University of Michigan Journal of Law Reform

Volume 38

2005

Fair Representation on Juries in the Eastern District of Michigan: Analyzing Past Efforts and Recommending Future Action

Andrew J. Lievense
University of Michigan Law School

FAIR REPRESENTATION ON JURIES IN THE EASTERN DISTRICT OF MICHIGAN: ANALYZING PAST EFFORTS AND RECOMMENDING FUTURE ACTION

Andrew J. Lievense*

This Note builds on past recommendations to reform jury selection systems to make juries more representative of the community. Juries representing a fair cross section of the community are both a statutory and constitutional requirement, as well as a policy goal. How a judicial district designs and implements its jury selection system is important to meeting this requirement.

Part I of this Note analyzes the history and development of the representativeness interest on juries, explains how the United States District Court for the Eastern District of Michigan attempted to meet this interest in the 1980s and 1990s, and reports and addresses the current demographic information of jurors at two stages of the Eastern District's selection system. Part II comments on prior proposals for reform of the jury selection system, and makes three proposals for reform: (1) improving the source lists from which jurors are drawn; (2) improving the jury questionnaire; and (3) if still necessary, increasing the representation levels of underrepresented groups on petit juries by decreasing their representation on grand juries. Part III analyzes potential constitutional and practical objections to the grand jury/petit jury reform.

The jury is at the foundation of our jurisprudential system, and no place in the system is the jury more important than when a person faces the possibility of imprisonment. To be effective, however, the jury system must not only be impartial, it must also reflect a fair cross section of the community. Most people are familiar with the jury selection process, known as voir dire, which occurs right before trial, as attorneys select jurors from the jury venire. But citizens who are underrepresented in the venire itself are at a disadvantage before the attorneys even begin the selection process. Few people, even few lawyers and litigants, understand how jury venires are created in the first place. This may be because the process of creating a jury venire is an unfamiliar, administrative process handled by the courts—not the litigants or their lawyers.

Juries representing a fair cross section of the community meet the constitutional goal of the Sixth Amendment,[1] as well as the policy

* B.A., Ohio Wesleyan University, 1999; J.D., University of Michigan Law School, 2005. The author would like to thank Professor Phoebe C. Ellsworth for her assistance, guidance and feedback regarding this Note, and his friends and family for their editing skills toward this effort. The author would also like to thank the Eastern District of Michigan for its cooperation.

1. *See* U.S. CONST. amend. VI. (stating that defendants enjoy the right to trial by an "impartial jury of the State and district wherein the crime shall have been committed"); Duren v.

goal of engendering confidence in the criminal justice system,[2] by providing at least the appearance of impartiality.[3] When a jury system fails to meet these goals on a consistent basis or to a considerable degree, the Sixth Amendment or Equal Protection Clauses of the Fifth and Fourteenth Amendments may be violated. But, if the disparity between the actual demographic group's population and the jury pool demographic group's population does not rise to the level of constitutional concern, the government need not correct the problem, allowing smaller disparities between the actual demographic group population and jury pool demographic group population to persist.

In the 1980s and 1990s, the United States District Court for the Eastern District of Michigan (Eastern District) attempted to do more than was constitutionally required to achieve a fair cross section of the community on its juries. The Eastern District implemented a "balancing" system that removed individuals from certain groups, particularly overrepresented Whites, permitting increased representation for previously underrepresented groups. Ultimately, the Sixth Circuit Court of Appeals struck down this system.[4]

But ever since the Sixth Circuit struck down the Eastern District's attempt to remedy structural problems in the juror recruitment system that resulted in disproportionate, underinvolvement of minorities, particularly African Americans,[5] the Eastern District has been content with the discrepancies that result in their current, less ambitious, but "race-neutral," jury selection plan, which does not ensure a fair cross section of the community in jury pools.[6] The Eastern District's jury selection plan developed in the 1990s and struck down in *United States v. Ovalle* sought to correct significant, though likely not constitutionally prohibited, differences between the racial composition of the general population and jury venires empanelled in the Eastern District.

Missouri, 439 U.S. 357 (1979) (striking down a law making it more difficult for women to serve on juries as violating the Sixth Amendment guarantee of an impartial jury); Strauder v. West Virginia, 100 U.S. 303 (1880) (striking down a law preventing African Americans from serving on juries as a denial of the Fourteenth Amendment).

2. *See* Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003).

3. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 47–61 (1986).

4. United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998).

5. *See id.* at 1095.

6. EASTERN DISTRICT OF MICHIGAN, UNITED STATES DISTRICT COURT, JS-12 FORM (Oct. 1, 2000–Sept. 30, 2002) (on file with the University of Michigan Journal of Law Reform) [hereinafter JS-12]. The JS-12 is a U.S. Department of Justice form used by courts to monitor demographic data regarding their juror selection system. *See infra* Part I.C.

While the Eastern District's "balancing" plan did not pass constitutional muster, there are other ways to accomplish the goal of having juries more adequately mirror the community from which they are constituted. Part I discusses the development of the representativeness interest on juries required by the Constitution, federal statutes, and the judiciary, with particular focus on how the Eastern District has attempted to achieve that interest. Part II argues for the adoption of reforms addressing each phase of the jury recruitment process and also discusses previously suggested reforms. The most controversial reform, that representation of underrepresented communities on grand juries be temporarily and slightly sacrificed in favor of increased representation of those communities on petit juries, will receive particular attention. Finally, Part III addresses potential criticisms of the grand jury/petit jury reform, including potential constitutional issues. Though the same ideas and principles apply in most states, this Note will focus on the federal trial courts, with special attention given to the Eastern District.

Though each judicial jurisdiction may have different terminology to describe slightly varying jury selection procedures, this Note adopts those of the Eastern District. Accordingly, "jury pool" is intended to describe all adults over eighteen years of age who generally qualify for jury service. This list typically comes from voter registration and other state databases. The "master jury wheel," a subset of the jury pool, is drawn randomly from the jury pool for the purposes of mailing a jury questionnaire to determine specific qualification for jury service. The "qualified juror wheel" is a subset of the master jury wheel and is composed of all statutorily qualified jurors who return the jury questionnaire indicating the capacity and qualification to serve on a jury. "Venires," panels from which jurors are selected by the court and litigants, are drawn from the qualified juror wheel.

I. THE HISTORICAL DEVELOPMENT OF RACE AND JURY SERVICE, AND THE EASTERN DISTRICT EXPERIENCE

A. General Constitutional and Statutory Background

The Sixth Amendment guarantees the right to trial "by an impartial jury of the State and district wherein the crime shall have

been committed."[7] The Jury Selection and Service Act provides that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status."[8] As the Sixth Circuit has observed: "The plain meaning of this section is a clear prohibition of discrimination in the selection of grand and petit juries."[9] In passing the Jury Selection and Service Act, the House of Representatives noted that juries should "reflect the community's sense of justice in deciding [the case]. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent."[10]

The right to a trial by jury for all serious crimes is founded in the jury's historical role in society. The Supreme Court has noted that juries serve as a "protection against arbitrary rule,"[11] observing that "the truth of every accusation, whether proferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion."[12] For developing jury selection systems, the Court has interpreted the Constitution as requiring "a body truly representative of the community."[13] One important benefit of such a system is that impartial juries, representing a fair cross section of the community, engender confidence in the judicial system.[14] It is possible that diverse juries better understand or interpret the facts or law of a case.[15] Although the Supreme Court has repeatedly "recognized the importance of both the fact and the appearance of impartiality,

---

7. U.S. CONST. amend. VI.

8. 28 U.S.C. §§ 1861–1877 (2000).

9. *Ovalle*, 136 F.3d at 1099; *see also* Peters v. Kiff, 407 U.S. 493, 505 (1972) (interpreting a similarly worded statute as having such meaning).

10. H.R. Rep. No. 90-1076, at 6 (1968), as *reprinted in* 1968 U.S.C.C.A.N. 1792, 1797.

11. Duncan v. Louisiana, 391 U.S. 145, 151 (1968).

12. *Id.* at 151–52 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349) (citations omitted)).

13. Smith v. Texas, 311 U.S. 128, 130 (1940).

14. *See* Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 361 n.30 (1999) (citing Taylor v. Louisiana, 419 U.S. 522, 530 (1975)); *see also* Susanne H. Vikoren, *Justice or Jurymandering? Confronting the Underrepresentation of Racial Groups in the Jury Pool of New York's Eastern District*, 27 COLUM. HUM. RTS. L. REV. 605 (1996).

15. For a survey of many ways to improve jury understanding and jury deliberations, see Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001); Phoebe C. Ellsworth & Allan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788 (2000); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205 (1989).

they have struggled with mixed success in achieving those goals."[16] Despite the aspiration, the Court has never required that each jury proportionally reflect the community.[17] Yet the costs of unrepresentative juries should not be ignored. "[U]nrepresentative juries potentially threaten the public's faith in the legitimacy of the legal system and its outcomes" as the system loses "differing life experiences and potentially differing expectations and predispositions that can influence the assessments of the evidence, including judgments about witness credibility, that characterize the impartial jury."[18]

The Supreme Court, in *Strauder v. West Virginia*,[19] long ago ruled that it is a denial of Equal Protection to compel "a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects."[20] Striking down a statute excluding all African Americans from jury service as a violation of the Fourteenth Amendment's Equal Protection Clause was just a beginning. Almost 100 years later the Supreme Court applied a similar principle, in conjunction with the Sixth Amendment right to an impartial jury,[21] to systematic preclusions of women from jury service in *Taylor v. Louisiana*.[22] In *Taylor*, the issue was not whether a statutory provision existed which prevented a female citizen from serving on a jury in violation of her Fourteenth Amendment right. Rather, the issue was whether a violation of the defendant's right to an impartial jury, under the Sixth Amendment, was committed by making it more difficult for women to be called for jury duty. Women, constituting 53% of the population, were required to apply for jury duty rather than being automatically summoned for jury duty, resulting in 10% of the jury pool being women.[23] Eventually, in *Duren v. Missouri*,[24] the Court found that a "systematic exclusion of women that results in jury venires averaging less than fifteen percent female violates the

16. Ellis & Diamond, *supra* note 2, at 1033.

17. Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (citing Apodaca v. Oregon, 406 U.S. 404, 413 (1972); Fay v. New York, 332 U.S. 261, 284 (1947)); *see also* Duren v. Missouri, 439 U.S. 357, 372–73 (1979) (Rehnquist, J., dissenting) (quoting *Taylor*, 419 U.S. at 538).

