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# GRAND JURY DISCRIMINATION AND THE MEXICAN AMERICAN

## I. INTRODUCTION

While numerous commentaries have directed attention and analysis to the constitutional proscription of petit and grand jury discrimination against the Negro,<sup>1</sup> there has been an astonishing dearth of legal comment concerning the discriminatory exclusion and inadequate representation of the Spanish surnamed Mexican American<sup>2</sup> on the

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1. See Gibson, *Racial Discrimination on Grand Juries*, 3 BAYLOR L. REV. 29 (1950); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968); Comment, *The Jury: A Reflection of the Prejudices of the Community*, 20 HAST. L.J. 1417 (1969); Comment, *Discrimination in the Selection of Grand Juries: Theory and Practice*, 29 TEXAS L. REV. 817 (1951); Annot., 1 A.L.R.2d 1291 (1948).

2. The terms "Mexican American" and "Spanish surname" will be used interchangeably in this Comment in an attempt to utilize and follow the statistical compilations and Mexican American reports introduced herein. In an effort to establish consistency with the Bureau of Census this Comment will adopt the definition of Mexican American as white persons with Spanish surnames. Non-white persons with Spanish surnames such as Indians, Negroes, Filipinos and other non-white races are not included in the analysis set forth.

In both the 1950 and 1960 census, persons of Spanish surname were identified as part of the general coding operation. In processing the 1960 census schedules, coders classified all persons, regardless of race, as having a Spanish or a non-Spanish surname. For this purpose, the coders used a list of approximately 7,000 Spanish surnames compiled originally by the U.S. Immigration and Naturalization Service. Additional names of apparent Spanish origin were referred to specialists trained to differentiate Spanish surnames from surnames in other Romance languages, such as Portuguese, French and Italian. While persons of all races with Spanish surnames were identified, only white persons with Spanish surnames were included in the Census Bureau's report. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960 SUBJECT REPORTS—PERSONS OF SPANISH SURNAME viii-ix (1963). The Census Bureau also compiled a special tabulation by race based on a five-percent sample of all persons of Spanish surname. It was found that in California, 97.5 percent of all persons with Spanish surnames were of white races, 1.2 percent were Filipinos, 0.4 percent were Indians, and 0.9 percent were of other races. *Id.* at 202. The Census Bureau stated that its objective in identifying persons of Spanish surname was considerably more than the mere identification of persons of Mexican birth or parentage already available from the questions on birthplace of the respondent and of his parents. It involves an attempt to identify the third and later generations of such immigrants as well as the descendants of Spanish Colonial inhabitants of the Southwest. *Id.* at ix.

For purposes of this Comment the term *Chicano* will not be used interchangeably with Spanish surnamed, or Mexican American. In the most recent challenge to the grand jury, *People v. Ramirez*, Crim. No. A244906 (Super. Ct. Los Angeles County, March 31, 1971), defendants used the term *Chicano* as descriptive of the class that had

petit and grand jury. The relevant legal principles have evolved only through an exhaustive array of constitutional challenges advanced by the Negro and founded upon Fourteenth Amendment due process and equal protection tenets.<sup>3</sup> Recently, however, the attack has been

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been under-represented from the grand jury. Testimony was introduced to show the existence of such a class. Record at 51-64, *People v. Ramirez*, Crim. No. A244906 (Super. Ct. Los Angeles County, March 31, 1971) [hereinafter cited as *Ramirez Record*]. The court found that the term *Chicano* was not an ethnic term as promulgated in *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954). The court also found that *Chicano* is a social movement which began in 1966, that no statistical evidence is available to support testimony introduced as to how large or who is in this movement, and that the evidence did not establish an *identifiable* class known as *Chicanos*. *People v. Ramirez*, Crim. No. A244906 (Super. Ct. Los Angeles County, March 31, 1971), Findings of Fact and Conclusions of Law at 8-9.

It has been recognized that *Chicano* is a self-designating term and consequently persons who wish to use this term cannot be discovered by any visual identification. The rapid spread of *chicanismo* should not be taken to mean that a full blown social movement is in progress among Mexican Americans, for *chicanismo* poses a very difficult dilemma for most older Mexican Americans. They sympathize with the motives of the movement but fear that the radical means used to pursue the goals intended will undermine their own hard-earned social and economic gains. J. MOORE, *THE MEXICAN AMERICANS* 148-56 (1970). One writer notes that *Chicano* could not be defined by La Raza writers, except by what it is not. S. STEINER, *LA RAZA: THE MEXICAN AMERICANS* 243 (1970). In an interview conducted by the author of this Comment with the only *Chicano* who sat on the 1971 Los Angeles County Grand Jury, Miss Lydia Lopez [hereinafter cited as *Interview*], the question was posed: What reaction did the 1971 grand jury have to your self-designation as a *Chicano*? Miss Lopez responded:

They really don't like it. They like Mexican American. I see that as rather difficult. I do not see myself as a 100% American. I have not been able to benefit in all America has to offer and neither have many of my people. Because my people as a class have not been able to, I cannot. A lot of our people are still discriminated against and I cannot really feel that we are yet able to enjoy everything here. Unless all the people can enjoy this—then I cannot.

The *Chicano* grand juror viewed the grand jury composition as a political extension of the selector-judges. Therefore, barring a major change in their political thinking, the only *Chicanos* that would ever be nominated to the grand jury would be either token or the consequence of community pressure. The *Chicano* grand juror summed up her experience on the grand jury in these words: "the ten dollar token."

There is, therefore, a subjective distinction between a Mexican American and a *Chicano*. While it is foreseeable that Mexican Americans of the higher economic echelon will be nominated to the grand jury system, it is not readily foreseeable that *Chicanos* will be nominated under our present system of selection. Therefore, the term *Chicano* cannot accurately reflect the statistics and testimony presented in this Comment.

3. See, e.g., *Whitus v. Georgia*, 385 U.S. 545 (1967); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Avery v. Georgia*, 345 U.S. 559 (1953); *Cassell v. Texas*, 339 U.S. 282 (1950); *Akins v. Texas*, 325 U.S. 398 (1945); *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Norris v. Alabama*, 294 U.S. 587 (1935); *Bush v. Kentucky*, 107 U.S. 110 (1882); *Neal v. Delaware*, 103 U.S. 370 (1881); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

levied by the Mexican American, and the Los Angeles County grand jury selection process has provided the current source of the constitutional dispute.<sup>4</sup>

Mexican American exclusion and discrimination, in the context of the grand jury system, has been recognized in the Southwest since 1954.<sup>5</sup> The high proportional disparity that in fact exists between the size of the Mexican American population and their numerical representation in Los Angeles County jury service is the current source of controversy.<sup>6</sup> Although the Spanish surnamed population of Los Angeles County has increased from 6.93 percent of the total population in 1950 to approximately 14 percent in 1971,<sup>7</sup> only 3.6 percent of the grand jury nominees from 1959 through 1972 have been Spanish surnamed. As such, only 8 out of a total of 302 persons actually serving on the grand jury were of Spanish surname.<sup>8</sup>

This Comment will investigate the underlying causes of this egregious proportional disparity. The Los Angeles County grand jury selection process will be analyzed to determine whether it has promoted an intentional exclusion,<sup>9</sup> a systematic exclusion,<sup>10</sup> or merely

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4. *People v. Castro*, Crim. No. A232902 (Super. Ct. Los Angeles County, January 9, 1969), *writ of prohibition granted in part and denied in part sub. nom.*, *Castro v. Superior Court*, 9 Cal. App. 3d 675, 88 Cal. Rptr. 500 (1970) (grand jury issue not decided); *People v. Montez*, Crim. No. A224906 (Super. Ct. Los Angeles County, Oct. 27, 1969), *writ of prohibition or in the alternative a writ to hear motion to quash the indictment de novo granted sub. nom.*, *Montez v. Superior Court*, 10 Cal. App. 3d 343, 88 Cal. Rptr. 736 (1970), *remanded sub. nom.*, (*People v. Ramirez*, Crim. No. A244906 Super. Ct. Los Angeles County, March 31, 1971), *writ of prohibition denied*, *Ramirez v. Superior Court*, 2d Civ. 38508 (Cal. Dist. Ct. App., June 1, 1971), *petition for hearing denied*, 2d Civ. 38508 (Cal. Supp. Ct., June 14, 1971).

5. *Hernandez v. Texas*, 347 U.S. 475 (1954). See also *Montoya v. People*, 141 Colo. 9, 345 P.2d 1062 (1959).

6. See note 4 *supra*.

7. See notes 100 and 107 *infra* and accompanying text.

8. This information regarding nominees and members of the grand juries from 1959 through 1969 was obtained by the Los Angeles County Jury Commissioner on order of the court, *Ramirez Record*, *supra* note 2, at 93, and is on file at the offices of the Loyola of Los Angeles Law Review. Similar information for the 1970 through 1972 grand juries was obtained from Los Angeles Superior Court Grand Jury Nominee Lists and Final Grand Jury Member lists on file at the Administrative Offices, Superior Court, Los Angeles County. All lists were compared with LIST OF SPANISH SURNAMES (rev. ed. 1963) (on file at the Bureau of the Census Library, Federal Building, West Los Angeles).

9. For purposes of this Comment, *intentional exclusion* is defined as either exclusion by a statute that is unconstitutional on its face, or exclusion by a conscious design of

a chance exclusion<sup>11</sup> of the Mexican American. The constitutional implications of each type of exclusion, the exclusion's effect on a defendant and the corresponding sociological impact upon the excluded groups will be explored. If the method of exclusion is found to be constitutionally prohibited, and until it is corrected, indicted Mexican Americans have been and will continue to be denied equal protection and due process of law no matter how strong the showing of substantive evidence sustaining the indictment.<sup>12</sup>

## II. HISTORY AND FUNCTION OF THE GRAND JURY

The grand jury incipiated at common law<sup>13</sup> and from the common law developed its current function in this country as an investigating, informing and accusing body.<sup>14</sup> It investigates *ex parte*, appropriate complaints of wrongdoing in order to determine on the basis of the evidence presented whether *prima facie* grounds for criminal prosecution exist.<sup>15</sup> The California grand jury, not unlike its counterparts in

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the officers in charge of jury selection in the shadow of a statute constitutional on its face. See notes 36-51 and accompanying text *infra*.

10. For purposes of this Comment, *systematic exclusion* is defined as (1) intentional exclusion as defined in note 9 *supra*, or (2) an unconstitutional total or partial exclusion by selectors in the exercise of their discretionary application of selection procedure, the result of which bespeaks discrimination over a period of time, whether "ingenious or ingenuous." This concept will best be illustrated by the textual progression of cases contained herein. See text accompanying notes 55-80 *infra*.

11. For purposes of this Comment, *chance exclusion* is defined as the laws of probability at work in the disparity between the constitutionally protected group in the community and their number on the grand or petit jury lists. Chance exclusion is the result of myriad social factors and the interplay of elements of happenstance without apparent cause or design. Of course, chance exclusion is not constitutionally prohibited.

12. See, e.g., *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Cassell v. Texas*, 339 U.S. 282 (1950); *Norris v. Alabama*, 294 U.S. 587 (1935); *Bush v. Kentucky*, 107 U.S. 110 (1882); *Neal v. Delaware*, 103 U.S. 370 (1881); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

13. See *Kennedy & Briggs, Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251 (1955), and *Morse, A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931), for discussions of the history of the grand jury.

14. See EDWARDS, *THE GRAND JURY* 2 (1906); STEPHENSON & MARCHAM, *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 77 (1937). Cf. Vukasin, *The Grand Jury*, 34 CAL. STATE B.J. 436, 438-39 (1959):

Upon the creation of our country, a grand jury was put into the hands of each of the states and the federal government. Within each, its growth depended on the grand jurors and their understanding and enthusiasm, the quirks of related government officials . . . and the interest of citizens. Strong, effective jurymen, reflecting an interested citizenry caused this institution to become a very useful instrument of local government. Ineffective juries, apathetic citizens, and dominating public officials produced grand juries which retard justice or else 'rubber stamped' for the public prosecutor.

15. See 38 C.J.S. *Grand Juries* § 1 (1943); 38 AM. JUR. 2d *Grand Juries* § 1 (1968).

other states, is defined as: "A body of the required number of persons returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county."<sup>16</sup> The investigatory duties of California grand juries include inquiry into the misconduct in office of public officers of every description within the county,<sup>17</sup> examination of the accounts and records of every county office,<sup>18</sup> and investigation of the requests of all county officers.<sup>19</sup>

There are two basic methods employed in the selection of grand juries.<sup>20</sup> The first involves jury commissioners who compile lists from various sources and who ultimately select the grand jury.<sup>21</sup> The second procedure involves judges of the general trial court who select the grand jury either from lists supplied to them by jury boards, or from their own nominations.<sup>22</sup> Combinations of these two modes of selection have developed to include systems under which jury commissioners assemble a list of qualified potential grand jurors and then present the list to the judges for final selection.<sup>23</sup>

California incorporates variations of both types of selection procedures depending upon the population of the county in question.<sup>24</sup> Spe-

16. CAL. PEN. CODE ANN. § 888 (West 1970). The California grand jury has been described to be

endowed with broad powers as an inquisitorial and judicial body, but enjoined to exercise those powers with mature discretion. It is not to engage in 'fishing expeditions,' that is, initiate investigations not specifically enjoined upon it without probable cause, nor is it to attempt to act as a supervising administrative agency controlling the discretionary activities of public officers. Kennedy & Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251, 267 (1955).

