



Facts Can't Speak for Themselves¹

(Part One)

By Eric Oliver

Every solution should be made as simple as possible, but no simpler.
—Albert Einstein

For more than twenty years, the best minds at work on the nature of legal decision making have been aiming at what is now commonly called the “story model” to explain the mental process producing legal judgments. Replacing the old ideal of decision makers as empty vessels, this model suggests that each decision maker builds a private version of the case story and draws a final decision based on that subjective retelling of the case.

Many legal professionals are well aware of what we now know about how people make decisions, whether those people are judges, jurors or members of panels or boards. But the way they practice preparing for and presenting the best possible case for their clients hasn't really kept pace with what is known about those waiting to sit in judgment of their case—and the potentially unlimited versions of case stories they embody.

In two parts, this article provides straightforward steps to help legal professionals incorporate what we know about the story-building process into more persuasive presentations in bench trials, jury trials, arbitrations, facilitated mediations and other conflict resolution situations.

Part one focuses on:

- How legal decision makers unconsciously construct their own case stories and use them to judge cases. The most significant aspect is that all decision makers, professional or layperson, reauthor their own version of the case story presented to them and go through *several* versions—not just one—before they arrive at the one they will use for deciding; and

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- The fact that legal professionals (attorneys and trial consultants) have yet to make all the adjustments needed to deal with the reality of this story model in their preparation and presentation of case stories in settlement talks, negotiation and at trial.

Part two focuses on:

- How the crafting and communicating of a case as a story can be the most direct and influential way of addressing decision makers' private story versions before they finish constructing the one they use to judge the case.
- How discovering which forms a case story will likely take and how best to present that story later on are best done in structured focus groups, not mock trials or unstructured "kitchen table" focus groups.
- How to construct the best case presentation possible from what the groups provide, using communication techniques designed to influence the process both consciously and outside of conscious reach.

If our stories are the source of decisions producing judgements, then it is important that all professionals in the trial world adjust to that reality.

The most accepted, yet under-appreciated, dynamic in story construction is the interplay between our consciously available facilities and the majority of processing that happens outside of and prior to conscious knowledge or direction. If we truly want insight into the way people rebuild case stories and render legal judgments, we need to respect the very different rules that the two parts of every decision maker's mind employs.

Seeds of Judgment

Decision makers at every level of the justice system make decisions about conflicts in much the same way. No matter how we may think we do it, *we each make up a story*. If our stories are the source of the decisions

producing judgments (both formal research and simple observation are pretty well settled on that point), then it is important that all professionals in the trial world adjust to that reality.

From the start of a case's life, the attorneys and other professionals developing it will need to present a story wherever that case will be heard and seen. You still have to adhere to the system of rules, procedures, and laws, and you are still obliged to work with and through

the facts in evidence. Yet, that is just part of the process, not the end.

An equally important part is the development and delivery of the case *as a story* to meet the human

decision makers where jurors, judges and mediators will be starting the judgment process. The traditional paradigm of weighing every fact after all have been submitted and the law has been imposed on the process has given way in scientific and legal communities to a different model of how it's done. This model for legal decision making accepts that the human experiences of the decision maker and the intellectual goals of impartiality need to coexist. In a conflict, the former often prevail over the latter.

This appreciation of the process from the decision maker's viewpoint was well articulated in 1960 by Judge E. Barrett Prettyman:

What manner of mind can go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events? The human mind cannot do so.

Most professionals working in the trial field have yet to fully adjust their practices to the

human truth cited by Judge Prettyman. Not only will the judge or juror of the presentation be formulating his or her own story in order to make sense of each party's story: much of the process will be happening in the moment delivery takes place. It often has as much or more to do with *how* the story is presented as with the discrete facts, *and* with the fact that judge and juror will engage both the conscious and other-than-conscious faculties at the same time. Those processes include the intellect

as well as perceptions, emotional reactions, memory, beliefs, and imagination. In the end, it is the decision makers' own versions that determine the meanings upon which

The concern is how to create the story presentation that most effectively influences the whole subjective process in the best interests of the client.

they will base their decisions, rather than the meanings the lawyers or parties may have drawn for themselves and tried to communicate. Even though it is widely acknowledged today, most professionals still fail to account for the fact that decision makers base their decisions upon their own versions of case stories.