18. Ellis & Diamond, *supra* note 2, at 1038.

19. 100 U.S. 303, 309 (1880).

20. *Id.*

21. Duncan v. Louisiana, 391 U.S. 145, 153 (1968) (discussing application of the Sixth Amendment right to an impartial jury against the states).

22. 419 U.S. 522 (1975).

23. *Id.* at 524.

24. 439 U.S. 357, 360 (1979).

Constitution's fair-cross-section requirement."[25] *Batson v. Kentucky*[26] expanded impartial jury requirements, deciding that not only is the government prohibited from systematically making participation in jury service more difficult for certain disfavored groups, but also deciding that the state may not peremptorily strike a member of a represented group on a jury venire panel solely on the basis of race.[27] *Batson* further strengthened the argument that the constitution ensures individuals the right to a diverse, impartial jury drawn from a fair cross section of the community. Today, juror selection processes or peremptory challenges based on race or gender can be challenged by any party to a lawsuit, regardless of their race or gender, making it more likely that a demographically diverse jury will decide the case than if only some parties could raise such a claim. Together, these cases[28] have articulated and solidified (1) the defendant's right and (2) the community's interest in having cases heard by fair cross sections of the community; as well as (3) a litigant's right to a petit jury selected without race or gender discrimination.

B. The Eastern District Experiment

Against this backdrop the Eastern District judges adopted and implemented a new jury selection plan—ultimately struck down by the Sixth Circuit as unconstitutional—that aggressively balanced the racial composition of its qualified jury pool to reflect the racial demographics of the public in the district. The court's judges and administrators decided that its juror selection system was insufficient and ineffective even though it might pass constitutional review, and sought to increase the likelihood that juries reflected the racial demographics of the area. The Eastern District sought proportional representation on juries to a greater extent than was achievable by using random selection procedures. Two government interests were at stake: ensuring that both the defendant's *and* the community's rights to juries that truly represent a fair cross section of the community were preserved.

---

25. *Id.*

26. 476 U.S. 79 (1986).

27. *Id.* at 84 (reaffirming the principle that a state's purposeful or deliberate denial to African Americans on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause).

28. *Batson*, 476 U.S. 79; *Duren*, 439 U.S. 357; Strauder v. West Virginia, 100 U.S. 303 (1880); *see also* J.E.B. v. Alabama, 511 U.S. 127 (1994) (extending *Batson* protections to challenges based on gender); Powers v. Ohio, 499 U.S. 400 (1991) (modifying *Batson*).

The Eastern District had wrestled with the problem of having a significant racial disparity between the general population and jury venire population for many years.[29] While certainly not alone,[30] the Eastern District endeavored to correct this problem with a more aggressive solution than any other federal district courts had considered. The Eastern District had previously tried various measures. For example, the pool of citizens considered for jury service was expanded with additional source lists, such as driver's license lists, with the hope of including additional minority groups. Additionally, the Eastern District had added names from certain zip codes to achieve greater representativeness.[31] However, the age of then-existing demographic population data, population shifts, and interstate highway and industrial construction which displaced certain minority population groups, made these methods of increasing minority representation on juries less reliable than they had been in the past.[32] With these tools of increasing representativeness neutralized and proven inadequate, alternative mechanisms were needed to achieve increases in minority representation in the qualified jury wheel.

The Eastern District, therefore, decided to implement a plan that called for "balancing" the racial composition of the jury pool by deleting a calculated number of non-African American individuals from the qualified jury wheel, thus achieving a more balanced and representative cross section of the community.[33] The new plan set forth the following procedure:

> The qualified jury wheel shall be composed of persons who represent a fair cross-section of the area of each place of holding court as set forth in Section III of this Plan. To this end, if the Court determines that a cognizable group of persons is substantially overrepresented in the qualified jury wheel, the Chief Judge shall order the Clerk to remove randomly a specific number of names so that the population of each

29. *See* Robert Mossing, *Changes in the Eastern District of Michigan Detroit Administrative Unit's Jury System*, 63 MICH. B.J. 33 (1984).

30. *See* Vikoren, *supra* note 14, at 611 (identifying problems faced by the Eastern District of New York).

31. *See* Mossing, *supra* note 29, at 33 (describing past efforts to improve the jury selection system).

32. *See* Avern Cohn & David R. Sherwood, *The Rise and Fall of Affirmative Action in Jury Selection*, 32 U. MICH. J.L. REFORM 323, 325 (1999).

33. *See id.*; *cf.* United States v. Greene, 971 F. Supp. 1117, 1122–24 (E.D. Mich. 1997) (providing an alternative, in depth, and historical explanation of the Eastern District's experiments).

> cognizable group in the qualified wheel closely approximates the percentage of the population of each group in the area of each place of holding court, according to the most recent published national census report. A quotient and a starting number shall be used in this process.[34]

If responses to the federal juror questionnaire resulted in a disproportionately low number of African Americans, "a sufficient number of white peoples' names were then subtracted from the qualified wheel to achieve a percentage ratio of Whites to African Americans that conformed to the percentage ratio in the general population established by the current census."[35]

This plan accomplished its goal, increasing African American representation on juries. Whereas without balancing only 8%[36] of jurors would have been African American, the balancing plan raised African American representation to 19% for the Eastern District's Detroit unit.[37] However, problems with the plan's implementation remained. African Americans were the only cognizable group for which "balancing" was performed, and Hispanics were considered white for "balancing" purposes, thus harming another potentially under-represented group. Defendants began to challenge the system,[38] leading to questions as to the statutory and constitutional validity of a program that subtracted qualified citizens from service to achieve a qualified jury pool that more closely mirrored the general, eligible population of the district, but for only some racial groups. These questions resulted in the Sixth Circuit's decision in *United States v. Ovalle*, where the Sixth Circuit Court of Appeals considered whether the "balancing" method could continue. *Ovalle* involved a Hispanic defendant who challenged the Eastern District's jury selection procedure because it only recognized African Americans, not Hispanics, as a cognizable group for balancing purposes.[39]

---

34. Cohn & Sherwood, *supra* note 32, at 325 (quoting *Jury Selection Plan*, VIII.B. (E.D. Mich. 1998)).

35. *Id.* at 325–26.

36. In *Taylor v. Louisiana*, 419 U.S. 522, 524 (1975), women composed 53% of the eligible population, no more than 10% of the jury pool, and 0% of the defendant's venire. In *Duren v. Missouri*, 439 U.S. 357, 362–63 (1979), women composed 54% of the eligible population, 26.7% of the pool, approximately 15% of weekly venires, and approximately 9% (5 of 53) of the defendant's venire. The Court struck down the jury selection systems in both cases. The Supreme Court has not gone further, but it is unclear what percentage difference might be sufficient to raise concern in the future.

37. Cohn & Sherwood, *supra* note 32, at 326.

38. *See Greene*, 971 F. Supp. at 1117 (challenging the Eastern District's juror selection program).

39. United States v. Ovalle, 136 F.3d 1092, 1097 (6th Cir. 1998).

During the relevant time period for the jury selected for the *Ovalle* case, "at least 14 Hispanics and 863 other individuals were removed from the jury wheel for the sole reason that they were not African Americans."[40] The question, for the purposes of the defendants' Equal Protection claim under the Fifth Amendment and the Jury Selection and Service Act claim, was "whether non-African-Americans were eliminated from the qualified jury wheel based solely on their racial status in violation of the right to equal protection guaranteed by the Fifth Amendment."[41] After considering the defendants' standing to raise the Equal Protection claim, the Sixth Circuit noted that the standard for determining the validity of an Equal Protection claim is the "degree of underrepresentation occurring over a significant period of time."[42] Explaining how the standard would apply in this case, however, the court said:

> As the Sixth Circuit has previously indicated, the rationale underlying [this requirement] "is that if a disparity is sufficiently large over a significant period of time, then it is unlikely that the disparity is due solely to chance or to accident, and in the absence of evidence to the contrary, a court should conclude that racial or other . . . factors entered into the selection process." This rationale suggests that if there is no doubt that racial factors were the primary reason for excluding potential jurors, there would be no need to utilize the traditional . . . approach; a court could simply look to the direct evidence of exclusion based on race.[43]

Thus, the court suggested that some disparity among a particular demographic group may constitute an Equal Protection violation by itself, without analyzing other traditional factors.

The Sixth Circuit found that "[t]he implementation of the jury selection is clearly not race neutral" and "[an]y non-African-American had a chance of being eliminated from the jury wheel solely based on race."[44] The more important and extensive analysis addressed whether the government interests justifying the race-conscious jury selection process were compelling and whether the Eastern District's plan was narrowly tailored to address these

40. *Id.* at 1100.

41. *Id.* In state prosecutions, the Equal Protection Clause of the Fourteenth Amendment would be at issue.

42. *Id.* at 1104.

43. *Id.* at 1104–05 (internal citations omitted).

