18 year and older population in Divisions I and III (Oklahoma City and Lawton) to two percent in Division II, Enid, and one percent in Division IV, Woodward.
59 In order to test this assumption, consider the changes in the proportion of “race missing” respondents in the wheels over time. When the format of the questionnaire was changed for the 2001 jury wheel, the percentage of returned questionnaires with “race” missing dropped from 44.79 percent (16,296 out of 36,382, 1997) to 7.32 percent (1,856 out of 25,339) in the Oklahoma City Division. Before the change, in the 1997 wheel, Blacks made up 4.88 percent of the prospective jurors who specified their race. In the 2001 wheel, after the format change, Blacks made up 5.51 percent of the prospective jurors who specified their race in Division 2, Oklahoma City. The absence of any major change in Black proportions among prospective jurors between 1997 and 2001, despite the dramatic upswing in response to the race question, makes the assumption about the "missing race" jurors in the wheels reasonable.

Further evidence supporting this conclusion are the rates at which respondents omitted sex information in the 1993 and 1997 wheels. Sex information is missing at almost the same rate as race information. And almost all the prospective jurors missing race information are also missing sex information. Missing race information is thus likely due to something other than confusion over racial categories or a reluctance to reveal one's race on the juror form. The proportion providing sex, but not race information, however small, is about twice the proportion providing race but not sex information.
.0478 while the Black proportion of the population age 18 and over was .0740. The Black perspective juror proportion was 21.80 standard errors from the Black population proportion age 18 and over.60 A difference of 1.96 standard deviations is considered ‘significant.’

Hispanics can be of any race and, therefore, are counted on jury questionnaires and by the Census as an ethnic rather than a racial group. In the Western District, Hispanics are 3.02 percent of the population age 18 and older, and are 1.30 percent of the prospective jurors. The proportion of Hispanic jurors in the western District is 42.96 percent of their population proportions. Hispanics are significantly underrepresented on juries, compared to their population proportions overall and in three of the four divisions. The Hispanic prospective juror proportion was 15.31 standard errors from the Hispanic population proportion age 18 and over.61

2. 1997 Wheel

In 1997, the University of New Mexico report mailing 48,489 juror questionnaires to persons selected from voter registration rolls. Forty-six percent of the juror questionnaires mailed were either undeliverable, the addressee was deceased or the questionnaire was not returned.62 The interval between the 1990 Census and 1997 is of sufficient length that use of 1997 Census population estimates is preferable. Whites make up eighty-three percent of all 1997 persons living in the counties making up the Western District but are eighty-five percent of those age eighteen or older in those counties; Blacks are eight percent of all persons but only seven percent of those age eighteen or older.63

If we again assume the racially unidentified prospective jurors are in the same racial proportions as the racially identified prospective jurors, an adjusted percent of prospective jurors can be calculated by ignoring jurors whose race is not documented.64 Overall, the white juror adjusted proportion are 105 percent of the white population proportion, Black prospective jurors are 58 percent, and other race jurors are 75 percent. The differences between the prospective juror proportions and the population age 18 and over proportions are significant. The differences cannot be attributed to sampling variation. The Black adjusted proportion of prospective jurors

60 (.0740 -.0455)/(((.0455 x (1 -.0455))/23,130)^3)
61 (.0302 -.0130)/(((.0302 x (1 -.0302))/23,229)^3)
62 The usable return rate varied from fifty-two percent in the Enid - Ponca City Division to sixty-one percent in the Woodward Division.
63 The appropriate population proportion to compare the racial composition of jurors with is the population age eighteen and over, the population from which prospective jurors are selected. Although the 1997 Census estimated each county’s racial population, it did not indicate the proportion of each race that are age 18 and older. (Age distributions for various racial groups differ because of different life expectancies and different fertility rates, among other things.) The 1990 U.S. Census estimates the population age 18 and over for each county in the Western District. If we assume the age distributions for Oklahoma in 1990 are the same as those in the counties of the Western District in 1997, we can adjust the 1997 Census estimates to include only persons 18 years old and older. This is done by multiplying the proportion of the group that is 18 years or older by the total number of persons in the group in 1997. In 1990, seventy-five percent of whites are age 18 and over while sixty-five percent of Blacks and those of other races were age 18 and over.
64 See text accompanying note.
was .0452 while the Black proportion of the population age 18 and over was .0770. The Black juror proportion was 23.21 standard errors from the Black population proportion age 18 and over.65

3. 2001 Wheel

In 2001, Blacks were between 7.82 and 8.17 percent of those age eighteen or older in the Western District. Whites were 89.04 percent of the prospective jurors in the 2001 Wheel and only 80 percent of the Western District's population age eighteen and over. District-wide, white qualified juror proportions are 110 percent of their population proportions. Blacks are 5.15 percent of the prospective jurors and 8 percent of the population. Black prospective juror proportions are 63 percent of their population proportions if we include those with multiple races including Black with the Black alone population.