Jury researchers have been proposing models centered on story formation for more than twenty years. For far longer, students of language and culture have held that the drive toward *narrative* is the path we take to learn and pass on both. Yet, few lawyers and not all trial consultants have considered the adjustments needed to the accepted way of crafting and communicating a client's case in order to catch up to what we now know. While good attorneys always find time to learn and develop the facts in a case, few put comparable effort into learning and developing the case story. Still, it is the story and not the facts that determines verdicts and settlements for decision makers.

Terrain of the Story Context

The ground where the seeds of a decision will be planted lies between the ears of each decision maker. It is the life experiences and the stories generated and valued from those experiences of each person that will decide the case. Although the same observations apply to judges, mediators, and negotiators who may or may not be attorneys, let's consider the subjective

context of these case stories from the perspective of the juror.

Once selected and seated, each juror begins struggling to make sense of the case stories in a way that is personally meaningful—both as an individual and a member of a functioning jury. Influence as a group member begins from the outset as well, although jurors are instructed not to discuss case facts aloud within the group until deliberations begin.

However, research over time has shown some remarkable consistencies in this “between-the-ears” territory in which all case stories will be redeveloped and then decided. It has

demonstrated that jurors take their jobs very seriously, despite feeling overburdened and ill-helped by the system that bestows these jobs. Some research indicates that their group status and the desire to do their job well may tend to moderate some otherwise strong personal biases they bring to the courthouse.

Ultimately, most jurors have a very strong desire to “get it right” and not be fooled in the process. As jurors do their jobs, they formulate several subjective story versions during the presentation, not afterwards. It is through the themes of these stories they construct that they will deliberate toward their verdict. What is not always understood is that about half the deliberation time will be spent alluding to their own life experiences and the lessons drawn from them so as to provide a meaningful context for the story themes and content at issue.

Of course, these themes emerge through each person “referencing” his or her own life experiences and lessons to develop a personal version of the case story, and coming up with a theme after most of the initial referencing has been done unconsciously. But that part of the process is not as obvious as others. The structures of their own inner worlds tend to shape the final arrangement of the case stories they hear, regardless of the intentions, backgrounds or experience of the advocates working before them.

A seemingly trivial but actually serious reminder of this separate story context, always at work in every juror's mind, is this frequently retold exchange between a lawyer and witness:

Attorney: Is your appearance here today pursuant to a subpoena you received?

Witness: No. This is how I always dress.

If the goal is to pass on the most effective story presentation for the *receivers*, should that answer ever be thought of as "wrong"? Each juror builds his or her own story from his or her own unique perspective. Thus no two will be exactly alike, although often consensus conclusions will be reached from widely different paths.

The path each person travels is not composed of the extremes imagined by courts in the past, nor of the presumed bias many lawyers and other professionals have contemplated in more recent years. The process is not a passive one of collecting all facts without considering them until so instructed. But neither is it a preemptive act of imposing preexisting biases or prejudgments from a predictable set of life characteristics sorted into demographic, sociographic, or psychographic piles.

People are usually neither totally objective nor totally subjective. The lessons learned from their individual lives cannot be wholly disengaged from their brains as they receive a case story. But neither are they the first and last word most jurors hear, turning deaf ears to any differences in the case story from their own life stories.

Basic Story Elements

There are certain, basic elements common to any story that lawyers bring to decision makers, as well as to the stories decision makers simultaneously construct to understand the lawyers' offerings. Whether or not these basic story

elements are purposely provided, these elements will appear in almost all stories people tell themselves and each other. Because they are so basic, people will usually fill them in even when no real effort has been made to include them. This gap-filling feature of story formation is quite well known, but again, it is not yet something that many professionals regularly take into account when they work up a case. Wherever someone perceives that these elements are missing or only partly provided by the case story teller, they will be fully filled in by the story's judges. The question for legal professionals trying to bring the best story forward on a client's behalf is not whether to craft

and communicate a story, but how to find the best one for each case, and how to put its elements across.