44. *Id.* at 1105.

interests.[45] The Sixth Circuit, after discussing the historical role of the jury, found that the "requirements of the Sixth Amendment and the importance of both the reality and the appearance of fairness in our criminal justice system, creating a jury pool that represents a fair cross section of the community is a compelling government interest."[46]

The *Ovalle* court then turned their attention to the "narrowly tailored" prong of Equal Protection analysis. The court found that the plan was not narrowly tailored and that the compelling interest could be achieved in other ways. The *Ovalle* court decided this despite the aforementioned evidence of considerable prior efforts to achieve more representative jury pools through other means.[47] The *Ovalle* court noted that one in five non-African American jurors were eliminated, and thus not everyone had the same opportunity to serve on a jury.[48] Additionally, no attempt was made to increase jury representation of Hispanics or other cognizable groups.[49] Instead, the *Ovalle* court admonished the Eastern District for not broadening membership in the jury pool as an alternative, and non-discriminatory, means of accomplishing its goal.[50] Finding a Fifth Amendment violation, the court reversed the convictions and struck down the policy.[51]

The aftermath of this decision presented a daunting task for the Eastern District's judges and administrators.[52] A new jury selection plan had to be developed and implemented quickly by the Eastern District judges and administrators. Facing numerous attacks and lacking the will to correct racial disparities in other ways in the aftermath of *Ovalle*, the Eastern District judges switched to a "neutral" system that did not utilize race-conscience balancing.[53] Yet a very simple addition to the balancing system had already

45. *Id.*
46. *Id.* at 1106.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1109.
52. The Eastern District faced numerous challenges to the balancing system on direct appeal and habeas corpus review by criminal defendants and prisoners who had been indicted by grand juries or convicted by petit juries under the now-unconstitutional system. *See, e.g.*, United States v. Spearman, 186 F.3d 743 (6th Cir. 1999) (suggesting that jury selection post-*Ovalle* will leave African Americans underrepresented); Spearman v. United States, No. 96-1887, 1998 U.S. App. LEXIS 29585 (6th Cir. Nov. 17, 1998) ("[*Ovalle*] does not appear to address claims of defendants who would complain about the low number of African Americans in a jury pool."); United States v. Brown, 128 F. Supp. 2d 1034 (E.D. Mich. 2000); United States v. Goode, 110 F. Supp. 2d 580 (E.D. Mich. 2000).
53. Interview with Avern Cohn, Senior Judge, U.S. Dist. Ct. for the E. Dist. of Mich., in Detroit, Mich. (Sept. 26, 2003) [hereinafter Cohn Interview].

taken place. This addition was not at issue in *Ovalle*, but might have led to a different constitutional analysis by the Sixth Circuit. Soon after beginning the "balancing" procedures, the Eastern District adjusted the system so that, rather than remove names from the jury rolls during the balancing process, the Eastern District returned the names to the qualified juror wheel for future consideration; this created the modified Eastern District plan.[54] What happened to the people who were subtracted from the qualified wheel, and the impact of the destination of these names within the Eastern District's system, remains somewhat in doubt. Judge Cohn, in an article and in an interview, insisted that *Ovalle* only struck down a jury selection system that eliminated stricken names from service all together.[55] Consequently, this leaves open the possibility that if names are returned to the jury pool or qualified jury wheel, or reserved for future service should non-African Americans be underrepresented in a future qualified jury wheel, the plan would be constitutional.

Applying *Ovalle*, it is unclear whether the Sixth Circuit would have considered this modified Eastern District plan, which merely postponed jury service for a small number of non-African American members of the qualified jury wheel, to be a constitutional violation as well. The *Ovalle* court emphasized that the elimination of individuals from service was a major factor in finding the plan unconstitutional, noting that "the one-in-five white or other jurors *eliminated* from this qualified jury wheel did not have the same opportunity to serve as did the African-American members of the wheel who were protected from elimination."[56] Similarly, elimination from service, not postponement, was what occurred for the defendants' jury in *Ovalle*.[57] With this modification, subtraction no longer determines *whether* a non-minority individual will serve on a jury, it only determines *when* a non-minority individual can serve. This distinction might have saved the modified Eastern District plan. However, if postponement occurs, meaning individuals' names are returned to the qualified jury wheel, near the end of the life of the master jury wheel, individuals would be prevented from serving on a jury because of their race once the court creates a new master jury wheel and the old master jury wheel and qualified jury

54. According to Judge Cohn, the Eastern District always intended for names to be returned to the qualified jury pool rather than eliminated, and the Eastern District corrected the problem as soon as this discrepancy was discovered. *Id.*

55. Cohn & Sherwood, *supra* note 32, at 328; Cohn Interview, *supra* note 53.

56. United States v. Ovalle, 136 F.3d 1092, 1106 (6th Cir. 1998) (emphasis added).

57. *Id.* at 1100.

wheel are eliminated. The modified Eastern District plan may have little discernable impact on a juror's chance of serving early in the life of a jury wheel, when addresses are fresh and the pool will be used for many years, but it might have considerable impact near the end of a jury wheel's life when more people have moved and the court is preparing to draw an entirely new jury wheel from the jury pool.

Whether these differences would substantially alter the Sixth Circuit's analysis is unclear. Because the Eastern District chose not to continue this plan, as it could have, we do not know the answer. We do know that the problems the balancing system was designed to correct have reappeared in the Eastern District. Early indications, after *Ovalle* was decided, "suggest that judges are trying criminal cases largely with African-American defendants, prosecuted in front of mostly white judges, by mostly white prosecutors and defense counsel, and with decisions made by almost all-white juries. This is not fairness in the criminal justice system."[58]

C. The Status Quo in the Eastern District

Striking down *Ovalle* was easy to do because no definitive data existed to demonstrate whether an improved or adequate demographic balance could be achieved absent the balancing plan. Indeed, the Sixth Circuit's decision that the balancing plan was not narrowly tailored relied in large part on its belief that there were likely to be alternative, race-neutral methods of increasing racial representativeness.[59] It had been many years since the Eastern District operated a jury selection system without some compensation for and recognition of demographic realities in the judicial district. Today, more than six years later, the results of a "race neutral" plan can be more fairly compared with what was struck down in *Ovalle.*

In October, 2000, the Eastern District placed 130,000 names of individuals from the voter registration, personal identification card, and driver's license files supplied by the Michigan Secretary of State into the master jury wheel.[60] The Eastern District mailed forms to 60,400 individuals; 41,253 were returned and the remain-

58. Cohn & Sherwood, *supra* note 32, at 333.

59. *Ovalle*, 136 F.3d at 1106.

60. The information included in this section was reported by the Eastern District of Michigan to the Justice Department in Washington, D.C., on the JS-12 form, pursuant to federal law. *See supra* note 6. The information from the JS-12 form reports a summary of jury wheel data and is recreated in the charts with some collapsing of data.

ing 19,147 were not. The JS-12 form does not report why almost one-third were not returned. For example, the JS-12 form includes no notation as to how many were due to incorrect addresses, despite the fact that the form includes a space for those deemed undeliverable by the post office. Below in Table 1 and Table 2 is the demographic breakdown of the 41,253 individuals from the master jury wheel who returned their questionnaires.

TABLE 1
DEMOGRAPHIC BREAKDOWN OF THE MASTER JURY WHEEL[61]

Race	Sex						Total in Sample	% of Sample
	Male %		*Female %*		*Unknown %*			
White	15,668	37.98	18,166	44.04	189	.46	34,023	82.47
Black	1,254	3.04	2022	4.90	58	.14	3,334	8.08
Native American	94	.23	82	.20	0	NA	176	.43
Asian	315	.76	341	.83	2	NA	658	1.60
Other	87	.21	99	.24	1	NA	187	.45
Unknown	1,373	3.33	1,452	3.52	50	.12	2,857	6.97
TOTAL	18,791	45.55	22,162	53.72	300	.73	41,253	100%

TABLE 2
ETHNIC BREAKDOWN OF THE MASTER JURY WHEEL[62]

Ethnicity	Sex						Total in Sample	% of Sample
	Male %		*Female %*		*Unknown %*			
Hispanic/Latino	179	.43	179	.43	NA	NA	358	.87
Non-hispanic/ non-latino	12,109	29.35	13,992	33.92	192	.47	26,293	63.74
Unknown	6503	15.76	7,991	19.37	108	.26	14,602	35.40
Total	18,791	45.55	22,162	53.72	300	.73	41,253	100

Table 2 indicates that more than 35% of the individuals completing the questionnaire either did not answer or were unsure whether they were of Hispanic/Latino ethnicity (see "Unknown" row). This number seems high and may partially explain why less than 1% reported Hispanic/Latino ethnicity. More complete information is needed to analyze the impact of the Eastern District's jury selection system on the Hispanic/Latino community.

From those 41,253 completed questionnaires, 30,683 individuals composed the qualified jury wheel. While the form offers no

61. JS-12, *supra* note 6, at 1.
62. *Id.*

explanation for this reduction, presumably citizens who were disqualified or excused from service by statute, were unable to perform jury service, or had changed residences, combined to cause this reduction. The demographic data on the qualified jury wheel follows in Table 3 and Table 4.