In the two divisions with substantial Black populations the situation is slightly worse for Black representation among qualified jurors than it is overall. In Division 3, Lawton - Mangum Blacks are almost ten percent of the population and 3.92 percent of prospective jurors. The Black juror proportion is 39.8 percent of their population proportions when those with several races including Black are grouped with those only indicating Black. In Division 2, Oklahoma City, Blacks are 9 percent of the population and 5.51 percent of the prospective jurors. The Black juror proportion is 59.59 percent of their population proportions if those with several races including Black are grouped with those only indicating Black.

In each of the Divisions there is a significant difference between the racial proportions of the prospective jurors and that in the population age 18 and older. The differences between the prospective juror proportions and the population age 18 and over proportions are significant. The differences cannot be attributed to sampling variation. The Black adjusted proportion of prospective jurors was .05147 while the Black proportion of the population age 18 and over was .081704. The Black prospective juror proportion was 22.33 standard errors from the Black population proportion age 18 and over.66

B. Discriminatory Effect of Selection Procedures

Examination of the 1993, 1997, and 2001 jury wheels along with relevant U.S. Census information shows whites over represented and Blacks under represented among prospective jurors. The pattern is consistent and significant across all four divisions in each year studied. Between 1993 and 2001 the Black proportion of prospective jurors was between 60 percent and 65.66 percent of their population proportions age eighteen and over. The absolute difference between Black prospective juror proportions and Black Census population proportions in the Western District was 2.96 percent in 1993, 2.87 percent in 1997 and 2.81 percent in 2001.

65 (.0770 - .0452)/(((.0452 x (1 - .0452))/22,989)^.5)
66 (.0817 - .05147)/(((.05147 x (1 - .05147))/26,657)^.5)
What is the origin of Black under-representation among qualified jurors? Overall, Blacks are a higher percent of qualified jurors from those returning questionnaires than are whites: 71 or 72 percent of identified whites returning questionnaires are qualified compared to 75 percent of identified Blacks. The differences are significant. Blacks are not being disqualified or excused, exempted or excluded based on their questionnaire responses or in-person interviews at greater rates than whites. To the contrary, if anything, Blacks are less likely than whites to be excused, exempted, disqualified or excluded than are whites.

Among the several sources of Black under-representation there are three the court can remedy. The first possibility is that Blacks are under-represented among the registered voters to whom the questionnaires were sent. The second possibility is Blacks are over-represented among those who received but did not return questionnaires. The race of these persons is unknown from available questionnaire data. The third possibility is Blacks are over-represented among those who were sent questionnaires returned as undeliverable, for some reason including the addressee is deceased or moved. Race is not available for these persons from the questionnaire data.

1. Voter Lists

Black under representation among registered voters is one possible source of Black under representation on juries. According to a quadrennial Census survey, only 74.2 percent of the adult population in Oklahoma registered to vote in the 1992 presidential election. The same survey shows that the registration percentage declined to 70.1 percent in the 1996 presidential election, and fell to 68.8 percent in the 2000 presidential election. The non-registered voters are being bypassed for jury service. The Census surveys also reveal a difference in the rate at which different races register to vote. At the 1992 presidential election, 75.5 percent of the white adult population in Oklahoma registered, as compared to 65.5 percent of the black adult population. In the 1996 presidential election, 71.3 percent of the white adult population in Oklahoma registered, as compared to 67.1 percent of the black adult population. Because Western District jury wheels are refilled soon after each presidential election, these differential rates of voter registration have a direct impact on the racial makeup of the wheels of prospective jurors.