Filling in gaps in the immediate story and the distortion of our memories of that story after the fact, with and without the help of someone questioning us

Jurors can vote against one side's story even more than voting for the one that prevails on the verdict form.

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about it, are both well-known phenomena. We all *construct* a good deal of the case stories we believe we simply receive. The construction process is affected by our memories, our interaction with our environment (surroundings, speaker, story context), and our perceptual apparatus, as well as by the purely verbal content of the message and the connections it may prompt for each listener. In fact, this constructive activity continues each time we recall the message or experience, singly or in conversation, filling in perceived gaps and changing the story yet again.

It is not the facts in evidence but stories the decision makers build from, around and in spite of those facts that determine their ultimate decisions. The concern for trial professionals is not whether stories are going to be constructed from their written or spoken case presentations. They will. The concern is how to create the story presentation that most effectively influences the whole subjective process in the best interests of the client. When you accept the fact that all decision makers are rewriting your story, then the most reasonable choice would be to respond in kind and purposely use your presentation to influence their story building. To give your effort some direction, you might consider decision makers' use of the following basic story elements:

Theme: The theme of a story provides the means to determine what is important, what is a priority and what is not. The theme a decision maker creates for a case story provides a bridge to the personal meaning that will be derived. It should answer the question, "What is this story really all about?"

Scope: The story's scope covers the full reach of time, actions, and individuals involved. The scope a decision maker creates for a case story provides the personal frame of reference to be applied, the context in which the story plays itself out. It should address the question, "How far does this story reach?"

Point of View: Motive is a factor in both civil and criminal cases. In order to determine cause, people need what trial consultants call a "locus (center) of control of the significant actions." The point of view that a decision maker creates for a case story provides a direction in which to look for responsibility. It helps answer the question, "Who, or what, is in the center of this story?"

Sequence: The story sequence is a potent and frequently underutilized lever that focuses attention and helps establish significance of one fact over another. The sequence a decision maker adopts for a case story's events sorts the facts and the rules governing them into their meaningful relationships for that person. Strategic sequencing frames jurors' opinions of, "What happens in this story?"

No one who hears and sees a particular case story believes 100 percent in every single detail of that case. Like the lawyers, the decision makers can decide in favor of a case story despite actively disliking—or disbelieving—certain parts of that story. People can and do decide cases both because they favor one side's case or because they dislike the other side's; they can vote *against* one side's story even more than voting *for* the one that prevails on the verdict form.

While the law likes to imagine clear separations between criminal and liability claims, between a document exhibit and a demonstrative aid, or between an argument and a statement, all human beings, regardless of their training, tend to blend the various parts of the process in varied and unexpected ways. So *how* a case story is crafted is extremely important in helping people draw their own meanings in the most advantageous way to the client. But it is important to realize from the start that the text of the story cannot and does not convince by itself. The *telling* of the story leaves inevitable marks on the meanings people draw from it as well. People blend all the elements as they create their own versions of the text, of the telling and

of the teller. Ultimately, someone may prevail because the decision maker chose to vote more against one story than for another, despite what the rules specify about burdens and proofs.

Each listener formulates a personal version of the case story from what he or she receives of what was presented, and that always includes how the presentation was made. Though they do not appear in the *Pattern Jury Instructions*, or in any statute for that matter, the basic story elements of theme, scope, viewpoint and sequence are essential in crafting a case story that is more likely to be appreciated as you would like it to be. There is another area in which professional practice has not caught up with the realities of juror and judge decision making, since facts are not a story in themselves, nor do they present a cohesive story in the aggregate. It is the *story* brought to bear delivering the facts, rather than the facts themselves, that most influences how any case is perceived, processed, and then decided.

Part two of "Facts Can't Speak for Themselves" will appear in next month's issue of *The Jury Expert* (Volume 18, Issue 12).

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Quick Courtroom Tips

By
Bob Gerchen

Think in Terms of "Jurors," Not "Juries"

I'm often asked, "What do juries think about...?" or, "How do juries react to...?"

In the words of the immortal Aussie band ABC, I don't know the answer to that question. That's because there is no monolithic entity called "jury." A jury is a collection of individuals, each replete with his or her own attitudes, beliefs and life experiences.