17. CAL. PEN. CODE ANN. § 919(c) (West 1970).

18. CAL. PEN. CODE ANN. § 925 (West 1970).

19. CAL. PEN. CODE ANN. § 928 (West 1970).

20. See, e.g., R.I. GEN. LAWS ANN. § 9-9-5 (1970); PA. STAT. ANN. tit. 17 § 1251 (1962).

21. See, e.g., R.I. GEN. LAWS ANN. § 9-9-8 (1970); MICH. STAT. ANN. § 27A.1304 (Supp. 1971); N.Y. JUDICIARY LAW ANN. § 594 (McKinney 1968).

22. See, e.g., VA. CODE ANN. § 19.1-148 (1960); PA. STAT. ANN. tit. 17 § 1251 (1962).

23. See, e.g., FLA. STAT. ANN. § 40.09 (1961); ILL. ANN. STAT. Ch. 78, §§ 24-25 (Smith-Hurd Supp. 1971). Another variation is N.Y. JUDICIARY LAW ANN. § 591 (McKinney 1968).

24. See CAL. CODE CIV. PROC. § 204(a) (West 1967). In counties having a population of over 60,000, a majority of the judges of the superior court of that county may at their discretion appoint a jury commissioner to assist them in making selections of trial and grand jurors of that county. The judges or jury commissioners are free to employ any source from which to select nominees for grand jury service. However, judges are not required to choose any names from the list returned by the jury commissioner, but may at their discretion make nominations from any source regardless of the list returned by the jury commissioners. When the list is returned, the judges by

cifically, the Los Angeles County Superior Court Rules prescribe the method to be used in obtaining Los Angeles County grand jurors.<sup>26</sup> The grand jury is to be drawn and impaneled once every calendar year by the presiding judge.<sup>26</sup> On or before the first court day in September of each year individual judges *may* nominate two people of their choosing, and the names of the nominees are to be put on a preliminary jury list. Nominees must meet certain provisions of the Penal and Civil Codes.<sup>27</sup> The entire list is then distributed to the judges and opened to public inspection.<sup>28</sup> After a process of inspection and investigation is completed by the jury commissioner, the majority of the judges vote to select a grand jury list of thirty-four nominees.<sup>29</sup> From this list, the county clerk selects the twenty-three members by a drawing held in January of each year.<sup>30</sup>

The ideal sought is "[a] body truly representative of the community."<sup>31</sup> However, recent studies of the California grand jury have revealed that this is not the case.<sup>32</sup> These studies have indicated that prospective grand jurors are selected on the basis of either

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majority vote select such persons as in their opinion should serve on the grand jury. CAL. PEN. CODE ANN. §§ 903.1, 903.3, 903.4 (West 1970).

25. LOS ANGELES COUNTY SUPER CT. R. 29.

26. *Id.* § 1.

27. CAL. CODE CIV. PROC. §§ 198, 199 (West 1967); CAL. PEN. CODE § 893, *as amended* Ch. 856 § 1.3 [1971] Cal. Stat. 1748; CAL. PEN. CODE § 893.5, *added by* Ch. 856 § 1.7 [1971] Cal. Stat. 1749.

A person to be eligible for service as a grand juror must be a citizen of the United States, 21 or older and a resident of the county for one year. He must be of sound mind and ordinary intelligence and have a sufficient knowledge of English. He must not be serving on a trial jury or have been discharged as a grand juror within one year of selection. He cannot have been convicted of malfeasance in office or any felony and cannot be serving as a public officer.

28. LOS ANGELES COUNTY SUPER. CT. R. 29 §§ 4-6 provide in greater detail that the presiding judge then appoints a "Committee on Selection of Grand Jurors." The county jury commissioner then makes interviews and investigations of the nominees, as are appropriate. Objections can be made against nominees by any judge or other person. A written confidential report on all nominees remaining is presented to the presiding judge on or before November 30.

29. On or before December 10, all judges of the court meet, and those nominees who are approved by the majority of the judges will be placed upon and will constitute the grand jury list. LOS ANGELES COUNTY SUPER. CT. R. 29-6(b).

30. SUPER. CT. LOS ANGELES COUNTY, FINAL GRAND JURY LIST, released as a public record the first week of January each year.

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

32. U.S. COMM'N ON CIVIL RIGHTS, REPORT ON MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST, A STUDY OF GRAND JURY SERVICE BY PERSONS OF SPANISH SURNAME AND BY INDIANS IN SELECTED CALIFORNIA COUNTIES (1970) [hereinafter cited as 1970 STUDY]; Comment, *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631, 637-38 (1956).

personal acquaintance with the judge or recommendations received from persons with whom the judge is acquainted.<sup>33</sup> Given these methods of selection, it is not surprising that the average California grand jury tends to be composed of above-average-income white Anglo Americans.<sup>34</sup> While it is difficult to determine whether the judge-selectors consciously excluded minority persons, it appears that they failed to take adequate steps to acquaint themselves with minority groups in the population.<sup>35</sup> The resultant exclusion of Mexican Americans from the Los Angeles County grand jury thus raises serious constitutional questions.

### III. CONSTITUTIONAL ASPECTS OF RACIAL EXCLUSION FROM GRAND JURIES

In 1880 the Supreme Court established that any statutory or systematic exclusion of persons from jury service solely because of their racial or ethnic background contravenes the Equal Protection Clause of the Fourteenth Amendment.<sup>36</sup> This protection has subsequently been extended to include cases where a long and continued disparity between the number of an identifiable group in the general population and the number serving on the jury is shown.<sup>37</sup> However, there is no objective test with which to determine what period constitutes a long and continued disparity,<sup>38</sup> or how great a proportional disparity must exist to require remedial action in order to comply with constitutional dictates. An analysis of the major cases in this area is crucial to an understanding of both these issues and the theory employed to challenge the composi-

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33. 1970 STUDY, *supra* note 32.

34. Comment, *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631, 637-38 (1956). In most portions of the Southwest, the term Anglo American is used as a catchall expression to designate all persons who are neither Indian, Mexican, Negro or Asian. The term Anglo American does not define a homogeneous entity, it defines a relationship. Since two or more ethnic groups constitute an ethnic system, one ethnic group always implies the existence of another. The dichotomy implied in the terms Anglo American and Mexican American is real enough, no matter how vague either term may be as descriptive of the heterogeneous elements making up the two categories.

35. See text accompanying notes 162-176 *infra*.

36. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880).

37. *Hernandez v. Texas*, 347 U.S. 475 (1954); *Ballard v. United States*, 329 U.S. 187 (1946); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966).

38. See text accompanying notes 138-142 *infra* for definitions of "long and continued disparity".



tion of the grand jury in Los Angeles County.<sup>39</sup>

### A. *De Jure, De Facto and Systematic Exclusion*

The Sixth Amendment of the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury. . . ." The Framers of the Constitution intended the words "impartial jury" to mean all the essential elements of a jury trial which were then recognized in this country and at common law.<sup>40</sup> However, the Sixth Amendment was then applicable only to the federal government.<sup>41</sup> Thus, challenges to the impartiality of state petit or grand juries were not raised prior to the Civil War, since the states were not restricted by the present constitutional guarantees of equal protection or due process. As a result, during the pre-Civil War Period many states lawfully enacted legislation which in effect denied the black man the right to participate in the administration of the government and its laws. These statutes usually excluded Negroes and other non-whites from serving as jurors,<sup>42</sup> from being witnesses against a white man,<sup>43</sup> or from voting.<sup>44</sup>

The post-Civil War Period witnessed congressional legislation de-

39. See text accompanying notes 120-152 *infra* for a statistical analysis of the Los Angeles Grand Jury.

40. R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 75-76 (1956). In *United States v. Aaron Burr*, 25 F. Cas. 49, 50 (No. 14, 692g) (C.C.D. Va. 1807), Chief Justice Marshall opined:

The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind. I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the constitution. . . .

41. See *Eilenbecker v. Plymouth County*, 134 U.S. 31 (1890); *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (1868). In 1928 Chief Justice Taft restated this position with what seemed to be finality in *Gaines v. Washington*, 277 U.S. 81, 85 (1928):

[T]he Sixth Amendment to the Federal Constitution does not apply to the trial of criminal prosecutions by a State. It has been well settled for years that the first ten Amendments apply only to the procedure and trial of causes in the federal courts and are not limitations upon those in state courts.

However, the gradual incorporation of the bill of rights into the Due Process Clause has partially erased this distinction. See *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

42. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court noted the text of a West Virginia statute, which provided that all *white males* of the State would be liable for jury service.

43. See, e.g., Ch. 42, § 1, [1853] Ind. Stat. 60 (repealed 1881); see also *People v. Hall*, 4 Cal. 399 (1854) for the court's consideration of an excellent judicial analysis of the physical and mental attributes of non-whites in California in 1854.

44. In *Neal v. Delaware*, 103 U.S. 370, 376-77 (1880), the Court observed that Delaware had an interesting device to exclude Negroes from jury service. Chapter 109

signed to protect the newly freed man from the harsh laws that discriminated against him in many states.<sup>45</sup> Elements of Congress, unsatisfied with the Civil Rights Act of 1866,<sup>46</sup> lobbied for a constitutional amendment that would secure new rights for the Negro. A guarantee similar to the Sixth Amendment's requirement of an "impartial jury" was among the new rights sought against the states.<sup>47</sup>

With the ratification of the Fourteenth Amendment, the Enabling Clause thereof<sup>48</sup> became the focal point in the next phase of the struggle. Pursuant to the Enabling Clause, Congress enacted the Civil Rights Act of 1875<sup>49</sup> which provided a cause of action in cases of grand jury racial exclusion.<sup>50</sup> Subsequently, a series of Supreme Court decisions which were founded upon equal protection and due process of law grounds invalidated various state statutes excluding Negroes from jury systems.<sup>51</sup>

A basic distinction derived from the Court's consideration of racial exclusion from jury service is one of *de jure* and *de facto* exclusion.<sup>52</sup> *De jure* exclusion denotes discrimination emanating from

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of the Revised Statutes of 1853 contained the jury law of February 28, 1849, and provided that all persons qualified to vote at the general election and to be electors shall be liable to serve as jurors. However, section 1 of article IV of the Delaware Constitution (1831) declared that "[in general elections] every free white male citizen . . . shall enjoy the right to be an elector. . . ." By negative inference, Negroes were excluded from such a right.

45. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, CONG. GLOBE, 39th Cong., 1st Sess. 6-1861 (1865).

46. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

47. The words in the Sixth Amendment were on the minds of both opponents and proponents of the amendment, as well as were other provisions of the first eight amendments. See Rep. Andrew J. Rodger's understanding of section 1 of the proposed amendment in CONG. GLOBE, 39th Cong. 1st Sess. 2538 (1865); Senator Jacob M. Howard's speech to the Senate in CONG. GLOBE, 39th Cong. 1st Sess. 2539 (1865).

48. U.S. CONST. amend. XIV, § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article".

49. Act of March 1, 1875, ch. 114, 18 Stat. 336, *as amended*, 18 U.S.C. § 243 (1970).

50. Section 4 of the Act provided in part that:

[N]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as [a] grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

51. *Bush v. Kentucky*, 107 U.S. 110 (1882); *Neal v. Delaware*, 103 U.S. 370 (1880); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

52. The distinction between *de facto* and *de jure* exclusion, as termed herein, arose from the remedy set forth in the federal removal statute. The Act of Dec. 1, 1873, tit. xiii, ch. 7, § 641, 18 Rev. Stat. 115, *as amended*, 28 U.S.C. § 1443 (1970), *de-*

state action in the form of a statute unconstitutional on its face. For the most part, however, such statutes have been litigated into non-existence in the jury selection area. On the other hand, *de facto* exclusion, or what has now been termed "systematic exclusion," remains all too prevalent. It results from the unconstitutional application of a statute constitutional on its face. Due to the problems inherent in establishing such an unconstitutional application,<sup>53</sup> the Court has at-

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clared that when any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state any right secured to him by any law providing for the equal civil rights to citizens of the United States, such suit or prosecution may, upon the petition of such defendants filed in said state court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial into the circuit court. Petitions for removal founded on statutes prohibiting Negro jury service are required to show that the express operation of the statute in question renders it impossible to obtain an impartial trial and therefore denies equal protection of the laws in violation of the Fourteenth Amendment. In such an instance the case may be removed to the United States district court.