---

67 Some District Courts, the Northern District of Oklahoma in Tulsa, for example, supplement the voter registration lists with driver and identification licensees aged eighteen and over.
68 Voter registration is measured two ways, State Election Board recorded registrations and U.S. Census and other survey self-reported registration. Both exaggerate actual current registrations. In our opinion, the U.S. Census more accurately estimates the actual registered voters available for jury service in the time periods studied.
2. Lower Black Response Rate to Received Juror Questionnaires

Another source of Black under representation among prospective jurors is lower response rates among Blacks who receive questionnaires. A 1997 Census study has shown that Blacks are about twice as likely as whites not to respond to mailed U.S. Census questionnaires. Because both Census questionnaires and jury questionnaires are transmitted by mail, there should also be a comparable lower return rate among Blacks who receive juror questionnaires. In a system where there is no follow-up to unreturned questionnaires, as in the Western District, such a lower Black return rate will be reflected in lower Black representation among prospective jurors.

The non-return rates on received juror questionnaires in the Western District are high. For example, the non-return rate for the 1993 master wheel for the Oklahoma City Division was 26.89 percent (8,339 out of 31,012 who received questionnaires), while the non-return rate for same division of the 1997 master wheel was 21.68 percent (6,301 out of 29,057 who received questionnaires). These non-responders were excluded from jury service without further action or inquiry by the Court.

We examined of a University of New Mexico analysis of juror questionnaire status for 1993 and 1997 by the ZIP code of the addressee. To make our analysis more manageable, we considered only ZIP codes mailed fifty or more questionnaires. The ZIP code data include 91 percent of those mailed questionnaires in 1993 and 92 percent of those mailed questionnaires in 1997. The juror questionnaire status proportions from the persons available in the ZIP code data are close to those of the entire group mailed questionnaires in 1993 and in 1997.

The five existing ZIP codes with the highest non-return rates (of questionnaires received) for the 1997 wheel had Black populations age 18 and over, as measured in the 1990 Census, which were far higher than the District as a whole:

<table>
<thead>
<tr>
<th>ZIP</th>
<th>Percent Return Rate</th>
<th>Percent Population Black</th>
</tr>
</thead>
<tbody>
<tr>
<td>73117</td>
<td>53.79</td>
<td>87.66</td>
</tr>
<tr>
<td>73104</td>
<td>54.55</td>
<td>70.57</td>
</tr>
<tr>
<td>73111</td>
<td>55.75</td>
<td>88.81</td>
</tr>
</tbody>
</table>

---

All five of these ZIP codes are in northeastern Oklahoma City, within the Oklahoma City division. Three of these ZIP codes (73104, 73114 and 73117) were among the top 5 non-returners for the 1993 wheel as well, and the other two were in the top 10. The return rates for these five ZIP codes for the 1993 wheel were:

<table>
<thead>
<tr>
<th>ZIP</th>
<th>Percent Return Rate</th>
<th>Percent Black</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>73104</td>
<td>43.24</td>
<td>70.57</td>
<td>377</td>
</tr>
<tr>
<td>73114</td>
<td>54.70</td>
<td>45.35</td>
<td>377</td>
</tr>
<tr>
<td>73117</td>
<td>55.73</td>
<td>87.66</td>
<td>377</td>
</tr>
<tr>
<td>73111</td>
<td>57.56</td>
<td>88.81</td>
<td>377</td>
</tr>
<tr>
<td>73084</td>
<td>58.01</td>
<td>66.18</td>
<td>377</td>
</tr>
</tbody>
</table>

The ZIP code data reveals that non-response to juror questionnaires is clearly associated with race. Persons in Black majority ZIP codes in 1993 were twice as likely not to respond to a juror questionnaire than persons from all white ZIP codes and almost three times as likely in 1997. This confirms what the U.S. Census and other courts have found. Black Americans are less likely to respond to an initial mail questionnaire than are whites.

III. SOLUTIONS

In light of the persistent exclusion of Blacks and other minorities from the jury-selection process, changes to the governing law and selection procedures in many federal districts are overdue. The Tenth Circuit’s use of absolute disparity, with a ten percent threshold, does not check exclusion of small minorities. This creates complacency in court clerks and judges, and it does not encourage adoption of the most inclusive selection procedures. Further, groups most
impacted by non-representative juries, blacks and Hispanics, make up the majority of criminal defendants convicted by those juries.\textsuperscript{71} For the federal court system to promote fairness, or even the appearance of fairness, changes to the governing law and selection procedures of most districts must change.