It's your job to explore those attitudes and experiences in voir dire.

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For more information about Bob Gerchen's book, 101 Quick Courtroom Tips for Busy Trial Lawyers, visit www.CourtroomPresentationTips.com.

From the Editor:

Thank you to the readers who completed our survey last month! We truly appreciate your comments and feedback. We will be reporting some of the results in upcoming issues of TJE and implementing some of your suggestions very soon. The winner of our iPod giveaway is Artemis Malekpour of Chapel Hill, NC. **Congratulations Artemis!**

Also, due to editorial space considerations, Diane Wyzga's column *Wyzga on Words* will not appear this month. Look for Diane's column in the December 2006 issue.

Ten Tips to Better Courtroom Visuals

By Ralph J. Mongeluzo, Esq.

Trial lawyers are masters of language, both verbal and written. It is with words that we transmit and receive information. But many jurors on a typical panel will assimilate information more effectively when we use visual tools in addition to words, such as photographs, video, illustrations, charts and animations. Here are some quick tips to maximize your effectiveness in the use of courtroom visuals to educate and persuade your jurors:

1. *Use information design, not artistic design.* Your purpose in creating courtroom graphics is to communicate the facts that jurors need to reach the desired conclusion. Images that are clean and straight-forward will be more effective than those that are pretty and fancy.
2. *Establish consistency with a template.* Before creating demonstratives, determine uniform fonts, sizes and colors for the title, sub-title and body of each exhibit. Make selections to enhance visibility, understandability and impact—not aesthetics.
3. *Meet your jurors' expectations.* There is a difference between slick and high-quality. In the 21st century, your jurors expect a high-quality visual presentation, especially from a well-heeled client. “Dumbing down” your graphics for fear of looking like Goliath to your opposing David may send the wrong message—that your case is weak.
4. *Illustrate your points, don't just list them.* Both comprehension and retention are enhanced when visual images are used to convey information. “A picture is worth a thousand words” is more than just a cliché. It works.
5. *Spoon-feed, don't dump.* Limit the amount of information on each demonstrative so you can feed your jurors small digestible bits. If you present a single graphic with too much data, such as a timeline with dozens of events, at best you will lose the attention of some jurors while they try to read all the entries. At worst, your jurors will be overwhelmed by TMI—too much information.
6. *Break the monotony with varied presentation media.* Some demonstratives are best presented on big hardboards. Others can be projected via an Elmo projector. Document-heavy cases require electronic presentation software such as Sanction or TrialDirector®. Use a multimedia approach for maximum effectiveness.
7. *Use different colors to send different messages.* The choice of color has a subtle but measurable emotional impact on the viewer. This includes not only the use of reds, greens and blues, but also the use of white space, also known as negative space. If you don't have a graphics consultant, browse the internet for color connotations.
8. *Engage your jurors with motion and interactivity.* The cost of video, animation and Flash programming has declined substantially in the last decade. The same jurors who are engrossed by moving pictures in the theater, on TV and on the Internet are sitting on your panel.
9. *Test visual designs, themes and concepts before trial.* Focus groups and mock trials are ideal pretrial venues to gauge the effectiveness of your courtroom visuals. But if you don't have the opportunity for formal simulations, at least try them out on three to five people in the office or at home who are unfamiliar with the case—preferably non-lawyers.
10. *Practice makes perfect.* Integrate your demonstratives into your practice sessions for opening and closing, and make sure that your witnesses are thoroughly familiar with any visuals you plan to show while they are on the stand.

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Immigration Law: Implications on the American Jury System

By Samantha Schwartz

The United States prides itself on its diverse population, including a significant population of immigrants who arrive hoping to achieve the American dream and/or seeking asylum to protect themselves from persecution because of their race, religion, nationality, social group membership, or political opinion. Currently, however, these individuals are in the hot seat as Congress decides how to proceed with the countless number of illegal immigrants who reside in this country. Several controversial issues lie at the heart of the debate. Some are quick to point out that other U.S. habitants benefit from the lower cost of goods and services attributive to immigrant workers who are willing to work for lower wages with minimal benefits, if

any at all. Others argue that illegal immigrants are only responding to a globalized economy that entices them to work here illegally, particularly with high unemployment rates and a sense of no other

recourse in their homelands. Despite the benefits to the U.S. and sympathies for illegal immigrants, some are frustrated by the lack of effective sanctions on employers who knowingly hire and exploit undocumented workers. Others are hesitant to accommodate illegal immigrants because that would require resources that are already spread thin for those who came here legally.