However, as the Court noted in *Virginia v. Rives*, 100 U.S. 313 (1880), the removal statute does not apply to all cases in which the equal protection of the laws may be denied to a defendant. Mr. Justice Field, concurring, stated:

The denial of rights or the inability to enforce them, to which this section refers, is, in my opinion such as arises from legislative action of the State, as, for example, an act excluding colored persons from being witnesses, making contracts, acquiring property and the like. *Id.* at 333.

It is insufficient if a defendant merely alleges a belief that he is unable to enforce his rights at a subsequent stage of a proceeding. *Id.* at 320. In the absence of an express state constitutional or legislative impediment, he cannot prior to trial absolutely assert that his civil rights are denied. *Id.* The Court found no congressional intent to authorize a removal where jury commissioners or other subordinate officers had excluded non-white citizens from juries because of race without express authority derived from the Constitution or laws of the state. In the absence of exclusion by statutory language, as contrasted to exclusion by statutory operation, removal would be denied. *Id.* at 322. However, as Mr. Justice Field noted, if Negro defendants were deprived of the equal protection of the laws by total exclusion of members of their race from selection, a remedy could be had before the Court. But the appropriate remedy was the ordinary judicial review of a federal question rather than statutory removal.

If an executive or judicial officer exercises power with which he is not invested by law. . . . [then] [t]he action—in such a case, where the rights of a citizen under laws of the United States are disregarded, may be reviewed and corrected or reversed by this court. . . . It is merely the ordinary case of an erroneous ruling of an inferior tribunal. *Id.* at 334.

53. The grounds affording reversal on the basis of systematic exclusion revolve around the question of whether the burden of proof needed to sustain an allegation of unconstitutional application of an otherwise valid statute is met. The burden is often difficult to meet and the degree of proof required is uncertain where state laws have granted discretion in the administration of the jury laws and the challenge is founded on evidence purporting to establish that this discretion as exercised results in a denial to the Negro of the right to be selected to state juries.

Thus, in *Williams v. Mississippi*, 170 U.S. 213 (1898), an order denying a motion to quash an indictment was upheld. The Court found that the laws of the state "do

tempted to formulate a workable criterion or standard to determine the existence of systematic exclusion.

The "systematic exclusion rule" which has evolved proceeds upon a theory which recognizes the probability of prejudice to a petitioner-member of a group that has been the traditional object of oppression. Thus, when this group is arbitrarily excluded from jury service, the petitioner need not show actual prejudice.<sup>54</sup> However, the degree of exclusion necessary to invoke the systematic exclusion rule necessarily presents problems of uncertainty and diversity in application. In response, the Supreme Court has fashioned the "prima facie" case which is intended to aid in effectuating the systematic exclusion theory.

### B. *The Prima Facie Case*

The concept of systematic exclusion from the jury system has necessarily evolved from the Court's interpretation of the laws of chance.<sup>55</sup> The Court has adopted an intuitive "I know it when I see it"<sup>56</sup> approach rather than articulating a definite standard for detecting unconstitutional discrimination. While it has been recognized that

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not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them." *Id.* at 225. The *Williams* Court held that petitioners had failed to meet the burden of proof needed to show the unconstitutional application of statutes constitutional on their face. *Id.* at 222-23. More than probability or opportunity for unconstitutional application must be shown to sustain a contention of racial exclusion from juries by state or county officials. A showing of actual unconstitutional administration of such statutes is necessary. *Id.* at 224-25. If the statute does not on its face discriminate against Negroes because of race or color, the application of the law has to be shown to be the same as if it had been written in the statutes. See text accompanying notes 59-60 *infra*. The petitioner in *Williams* offered no statistical evidence and did not allege that state action deprived him of equal protection. The only evidence submitted were four affidavits. 170 U.S. at 222-23. *Cf.* *Neal v. Delaware*, 103 U.S. 370 (1880) (claim of exclusion upheld where petitioner offered statistical evidence in support of the allegation of total exclusion and the state failed to introduce rebuttal evidence).

54. Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HAST. L. J. 1417, 1434 (1969). See text accompanying notes 131-42 *infra*. Note, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Reconciliation*, 1968 DUKE L. J. 283, 300-01.

55. See Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 251 & n. 67. "[I]t taxes our credibility to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past twenty-five years." *Id.*, quoting *Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

56. Compare the Court's approach in the obscenity area. In attempting to formulate a definition of "obscenity," Justice Stewart stated: "I shall not today attempt further to define [obscene material] . . . . But I know it when I see it. . . ." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion).

the Constitution does not require proportionate jury representation of racial and economic groups,<sup>57</sup> the equal protection mandate does demand that the system of grand jury nomination not be employed to intentionally exclude such groups from the selection process.<sup>58</sup> And although the Court has repetitiously deemed unconstitutional exclusion to be synonymous with intentional exclusion,<sup>59</sup> the element of intent or consciousness that is constitutionally prohibited need not be directly established but may be inferred from a showing of a long and continued egregious disparity between the proportion of the class nominated for jury duty and the proportion of the class eligible in the population.<sup>60</sup> This inference has been judicially termed a "prima facie showing" which dispenses with the insurmountable burden of establishing actual intent to discriminate. Upon presenting the prima facie case the burden is shifted to the state.<sup>61</sup>

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57. *Swain v. Alabama*, 380 U.S. 202, 208 (1965); *Cassell v. Texas*, 339 U.S. 282, 286-87 (1950); *Akins v. Texas*, 325 U.S. 398, 403 (1945).

58. *Labat v. Bennett*, 365 F.2d 698, 711-13 (5th Cir. 1966), and cases cited therein.

59. *Cassell v. Texas*, 339 U.S. 282, 290 (1950); *Smith v. Texas*, 311 U.S. 128 (1940).

60. See *Carmical v. Craven*, 451 F.2d 399, 404 (9th Cir. 1971) ("clear thinking" test resulted in exclusion of identifiable classes of veniremen and was sufficient to constitute a prima facie case of unconstitutional jury selection):

When a jury selection system actually results in master jury panels from which identifiable classes are grossly excluded, the subjective intent of those who develop and enforce the system is immaterial . . . . The lack of specific intent to discriminate . . . cannot offset the grossly discriminatory effect of . . . [the] jury selection process.

See text accompanying notes 64-79 *infra*.

61. *Cf. Neal v. Delaware*, 103 U.S. 370 (1880), where the Supreme Court held that the selectors' contentions that the black race in Delaware was utterly disqualified by want of intelligence, experience or moral integrity to sit on juries was a "violent presumption." *Id.* at 397. Such a presumption of disqualification could not rebut petitioner's showing that while there was a sizeable number of Negroes in the state, none had ever served on the grand jury. *Id.*

The concept of a prima facie showing was further articulated in *Norris v. Alabama*, 294 U.S. 587 (1935), where it was charged that there was a long, continued, systematic and arbitrary exclusion of qualified Negro citizens from jury service solely because of their race or color, in violation of the Equal Protection Clause. *Id.* at 591. Petitioners first presented evidence establishing the presence of a substantial number of Negroes in the county. Statistics were introduced comparing the number of Negroes to the total population. *Id.* at 590. Second, testimony from various citizens in the community revealed that Negroes had been totally excluded from jury service. *Id.* at 591. On this showing alone the Court found that the "testimony in itself made out a prima facie case of the denial of equal protection which the Constitution guarantees." *Id.* The Court further considered direct testimony nonessential to the prima facie case indicating that various Negroes were qualified for grand jury service. *Id.* The showing could not be rebutted by the jury commissioners' testimony indicating a failure to appropriately consider the qualifications of Negroes, (*Id.* at 592-95) and the Court, in holding for petitioners, found that the practice of the jury commissioners denied petitioners the equal protection of the laws. *Id.* at 596.

Developed from cases involving total exclusions,<sup>62</sup> the prima facie case has since adapted its statistical presentation to claims of partial exclusion.<sup>63</sup> In *Smith v. Texas*,<sup>64</sup> evidence was introduced to show that Negroes constituted 20 percent of the population of the county, yet from 1931 to 1938 only three individual Negroes out of 18 called had sat on

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*Norris v. Alabama* firmly established the burden of proof required to present a prima facie case of unconstitutional jury exclusion. The indications first expounded in *Neal* over fifty years earlier were clarified. These indications were (1) that a substantial number of Negroes lived in the state, and (2) that these Negroes had never been summoned to serve in the state courts. It can be assumed from the Supreme Court's opinion that the sufficiency of the evidence presented by petitioner could not have been rebutted by any state showing. Building upon the *Neal* Court's indications of the prima facie showing necessary to sustain an allegation of racial discrimination in jury selection (103 U.S. at 397), the Court in *Norris* held that a statistical showing of the existence of a substantial proportion of Negroes in the county, combined with testimonial evidence of total exclusion from jury service, presented a prima facie case of the denial of equal protection. As a result, the burden was shifted to the state.

62. The fact that the exclusion was *total* in *Norris v. Alabama*, 294 U.S. 587 (1935), put a heavier burden on the state to overcome the prima facie case because the inference drawn from such an exclusion would invariably be that the exclusion is based on race or color. See, e.g., *Williams v. Georgia*, 349 U.S. 375 (1955); *Avery v. Georgia*, 345 U.S. 559 (1953); *Hill v. Texas*, 316 U.S. 400 (1942).

However, other nonracial factors that may have operated to virtually exclude Negroes from juries were not prohibited, since an "obvious and overwhelming" inference could not be drawn when there had been a small number of Negroes called or selected on the juries in question. Therefore, if Negroes had been called for service at one time or another, the Court would not infer systematic exclusion by reason of race or color. See, e.g., *Simmons v. United States*, 406 F.2d 456 (5th Cir. 1969), *cert. denied*, 395 U.S. 982 (1969); *Trotter v. Stephens*, 241 F. Supp. 33 (E.D. Ark. 1965); *Seals v. State*, 282 Ala. 586, 213 So. 2d 645 (1968); *Butler v. State*, 285 Ala. 387, 232 So. 2d 631 (1970); *State v. Copeland*, 255 La. 91, 229 So. 2d 710 (1969).

63. For seven decades following the passage of the Fourteenth Amendment, the only cases reversed by the Supreme Court in the area of racial exclusion from jury service were those of total exclusion. However, in *Pierre v. Louisiana*, 306 U.S. 354 (1939), the Court found that a prima facie case of systematic exclusion had been presented even though the names of three Negroes appeared on the venire list. Only one of the three had been called within memory of the trial court. A venire of 300 in December of 1936 contained the names of three Negroes, one of whom was then dead, one of whom was listed by the wrong name, and the third of whom was called for petit jury service in January 1937. He was the only Negro who had ever been called for jury service within the memory of the Clerk of the Court, the Sheriff or any other witness who testified. *Id.* at 359. The Louisiana Supreme Court had found that Negroes had been excluded from jury service not on account of race or color, but rather on account of the laws prescribing jury selection. *Id.* The Court did not agree and held, as in cases of total exclusion, that the state had failed to overcome the prima facie case with direct and appropriate evidence. *Id.* at 361-62. The Court observed further that petitioner's testimony was not challenged by appropriate evidence. If there had been direct and specific evidence obtainable to overcome the prima facie showing, the Court assumed the state would not have refrained from using it. *Id.*

64. 311 U.S. 128 (1940).

the grand jury.<sup>65</sup> The Court found an unconstitutional exclusion on the grounds that

[c]hance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service.<sup>66</sup>

The *Smith* Court recognized for the first time that a statistical disparity was strong proof of class discrimination.<sup>67</sup> The statistical evidence introduced in *Smith* led the Court to eliminate "chance" as the cause of the startling disparity between the number of Negroes in the county and those called for jury service. The Court had thus attempted to distinguish systematic exclusion from chance exclusion. The former, of course, was constitutionally prohibited, while the latter apparently was not. However, it must be assumed that only the Court's intuition was employed in applying the laws of probability since the opinion fails to indicate the mathematical basis for the final determination of unconstitutional exclusion.

In later cases of partial exclusion, efforts to establish a prima facie showing of denial of equal protection were increasingly subject to state rebuttal as the disparity decreased. In *Whitus v. Georgia*,<sup>68</sup> statistical evidence indicated that 21.7 percent of the eligible jurors in the county were Negro, while only 9.1 percent of the grand jury venire were Negro.<sup>69</sup> The Court noted that this disparity was sufficient to shift the burden to the state,<sup>70</sup> and Georgia failed to meet the burden of overcoming the prima facie case.<sup>71</sup> In *Jones v. Georgia*,<sup>72</sup> it was shown that 19.7 percent of the Negroes in the county were eligible jurors, while only 5 percent of the jury lists contained Negroes.<sup>73</sup> One Negro was included in the panel of grand jurors which had indicted the petitioner.<sup>74</sup> From the evidence presented, the Court found that a prima facie case had been established and held:

[T]he burden upon the State to explain "the disparity between the

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65. *Id.* at 129. Only five of the 534 grand jurors who served from 1931 to 1938 were Negro. One Negro served three times and thus there were only three individual Negroes in actual service.