\textbf{A. A New Statistical Measurement}

The infirmities of the current statistical measures used by federal courts-absolute and comparative disparity and standard deviation- are heavily criticized by the courts themselves.\textsuperscript{72} The selection system should be evaluated on the probability that a jury wheel could have been selected randomly from the general population. In \textit{Orange}, the 1997 jury prospective juror wheel was 91.07\% white, 4.52\% Black, and 4.42\% other. The general population aged eighteen and over in Oklahoma had percentages of 86.47, 7.70, and 5.83 respectively. Using this new approach, the probability that the 1997 wheel would be selected at random from the general population would be 9.56E-96.

A proposed cut-off criterion would be .000001\textsuperscript{(or 1E-5)} -that is, a one and one million chance that a juror pool could come from the population by chance. This statistical measure would illuminate any disparities in the selection process while effectively guarding groups who make up small percentages of the general population.

\textbf{B. Changes to Selection Procedures in the Western District}

The Western District’s selection procedures were crafted in accordance with federal law and have been approved by the Tenth Circuit. Yet, the procedures have yielded consistently under-representative jury wheels. More troubling, federal law does not compel change when low-cost procedures exist that would substantially improve the inclusiveness of jury wheels.\textsuperscript{73}

\begin{enumerate}
\item \textbf{Supplement Voter Lists with DMV Lists}

Use of a more inclusive juror source list could remedy the under representation of Blacks on registered voter lists. The most likely alternative source list is the computerized system of driver and identification licensee records maintained by Oklahoma’s Department of Public Safety ("DPS"). DPS records have been used as the source lists for jurors in the Oklahoma state courts since the late1980s. In addition, some federal District Courts, such as the Northern District of Oklahoma in Tulsa, supplement the voter registration lists with driver and identification licensees aged eighteen and over.

To gauge the inclusiveness of the DPS lists, one can compare the estimated number of individuals actually available to serve as jurors on registered voter lists, and on DPS lists. As a

\textsuperscript{71} See NAT’L URBAN LEAGUE, STATE OF BLACK AMERICA 2010 // JOBS: RESPONDING TO THE CRISIS 27 (2010).
\textsuperscript{72} See Berghuis v. Smith, 130 S. Ct. 1382, 1393 (2010).
\textsuperscript{73} See \textit{Orange}, 447 F.3d at 800 (McConnell, J., concurring).
measure of the number of registered voters available to serve as jurors, the registration figures estimated by the quadrennial Census surveys are more accurate than State Election Board figures. As a measure of the number of DPS licensees available to serve as jurors, only DPS licensees age 18 and over whose licenses were current were used. The comparison involved the number of registered voters in Oklahoma in the presidential election held in November of 1992, as reported by Census surveys, to the number of holders of current DPS driver and identification licenses in 1993, age 18 and older. These figures were also compared to the total adult population of Oklahoma in 1993. The results of this comparison are shown below:

Total Oklahoma Registered Voters (Nov. 1992) 1,704,000

Total Current ID and Driver Licensees Age 18 & Older, 1993

Total Oklahoma Population, Age 18 and Over, 1993

Also, the number of voters in the election of November 1996, was compared to the number of adult licensees, and the adult population in 1997:

Total Oklahoma Registered Voters (Nov. 1996) 1,652,000

Total Current ID and Driver Licensees Age 18 & Older, 1997

---

74 State Election Board registration lists include large numbers of names of individuals who are either deceased or have moved. The inaccuracy, for juror election purposes, of the state Election Board lists is reflected in the large number of undeliverable and deceased juror questionnaires returned to the Court, after being sent to names on Election Board registered voter lists. In the 1993 wheel, the dead and undeliverable were 25.80 percent of questionnaires mailed. In the 1997 wheel, the same percentage was 31.63 percent.


Total Oklahoma Population, Age 18 and Over, 1997

These figures indicate that, in 1993 and 1997, between 98 percent to 100 percent of the State’s adult population age 18 and over had a current DPS identification or driver license. If suspended licensees had been included, the percentages would have been even higher. During the same periods, reported voter registration rate never exceeded 74.2 percent. The DPS licensee list is thus more inclusive of the adult population than registered voter lists. If the DPS licensee list were used to supplement registered voter lists, it would bring a large number of additional persons into the jury pool.