TABLE 3
DEMOGRAPHIC BREAKDOWN OF THE QUALIFIED JURY WHEEL[63]

Race	Sex						Total in Sample	% of Sample
	Male %		*Female %*		*Unknown %*			
White	12,576	40.99	14,363	46.81	139	.45	27,078	88.25
Black	1,044	3.40	1,744	5.68	46	.15	2,834	9.24
Native American	73	.24	74	.24	NA	NA	147	.48
Asian	205	.67	245	.80	2	.01	452	1.47
Other	50	.16	54	.18	NA	NA	104	.34
Unknown	31	.10	36	.12	1	NA	68	.22
Total	13,979	45.56	16,516	53.83	188	.61	30,683	100

TABLE 4
ETHNIC BREAKDOWN OF THE QUALIFIED JURY WHEEL[64]

Ethnicity	Sex						Total in Sample	% of Sample
	Male %		*Female %*		*Unknown %*			
Hispanic/Latino	132	.43	120	.39	NA	NA	252	.82
Non-hispanic/ non-latino	9,039	29.46	10,437	34.02	133	.43	19,609	63.91
Unknown	4,808	15.67	5,959	19.42	55	.18	10,822	35.27
Total	13,979	45.56	16,516	53.83	188	.61	30,683	100

The JS-12 form concludes with a table comparing the demographic statistical data of the qualified jury wheel against the general population in the Eastern District. Only people eighteen years old and older in the general population were included in the demographic comparison[65] since jurors must be eighteen years of age or older.[66] The comparison follows in Table 5.[67]

63. *Id.* at 2.
64. *Id.*
65. *Id.*
66. 28 U.S.C. § 1865(b)(1) (2000) (discussing statutory jury qualifications for jury service).
67. The JS-12 form reports the ethnic and gender data of the qualified jury pool as well, but does not report the comparable information for the general population. The JS-12 form has space for this information, but the Eastern District did not report the data on the

TABLE 5
DEMOGRAPHIC COMPARISON OF THE QUALIFIED JURY WHEEL AGAINST THE POPULATION TOTAL.[68]

Race	*Wheel Sample #*	*Wheel Sample %*	*Population Total*	*Population %*
White	27,078	88.25	3,835,982	78.37
Black	2,834	9.24	821,990	16.79
Native American	147	.48	19,122	.39
Asian	452	1.47	99,144	2.03
Other	104	.34	45,525	.93
Unknown	68	.22	72,924	1.49
TOTAL	30,683	100	4,894,687	100

D. Analysis of the Eastern District's Data

All racial groups, except Whites and Native Americans, are underrepresented in the qualified jury wheel as compared with the group's representation in the total eligible population.[69] African Americans are the group with the largest real differential (7.55%) between their percentage of the qualified jury wheel (9.24%) and their percentage of the total eligible population (16.79%); this real difference equates to a 55% decrease as compared with their percentage of the total eligible population. The *Ovalle* court disapproved of the balancing system's emphasis on increasing representation for African Americans to the exclusion of other minority groups. However, this data suggests that the unbalanced, "race-neutral" juror selection system adopted after *Ovalle* has resulted in significant disparities, suggesting that perhaps the Eastern District was correct pre-*Ovalle* to be concerned with ensuring an increased level of representation by African Americans in the qualified jury wheel, and that the Sixth Circuit did not appreciate the need for the system struck down in *Ovalle*. The Eastern District likely was particularly interested in avoiding a challenge to their jury selection process due to the considerable underrepresentation of African Americans in the qualified jury wheel

form. This makes it difficult, without more information, to determine whether Hispanics or women are under- or over-represented in the jury system. While comparable information could be acquired from census results, the author's unfamiliarity with the source used by the Eastern District to report other data gives him pause. The author does not want to fill in the blanks for the Eastern District, thus possibly leading to erroneous analyses and conclusions.

68. JS-12, *supra* note 6, at 2.

69. The comparative racial data reported on the JS-12 form did not include a comparison for Hispanics.

that existed before the balancing system. The data presented above suggests that this under-representation has reemerged since the abandonment of the balancing system.

The *Ovalle* court was correct that the Eastern District could not legally correct for the under-representation of one group by harming another underrepresented group, such as Hispanics. The comparatively few people belonging to the "Asian," "Native American," and "Other" racial categories make these groups' under-representation on the qualified jury wheel less of a legal concern, given the historical representation disparities necessary to mount a challenge to the jury system,[70] and the idea that a fair cross section of the community does not require exact representativeness.[71] However, the Hispanic population is not accounted for in the qualified jury wheel comparison with the total eligible population because of the incomplete statistical data reported on the JS-12 form.[72] Until the same comparison is done with the Hispanic population, it is unclear whether the *Ovalle* court was correct to suggest that the Eastern District should have been as concerned with qualified jury wheel under-representation in the Hispanic community as they were with the African American community. Regardless, the Eastern District should monitor the representativeness levels of each demographic group, both racial- and gender-based, to ensure that their jury selection system is protected from constitutional challenge.

One could argue that a 7.55% real difference between a group's total eligible population and the groups qualified jury wheel population is not constitutionally consequential. In fact, the *Greene* court surveyed related case law and found decisions holding that absolute disparities of between 2% and 21.7% were insufficient to establish a *prima facie* case of unconstitutional exclusion.[73] In *Greene* itself, a pre-*Ovalle* case, an 11.8% disparity did not give rise to an inference of a Sixth Amendment violation.[74] In a post-*Ovalle* case, *United States v. Brown*, "the 7-to-8 percent disparities shown by Defendant here have never been held sufficient, standing alone, to satisfy [one] element of a *prima facie* case."[75]

The test for examining fair cross section claims under the Sixth Amendment and statutory requirements significantly overlaps that

70. *See supra* note 36.
71. *See supra* note 17 and accompanying text.
72. *See supra* tbls.2 & 4.
73. United States v. Greene, 971 F. Supp. 1117, 1128 (E.D. Mich. 1997).
74. *Id.* at 1127–28.
75. United States v. Brown, 128 F. Supp. 2d 1034, 1040 (2001).

applied in *Ovalle* for deciding equal protection claims.[76] There are three elements:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that underrepresentation is due to systematic exclusion of the group in the jury-selection process.[77]

Satisfying the first prong is quite easy, as racial groups are distinctive groups. The second prong is more difficult, and it is unclear whether the 7.55% real difference amounts to an unfair or unreasonable difference.

There are two arguments that the 7.55% real difference should satisfy the second prong. First, this difference simply is constitutionally significant. Each member of a twelve-person jury makes up 8.33% of the jury, meaning that if African Americans are underrepresented by 7.55%, on average one African American person is replaced by another person, likely a white person, on every jury.[78] When it takes one person to hang a jury, this one person seems enormously significant. Second, the 7.55% real difference masks the proportional comparison of the harm. A 7.55% difference seems small. But the disparity seems more significant when a 7.55% drop is described as a more than 55% drop in African American representation on the qualified jury wheel as compared with their percentage in the overall population.[79] A hypothetical jurisdiction that is 50% female in the total population, but 30% female in the qualified jury pool, has a real difference of 20%, but only a 40% drop in female representation on the qualified jury wheel. Similarly, a group with 68% of the overall population, but only 60% of the average venire, is very different than a group with 8% of the overall population,

76. United States v. Ovalle, 136 F.3d 1092, 1104 (6th Cir. 1998) (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

77. *Id.* at 1098 n.7 (citing Duren v. Missouri, 439 U.S. 357, 364 (1979)).

78. Whites are the most common and most overrepresented group in the jury wheel, and thus are the most likely to replace an underrepresented group. The impact of overrepresentation is more pronounced after peremptory challenges are used, as a white juror is most likely to replace a stricken African American juror. *See infra* Part II.A.

79. Using the proportional decrease method makes the determination of which cognizable groups to cover even more important, as the proportional decrease for groups which total, for example, less than 1% of the population, could be enormous (i.e., if a group is 0.9% of the population, but only 0.1% the qualified jury wheel, the proportional decrease would be 89%).

but 0% of the average venire. Thus, an absolute percentage comparison is just wrong as the only measure of whether the group's representation is "fair and reasonable." That said, the author advances no rule on what the cut off should be for deciding whether the real or proportional percent disparity should satisfy the *Duren* test, except to say that the 7.55% real difference for African Americans should satisfy the second prong of the analysis in the Eastern District.

The third prong, attributing the under-representation discrepancy to the system, is also difficult to prove, especially since allegedly random processes leading to a disparate result is insufficient to make this showing.[80] While a complete analysis of the third prong of the *Duren* test is beyond the scope of this Note, the courts must decide at what point "random" and "neutral" procedures are proven to be a function of the system based upon historical trends, which create incontrovertible disparities in a distinctive group's representation in the jury system. In this way, the real or proportional percent disparity discussed under the second prong could be, in unique circumstances, sufficient to satisfy the third prong of this test.

E. Disclosure of the Information on the JS-12 Form

The JS-12 information is important to any challenge to a juror selection system. Yet, the Eastern District does not make the above JS-12 information regarding its jury selection plan available to the public and it has the discretion to withhold the information from criminal defendants seeking to challenge the jury selection plan itself. No federal statute requires public disclosure, and the Freedom of Information Act does not apply to the judiciary.[81] William Burchill, the General Counsel to the Administrative Office of the United States Courts, wrote in a letter to an Eastern District judge that "[i]n the apparent absence of any other authority on this point, I would conclude that the degree to which JS-12 data should be disseminated outside of the judiciary is left to the discretion of

80. *See Brown*, 128 F. Supp. 2d at 1041 ("[A] jury selection system does not systematically exclude a distinctive group where the system treats all groups equally but had a disparate impact on one or more." (citing United States v. Footracer, 189 F.3d 1058, 1062 (9th Cir. 1999))). However, it should be noted that, post-*Ovalle*, there was a conscious decision to reject a more representative system in favor of one that has produced less desirable results.

81. 5 U.S.C. § 551(1)(B) (2005) (exempting the "courts of the United States" from the definition of "agency" for the purposes of the Freedom of Information Act).

each district court."[82] Mr. Burchill added that he expected that courts keep the JS-12 data "quite close except perhaps when a proceeding is brought challenging jury selection under 28 U.S.C. § 1867."[83] In the end, Mr. Burchill found no authority requiring that the information be divulged. While no authority may exist for regular disclosure, principles of transparency and good faith suggest that the JS-12 data should be made publicly available.