66. *Id.* at 131.

67. *Id.* at 129, 131.

68. 385 U.S. 545 (1967).

69. *Id.* at 552.

70. *Id.*

71. *Id.*

72. 389 U.S. 24 (1967).

73. *Id.* at 25.

74. *Id.*

percentage of Negroes on the tax digest and those on the venire<sup>75</sup>. . . , was not met by the Georgia Supreme Court's reliance on the stated presumptions.<sup>75</sup>

*Sims v. Georgia*<sup>76</sup> involved essentially the same prima facie case as did *Whitus*. Negroes constituted 24.4 percent of those statutorily eligible for jury service in the county, but only 9.8 percent of the jury list from which the grand and petit juries were selected.<sup>77</sup> The state introduced testimony offered by a jury commissioner that the commissioners personally knew every qualified person in the county and that there was no discrimination in the county nor in the selection of names.<sup>78</sup> The Court, however, held the testimony insufficient to overcome the prima facie case.<sup>79</sup>

The judicially forged prima facie case thus enables members of the excluded group to successfully vitiate jury selection processes. By establishing an inference of systematic exclusion or by shifting the burden to the state by a showing of an egregious disparity between the eligible members of the group in the community and their numerical representation on the jury, petitioners are placed on firm constitutional ground. State explanations grounded either in assertions of good faith or in the proffered testimony of jury commissioners averring to have acted without regard to race or color do not satisfy equal protection requirements. Such self-serving testimony would make the concept of unbiased jury selection a vain and illusory requirement.<sup>80</sup>

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75. *Id.*, quoting *Whitus v. Georgia*, 385 U.S. 545, 552 (1967).

76. 389 U.S. 404 (1967).

77. *Id.* at 407.

78. *Id.*

79. *Id.* at 407-08. The Court stated that the facts in *Sims* were virtually indistinguishable from *Whitus v. Georgia*, 385 U.S. 545 (1967), and that from considering the jury commissioner's testimony it was clear that the method of selection did not meet constitutional requirements.

80. *Norris v. Alabama*, 294 U.S. 587, 598-99 (1935). In *Speller v. Allen*, 344 U.S. 477 (1953), however, such testimony was central to the Court's finding of no unconstitutional action. There, the eligible juror population was found to be 38 percent Negro, while 7 percent of the venire were Negro. The statistics in *Speller* might have supported a contention of systematic exclusion as opposed to chance exclusion based on race and color. However, economic criteria, not then judicially considered as prohibited by the Constitution, were introduced by the state to rebut any presumption of racial discrimination that might have arisen. The clerk of the jury commissioners testified that he chose potential jurors from the usual tax lists then in effect. His method of choosing, however, was to select those on the list with the most property. He further testified that no racial discrimination entered into his selection. The Court noted that the choosing of those with the most property, an economic basis not under scrutiny in the case, might well have accounted for the few Negroes in the jury box. *Id.* at 480-81.



*C. The Extension of Fourteenth Amendment Protection to  
Other Identifiable Groups*

The Fourteenth Amendment has not been limited to the protection of Negroes.<sup>81</sup> Although early cases rejected the application of the Equal Protection Clause to Mexican Americans on the theory that nationality and race did not bear the same relation under the Fourteenth Amendment,<sup>82</sup> the Supreme Court in *Hernandez v. Texas*<sup>83</sup> eliminated this racial criteria.<sup>84</sup> In *Hernandez*, persons of Mexican American descent contended that they were systematically excluded from jury service.<sup>85</sup> Although there was no statute expressly prohibiting Mexican Americans from jury service the parties had stipulated that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury com-

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81. The Court in *Strauder v. West Virginia*, 100 U.S. 303 (1880), noted that the purpose underlying the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments was to secure to a recently emancipated race all the civil rights which the "superior" race enjoys. *Id.* at 306. Subsequently, however, this protection has been afforded to classifications other than race.

Discrimination solely because of religion was the issue in a Texas case, *Juarez v. State*, 277 S.W. 1091 (1925), where it was contended that since no Catholic jury commissioner had been appointed, only one Catholic had served on the grand jury in the years in question. It was further contended that the failure to include Catholics was the result of a design on the part of officers to deny representation to Catholics. The trial court refused to hear proof and the appellate court reversed on the grounds that religious exclusion is a denial of equal protection. *Id.* at 1094-95.

Nationality was the issue in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese); *United States ex rel. Leguillou v. Davis*, 115 F. Supp. 392 (D.V.I. 1953) (Puerto Ricans in the Virgin Islands); *International Longshoremen v. Ackerman*, 82 F. Supp. 65 (D. Hawaii 1948) (Filipinos).

82. As early as 1936, the issue was brought before a Texas Court. In *Carrasco v. State*, 130 Tex. Crim. 526, 95 S.W.2d 433 (1936), the plaintiff attempted to establish a systematic exclusion of Mexican Americans from jury service. In denying relief, the court opined: "In order to sustain the allegation of discrimination, the proof must show that Mexicans were excluded or discriminated against solely because of race." *Id.* at 527, 95 S.W.2d 434. In a later Texas case, *Sanchez v. State*, 147 Tex. 436, 181 S.W.2d 87 (1944), the defendant, a Mexican, insisted that the long, continued, and uninterrupted failure to call members of the Mexican and Spanish nationalities for jury service constituted a denial to him of equal protection. In denying the contention, the Texas court observed that such an assertion of a denial of equal protection was applicable only to the Negro race:

In the absence of a holding by the Supreme Court of the United States that nationality and race bear the same relation, within the meaning of the constitutional provision mentioned, we shall continue to hold that the statute law of this State furnishes the guide for the selection of juries in this State, and that, in the absence of proof showing express discrimination by administrators of the law, a jury so selected in accordance therewith is valid. *Id.* at 439-40, 181 S.W.2d 90-91.

83. 347 U.S. 475 (1954).

84. *Id.* at 482.

85. *Id.* at 476.

mission, grand jury or petit jury in Jackson County."<sup>86</sup>

The Court recognized that the Texas system of selecting grand and petit jurors was fair on its face and capable of administration without discrimination.<sup>87</sup> However, since it was administered to the exclusion of otherwise eligible groups, solely because of their ancestry or national origin, the system was constitutionally defective as applied.<sup>88</sup> The Court noted that identifiable groups other than the Negro could claim protection under the Equal Protection Clause of the Fourteenth Amendment:

[F]rom time to time other differences from the community norm may define other groups which need the same [constitutional] protection. . . . When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.<sup>89</sup>

Thus, the *Hernandez* Court presented what appears to be a two-pronged test of equal protection exclusion applicable to Mexican Americans and other identifiable groups in the community: (1) the existence of a distinct class in the county/community must be proved as a matter of fact, and (2) the laws as written or applied must unreasonably single out that class for different treatment. A statistical or testimonial evidentiary showing which satisfies the *Hernandez* test combined with a showing of proportionate disparity would shift the burden of proof to the grand jury selectors. The selectors would then be required to establish that unequal application of the law was not the reason for such exclusion.<sup>90</sup> The presumption of systematic exclusion raised could not be rebutted by a showing that the exclusion was "unintentional" in the sense of an unconscious discrimination. "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner."<sup>91</sup>

Obviously, the great diversity of nationalities and ethnic groups in our

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86. *Id.* at 481.

87. The Court stated: "As the petitioner acknowledges, the Texas system of selecting grand and petit jurors by the use of jury commissions is fair on its face and capable of being utilized without discrimination." *Id.* at 478-79.

88. *Id.* at 479.

89. *Id.* at 478.

90. *Id.* at 481.

91. *Id.* at 482. A later Colorado case, *Montoya v. People*, 141 Colo. 9, 345 P.2d 1062 (1959), relied directly upon *Hernandez*. In *Montoya*, the petitioners made out a prima facie case of systematic exclusion of people with Spanish surnames following the test laid out in *Hernandez*. The People offered testimony of public officials who denied both the practice of systematic exclusion and any knowledge of a policy designed

society renders the task of proportional representation of each on the grand jury impossible.<sup>92</sup> However, once the two-pronged test of *Hernandez* is satisfied, a subsequent constitutional challenge should be on the same ground as the challenges previously discussed by this Comment.

### 1. The Requirement of "Identifiability"

The ethnological and statistical identifiability of the Spanish surnamed Mexican American has been noted not only in *Hernandez v. Texas*,<sup>93</sup> but also in *Montoya v. People*,<sup>94</sup> *Montez v. Superior Court*,<sup>95</sup> and *United States v. Hunt*.<sup>96</sup> These cases merely mirror a fact of life in this country in general and in the Southwestern United States in particular. The cultural and ethnic differences of the Mexican American coupled with their large numbers have necessitated studies of various aspects of the Mexican American for socio-economic and political reasons. Numerous publications streaming from various governmental agencies indicate a growing awareness of the identifiability of this group.<sup>97</sup>

It is clear that on a governmental and academic plane the Mexican

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to promote such exclusion, but the court, reversing *Montoya's* conviction, held that such testimony was insufficient to rebut the prima facie case. The element of intent, while an important factor in determining whether there was systematic exclusion in earlier cases, was expressly abandoned. See, e.g., *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Cassell v. Texas*, 339 U.S. 282 (1950).

92. *Cassell v. Texas*, 339 U.S. 282, 286-87 (1950).

93. 347 U.S. 475, 479-80 (1954).

94. 141 Colo. 10, 11, 345 P.2d 1062, 1063 (1959).

95. 10 Cal. App. 3d 343, 88 Cal. Rptr. 736 (1970). *Montez* was one of the recent challenges of the grand jury composition in Los Angeles County. There, the defendants' attempt to introduce testimony of unconstitutional under-representation was denied by the trial court. The court of appeals, in granting a writ of prohibition or, in the discretion of the trial court, an alternative writ to hear the motion to quash the indictment de novo, stated that defendants had the right to present evidence showing that a particular class, to wit, Mexican Americans, does in fact exist and is under-represented on the grand jury. *Id.* at 350-51, 88 Cal. Rptr. at 740-41.

96. 265 F. Supp. 178 (W.D. Tex. 1967). In *Hunt* a motion to quash the jury panel on the ground that it failed to fairly represent Mexican Americans in the community was denied. However, the court in its opinion took full notice of defendant's massive evidence on the identifiability of Mexican Americans. *Id.* at 179-81.

97. Federal government publications include: U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION STUDY REPORT NO. 1: ETHNIC ISOLATION OF MEXICAN AMERICANS IN THE PUBLIC SCHOOLS OF THE SOUTHWEST (1971); U.S. COMM'N ON CIVIL RIGHTS, STRANGER IN ONE'S LAND (1970); CABINET COMM. ON OPPORTUNITY FOR THE SPANISH SPEAKING, DIRECTORY OF SPANISH SPEAKING COMMUNITY ORGANIZATIONS (1970); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, WE THE MEXICAN AMERICANS (1970); U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (1970); U.S. COMM'N ON CIVIL

American has had significant import and recognition as a viable and identifiable people. Moreover, the numerical growth and statistical significance of the group must also be recognized. In Los Angeles, Mexican Americans comprise the largest ethnic minority situated in the county. In 1950, the total population in California was 10,586,223.<sup>98</sup> The Spanish surnamed population was 758,400, or 7.2 percent of the total population.<sup>99</sup> The population of Los Angeles County was 4,151,687<sup>100</sup> while the Spanish surnamed population numbered 287,614 or 6.93 percent. By 1960 the State population had grown to 15,717,204, with the Spanish surnamed population at 1,426,538 or 9.1 percent of the total.<sup>101</sup> At the same time, the Los Angeles County population had become 6,039,834<sup>102</sup> while the Spanish surnamed population climbed to 576,716 or 9.5 percent.<sup>103</sup> In summary, during the 1950-60 decade, the state's population grew 48.5 percent while the Spanish surname number grew by 88.1 percent. In Los Angeles County, total population increased 45.5 percent while Spanish surnamed inhabitants grew by 100.5 percent.

The trend of the earlier decade has continued from 1960 until the present. A Los Angeles County Regional Planning Commission estimated the population in 1965 to be 6,583,027 for the County.<sup>104</sup> An expert demographer estimated that the County population in 1967 was 7,032,400, with 874,000 persons of Spanish surname or 12.4 per-

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RIGHTS, THE MEXICAN AMERICAN (1968); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, PERSONS OF SPANISH SURNAME: SOCIAL AND ECONOMIC DATA FOR WHITE PERSONS OF SPANISH SURNAME IN FIVE SOUTHWESTERN STATES (1960) (The states are Arizona, California, Colorado, New Mexico and Texas).