Supplementation of voter lists with DPS lists would be a step to remedy the under-inclusiveness of jury wheels. This can be shown by obtaining the racial breakdown of driver and identification licensees age eighteen and over from the Oklahoma Department of Public Safety. The data is current as of April 18, 2004. Overall, Blacks are a greater percent of the DPS driver and identification licensee records, 9.41 percent, than prospective jurors, 5.22 percent, of even the Census population age eighteen and over, 7.82 percent. This is true in each of the divisions of the Western District except Division 4, Woodward, where the Black percent of the Census population age eighteen and over is slightly larger than the DPS licensee proportion. The relatively high proportion of Blacks appearing on the DPS licensee lists suggests that supplementation from such lists would contribute to reducing Black juror under representation due to registered voter lists. A more definitive conclusion on this point would require study of DPS licensee data which is limited to current licenses.

2. Follow-up System on Unreturned Questionnaires

The low return rates observed in the Western District could be remedied with a similar follow-up system for unreturned questionnaires. According to a 1988 publication of the Administrative Office of U.S. Courts, most federal district courts have a follow-up system to identify unreturned questionnaires, and take follow-up action, such as mailing a second

---


79 One problem with the DPS licensee data provided to date is that the total number of adult licensee records in the DPS system exceeds the adult population of the State. The apparent reason for this excess is that the DPS list includes expired licenses and other non-current records. Limitation of the DPS data to current and suspended licenses would more accurately track the State’s current adult population, and more accurately represent the group of individuals actually available for jury service.
questionnaire, when an initial questionnaire is not returned. The Court Administrator for the Eastern District of Illinois reported on a juror questionnaire mailing in 1992 followed up by a second mailing. He reported "13.1 percent of the 14,509 respondents to the first mailing reported their race as African American. African Americans represented 28.2 percent of the 2,303 respondents to the second mailing." This data shows that the effectiveness of a follow-up system is not conjecture; rather, it is a proven tool to create a more inclusive groups of responders.

A follow-up system could also be more cost-effective. In the years examined, the Western District sent out almost 50,000 questionnaires, with only half being returned. Twenty percent (about 9,000) are nonresponsive. An effective follow-up system, along with use of cheap database services to update addresses, would significantly improve this return rate and save costs. For example, to yield 25,000 responses, the court clerk could send out 40,000 questionnaires, and expect a little more than 20,000 responses. Approximately 7,200 would be nonresponsive. If following up with a second questionnaire on the non-responders yields just 3,500 responses, then the District could create a comparable potential juror wheel while sending out less questionnaires. This would cut costs and create a more inclusive jury wheels in federal districts that do not follow-up after the initial questionnaire.

3. Simplify the Questionnaire

The juror questionnaire should be simplified-keeping the amount of writing on it to a minimum. Make it user-friendly. Non-response rates to mailed questionnaires are a function of the length and complexity of the questionnaire. Increased race information available in 2001, compared to 1993 and 1997 is likely due, at least in part, to modifications in questionnaire format.

4. Update Voter Registration Addresses

A disproportionate number of Black juror questionnaires are undeliverable as addressed. Generally, renters and young people move more frequently than home owners and older people. Blacks are more likely than whites to be renters and young and therefore, more likely to move more frequently. The Oklahoma Census shows 20.99 percent of whites having moved while 31.51 percent of Blacks moved in the same period. Approximately two-thirds of the movers stay in the same county. In Oklahoma, 52.06 percent of the whites and 59.46 percent of the

80 JODY GEORGE, DEIDRE GOLASH, & RUSSELL WHEELER, HANDBOOK ON JURY USE IN THE FEDERAL COURTS 23 (1989).
82 See infra Part III.B.4.
84 U.S. Census Bureau HCT24 Tenure by Year Householder Moved into Census Unit 2000 Summary File 4 (SF 4) – Sample Data.
Blacks that moved in 1995 stayed in the same town or county.85 A postal forwarding order is only effective for twelve months and none of the District’s jury lists are updated against Postal Service or commercial change of address data bases. Updating mailing lists with a change of address data base will increase the proportions of Blacks delivered juror questionnaires.

CONCLUSION

Blacks and other minorities are under-represented on many federal juries as a direct result of the procedures employed by the respective district courts. Many jurisdictions, however, have sought the reality and appearance of fairness by taking well-proven steps to reduce this under representation. The Western District of Oklahoma should do so as well.

---