The Eastern District does have a policy regarding release of jury selection process information. Administrative Order No. 00-AO-060 of the Eastern District of Michigan states:

> In preparation for resolution of a motion challenging the composition of a jury wheel or panel on the basis of race or ethnicity or both, the Court urges judges of this bench to limit the scope of any order permitting inspection and/or recording of juror questionnaire information or other materials as follows: juror number; race; Hispanic ethnicity. Accordingly,
>
> IT IS ORDERED that in the event that a party moves for the provision of juror information beyond that contemplated in this Administrative Order, such motion will be referred to the Chief Judge; the Court assigns to the Chief Judge the responsibility of reviewing and ruling upon the propriety of providing any such additional juror information for *good cause shown* by the movant, on a case-by-case basis.[84]

The Eastern District's process was recently utilized in the case of *United States v. Jones*.[85] In *Jones*, a criminal defendant requested the Eastern District's jury selection records. The defendant claimed that he met the "good cause shown" requirement of the Administrative Order because "it is necessary for him to have access to such information in order to know whether the Court is failing to comply with the provisions of the [Jury Selection and Service Act], because otherwise no litigant would ever be able to ensure that the

82. Letter from William R. Burchill, Jr., Assoc. Dir. & Gen. Counsel, Admin. Office of the U.S. Courts, to the Honorable Avern Cohn, Judge, U.S. Dist. Court for the E. Dist. of Mich. 2 (December 18, 2003) (on file with the University of Michigan Journal of Law Reform).

83. *Id.* (referencing challenges based on the Jury Selection and Service Act).

84. E.D. Mich. Admin. Order No. 00-AO-060 (June 5, 2000) (emphasis added).

85. No. 01-80571-D-2 (E.D. Mich. May 14, 2004) (denying motion for access to jury selection records).

Court is in compliance."[86] The defendant cited *Test v. U.S.*, which held that "a litigant has essentially an *unqualified* right to inspect jury lists."[87]

Then-Chief Judge Lawrence Zatkoff rejected the defendant's motion. Rather than an "unqualified right" to the jury selection information, Judge Zatkoff ruled that the defendant was "entitled to only such records or papers that he needs in order to challenge the jury selection process."[88] Judge Zatkoff reconciled *Test's* "unqualified right to inspect jury lists" language with his ruling by defining "jury lists" more narrowly, as "there is no reason to think that the Supreme Court stated that Defendant has an unqualified right to *all* records or papers relating to the jury selection process."[89] After deciding that the defendant did not have an "unqualified right" to the jury information, Judge Zatkoff had to decide whether the defendant had shown "good cause" in his case to receive the JS-12 and other information.[90] Judge Zatkoff ruled that the defendant could get adequate information to challenge the jury selection system from the information already available to him. Judge Zatkoff noted that the Eastern District's jury selection plan was approved by the Judicial Council for the Sixth Circuit, was designed to ensure that juries are selected at random from a fair cross section of the community, and "cannot be said . . . [to] systematically [exclude] any distinctive groups in the community when selecting its jury wheels."[91] Judge Zatkoff denied the defendant's motion.

The process and circumstances under which courts must or should divulge the contents of the JS-12 is beyond the scope of this Note. However, it is logical that the availability of the JS-12 data to litigants, especially criminal defendants, allows them to challenge the jury selection system in a more effective and complete manner. With the JS-12 data, more persuasive evidence of the system's actual impact, rather than procedural goals, would be before the court. Challenges to the jury selection system which include the JS-12 data could lead to more impartial juries that are racially balanced by providing incentives for judicial districts to develop, maintain, and improve their jury selection systems. Widespread availability of the JS-12 information might help the Eastern District strive to increase jury representativeness. Judge Zatkoff's approach

86. *Id.*, slip op. at 16.
87. Test v. United States, 420 U.S. 28, 30 (1975).
88. *Jones*, No. 01-80571-D-2, slip op. at 16.
89. *Id.*
90. *Id.*, slip op. at 17 (citing E.D. Mich. Admin. Order No. 00-AO-060 (June 5, 2000)).
91. *Jones*, No. 01-80571-D-2, slip op. at 19.

to the *Jones* motion ignores the fact that many successful challenges to jury selections system have come from challenging both the process *and the outcome* of the jury selection system employed by the judicial district.[92] A data comparison between a demographic group's actual population and qualified jury wheel population is strong evidence of the merits of a jury system challenge.[93]

Finally, such a refusal to grant access to this information has significant implications. The refusal to divulge the information in *Jones* could create grounds for appeal, thus threatening the viability of a criminal conviction. In addition, refusal by the Eastern District to divulge the information could give the impression, rightly or wrongly, that the data should be concealed from public view because the jury selection plan is biased or functionally unfair. These problems can be avoided by releasing the JS-12 information and by taking steps to increase jury representativeness, thus increasing the likelihood that the jury's constitutional role in the judicial system will be achieved.

II. REFORMS TO LESSEN RACIAL IMBALANCE ON JURIES

This Note advances three proposals for improving the jury selection system with the hope of increasing the representation of currently underrepresented groups in the jury system: improving the pool of potential jurors; updating the jury questionnaire to increase the yield of minority respondents among those in the pool; and, intentionally sacrificing a minimal degree of minority representation on grand juries in favor of increased representation on petit juries. Reforms for increasing jury representativeness posed by other academics will be addressed first, as well as in the context of the other reform proposals.

A. Other Models for Reform Impacting Representativeness

It is unfortunate that a 7%–8% difference between a demographic group's actual population and qualified jury wheel population is acceptable. Even if one concurs with that assessment,

92. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

93. *See supra* note 36 (citing cases relying on comparisons between percentage of population and juries to find constitutional violations).

however, the 7%–8% drop in minority group representation becomes even more problematic when litigators are allowed to exercise peremptory challenges. While litigators are not allowed to strike a juror based solely on race or gender,[94] there is no denying that such challenges still occur,[95] thus further diluting the presence of minorities on juries. Thus, a group constituting almost 17% of the total eligible jury population, and constituting about 9% of the qualified jury wheel and venires, would likely constitute an even lower percentage of the empanelled jury if even one person from this group is peremptorily challenged. This is because, statistically, the person selected to replace the stricken juror is not likely to belong to the minority group. The likely result is, on average, approximately one person from that minority group will serve on a standard twelve-person jury.

While *Batson* and its progeny have helped deter race-based challenges,[96] such challenges cannot be eliminated absent additional reforms because race-neutral reasons frequently can be proffered to justify them. Reforms to the peremptory challenge system, therefore, could increase minority group representation on juries. The American Bar Association and others have published proposals to reform or eliminate the peremptory challenge system.[97] Ultimately, however, these reforms only increase the probability that individuals on jury venires of certain demographic groups get selected for jury service, and do nothing to increase the representation of these groups in the jury pool and qualified jury wheel.

Another idea for reform offered by jury reform scholars Nancy King and G. Thomas Munsterman is known as "stratified selection."[98] Touching on some features of the pre-*Ovalle* jury selection system in the Eastern District and the reforms offered below, "stratified selection" works as follows:

> By manipulating the number of citizens in each of several multiple smaller lists who are summoned, qualified, or sent

94. *See supra* Part I.A.

95. *See, e.g.*, Shari Diamond et al., *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J.L. & PUB. POL'Y 77 (1997); Anthony Page, *Batson's Blindspot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 156 (2005) (recounting a story suggesting the *Batson* process is ineffective at preventing race-based challenges).

96. *See generally* Page, *supra* note 95 (providing supporting and contradictory evidence on the deterrence of race-based challenges).

97. *See* Sol Schreiber, *Principles for Juries and Jury Trials*, *in* ABA AMERICAN JURY PROJECT, at 929, 942–45 (SK042 ALI-ABA, 2005); Felice Banker, Note, *Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges from Jury Selection*, 3 J.L. & POL'Y 605 (1995); Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273 (1996).

98. King & Munsterman, *supra* note 97, at 274.

> questionnaires, a court can ensure that each of several populations is sampled proportionally, and can target for oversampling those populations that continue to yield disproportionately fewer veniremembers. Potential jurors can be grouped according to whatever demographic characteristics are available to jury administrators, including residence, ethnicity, or race.[99]

By essentially balancing the jury pool before questionnaires are sent out, the court would be using available historic, geographic, and/or demographic information to compensate for predicted inadequacies in yield rates among identified groups. Unlike in *Ovalle*, qualified jurors would not be removed from consideration simply because of their race. However, proponents of "stratified selection" concede that some applications of the system may not be able to withstand statutory or constitutional challenge.[100]

The aforementioned reforms certainly would increase jury representativeness, but there are others that could help accomplish this Sixth Amendment goal. These and other reforms are discussed below.

B. The Jury Pool

Improving the pool from which potential jurors are drawn is the least controversial recommendation. This reform has been discussed and attempted frequently,[101] though the extent of proposed expansion varies. An improved pool would more accurately represent the community, would result in more diverse juries, and can be done by adding people to the list, not subtracting names, which the *Ovalle* court frowned upon.[102] Currently, registered voters,

---

99. *Id.*

100. *Id.* at 276–78.

101. *See* United States v. Brown, 128 F. Supp. 2d 1034, 1037 (2001) (discussing an Eastern District report conducted by the National Center for State Courts' Center for Jury Studies that suggested improvements to the sources of jury lists); HANS & VIDMAR, *supra* note 3, at 53–54; David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 803–11 (1977); Cohn & Sherwood, *supra* note 32, at 327; Ellis & Diamond, *supra* note 2, at 1055–58; King & Munsterman, *supra* note 97, at 274; Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 721 (1993); Council for Court Excellence, *Juries for the Year 2000 and Beyond* (2000), *available at* http://www.courtexcellence.org/pdf/publications/juries_for_y2k_and_beyond_2000.pdf (on file with the University of Michigan Journal of Law Reform).