State government publications concerning Mexican Americans include: CALIFORNIA STATE ADVISORY COMM., POLITICAL PARTICIPATION OF MEXICAN AMERICANS IN CALIFORNIA (1971); CALIFORNIA STATE ADVISORY COMM., POLICE-COMMUNITY RELATIONS IN EAST LOS ANGELES, CALIFORNIA (1970); CALIFORNIA STATE ADVISORY COMM., EDUCATION AND THE MEXICAN AMERICAN COMMUNITY IN LOS ANGELES COUNTY (1968); CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS, CALIFORNIANS OF SPANISH SURNAME (1964).

98. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, at 12 (1960).

99. CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS, CALIFORNIANS OF SPANISH SURNAME 20 (1964).

100. LOS ANGELES COUNTY ALMANAC 65 (1969).

101. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960 SUBJECT REPORTS, PERSONS OF SPANISH SURNAME 4 (1963).

102. LOS ANGELES COUNTY ALMANAC 65 (1969).

103. CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS, CALIFORNIANS OF SPANISH SURNAME 26, 28 (1964).

104. LOS ANGELES COUNTY ALMANAC 65 (1969).

cent of the total.<sup>105</sup> The 1970 Census reported a population of 6,993,371 for Los Angeles County<sup>106</sup> while a study published by the Economics and Youth Opportunities Agency of greater Los Angeles (EYOA) in 1971, found that according to the April, 1970 U.S. Census figures, there were approximately 1,000,000 Spanish surnamed people in the County, or 14.2 percent.<sup>107</sup> An official census report of the Mexican American Population Commission of California estimated the Mexican American population in Los Angeles County in 1970 at 18.2 percent with an accurate projection of 21.1 percent by 1975 and 23.9 percent of the total population in the County by 1980.<sup>108</sup>

A recapitulation of the figures reveals:

Year	Total Population	Spanish Surnamed	Percentage
1950	4,151,687	287,614	6.9%
1960	6,039,834	576,716	9.5%
1967	7,032,400	874,000	12.4%
1970	6,993,371	1,000,000	14.2%

## 2. The Requirement of "Subject to Prejudice"

The second prong of the *Hernandez* test requires a showing that the contested laws as written or applied subject a class to prejudice or different treatment.<sup>109</sup> In California, the Mexican American has clearly been subjected to cultural bias since 1848.

An insight into this historical prejudice<sup>110</sup> may best be initiated by reference to events shortly following the signing of the Treaty of Guadalupe Hidalgo.<sup>111</sup> This treaty purported to guarantee full citizenship rights to Mexicans who remained in the conquered Southwest following the United States' victory in the brief Mexican War. However, one of the initial actions of the neophyte California Legislature was

105. *People v. Castro*, Crim. No. A232902 (Super. Ct., Los Angeles County, Jan. 9, 1969), Defense Exhibit N.

106. STATE OF CALIFORNIA, CALIFORNIA STATISTICAL ABSTRACT 13 (1970).

107. E.Y.O.A., RESEARCH AND EVALUATION DIVISION, 1971 REPORT. Sources are based on (1) E.Y.O.A. working papers, (2) Bureau of Census Reports, (3) L.A. County Regional Planning Commission studies and (4) Southern California Regional Information Study, 1970 Census Data.

108. MEXICAN AMERICAN POPULATION COMM'N OF CALIFORNIA, MEXICAN AMERICAN POPULATION IN CALIFORNIA 10 (1971).

109. *Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

110. See E. GALARZA, MEXICAN AMERICANS IN THE SOUTHWEST 57-73 (1969); R. LANDES, LATIN AMERICANS OF THE SOUTHWEST 1-18, 47-100 (1965); C. McWILLIAMS, NORTH FROM MEXICO 206-304 (1948).

111. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922-43 (1848), T.S. No. 207.

the adoption of a foreign miners' license tax designed specifically to eliminate the competition of Mexican miners.<sup>112</sup> Subsequently, numerous Mexican miners were physically attacked, lynched and murdered in California's Gold Rush territory, causing most of the survivors to abandon their claims and flee to the south.<sup>113</sup> Historian Carey McWilliams noted that "the ease and swiftness of the victory over Mexico and the conquest of California had bred in the Americans a measureless contempt for all things Mexican."<sup>114</sup>

A recent study and report by the California State Advisory Committee to the United States Commission on Civil Rights<sup>115</sup> revealed that many of the methods used in the past to exclude Mexican Americans from political participation in California were strikingly similar to those used to exclude Negroes in the South: tests based on education and literacy, gerrymandering, intimidation, and murder.<sup>116</sup> However, English language voting requirements and threats of deportation provided two additional tools to aid in the exclusion of Mexican Americans.<sup>117</sup> The State Advisory Committee Study further revealed that while Mexican Americans represent 12 to 15 percent<sup>118</sup> of the population in California, they presently hold less than 2 percent of the

112. An Act for the Better Regulation of the Mines and the Government of Foreign Miners, ch. 97, [1850] Cal. Stat. 221-22 (repealed Ch. 108, § 1 [1851] Cal. Stat. 424).

113. CALIFORNIA STATE ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION OF MEXICAN AMERICANS IN CALIFORNIA 4 (1971).

114. C. McWILLIAMS, NORTH FROM MEXICO 129 (1968). Mr. McWilliams vividly describes the historical segregation of the Mexican American:

Above all it is important to remember that Mexicans are a "conquered" people in the Southwest, a people whose culture has been under incessant attack for many years and whose character and achievements, as a people, have been consistently disparaged. Apart from the physical violence, conquered and conqueror have continued to be competitors for land and jobs and power, parties to a constant economic conflict which has found expression in litigation, dispossession, hotly contested elections, and the mutual disparagement which inevitably accompanies a situation of this kind. Throughout this struggle, the Anglo-Americans have possessed every advantage: in numbers and wealth, arms and machines. Having been subjected, first to a brutal physical attack, and then to a long process of economic attrition, it is not surprising that so many Mexicans should show evidences of the spiritual defeatism which so often arises when a cultural minority is annexed to an alien culture and way of life. More is involved, in situations of this kind, than the defeat of individual ambitions, for the victims also suffer from the defeat of their culture and of the society of which they are a part. *Id.* at 132.

115. CALIFORNIA STATE ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION OF MEXICAN AMERICANS IN CALIFORNIA (1971).

116. *Id.* at 5-6.

117. *See, e.g.*, CAL. CONST. art. II, § 1: "[N]o person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State. . . ."

118. CALIFORNIA STATE ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION OF MEXICAN AMERICANS IN CALIFORNIA 8 (1971).

State's elective offices in the United States Congress and State Legislature.<sup>119</sup>

It is apparent that the Mexican American has been, and is, the subject of prejudice in California. A study conducted by the respected Institute of Governmental Studies cogently summarizes society's prejudicial view of the Mexican American and concludes:

The Mexican American minority is frequently treated as if it were a "racial" as well as a nationality, religious, and linguistic minority. Sociologically, Mexican-Americans can be thought of as a distinct group whose physical characteristics, coupled with their cultural traits, lead to their being discriminated against in a variety of ways by the dominant "white" elements in the culture, and to their occupying a general position closely akin to that of the Negro. It is the Mexican's cultural disparity more than his color that sets him apart, and cultural disparity is more readily shucked than is pigmentation.<sup>120</sup>

#### IV. EXCLUSION AND UNDER-REPRESENTATION OF SPANISH SURNAMED MEXICAN AMERICANS FROM CONSIDERATION, NOMINATION AND SELECTION FOR THE LOS ANGELES COUNTY GRAND JURIES

Since 1962, judges of the Los Angeles County Superior Court have been expressly advised by the presiding judge that the grand jury should be representative of a cross section of the community.<sup>121</sup> Each judge therefore is on notice to be mindful of the need to make nominations from the various racial and ethnic groups, economic sectors and geographic areas.<sup>122</sup> Of the 234 judges who have made one or more nominations from 1959 to 1972, only 31 judges or 13.2 percent have ever nominated Spanish surnamed Mexican American persons for

119. *Id.* See 117 CONG. REC. No. 172A (daily ed. Nov. 12, 1971).

120. UNIVERSITY OF CALIFORNIA AT BERKELEY, INSTITUTE OF GOVERNMENTAL STUDIES, MINORITY GROUPS AND INTERGROUP RELATIONS IN THE SAN FRANCISCO BAY AREA 8 (1963).

121. Letters from several presiding judges have been written. The latest is the letter from Judge Lloyd Nix to all judges of the Superior Court (Los Angeles County), July 26, 1967, on file at the offices of the Loyola of Los Angeles Law Review.

122. Note should be taken that until 1963, selection of Los Angeles County grand jury nominees was controlled by CAL. PEN. CODE § 899 (West 1954):

The names for the grand jury list shall be selected from the different wards, judicial districts, or supervisorial districts of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making the lists.

Ch. 1614, § 1 [1963] Cal. Stat. 3207, amended CAL. PEN. CODE § 899 by adding: "In a county of the first class, the names for such list may be selected from the county at large."

grand jury service.<sup>123</sup> A statistical summary<sup>124</sup> of the percentage of bona fide Spanish surnamed nominees among the 1959-1969 grand jury nomination pool was offered in *People v. Montez*<sup>125</sup> and is here brought up to date.<sup>126</sup>

Year	A	B	C	D	Ratio
1959	132	1	1	0.8%	132:1
1960	146	2	2	1.4%	73:1
1961	148	3	3	2.0%	49:1
1962	144	4	4	2.8%	36:1
1963	140	5	5	3.6%	28:1
1964	155	7	6	4.5%	22:1
1965	152	6	6	3.9%	25:1
1966	162	5	5	3.1%	32:1
1967	151	4	4	2.6%	38:1
1968	171	3	3	1.8%	57:1
1969	189	7	7	3.7%	27:1
1970	155	10	10	6.4%	16:1
1971	164	13	13	7.9%	13:1
1972	214	15	15	7.0%	14:1
Totals	2223	85	84	3.7% (an average)	

Key: A=Total Nominations<sup>127</sup>

B=Total SS (Spanish surnamed) Nominations<sup>128</sup>

C=Number of Individual SS Nominees (many of whom were repeat nominees)<sup>129</sup>

D=Percentage of SS Nominations to Total Nominations

The above statistics reflect with greater clarity the widespread failure to nominate Spanish surnamed Mexican Americans when it is realized that one judge nominated 12 of the total Spanish surnamed Mexican American individuals.<sup>130</sup> Actually, only 41 individual Spanish surnamed Mexican Americans have been nominated during the fourteen-year period since some individuals were being nominated year after year<sup>131</sup> and, as the following compilation indicates, only six nominees from the total number shown above (excluding 1972) were ultimately selected to serve on the grand jury.<sup>132</sup>

123. See note 8 *supra*.

124. *Id.*

125. Crim. No. A244906 (Super. Ct. Los Angeles County, Oct. 27, 1969).

126. See note 8 *supra*.

127. *Id.*

128. *Id.*

129. Individual Spanish surnamed nominees stated are the total individuals nominated each year. Some judges nominate the same person thus providing a "double nominee."

130. See note 8 *supra*.

131. *Id.*

132. *Id.*



Year	No. of Ultimately Selected Grand Jurors	No. of Spanish Surnamed Grand Jurors
1959	19	0
1960	19	0
1961	19	0
1962	19	0
1963	19	0
1964	23	0
1965	22	2
1966	23	0
1967	24	1
1968	23	1
1969	23	0
1970	23	1
1971	23	1
	279	6

The net effect of the nomination-selection process during the past thirteen years has been the total exclusion from eight of the last thirteen grand juries of the Spanish surnamed Mexican Americans, a class which constituted from 9.55 percent to approximately 14 percent of the County population from 1959 to 1971. Only 2.1 percent of the grand jurors ultimately selected over the past thirteen years have been of the Mexican American ethnic minority. Whether one counts nominees (a fourteen-year average of approximately one Mexican American to 26.10 nominees) or grand jurors (a thirteen-year average of approximately one Mexican American to 46.5 grand jurors), there has been a striking and long-standing disparity between population and grand jury representation. Simple proportional representation based on the conservative estimate of Mexican American population would have established approximately 222 Spanish surnamed Mexican American nominees and approximately 26 grand jurors of that ethnic extraction.