Notwithstanding these pertinent social issues, immigration has significant implications for the legal system as well. Changes in law and policy over the past decade, coupled with the horrific events of September 11, 2001, have not only made it increasingly difficult for immigrants to attain or

maintain lawful status in the United States, but they have had to endure a zero-tolerance approach to immigration law enforcement as well. At the same time, increasing numbers of immigrants continue to reside here legally. Further, there is little evidence to believe that there will be a significant decrease in the immigrant population anytime soon, particularly when the government is considering how it may shift its immigration policies to accommodate a portion of those who reside here illegally.

One consequence of the increased attention to immigration policy is directly related to a vital pillar of our justice system: Trial by a fair and impartial jury. Current immigration status calls into question Americans' constitutional right to a *representative jury* (i.e., a jury drawn from a fair cross section of the community). The problem is not unique to the immigrant population; other racial/ethnic minority groups, such as African-Americans, have been associated with underrepresentation on juries as well.¹ However, 2000 U.S. census

data indicates that Latinos are the fastest growing in 42 of the nation's 50 largest cities, a trend that is likely to exacerbate underrepresentation problems beyond reprieve.² This imminent threat forces us to reevaluate how

immigration, and the already existing danger of jury underrepresentation, will thwart the fundamental ideals of the American Jury System—if not in the present, certainly in the near future.

Preservation of Representative Juries

Ideally, the jury system ensures that a defendant is judged by a group of peers and it allows ordinary citizens the opportunity to participate in a process of government, precluding the exercise of arbitrary power. The public grows cynical about the justice system when verdicts are based on a disproportionate cross-section of the community. In this respect, racial diversity may be comparably more important on juries than in other contexts, mainly because juries decide a person's fate with

*By barring a significant portion
of the community from jury service,
the legal system will limit the jury
system's ability to ensure a fair
cross-section of the community.*

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¹ Kutz, A.L. (2005). A jury of one's peers: Virginia's restoration of rights process and its disproportionate effect on the African American Community. *William & Mary Law Review*, 46, 2109-2152.

² U.S. Census Bureau, 2000 as cited in Walters, R.C., Marin, M.D., & Curriden, M. (2005). Jury of our peers: An unfulfilled constitutional promise. *SMU L. Rev.*, 58, 319-355.

criminal or civil penalties. Given the potentially consequential decisions entrusted to juries, the public may perceive underrepresented juries as a means for majority group members to oppress minority group members by manipulating the legal system, wherein lies the heart of justice.

Two constitutional amendments are posited to deter such (perceptions of) injustice. Under the Sixth Amendment, a defendant has the right to a jury selected from a fair cross-section of the community. Under the Equal Protection Clause of the 14th Amendment, potential jurors have the right not to be excluded from jury service based on their group membership. Often these constitutional rights are discussed in the context of *Batson* challenges of venire member excusals based solely on group memberships such as gender or race. However, an increasing concern is that the right to representative juries is threatened by economic strife and selection procedures as well as citizenship and language requirements for jury service. These restrictive mechanisms for jury eligibility tend to function as proxies for race-based removals because they automatically disqualify disproportionate numbers of ethnic/racial minority groups, Latinos in particular.

Undoubtedly, the number of immigrants of Latin American descent has been increasing astronomically. Two studies, The Dallas Morning News and Southern Methodist study as well as the Vinson & Elkins, L.L.P. (V&E) pro bono study, report compelling support for the disproportionate underrepresentation of the Latino population on jury panels and venires in both criminal and civil trials.^{3,4} For example, the V&E study reported that Latinos made up approximately seven to 12 percent of the jury venires even though they comprised approximately 33 percent of the populations in Dallas and Houston. By barring a significant portion of the community from jury

service, the legal system will deny input from a segment of the community and will limit the jury system's ability to ensure a fair cross-section of the community. Thus, as the United States continues to grant citizenship to Latin American immigrants, in particular, the inherent language barriers and insufficient compensation for jury service pose an increasing threat to our jury system.