102. United States v. Ovalle, 136 F.3d 1092, 1100 (6th Cir. 1998).

licensed drivers, and Michigan identification card holders compose the jury pool in the Eastern District.[103] The Supreme Court has deferred to sources of jury lists "so long as the source reasonably reflects a cross section of the population suitable in character and intelligence for that civic duty."[104] Additional efforts should be undertaken to supplement these sources if these lists have not proven successful at creating a qualified jury wheel reflecting the population. One option is for the federal government to give grants to states to increase voter registration in underrepresented communities, by educating communities about the importance of jury service, therefore increasing participation among historically underrepresented minorities. This reform would serve the dual purpose of increasing voter registration and providing the federal court system with more potential jurors, and perhaps a more representative group of individuals from which to draw a qualified juror wheel.

A less costly alternative would be to expand the number of source lists currently utilized by the Eastern District. Churches, community organizations, and state public assistance rolls are all potential sources of individuals that may not already be in the jury pool. Those individuals on state public assistance could be particularly useful as an additional source,[105] as these individuals may not have a driver's license or state identification card, may not be registered to vote, and thus would not be in the current jury pool. Incorporating names from additional sources brings the potential for duplicity, a difficulty in determining who to add, and the prospect that the data is unreliable, outdated, or unable to be adequately updated. These problems are not fatal, however, as they do not impose excessive costs or administrative burdens, and the efforts advance a considerable government interest.

Every proponent of reforms aimed at achieving more representative juries laments society's inability to create the perfect community list able to achieve fair cross sections of the community in the jury box. Motor Voter, which encourages people to register to vote when applying for or renewing a driver's license, was supposed to cure this problem,[106] making it easier to become part of the jury pool and eliminating the discrimination inherent in other

103. Juror Selection Plan, E.D. Mich. Admin. Order No. 00-AO-083, at 3 (Dec. 5, 2000).

104. Brown v. Allen, 344 U.S. 443, 474 (1953); *see also* Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970) (discussing the exclusion of African Americans from the sources used for jury selection).

105. *See* Dennis Bilecki, *Program improves minority group representation on federal juries*, 77 JUDICATURE 221, 222 (1994); Kairys et al., *supra* note 101.

106. *See* Cohn & Sherwood, *supra* note 32, at 330

methods of juror recruitment. Whether the alternative method of recruitment is fewer government lists, or the keyman system, which consists of a small group of people who are "given discretion to select qualified individuals" to be eligible and serve on a jury,[107] jury pool source selection can result in a less diverse jury pool. While reducing opportunities for discrimination, discretion still is present "in designating the original source lists or supplemental sources lists or in designating the groups that will be . . . exempt."[108] The best way to eliminate potentially harmful discretion is to greatly expand the manner in which valid data can be added to the jury pool. Random selection of jurors from a non-random, or incidentally discriminatorily created, jury pool would create non-randomly constituted juries. Therefore, something more than simple random selection from the current jury pool is necessary to achieve representative juries.

C. The Jury Questionnaire

Regardless of whether the Eastern District, or any other judicial jurisdiction, attempts to address the disparity in racial composition in its juries, maintaining, recording and reporting such data are integral mechanisms that can guarantee progress or correct regression toward inequities in the jury selection system. The Eastern District's Juror Questionnaire requests racial data from respondents in Question 10.[109] The Questionnaire explains the purpose of Question 10 as "to avoid discrimination in juror selection and has absolutely no bearing on qualifications for jury service."[110] The explanation for Question 10 ends by emphasizing that the data "can fulfill the policy of the United States, which is to provide jurors

107. SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 3:5, at 3-25 (2d ed. 1996). *See generally* BEALE ET AL., *supra*, § 3:6, at 3-21 (providing an explanation of keyman systems); Eric M. Albritton, *Race-Conscious Grand Juror Selection: The Equal Protection Clause and Strict Scrutiny*, 31 AM. J. CRIM. L. 175, 202–10 (2003) (providing an in-depth analysis for the Texas key man system, at issue in *Castaneda v. Partida*, 430 U.S. 482 (1977), and its impact on representativeness of grand juries).

108. BEALE ET AL., *supra* note 107, § 3:5, at 3-35 (citations omitted).

109. EASTERN DISTRICT OF MICHIGAN, UNITED STATES DISTRICT COURT, JUROR QUALIFICATION QUESTIONNAIRE Question 10(a)–(b) [hereinafter QUESTIONNAIRE] (on file with The University of Michigan Journal of Law Reform). The Questionnaire used appears to be a standard form utilized by other U.S. District Courts.

110. QUESTIONNAIRE, *supra* note 109, Notes Regarding the Qualification Form, Question 10—Race/Ethnicity. Other data, such as sex, occupation, and marital status, are collected in Questions 11, 12, and 15.

who are randomly selected from fair cross section of the community."[111]

The Questionnaire and accompanying notes are augmented by the Eastern District with a less formal flyer entitled "Additional Instructions for filling out the Jury Qualification Questionnaire."[112] The flyer provides additional advice and notices for the potential jurors. The form requests that individuals complete and sign the Questionnaire and draws particular attention to Questions 10 and 14.[113] The following announcement is printed in bold, underlined, and in a larger font than the rest of the flyer: "Do not skip question #10, you must answer PART A AND B OF THE QUESTION. SEE BACK OF QUESTIONNAIRE FOR EXPLANATION."[114] Eastern District practice also includes returning the questionnaire to the respondent to determine race if the question is not answered initially.[115]

All of these measures to collect the demographic characteristics of potential jurors are integral to improving the representativeness of the jury pool. Without such data, tracking the progress of the system would be impossible. Under *Ovalle*, the Sixth Circuit may require that such information be tracked for other racial and non-racial groups as well, if the group constitutes a "cognizable group."[116]

The Eastern District employs many positive steps to collect demographic data, but does not use the Questionnaire as an opportunity for citizen education or to motivate citizens to participate in the jury system. Perhaps the current Questionnaire and flyer are insufficient to encourage an increased response rate among historically under-represented groups. The Eastern District should make a more vigorous appeal, particularly since demographic information about the individual can be determined before the

111. *Id.*

112. EASTERN DISTRICT OF MICHIGAN, UNITED STATES DISTRICT COURT, ADDITIONAL INSTRUCTIONS FOR FILLING OUT THE JURY QUALIFICATION QUESTIONNAIRE [hereinafter ADDITIONAL INSTRUCTIONS] (on file with The University of Michigan Journal of Law Reform).

113. *Id.* Question 14 addresses grounds for requesting an excuse. QUESTIONNAIRE, *supra* note 109.

114. ADDITIONAL INSTRUCTIONS, *supra* note 112.

115. See United States v. Ovalle, 136 F.3d 1092, 1096 (6th Cir. 1998).

116. *Id.* at 1095. An Arizona commission on jury reform reported that some states define a "numerically significant . . . minority group" as one that registers more than 3% of the local population. B. Michael Dann & George Logan III, *Jury reform: the Arizona experience*, 79 JUDICATURE 280, 284 (1996). Although the JS-12 appears incomplete regarding Hispanics/Latinos in the Eastern District population, Hispanics/Latinos may constitute a cognizable group about which the Eastern District should be concerned.

questionnaire is mailed,[117] thus enabling the court to specifically target underrepresented groups. The envelope's exterior could include an identification notice, including an appeal directed toward racial minorities. The Eastern District already includes an additional flyer providing guidance, which could perhaps provide information explaining that minority groups have been underrepresented in the past and that their participation is important to reduce or prevent underrepresentation in the future. If the race of the individual is known ahead of time, more can and should be done to target the questionnaire to make it more likely that the citizen will respond.

As with jury pool expansion, jury questionnaire reform can be done with increased attention and minimal cost. Each step in the process, from jury pool development to peremptory challenges, plays a role in any resulting disparities between the demographic composition of the general population and venire. The Questionnaire should be examined and retained in its current form for reasons beyond convenience and an appearance of neutrality. Ideally, the Questionnaire should advance the constitutional and societal goals of jury representativeness, rather than just serve a functional role in the overall jury selection process.

D. The Grand Jury

The case for juries made up of a fair cross section of the community, resulting in fair and balanced representation on juries, has been amply stated. The Supreme Court long ago recognized these principles and the government's obligation to achieve them. But every case discussed thus far only speaks of the constitutional requirements in trial, or petit, juries. In *Castaneda v. Partida*[118] and *Vasquez v. Hillery*,[119] the Supreme Court extended to criminal defendants the same fair cross section protections given petit juries to grand juries. *Castaneda* addressed a situation in which the Hispanic population constituted 79.1% of the population, but, utilizing the key man system, only represented 39% of the persons summoned for grand jury duty in a Texas border town over an

117. States collect basic demographic data for identification purposes that should be accessible to the courts. The data collected could vary on a state by state basis.

118. 430 U.S. 482 (1977).

119. 474 U.S. 254 (1986).

eleven year period.[120] In *Vasquez*, the Court deemed an entire California county's grand juror selection system unconstitutional after a more than sixty year history with no African American serving on a grand jury.[121]

Despite the Supreme Court having extended similar protections to and demanded comparable expectations of grand juries, there are many structural and functional differences between petit and grand juries. These differences lead to a different government interest in ensuring representative composition on each respective jury type. These differences should warrant applying a different constitutional analysis regarding the interests served by requiring fair cross sections of the community on grand juries.[122] Such differences also could justify sacrificing some racial balance on grand juries in favor of increased racial balance on petit juries.

What are these differences? Federal grand jurors are drawn from the same group of people as petit jurors.[123] However, grand juries are composed of twenty-three people,[124] and a simple majority of twelve is needed to present an indictment,[125] whereas petit juries generally require unanimity, or near-unanimity, of their twelve members to convict.[126] Grand juries generally accept the prosecutor's recommendation[127] while petit juries are more unpredictable.[128]

Grand juries are also inquisitorial in nature and may be convened without the suspect or arrested party's knowledge, permission or ability to respond to an accusation.[129] Petit juries are part of the adversarial criminal system, where the accused has the constitutional right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him."[130] More relevant to grand jury fairness and functioning is that, unlike in trials, federal courts "have refused to require the grand jury to

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

121. *Vasquez*, 474 U.S. at 259.