The total number of nominations has progressively increased from a low of 132 nominees in 1959 to a high of 214 in 1972, while the total number of Spanish surnamed Mexican Americans increased in the County from 9 percent to 14 percent. In contrast, the ratio of Mexican American nominees to total nominees was at its lowest in 1959 (0.8%) and in 1968 (1.2%). The disparity (12.9% of the total population to 3.7% of nominees) in the composition of 1969 grand jury nominees was approximately 4 to 1. Only once, 1971, has the disparity been less than 2 to 1. A study of the California grand jury system<sup>133</sup> found that a disparity of 2:1 or 2.5:1 has great significance

133. 1970 STUDY, *supra* note 32, at 112-35.

when continued over five or more years and that such a disparity is mathematically impossible if grand jury selection is fair.<sup>134</sup> The study continues:

The principles espoused by both judges and mathematicians would indicate that a long continued disparity of 3:1 or more between the percentage of minority grand jurors and the minority group percentage of the community raises a presumption of unconstitutional selection. A 3:1 disparity is "very decided."<sup>135</sup>

Unfortunately, precise statistical standards have not been articulated that would define exactly what disparity would raise a presumption of racial discrimination in the selection of juries.<sup>136</sup> The length of the period during which the disparity must exist is yet another factor that is open to question.<sup>137</sup> In recent cases, periods of twenty-four years,<sup>138</sup> sixteen years,<sup>139</sup> six years,<sup>140</sup> five years,<sup>141</sup> and even one year<sup>142</sup> have been considered sufficient. In order to cope with the ambiguous disparities involved, legislation has been proposed under which a definite disparity coupled with a fixed time period would trigger federal intervention in the selection of state juries.<sup>143</sup> However, these proposals have never been adopted and it appears that judicial determinations applied on an ad hoc basis<sup>144</sup> provide the only guidelines of the

134. *Id.* at 115.

135. *Id.* The mathematical analysis was based on Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

136. See text accompanying notes 55-80 *supra* for a discussion of the prima facie presumption.

137. *Id.*

138. *Arnold v. North Carolina*, 376 U.S. 773 (1964).

139. *Hill v. Texas*, 316 U.S. 400, 404 (1942).

140. *Labat v. Bennett*, 365 F.2d 698, 727 (5th Cir. 1966).

141. *Cassell v. Texas*, 339 U.S. 282 (1950). It should be noted that the *Cassell* Court placed its major emphasis on the systematic technique of exclusion rather than on the period of time in question.

142. *Sims v. Georgia*, 389 U.S. 404 (1967); *Jones v. Georgia*, 389 U.S. 24 (1967); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Brown v. Allen*, 344 U.S. 443 (1953).

143. Legislative proposals have been submitted which would provide that one-third-under-representation for a two-year period be made the test of discrimination for the purpose of triggering federal selection of state jurors and permitting removal of cases to the federal courts. See, e.g., S.2923 and H.R. 12845, 89th Cong. 2d Sess. (1966).

144. *But see* Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1151 (1966) wherein the author espouses a due process limitation upon the problems of jury selection:

It should be held that due process of law requires that standards . . . be not unduly restrictive and both objectively applicable and objectively applied [in favor of] a case-by-case adjudication of the propriety of the administration of the statutes in the distorted context of litigation.

showing required to establish the presumption of unconstitutional exclusion. A prima facie case of jury discrimination has been presented where 24.4 percent of the taxpayers<sup>145</sup> from whom jury lists are drawn were Negro, but only 9.8 percent were veniremen<sup>146</sup> (veniremen may be equated to the list of nominees to the grand jury);<sup>147</sup> where 27.1 percent of the taxpayers were Negro out of a population of Negroes in the county of 42.6 percent, but only 9.1 percent of that group were veniremen,<sup>148</sup> where the over-21 population in a county was 30.7 percent Negro and the taxpayers were 19.7 percent Negro, but only 5 percent of the veniremen were Negro;<sup>149</sup> where 38 percent of the taxpayers were Negro, but only 7 percent were veniremen,<sup>150</sup> and where 32 percent of the population were Negroes, but only 3.7 percent of the veniremen were of the same race.<sup>151</sup> In Los Angeles County it has been found that the Mexican American population has ranged from approximately 9 percent to a present 14.2 percent of the total population, yet only 3.7 percent of the grand jury nominees for the past 14 years have been Mexican American.<sup>152</sup>

It must be pointed out that to raise the issue does not prove the fact.<sup>153</sup> The statistical evidence and showing made only establishes

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145. The fact that taxpayer lists were employed in several of the cases as a statistical basis for analysis should not affect the adoption of these holdings to the presentation of this Comment. See note 152 *infra*.

146. *Sims v. Georgia*, 389 U.S. 404 (1967).

147. Venireman is defined as "a member of a panel of jurors; a juror summoned by a writ of *venire facias*." BLACK'S LAW DICTIONARY 1727 (rev. 4th ed. 1968).

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

149. *Jones v. Georgia*, 389 U.S. 24 (1967).

150. *Brown v. Allen*, 344 U.S. 443 (1953).

151. *Labat v. Bennett*, 365 F.2d 698, 716 (5th Cir. 1966).

152. For purposes of this Comment, and in the absence of any studies or statistics to the contrary, the assumption will be made that the ratio of eligible Mexican American grand jurors to that of eligible Anglo-American grand jurors remains constant to the ratio of the population in Los Angeles County. The assumption is based on (1) absence of any source lists needed for nomination, such as voting, telephone, etc.; (2) the absence of overly restrictive qualifications for service such as used in many cases cited above, such as poll taxes, property criteria or voter registration.

153. See, e.g., *Brown v. Allen*, 344 U.S. 443 (1953), where the Court stated that the apparent disparity between the number of Negroes in the county and the number of Negro veniremen was caused by the practice of choosing those for the jury with the most property, an economic basis not under scrutiny at trial. Petitioners' charge of discrimination against Negroes in the selection of grand and petit jurors was denied. The Court was of the opinion that the disparity present was reasonable and constitutional in view of the fact that jurors were drawn from tax lists. "We recognize the fact that these lists have a higher proportion of white citizens than of colored, doubtless due to inequality of educational and economic opportunities." *Id.* at 473. In *Akins v. Texas*, 325 U.S. 398, 404 (1945), the petitioner asserted that the jury com-

the prima facie case. It then becomes incumbent upon the defenders of a particular selection system to adduce evidence that overcomes the showing of unconstitutional exclusion.<sup>154</sup>

The foregoing cases and statistics, when coupled with both the recent statistical studies of racial identity and the percentage disparity shown between Mexican Americans in Los Angeles County and the number nominated and selected for grand jury service, patently evidence a prima facie showing of racial under-representation and unconstitutional discrimination against the Mexican American as a class. In addition, the Supreme Court has indicated that a jury selection system may be constitutionally infirm notwithstanding the absence of a prima facie case.<sup>155</sup> In several cases the Court has not limited inquiry to result, but has examined the intentions, methods and actions of the jury commissioners in selecting persons for jury service to discover whether there has been discrimination.<sup>156</sup>

#### A. *The Selection Process*

Recently in *People v. Castro*,<sup>157</sup> *People v. Montez*<sup>158</sup> and *People v. Ramirez*,<sup>159</sup> the petitioners contended and endeavored to prove that

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missioners deliberately, intentionally and purposely limited the number of Negroes that should be selected for a grand jury panel. The Court found that said jury commissioners did not intentionally discriminate and that the Texas courts endeavored to comply with Federal Constitutional requirements concerning the selection of grand juries as set forth in *Hill v. Texas*, 316 U.S. 400 (1942).

In *United States v. Hunt*, 265 F. Supp. 178, 194 (W.D. Tex. 1967) the court held that in a county where 36 percent of the total population of a county was Mexican American and 17.5 percent of the eligible jurors in the county were Mexican American, discrimination did not exist where 11 percent of the jurors were of that class.

154. See notes 61 & 62 *supra*.

155. *Swain v. Alabama*, 380 U.S. 202 (1965); *Cassell v. Texas*, 339 U.S. 282 (1950); *Akins v. Texas*, 325 U.S. 398 (1945).

156. In *Swain v. Alabama*, 380 U.S. 202, 207-09 (1965), while there was no prima facie case, the Court affirmed only after examining at length the intentions and methods of the commissioners in selecting jurors.

In *Cassell v. Texas*, 339 U.S. 282, 286-90 (1950), the jury panels closely reflected a fair racial cross section. Nevertheless, the Court reversed petitioner's conviction because the selectors had failed in their affirmative duty to familiarize themselves with qualified Negroes—their practice being to include only one Negro per panel.

In *Akins v. Texas*, 325 U.S. 398, 403-07 (1945), there was no prima facie case, for the jury panel itself closely approached a cross section of the community. Yet the Court went on to examine the actions and intentions of the jury commissioners and affirmed only on the ground that purposeful limitation of Negroes had not been factually demonstrated.

157. Crim. No. A232902 (Super. Ct. Los Angeles County, Jan. 9, 1969).

158. Crim. No. A244906 (Super. Ct. Los Angeles County, Oct. 27, 1969).

159. Crim. No. A244906 (Super. Ct. Los Angeles County, March 31, 1971).

the system of consideration, nomination and selection of grand jurors by Los Angeles County Superior Court judges systematically deprived eligible Spanish surnamed Mexican Americans of the opportunity to serve on the grand jury.<sup>160</sup> The petitioners asserted that the statistical disparity between the number of Mexican Americans in the county and the number nominated was caused by the very system of selection used. They sought to establish that, with very few exceptions, the judges of the Superior Court, by reason of birth, education, residence, wealth, social and professional associations, and similar factors were not acquainted with, and had not attempted to acquaint themselves with, the qualifications of eligible potential grand jurors of the Mexican American class.<sup>161</sup>

Sworn testimony elicited from 109 judges of the Superior Court focused on their attitudes and the methods they employed when considering, nominating and selecting persons for the grand jury.<sup>162</sup> The following table illustrates the virtual lack of effort taken by these judges to honor the presiding judge's admonition to select from all classes of the community, including Mexican Americans, when nominating persons for grand jury service.<sup>163</sup>

Information elicited:	1959-1971 <sup>164</sup>
Never considered or requested ethnic minorities <sup>165</sup>	25
Almost always considered ethnic minorities <sup>166</sup>	8

160. *Montez v. Superior Court*, 10 Cal. App. 3d 343, 350 (1970).

161. *Id.* at 350. In the *Montez* case, the California District Court of Appeals pointed out that even if statistical evidence is unable to shift the burden to the state, the attackers may call as their own witnesses those empowered to administer the selection procedure. The court found no case that had ever precluded this type of testimony. In *Castro v. Superior Court*, 9 Cal. App. 3d 675, 88 Cal. Rptr. 500 (1970), the court granted in part and denied in part a writ of prohibition without deciding a petitioner's challenge to the composition of the grand jury.

162. See Ramirez Record, *supra* note 2.

163. See note 121 and accompanying text *supra*.

164. The table constitutes the summation of the testimony of the judge-selectors in response to the questions posed by the defense counsel in *People v. Ramirez*, Crim. No. A244906 (Super. Ct. Los Angeles County, March 31, 1971), regarding the methods employed from 1959-70.

165. This was the response to questions posed by counsel to every judge. The questions were substantially phrased: "Between the years (of appointment to the bench) to 1969 have you ever considered nominating any person to the grand jury whom you believed to be a Mexican American?" If the response was "no," similar questions were asked of Black Americans, American Indians and Oriental Americans. Ramirez Record, *supra* note 2, at 320, 1158, 1196-97, 1538, 1546, 1593, 1637, 1653, 1679, 1684-86, 1696, 2021-22, 2194-95, 2217, 2249, 2321, 2424, 2525-26, 2570-72, 2579, and 2611.

166. In response to being asked if he had any knowledge that Caucasian judges on the

Never considered or requested Mexican American <sup>167</sup> .....	26
Token affirmative steps to nominate Mexican American <sup>168</sup> .....	27
Concrete affirmative steps to nominate Mexican American <sup>169</sup> .....	12
Nominated Mexican American <sup>170</sup> .....	15

Testimony was also sought which would support the contention that the demonstrated racially under-representative composition of the grand

bench had picked Caucasian nominees intentionally or systematically one judge answered:

Yes. Systematically, because they, as a rule, won't have contact with anyone else, so it has to be intentionally and systematic, the same as if I can get a Negro I'm going to select him for the grand jury because I know it's the only way—or I wouldn't say the only way, but it's the most probable way that any number of Negroes will get on the grand juries is by the Negro judges selecting Negro nominees. Ramirez Record, *supra* note 2, at 1502-03.

Another judge was asked (speaking of his nominees from 1960 to 1969): "Were each of these persons Mexican Americans?" The judge answered: "with the exception of one." Ramirez Record, *supra* note 2, at 2379. See Ramirez Record, *supra* note 2, at 834, 1406, 1625, 2042, 2411, and 2548.

167. Counsel's inquiry was phrased substantially as follows: "Were any of the persons that you considered for the grand jury (stating the years) persons that you believed to be Mexican Americans?" Twenty-six judges responded in the negative. Ramirez Record, *supra* note 2, at 1158, 1191, 1412, 1430, 1470, 1484, 1512, 1526, 1537, 1544, 1593, 1612, 1637, 1653, 1665, 1679, 1696, 1967, 1975, 1984, 2021, 2217, 2247, 2312, and 2321.

168. In response to the question, "Were any of the persons that you considered, persons that you believed to be Mexican-American?", one judge replied:

I've always considered that. If I can interject a voluntary statement here, my problem has always been this; that although I knew many Mexican-American people, unfortunately none of them seemed to be in a position where they could serve as grand jurors, if nominated. I think that, unfortunately, a person, to serve as a member of the grand jury, almost is compelled to be either retired with an independent income, or at least an independent income. It comes right down to that financial situation. I think they either have to be a housewife without any outside duties, without any children dependent upon her, or a retired person who no longer needs to work, or a person with an independent income. And most of the Mexican Americans I knew didn't fall in any of those categories. Ramirez Record, *supra* note 2, at 1564-65.