122. Grand juries are not constitutionally required in state prosecutions, but are required in federal courts pursuant to the 5th Amendment, which reads in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

123. *See* MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY 44 (1977).

124. *Id.*

125. *Id.* at 48.

126. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972) (holding that unanimity is not required under the Due Process Clause in every case).

127. *See* FRANKEL & NAFTALIS, *supra* note 123, at 50.

128. The prospect of jury nullification and the motivation for parties to criminal actions to enter into plea agreements is evidence of this uncertainty.

129. See BEALE ET AL., *supra* note 107, § 1.6, at 1-29.

130. U.S. CONST. amend. VI.

apply the technical rules of evidence . . . ."[131] For example, hearsay is admissible, as is evidence obtained through illegal searches and seizures. Confessions obtained in violation of the Fifth Amendment's self-incrimination clause are also admissible. Exculpatory evidence need not be offered by the prosecutor.[132] In theory, a grand jury ensures the review of charges by independent individuals and "serves as a safeguard against unfounded accusations."[133] But because suspects cannot respond to accusations, potentially inadmissible evidence can be offered to grand juries, prosecutors can disregard exculpatory evidence, and only a simple majority of grand jurors must support the indictment, suggest that grand juries are not the same in practice as in theory. Grand juries seem to be a rubber stamp more than an independent safeguard.

In any event, proportional representation of minority groups on grand juries does not have the same impact as it has on petit juries. While some suggest changing the grand jury system,[134] this Note argues that until such reform occurs, the government's interest in having a fair cross section of the community on the grand jury, and the goal of racial representativeness on the grand jury, may not be as acute and important to the functioning of the criminal justice system as racial representativeness is on petit juries. With the interest in a fair cross section and proportional representation on grand juries reduced, this Note proposes sacrificing, minimally, some of the racial balance on grand juries in favor of increased representation of underrepresented groups on petit juries.

This process could happen in many different ways; this Note will outline the general process. To review, a qualified juror wheel is composed of individuals on the master jury wheel who respond to the jury questionnaire and are qualified to serve. Respondents are required to indicate their race on the questionnaire form, so a comparison between racial composition of the resulting qualified jury wheel and the general population eligible for jury service can be performed. The court should take special note of racial groups that comprise a numerically significant minority group which are sometimes identified as those groups that register more than three percent of the local population.[135] The Eastern District could adopt

131. BEALE ET AL., *supra* note 107, § 1.6, at 1-29.

132. *See id.*, § 1.9, at 1-35 to 1-36.

133. *Id.*, § 1.7, at 1-31.

134. *See id.*, § 1.7, at 1-35 to 1-36; *see also* Andrew Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995) (providing viewpoint on grand jury effectiveness and potential reform).

135. Dann & Logan, *supra* note 116, at 284.

its own definition based on the demographic composition of the region and other political considerations.

If there is no disparity, or a statistically insignificant disparity, between the eligible general population and the members of the qualified jury wheel, there is no problem to correct. However, as is more likely, once the court knows the disparity between the eligible general population and the members of the qualified jury wheel for a particular cognizable group, it can compensate for the disparity in the creation of petit jury venires and grand juries by consciously selecting more individuals from underrepresented groups[136] for petit jury service. The likely result is that white individuals would compose a greater percentage of grand juries than they currently do, and then would be more likely to be assigned grand jury duty. Though potentially a cause for concern, this is not a fatal problem.

Currently, grand juries are empanelled infrequently and serve for long periods of time.[137] In order for this reform to have any significant impact, therefore, grand jurors would need to serve shorter terms, permitting more individuals to be selected for grand jury duty, resulting in a greater number of individuals being selected from the qualified juror wheel. Each federal judicial district empanels grand juries at a different rate depending on their needs. The shorter the term of service, the greater the opportunity there is for the court to consider potential jurors and attain a more representative petit jury venire by sacrificing some degree of representation on grand juries. For example, if a grand jury containing twenty-three individuals meets periodically for six months, decreasing the amount of time a grand jury sits to one month would increase the needed number of grand jurors six-fold. This would require additional jurors, thus an additional, and monthly, opportunity to achieve greater representation on petit juries by sacrificing some degree of representation on grand juries.

Racial balance on grand juries should still be a concern, and grand juries certainly should not become racially homogeneous. But given the differences in functioning and predictability of the result for grand juries, a petit jury venire that is more racially representative of the surrounding community has a much better chance of having the impact juries are expected to have on the trial system: community confidence in the legal system and result,[138] appearance

136. Each judicial jurisdiction could choose how to define its own underrepresented groups; for example, the Eastern District does not track all racial groups. *See supra* note 67.

137. *See* Cohn Interview, *supra* note 53. This practice may vary from district to district.

138. Ellis & Diamond, *supra* note 2, at 1038; Vikoren, *supra* note 14, at 621.

of impartiality,[139] and the differing backgrounds that contribute to a more sophisticated consideration of the evidence and assessments of credibility.[140]

Unlike the previous Eastern District plan struck down in *Ovalle*,[141] this system would not prevent or even delay jury service on account of race. Instead, it would solely, and only potentially, impact the *type* of jury on which a person will serve. The impact on grand jury functioning should also be minimal, as grand juries generally do not reject a prosecutor's attempt to indict.[142] And, according to Eastern District of Michigan District Judge Avern Cohn, the extent of a challenge in a criminal case to the petit jury and/or grand jury is usually directly proportional to the resources of the defendant,[143] indicating that grand jury challenges are infrequent and acts of desperation by defendants, not a regular issue raised in a typical criminal judicial proceeding.[144] Therefore, the costs of this grand jury/petit jury reform are outweighed by the benefit of increased representation on petit juries.

III. CRITICISMS AND BENEFITS OF REFORM

Opposition to improvements in the jury pool or juror questionnaire may exist, but the opposition is more likely to have a basis in politics or policy, rather than a basis in legal reason. The grand jury/petit jury reform raises constitutional concerns and criticisms, however, and therefore these concerns will be the exclusive subject of this section.

A race-conscious jury selection system that increases representation of some groups on petit juries and simultaneously decreases representation of that same group on grand juries likely would be attacked on Equal Protection grounds,[145] or because it

139. Ellis & Diamond, *supra* note 2, at 1034; Forde-Mazrui, *supra* note 14, at 361.

140. Ellis & Diamond, *supra* note 2, at 1038; *see also* sources cited *supra* note 14.

141. United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998).

142. *See* FRANKEL & NAFTALIS, *supra* note 123, at 50.

143. Cohn Interview, *supra* note 53.

144. One could argue that challenges to grand juries could increase should this reform be implemented. The potential increase in grand jury challenges may occur only to the extent that a grand jury empanelled under this plan fails to survive constitutional muster. If constitutional, challenges to this plan should be as infrequent as they are to the current plan. So while initial challenges could occur, the reform would not create a systemic change in grand jury challenges. *See infra* Part III (discussing constitutionality of this system).

145. Federal use of this policy might violate the Fifth Amendment, while states applying this policy might violate the Fourteenth Amendment.

violates constitutional and statutory fair cross section requirements. As previously stated, there is a significant overlap between the analyses under each of these claims. The three prong *Duren* test discussed above and cited in *Brown* will provide the framework for this analysis.

Recall that the first prong of the *Duren* test asks whether a "distinctive group" is being excluded from the jury pool. This prong is difficult to satisfy in the grand jury/petit jury reform. No group is being excluded. Instead, individuals of some groups are simply more likely to receive grand jury duty rather than petit jury duty. The second and third prongs are more easily satisfied. If the grand jury/petit jury reform leads to too great a racial disparity on grand juries, the second prong, that jury demographics reasonably relate to the community, may be satisfied. Since there is an explicit systemic cause for the disparity in the jury, the third prong, specifically in the grand jury, that prong also may be satisfied. However, because all groups and individuals are considered in the jury pool, the first prong in establishing a challenge to the grand jury/petit jury reform is not met.

A court could find that the proposed reform satisfies all prongs of the *Duren* test because of the impact of the grand jury-petit jury distinction directing over-represented groups to grand juries. Thus, if a challenger establishes a prima facie case that a jury was selected in violation of a defendant's fair cross section and Equal Protection rights,[146] something that is more easily done after *Ovalle*,[147] and more possible given the likely decrease in minority representation on grand juries, the government then must show that the jury plan (a) meets a compelling government interest and (b) is narrowly tailored to meet that interest.[148]

The *Ovalle* court found a compelling government interest in having a fair cross section of the community represented on grand and petit juries, and to assure that all citizens would have the opportunity to be considered for service on those juries.[149] The Sixth

146. *See* Castaneda v. Partida, 430 U.S. 482, 495 (1977) (explaining that a defendant must show that the group excluded is a "recognizable, distinct class, singled out for different treatment under the laws," that the degree of under-representation has occurred over a significant period of time, and that the selection process is not racially neutral or susceptible to abuse) (citation omitted).

147. United States v. Ovalle, 136 F.3d 1092, 1104–05 (6th Cir. 1998) (finding that direct exclusion from juries based on race is sufficient to establish a prima facie case for an Equal Protection violation).

148. This Note's Equal Protection analysis presumes that strict scrutiny would apply to race-conscious jury selection. The lower courts have not been consistent in the applicable level of scrutiny in these types of cases. *See* Albritton, *supra* note 107, at 194–95.

149. *Ovalle*, 136 F.3d at 1105.