Another response to the same question provoked the question from the second judge: "You mean specifically an individual or as a class?" When answered—"an individual," the judge responded: "No. I have never had any specific individual [in mind], but as a class yes, if I had been able to find one." Ramirez Record, *supra* note 2, at 2149-50. See Ramirez Record, *supra* note 2, at 187, 237, 1573, 1623, 1683, 1710, 1739-41, 1800, 1813, 1849, 1911-12, 1951, 2035, 2112-13, 2132-33, 2210, 2271, 2299, 2357-58, 2415, 2428, 2475, 2481, 2485, 2490-91, 2501, 2540-41, and 2560.

169. In response to counsel's inquiry if the judge had ever taken steps to consider the nomination of a person he believed to be Mexican American, some replied that they had considered specific individuals but that those individuals who were asked could not serve if nominated. Ramirez Record, *supra* note 2, at 560, 1254-57, 1325, 1446-47, 1782, 1881, 1900-02, 1958, 2084-87, 2340, and 2436.

170. Those who nominated a Mexican American are noted in the Ramirez Record, *supra* note 2, at 209, 666, 770-71, 927-30, 1341, 1364, 1406, 1581, 1919-22, 2103-04, 2170-71, 2179, 2257, 2379, 2559-60 and 2596.

juries in question was due not only to a failure to consider Mexican Americans, but also to a failure to affirmatively seek out eligible Mexican Americans.<sup>171</sup> The judges obliged by explaining their reasons for not nominating any Mexican Americans. This testimony may be generally classified as follows:

Mexican American has no ethnic identity <sup>172</sup> .....	10
Not acquainted with Mexican American who was qualified <sup>173</sup> .....	47
Mexican Americans could not afford to serve <sup>174</sup> .....	23
Not acquainted with Mexican American who sought nomination <sup>175</sup> .....	3
Rely on minority judges to nominate minority members <sup>176</sup> .....	8

171. See text accompanying notes 179-99 *infra* for discussion of the substantive aspects of the affirmative duty.

172. Defense counsel inquired of one judge: "In your opinion, is there any distinction between the class known as Mexican Americans and any other ethnic class of persons here in Los Angeles County?" The judge answered "No sir." Ramirez Record, *supra* note 2, at 1535. Another judge was asked, "Is there any difference in your mind between Mexican Americans and other Americans?" This judge replied, "Some are a little more courteous than Anglo Americans. . . ." Ramirez Record, *supra* note 2, at 788. See Ramirez Record, *supra* note 2, at 444, 467, 535-38, 651, 1426, and 1477.

173. Counsel asked one judge: "To your knowledge, of those persons with whom you talked to concerning the possible nomination, were any of them Mexican-American?" The judge replied:

I'm sure they weren't . . . because I know none in the classification of persons that might be eligible, might give their time, that is, and could stand the financial distress of being a member of the grand jury.

Ramirez Record, *supra* note 2, at 1544. Expressing his own view a judge testified: "If I ever knew anyone [Mexican Americans], I would be delighted to [recommend] them. . . . I don't know any Mexican-Americans who are a prospect for the grand jury. . . ." Ramirez Record, *supra* note 2, at 401. See Ramirez Record, *supra* note 2, at 512, 519-20, 1419, 1432, 1435, 1473, 1484, 1512, 1514, 1526-27, 1537-38, 1555-56, 1614, 1638-39, 1653, 1655, 1669, 1703, 1753, 1763, 1799, 1860, 1872, 1904, 1911-12, 1953, 1968, 1976, 1985, 2038, 2051, 2065, 2135, 2149-50, 2155, 2212, 2225, 2247, 2322, 2371, 2392-93, 2418, 2424, 2481-85, 2491-92, 2506, 2530, 2570, 2580, and 2611.

174. This was the general response to various questions which inquired that if the judges had known any Mexican Americans who were eligible to serve and who could afford to serve, would they have nominated them. These judges answered that if they could find a Mexican American who could afford to serve, they would not hesitate to nominate one. Ramirez Record, *supra* note 2, at 237, 1557-58, 1565, 1595, 1641, 1694, 1767, 1816, 1828, 1872, 1951, 1960, 1993, 2035, 2112, 2132, 2210, 2271, 2339, 2992-95, 2436, 2475, 2491, and 2570.

175. The particular judges stated that they had not been approached by Mexican Americans requesting grand jury nomination. Ramirez Record, *supra* note 2, at 1158, 1196, and 2228-29.

176. These judges relied on minority judges to nominate minority group members. If a minority judge was questioned, the majority of them replied that they took it upon themselves to insure that persons of minority groups were nominated, stating

Thus, on the basis of these responses it may be safely asserted that the proportional disparity in nomination is due in large part to a failure to affirmatively seek out and nominate eligible grand jurors of Mexican American extraction residing in Los Angeles County. Further, since the ethnic identity of Mexican Americans in Los Angeles County is firmly established,<sup>177</sup> the failure to nominate from this group on the ground that it has no identity is an absurdity.<sup>178</sup> The question remains, however, whether the Fourteenth Amendment imposes upon the judges as jury selectors an affirmative duty to familiarize themselves with all of the racially, ethnically or otherwise significant groups in the community eligible for service.

### B. *The Affirmative Duty to Seek Out*

The concept of an affirmative duty of the selector to select from all of the community was first espoused in *Smith v. Texas*.<sup>179</sup> There, the petitioner offered to show that while Negroes constituted 20 percent of the county population only three individual Negroes had sat on the grand juries in the years 1931 to 1938.<sup>180</sup> The Court, in finding racial discrimination, stated:

What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no Negroes as well as Commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.<sup>181</sup>

The *Smith* Court thus recognized that when those appointed to select prospective jurors are empowered with the discretion as to whom to select, exercise of the discretion in such a way as to intentionally

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that if they did not nominate minorities, very few minorities would ever be selected. Ramirez Record, *supra* note 2, at 671, 1503, 1999, 2379, 2411, and 2548.

177. See text accompanying notes 93-120 *supra*.

178. In *Ganz v. Justice Court*, 273 Cal. App. 2d 612, 78 Cal. Rptr. 348 (1969), the court was of the opinion that Mexican Americans of Spanish surname did not constitute a class with a common racial inheritance in California. Thus the court implied that the equal protection contentions of the petitioner were not to be afforded the same or similar treatment applied to the Negro exclusion cases. However, this archaic and unenlightened perspective cannot withstand the statistical recognition of the Mexican American as a constitutionally protected class within the meaning of *Hernandez*.

179. 311 U.S. 128 (1940).

180. *Id.* at 128-29.

181. *Id.* at 132.



or unintentionally exclude or under-represent significant groups in the community by selecting persons of their own acquaintance, constitutes an unconstitutional exclusion of the protected group. This concept was developed further in *Hill v. Texas*,<sup>182</sup> wherein two of the three jury commissioners who selected the grand jury which indicted the petitioner stated that they did not know of any Negroes legally qualified to serve as grand jurors. The commissioners further testified that they had made no investigation to ascertain whether there were Negroes in the county qualified for grand jury service.<sup>183</sup> The Court viewed such inaction on the part of the jury commissioners as patent discrimination in violation of the Fourteenth Amendment.<sup>184</sup> Chief Justice Stone, speaking for the Court, stated:

Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and *who neither know nor seek to learn whether there are in fact any qualified to serve*. In such a case, discrimination necessarily results where there are qualified Negroes available for jury service.<sup>185</sup>

Thus, passive de facto discrimination through inaction of the jury selectors is a denial of equal protection notwithstanding a failure to show an intentional exclusion.<sup>186</sup>

The affirmative duty concept is clearly articulated in *Cassell v. Texas*.<sup>187</sup> There, the petitioner attempted to establish a discriminatory class exclusion and presented the testimony of the three jury commissioners to support his allegations.<sup>188</sup> The Supreme Court, in

182. 316 U.S. 400 (1942).

183. *Id.* at 402-03.

184. *Id.* at 404.

185. *Id.* at 404 (emphasis added).

186. It was previously noted that 71 percent of the Los Angeles Superior Court judges took either no action at all or merely token efforts to consider a Mexican American. The People asked all 109 judges who testified the following questions:

1. In considering whom to nominate for grand jury service, was it your purpose to deliberately exclude members of any racial group?

2. By actually placing in nomination those persons whose names you mentioned here in court as being your nominees, did you ever intend to intentionally, arbitrarily and systematically exclude from grand jury service members of any racial or ethnic group?

Nearly all of the judges answered "no" to both questions. See Ramirez Record, *supra* note 2.

187. 339 U.S. 282 (1950). Mr. Justice Reed announced the opinion of the Court in which Vinson, C. J., Black and Clark, J.J. concurred. Mr. Justice Frankfurter filed a separate concurring opinion joined by Burton and Minton, J.J. Mr. Justice Clark filed a separate concurring opinion. Mr. Justice Jackson dissented. Mr. Justice Douglas took no part in the judgment.

188. *Cassell v. State*, 154 Tex. Crim. 648, 651, 216 S.W.2d 813, 816 (Crim. App. Ct. Tex. 1948).

reexamining the facts to determine whether petitioner had sustained by proof his allegation of discrimination,<sup>189</sup> noted that the jury commissioners' testimony indicated that they *purposely included* one Negro on the majority of lists from which the grand jury was selected.<sup>190</sup> This limitation of one Negro per panel proportionally matched the percentage of Negroes in the county eligible for grand jury service.<sup>191</sup> While the Court found no *prima facie* case,<sup>192</sup> petitioner's conviction was reversed solely on the testimony of the jury commissioners that they chose only whom they knew and that they knew no eligible Negroes, although more than 16.5 percent of the population were Negroes.<sup>193</sup> In so reversing, the *Cassell* Court stated that it was the duty of those empowered to select jurors to familiarize themselves with the qualifications of the eligible jurors in the County without regard to race or color.<sup>194</sup> Thus, the omission of minority members, their gross under-representation on the jury lists, or even an allegation of purposeful limitation as in *Cassell* will elicit a presumption of discrimination,<sup>195</sup> which testimony of "failure to familiarize" will not rebut.<sup>196</sup> In accord, it is apparent that the testimony of the Superior Court Judges in Los

189. Reexamination of the facts by the Court to determine whether a petitioner was denied a federal right was approved in *Fay v. New York*, 332 U.S. 261, 272 (1947); *Smith v. Texas*, 311 U.S. 128, 130 (1940); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939); *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935).

190. 339 U.S. 282, 294-95 (1950), concurring opinion of Mr. Justice Frankfurter, with whom Mr. Justice Minton and Mr. Justice Burton joined.

191. Evidence presented in *Cassell* indicated that 15.5 percent of the population in Dallas County was Negro. In the five years since *Hill v. Texas*, 316 U.S. 400 (1942), there were 21 grand juries—17 members, or 6.7 percent of which were Negro. The discrepancy is explained by the fact that Texas grand jurors must possess certain statutory qualifications. See TEX. CODE CRIM. PROC. art. 339 (Vernon 1948). Evidence further indicated that 6.5 percent of the Negro population met the requirements. 339 U.S. at 284-85.

192. In view of the "non-discriminatory" evidence presented, the Court stated: "Without more it cannot be said that Negroes had been left off grand-jury panels to such a degree as to establish a *prima facie* case of discrimination." 339 U.S. at 285-86.

193. *Id.* at 290.

194. *Id.* at 289. This principle was affirmed in *Avery v. Georgia*, 345 U.S. 559, 561 (1953), where the Court stated:

The Jury Commissioners, and the other officials responsible for the selection of this [jury] panel, were under a constitutional duty to follow a procedure—"a course of conduct"—which would not "operate to discriminate in the selection of jurors on racial grounds."

*But cf.* *Swain v. Alabama*, 380 U.S. 202 (1965) (although the state selection procedure was haphazard and little effort was taken to insure full representation of all groups of the community, such an imperfect system did not establish intentional exclusion based on race).

195. *Cassell v. Texas*, 339 U.S. 282 (1950).

196. The affirmative duty of the selectors to familiarize themselves with the community is further evidenced by the federal companion to systematic exclusion—the

cross section requirement. This mandate was established in *Glasser v. United States*, 315 U.S. 60, 86 (1942):

[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community". . . . [Selectors] must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.

The cross section requirement has been applied to include socio-economic groups as well as racial and ethnic groups. *Ballard v. United States*, 329 U.S. 187 (1946) (women); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (day laborers); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967) (daily wage earners). A recent federal act codifies the requirement and expressly directs that the jury be "selected at random from a fair cross section of the community. . . ." Federal Jury Selection and Service Act of 1968, Pub. L. 90-274, § 101, 82 Stat. 54, *amending* 28 U.S.C. §§ 1861-69 (1964) (codified at 28 U.S.C. §§ 1861-69 (1970)).