Amendment goal of an impartial jury was integral to the Sixth Circuit's conclusion. These are also the same goals that the grand jury/petit jury reform seeks to achieve because the grand jury/petit jury reform seeks increased representativeness on petit juries due to their higher degree of practical importance to the judicial system. This proposal implicates the government interest in making efficient and effective use of the jury system as a check on state power. It does so by ensuring demographic diversity on the type of jury with a demonstrable ability to make a greater difference in the criminal justice system. Moreover, diversity itself is a compelling government interest in admitting students to state-sponsored educational institutions.[150] Thus, because diversity is integral to the decisional effectiveness of juries,[151] racial diversity in jury service may serve a compelling interest for jury selection plans just as it does in the higher education context. Unlike some race-conscious plans, the interest served is not remedial in nature. The benefits being conferred upon an individual or group on the basis of race are only those to which they are entitled: the Sixth Amendment's guarantee that the defendant will be tried by a fair cross section of the community and jury of their peers, and the post-*Batson* right of citizens to participate in the jury system. The grand jury/petit jury reform preserves the equal right and opportunity to perform the civic function of jury service. Implementing this reform serves a compelling state interest.

Turning to the requirement that any race-conscious jury plan be narrowly tailored to serve a compelling state interest, *Ovalle* found that the Eastern District's "balancing" plan was not narrowly tailored. Non-African Americans did not have the same opportunities to serve, as they were being eliminated from the qualified jury wheel; and no similar procedure was in place for other cognizable minority groups to be represented on the qualified jury wheel.[152] The Sixth Circuit also stated that "broadening membership in the jury pool could have been utilized" as a method of achieving comparable results.[153] While these are not the only possible criticisms of a race-conscious jury plan, they will be addressed first.

Rather than eliminate or postpone the selection of jurors, as was done under the Eastern District's balancing plan, the grand jury/petit jury plan simply predetermines with a greater likelihood the type of jury to which each member of a demographic group

150. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).
151. *See supra* notes 13–15 and accompanying text.
152. *Ovalle*, 136 F.3d at 1106.
153. *Id.*

will be assigned. No one is prevented or delayed from serving on a jury. The character of the district in which someone can serve also remains unchanged. The plan advances the strong state interest in having greater representativeness on petit juries compared with grand juries.

Strauder v. West Virginia[154] and *Duren v. Missouri*[155] dealt with statutes excluding[156] groups from jury service based on race and gender. *Castaneda v. Partida*[157] and *United States v. Ovalle*[158] make clear that conscious consideration of race or gender alone, not just racial discrimination, may be prohibited under the Equal Protection Clause. It is important to distinguish the principles of racial discrimination and racial consciousness in jury selection systems. The former occurs when members of a certain group are prevented from serving on account of some prohibited classification (in this case race); the latter, under the grand jury/petit jury plan, happens when race is considered to determine the type of jury on which someone serves. There is no evidence to suggest that one type of jury has a greater value than another jury when reviewing a jury selection plan for constitutional violations, though the petit jury indeed has a greater practical influence and effect than the grand jury. Therefore, no right or benefit of citizenship is withheld on account of race, which would more strongly implicate Equal Protection concerns. The *Ovalle* court's concern of the direct impact of race consciousness on particular racial groups therefore is not material to the grand jury/petit jury reform.

The next criticism raised by the *Ovalle* court was that no similar procedure existed for other minority groups.[159] Under the grand jury/petit jury reform, each district can identify the cognizable groups present in the population. The constitutional implications raised by identifying cognizable groups should be easy to satisfy, as the Supreme Court has already identified such cognizable groups relevant to other government action. The added burden of considering each cognizable group as part of the jury selection plan, rather than only African Americans as the Eastern District did in their balancing plan, may make any plan more difficult, but not impossible, to implement. Protection of all potentially underrepresented groups is required by the narrowly tailored prong of the Equal Protection test.

---

154. 100 U.S. 303 (1880).
155. 439 U.S. 357 (1979).
156. The exclusion was either absolute or systematic.
157. 430 U.S. 482 (1977).
158. 136 F.3d 1092, 1092 (6th Cir. 1998).
159. *Id.* at 1106.

The final basis for the Sixth Circuit's finding against the Eastern District in *Ovalle* was that other mechanisms to accomplish the goal could be employed. For example, "broadening membership in the jury pool,"[160] would be a more narrowly tailored method of achieving the same result. Indeed, other means of enhancing jury representation should be and have been pursued.[161] But those means create questions of effectiveness and legality. As noted above, the Eastern District, other districts, and numerous scholars have investigated ways of creating juries that represent a fair cross section of the community, including paying attention to the jury pool, without complete success. Additionally, intentionally adding a race-conscious list, such as one from a church with a dominant racial demographic, as a means of "broadening membership in the jury pool," could raise the same equal protection concerns present in *Ovalle* or the grand jury/petit jury plan. Faith in a larger jury pool and additional lists, given the extent to which this remedy has been attempted, seems an excusatory rather than an effective solution. Finally, the Eastern District now has experience in employing the other mechanisms and more "race-neutral" procedures *Ovalle* called for and has not adequately remedied the problem,[162] despite the fact that some judges consider a 7%–8% disparity, or more than 50% drop, between a demographic group's actual population and qualified jury pool population to be constitutional. How long must judicial districts, or, more importantly, the community, have to wait before alternative means of achieving representation can be employed and be deemed narrowly tailored?

The grand jury/petit jury plan also may be criticized because it could lead to insufficient representation of demographic groups on grand juries. Since representation on the grand jury under this plan would be sacrificed to a degree, the grand jury's representativeness may depart further from the goal of representing a fair cross section of the community, as is required.[163] Yet this criticism ignores the fact that under the status quo a fair cross section is not achieved. A constitutional problem only exists if the disparity created by the new plan between total eligible population and grand jury composition of a demographic group reaches alarming levels over time. This Note does not advocate decreasing minority representation on

160. *Id.*

161. *See supra* Part II.A; *see also* United States v. Brown, 128 F. Supp. 2d 1034 (E.D. Mich. 2000) (discussing the Eastern District's commissioned study); Mossing, *supra* note 29.

162. *See supra* Part I.C.

163. *See supra* Part II.D; *see also* Vasquez v. Hillery, 474 U.S. 254 (1986); Castaneda v. Partida, 430 U.S. 482 (1977).

grand juries to such low levels. Moreover, unlike other cases,[164] the reason for the failure to empanel a fair cross section of the community on some grand juries will not be because distinct groups are statutorily or systematically discouraged from serving as jurors, or due to a desire to keep some individuals out of the process. Rather, the failure would be that a greater government interest can be achieved by placing an emphasis on assigning traditionally underrepresented groups to petit juries rather than grand juries. The flexibility created by having two types of juries on which to place citizens, and the different role each plays, should be a factor in analyzing this constitutional concern.

The constitutional concerns involving electoral redistricting[165] may be levied against the grand jury/petit jury plan. In some state electoral redistricting efforts, district lines are drawn to include a certain percentage of a minority group to increase the likelihood that that district will elect someone from a particular group. Similarities, it can be argued, exist between this system and the grand jury/petit jury plan in that race is used as a predictor of experience, opinion and judgment.[166] Tactics similar to those used in electoral redistricting could also be used in jury reform, such as altering the geographic areas from which citizens are eligible for jury service to achieve increases in minority jury representation in that judicial district. Neither concern is relevant to the grand jury/petit jury plan. No jurisdictional lines are altered in this plan. More importantly, increased representation on petit juries is intended to result in representation commensurate with the demographic group's population, not to attain majority status for a particular group with the hope of determining the outcome in any particular case. These differences distinguish the equal protection concerns raised by the electoral redistricting cases from the grand jury/petit jury reform.

Finally, some practical issues in implementing the grand jury/petit jury reform raise important policy concerns. These concerns should be taken into account when implementing this reform. First, there is no guarantee that the resulting representative jury will hear a criminal case, and instead the jury may hear a

164. *See* Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); *see also supra* Part I.A.

165. *See* Shaw v. Reno, 509 U.S. 630 (1993).

166. *See* Forde-Mazrui, *supra* note 14 (providing insight on how the Supreme Court's Equal Protection analysis regarding electoral redistricting might impact efforts to increase minority representation on juries); King, *supra* note 101, at 729–60 (explaining how the Supreme Court's Equal Protection analysis regarding electoral redistricting might impact efforts to increase minority representation on juries).

civil matter. Many of the government interests discussed above are more applicable in criminal cases than civil cases. Ensuring greater representativeness on civil juries may not be as important to some judicial districts.[167] Perhaps this reform could be implemented to only impact criminal cases. Second, grand juries often need to sit for periods longer than one month during more complex or longer investigations. Perhaps one grand jury in the judicial district should only hear longer cases, while the other(s) serve for shorter periods of time to allow the reform to have a greater impact. Third, grand jurors hear numerous cases, meaning that sacrificing diversity on one grand jury could impact hundreds of cases. This is particularly true if a minority grand juror ends up on a civil petit jury. However, this concern need only be weighed against the functional realities of the grand jury discussed in Part II.D to determine whether this potential cost is worth the benefit.

CONCLUSION

Race and gender are still significant conscious and subconscious factors in the way Americans live their lives, despite the efforts of many in society. As long as racial groups are significantly underrepresented on juries, the interests of defendants and communities in having cases heard and decided by diverse and representative juries is not realized. The Eastern District of Michigan should not abandon its history of taking proactive, constitutional (although not constitutionally required), measures to empanel juries representing a fair cross section of the community they represent. The Eastern District should not delay in reforming its jury selection system to eliminate the disparities that currently exist in some demographic groups.

167. Richard O. Lempert, *Uncovering "Non-Discernible" Differences: Empirical Research and the Jury-Size Case*, 73 MICH. L. REV. 643 (1975) (arguing that jury representativeness matters in civil cases).