While the systematic exclusion rule derives its thrust from the Equal Protection Clause, the cross section requirement is a due process application which rests upon the Supreme Court's supervisory power over the federal court system. *See Moore v. New York*, 333 U.S. 565 (1948); *Fay v. New York*, 332 U.S. 261 (1947). Although the Supreme Court has not applied the rule to the states as of yet, the fifth circuit has ruled that the exemption of daily wage earners from the jury system is violative of equal protection and due process. The court maintained that the cross section directive was extended by the Supreme Court in *Thiel* and *Ballard* "beyond the mere application of supervisory power." *Labat v. Bennett*, 365 F.2d 698, 722 n.40 (5th Cir. 1966).

The cross section of the community rule has been adopted in California to some extent. In *People v. White*, 43 Cal. 2d 740, 278 P.2d 9 (1954), *cert. denied*, 350 U.S. 875 (1955), the California Supreme Court stated:

The American system requires an impartial jury drawn from a cross-section of the entire community and recognition must be given to the fact that eligible jurors are to be found in every stratum of society. *Id.* at 754.

The impact of the *White* decision is yet all too unclear. In *People v. Nero*, 19 Cal. App. 3d 904, 97 Cal. Rptr. 145 (1971), the court held that individual grand jurors' right to privacy outweighed the petitioner's need for requested information that would reveal the economic strata of jury composition. *Id.* at 910, 97 Cal. Rptr. at 148. The court then continued to apparently confuse a prima facie case of systematic exclusion with the due process issue of failure to select a cross section of the community. Further, the court focused on the petitioner's group or class. A due process claim can be successfully asserted, however, by a non-member of the unrepresented class because all defendants are entitled to a representative jury. *See, e.g., Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946). An equal protection challenge, on the other hand, may require the challenger to be a member of the allegedly excluded group. *See Note, The Jury: A Reflection of the Prejudices of the Community*, 20 HAST. L.J. 1417, 1435-40 (1969), for a discussion of the cross section rule as compared to equal protection application.

An extension of the due process cross section application to the states may be forthcoming. Application of the Sixth Amendment to certain state judicial procedures has already eliminated several of the obstacles to the adoption of this approach. The Supreme Court decisions of *Moore v. New York*, 333 U.S. 565 (1948), and *Fay v. New York*, 332 U.S. 261 (1947), both rejected cross section application while emphasizing that the Sixth Amendment right to jury trial was limited to the federal system. However, *Duncan v. Louisiana*, 391 U.S. 145 (1968), in holding that the Sixth Amendment right of jury trial in serious criminal cases is guaranteed to state defendants by incorporation into the Fourteenth Amendment, casts a questionable shadow on the *Fay* and *Moore* analysis of the cross-section rule.

Furthermore, the extension of what was heretofore merely considered to be the

Angeles County<sup>197</sup> likewise fails to rebut the presumption of discrimination.<sup>198</sup>

### C. *The Impact of Under-Representation Upon the Mexican American*

While the systematic exclusion which infests the Los Angeles County selection process affords the keynote problem to the Mexican American, the social impact which the process wreaks is a problem of equally pressing importance. Selection as a grand or petit juror presents the sole opportunity for the average citizen to actively participate in the administration of government.<sup>199</sup> Jury service is a fundamental prerogative of citizenship.<sup>200</sup> The opportunity to participate in government through service as a grand or petit juror has been found to be of profound psychological importance to minority persons.<sup>201</sup> Studies have shown that minority groups are more likely to feel they belong to the community and society if they are available or called as jurors.<sup>202</sup> Such involvement has a profound impact on their attitude toward law and the system of justice in this country.<sup>203</sup> However, since minorities are continuously excluded or greatly under-represented, their confidence and trust in the government deteriorates, while, as "legal outcasts," their sense of inferiority and alienation grows.<sup>204</sup> But the importance of grand jury service takes on dimensions exceeding purely

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application of the Court's supervisory power over the federal courts is by no means unprecedented in the face of ineffective alternatives. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436 (1966). In addition, the ninth circuit appears willing to extend the cross section requirement to the states. *See Carmical v. Craven*, 451 F.2d 399, 403 (9th Cir. 1971).

197. See text accompanying notes 165-176 *supra*.

198. *Id.*

199. 1970 STUDY, *supra* note 32, at 113.

200. *Id.*

201. *Id.* Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 26. In an interview with the only 1971 Mexican American grand juror, *supra* note 2, the same response was revealed. The juror stated that

since I am on the grand jury the people from my area [East Los Angeles] feel they have a voice, they feel terrific about my position. I feel there should always be minorities on the grand jury if only to keep the conscience of the people aware of minority feelings.

202. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 26; *see generally* 1970 STUDY, *supra* note 32, at 113.

203. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 26. The Mexican American grand juror also echoed this response. "If Mexican Americans are not represented [not only on the grand jury] the frustration level will increase and people would find outlets. If people were represented they would feel they had an outlet." *Interview, supra* note 2.

204. *See generally* 1970 STUDY, *supra* note 32, at 114.

psychological consequences. A recent study by the United States Commission on Civil Rights, in particular reference to the Los Angeles County grand jury, stated:

To the extent that the grand jury considers criminal cases, the presence of minority jurors minimizes the possibility that prejudice will affect its deliberations or that laws will not be enforced to protect minority groups. Equally important for minority groups is the grand jury's primary function of investigating and evaluating the administration of local government and the actions of county and city officials.<sup>205</sup>

It is not difficult to perceive how a grand jury which is conscious of minority problems can prevent, punish, or mitigate official or private misconduct toward minority groups. The grand jury possesses the ability to address itself to common minority group complaints.<sup>206</sup> Furthermore, the grand jury has the power to indict anyone for crimes against or affecting minority persons on its own initiative and without the consent of the District Attorney.<sup>207</sup> A conscious and vigilant grand jury would exercise a significant influence in preventing or correcting misconduct toward minorities.

## V. CONCLUSION

The present method of nomination and selection to the Los Angeles County grand jury has failed to provide a body representative of the constitutionally protected Mexican American. Judge-selectors have failed to respond to the growing numbers of this group in the community. Either they have not recognized the viability of the Mexican American in Los Angeles, or they have neglected to take measures to acquaint themselves with members of this group. It is axiomatic that a substantial change must be made in the current nomination and selection procedures to satisfy Fourteenth Amendment dictates and social realizations.

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205. *Id.* at 113. The study continued:

The all encompassing nature of the grand jury's civil investigatory duties appears strikingly from the 1967 Final Report of the Los Angeles County Grand Jury. The Report contains commentary, frequently supplemented by criticism and specific recommendations, on such diverse subjects as: the Aid to Families with Dependent Children welfare program; . . . proposals to install a cafeteria in, and initiate admission fees for, the county museum; . . . debt collection practices of a county hospital . . . and myriad other subjects. *Id.* at 113.

206. *Id.*

207. CAL. PEN. CODE §§ 934-36 (West 1970). However, the sole Mexican American grand juror stated that the practicalities of the 1971 grand jury make these code sections illusory. To initiate an investigation without the consent of the District Attorney necessitates a majority vote of the grand jurors. On a topic concerning a minority problem this could be almost impossible. *Interview, supra* note 2.

Said change of course will not alleviate constitutional infirmities unless the practice of nomination by personal recommendation ceases, for it has been established that unless a sustained effort is made by the selectors to seek Mexican Americans for service, that class will continue to be under-represented to a point prohibited by the Fourteenth Amendment. It is recommended that the present procedure be replaced by a random selection procedure similar to that outlined in the Uniform Jury Selection and Service Act.<sup>208</sup> The random selection procedure could be administered by the jury commissioner and would require selection drawings from every available source.<sup>209</sup> The source lists so obtained should also reveal the ethnic background of each prospective grand juror. These lists would then be published and open to public record. If the source lists were not truly representative of the community, various interested groups could solicit lists for inclusion.

If subsequent events or studies indicate that some Mexican Americans are unqualified for jury service because of an inadequate understanding of the English language, the jury commissioner could call a higher number of Mexican American persons to compensate for the English language disability that eliminates some otherwise eligible grand jurors. This procedure would ensure Mexican American representation on the grand jury. However, an affirmative recognition of the race or ethnic group in selecting a representative jury instills a constitutional problem into the proposed remedy. In order to withstand judicial scrutiny it must first be established that race or ethnic grouping is a relevant consideration in the attempt to achieve and maintain the legally valid end of a representative jury.<sup>210</sup>

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208. The National Conference of Commissioners on Uniform State Laws has modeled a Uniform Jury Selection and Service Act after the Federal Jury Selection and Service Act of 1968, Pub. L. 90-274, § 101, 82 Stat. 54 (codified at 28 U.S.C. §§ 1861-69 (1970)). The policy of the Uniform Act is

that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this Act to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose. See McKusick & Boxer, *Uniform Jury Selection and Service Act*, 8 HARV. J. LEGIS. 280 (1971).

A recent California Senate Bill, S.B. No. 1420 (1971 Reg. Sess.), that would have provided for such a random selection of grand jurors in California was defeated on December 2, 1971. This bill would have amended CAL. PEN. CODE §§ 893, 895 and 896, and repealed §§ 897 and 899.

209. Sources should include voter registration, telephone, utility, and social security lists. Additional sources for minority groups could be obtained from minority organizations such as the Mexican American Political Association, and also from welfare rolls.

210. See *Board of Educ. v. Swann*, 402 U.S. 43, 46 (1971) (school desegre-

The Fourth Circuit has held, in *Wanner v. County School Board of Arlington*,<sup>211</sup> that it is absurd to insist that government bodies may not consider race and racial balance in their attempts to remove the traces of constitutionally invalid systems of discrimination.<sup>212</sup> And while proportional limitation and intentional inclusion of a minority group to grand jury service has been viewed as unconstitutional in *Cassell v. Texas*,<sup>213</sup> the inclusion condemned by the *Cassell* Court may be said to have encouraged discrimination ("debilitative discrimination") rather than to have alleviated discrimination ("ameliorative discrimination"). It appears that ameliorative discrimination was not meant to be prohibited by that Court in light of its strong admonition against racial discrimination.<sup>214</sup> Thus, *Cassell* will not preclude attempts to arrive at an ethnic or racial balance through a selection system which takes race or ethnic origin into account.<sup>215</sup>

Since the remedy proposed herein is in the nature of ameliorative intentional inclusion rather than the proportional limitation denounced by the *Cassell* Court, it should definitely withstand scrutiny. Additionally, the very fact that Mexican Americans have been se-

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gation): "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." See also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 19 (1971); *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 232 (1969).

211. 357 F.2d 452 (4th Cir. 1966).

212. *Id.* at 454. *Wanner* was a school desegregation case. The appellee, Board of Education, attacked the desegregation plan arguing that the plan took race into consideration in redrawing boundary lines. The court dismissed this contention stating:

It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve "consideration of race." When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the "consideration of race" which the Constitution discountenances. *Id.*

213. 339 U.S. 282, 286-87 (1950) [discussed at text accompanying notes 187-198 *supra*].

214. This proposition was expounded in *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), a habeas corpus case wherein the petitioner asserted that purposeful inclusion of Negroes in the grand jury which indicted him was a denial of equal protection. The court denied his application and assertion while distinguishing *Cassell*:

The statements by Justices Reed, Frankfurter and Clark [in *Cassell*] . . . on purposeful inclusion and selection totally without regard to race were all made in the context of proportional limitation. They are neither a part of nor essential to the Court's holding. *Id.* at 21 (footnote omitted).

215. The [Supreme] Court itself has never treated *Cassell* as a declaration against conscious inclusion where this is essential to satisfy constitutional imperatives. Rather, it has been treated as a case of *exclusion* through a system of *limited inclusion*. *Id.* at 21 (footnote omitted).

verely under-represented indicates that affirmative action on the part of the selectors may be the only means to correct this disparity. Such action may also be supported by the expanding federal requirement that a cross section of the community be taken into account in selecting the grand jury.<sup>216</sup> If grand jury selectors are required to take a cross section of the community into account,<sup>217</sup> they must interpret "cross section" to mean various racial, ethnic, economic, sociological and educational groups. As such, ethnic or racial groups would have to be *purposefully included* in any system of grand jury selection which purports to obtain a constitutionally valid outcome. Inclusion should, therefore, be both acceptable and encouraged where its purpose is to obtain a body truly representative of the community.

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216. *Id.* at 14, wherein the *Brooks* court interprets the Fourteenth Amendment to require that a fair cross-section of the community be taken into account when selecting the grand jury. In order to attain this cross-section the court would require that the jury selectors become acquainted with the community's human resources, *i.e.*, significant racial elements of the community. This could not be accomplished without a conscious recognition of the elements' existence. *Id.*

217. See note 196 *supra*.