Taking Action

Some of the appropriate reforms are outside of courts' and counsels' control, resting instead on legislators and on non-English speakers' amenability to overcoming language barriers.⁵ First, U.S. citizenship is required to participate in jury service. As discussed above, many Latinos may not have citizenship yet and they may, in fact, be illegal. Thus, the Legislature would have

*Trial by a fair and impartial jury
remains a fundamental and
high-valued component of the
U.S. jury system.*

to consider the benefits and costs of expanding jury service eligibility to noncitizens and what that would mean for illegal immigrants. Among the Latinos who have acquired citizenship

status, many have found it unnecessary to learn the English language. Federal law requires that jury-eligible individuals must be able to read, write, understand and speak English. The Supreme Court sanctioned the use of peremptory challenges to strike prospective jurors based on language proficiency, including bilingual individuals.⁶ In this way, language-speaking ability operates as a convenient proxy for race because it excludes a disproportionate amount of Latinos from jury service without question. To complicate matters, the costs necessary to accommodate non-English speakers on a jury would be exorbitant.⁷ The challenges raised by citizenship and language requirements for juror eligibility are far from inconsequential. Arguably, taking action on these issues alone would provide for significant progress in juror representation efforts.

Nevertheless, court officials and attorneys are also well-poised to make significant progress

³ Walters, R.C., Marin, M.D., & Curriden, M. (2005). Jury of our peers: An unfulfilled constitutional promise. *SMU L. Rev.*, 58, 319-355.

⁴ Walters, R.C. & Curriden, M. (2005). Jury of one's peers? Investigating underrepresentation in jury venires, *Judges Journal*, 43, 4, 17-21. Retrieval at: <http://www.abanet.org/jd/publications/jjournal/2004fall/home.html>

⁵ Johnson, K.R. (2005). Hernandez v. Texas: Legacies of justice and injustice. *Chicano-Latino Law Review*, 25, 153-198.

⁶ Hernandez v. New York (1991) 500 U.S. 352.

⁷ Johnson, K.R., *id.*

in preserving the right to a representative jury. For example, many jurisdictions are prioritizing representative juries among their jury reform objectives. Moreover, the ABA recently implemented four of 19 principles in its new model standards for jury service to address its concerns with jury representativeness and diversity.⁸ Thus, these efforts reflect the recognized responsibility of courts and attorneys in safeguarding the constitutional right to a representative jury. Although there are some issues that are more in the court's control than that of an attorney's, attorneys still may play integral roles in the jury selection process and in objecting or appealing to the court for its illegitimate jury selection procedures.

Modern racism is much more subtle and difficult to detect today than it was only a few decades ago.

Respective to jury selection, the Supreme Court ruled in *Batson* that prospective jurors could not be removed based on their race or other group membership. Despite this advancement, it is not difficult for an attorney to find a race-neutral justification if the court requires one. Attorneys may focus solely on their immediate client's best interest without sensitivity to the accumulative implications that would disservice the American Jury System in the long term. Some attorneys may knowingly violate the *Batson* doctrine when they provide a race neutral justification for such an excusal, but in most cases, attorneys may not be aware of their biased reasoning at all.⁹ That is, modern racism is much more subtle and difficult to detect today than it was only a few decades ago. Individuals may be perfectly capable of sympathizing with a victim of injustice and willing to promote racial equality. Based on their support of these (now socially endorsed) positions and others, they cannot conceive of themselves as prejudiced or discriminatory in any way. In turn,

they may not realize that someone else's race is influencing their judgments, perhaps indirectly through the race neutral justification they perceive as legitimately based. Researchers have developed a range of measures to detect such unconscious biases in people's judgments of others.¹⁰ Attorneys need to be conscientious of these prevalent findings. Further, attorneys need to re-evaluate their juror excusal decisions in good faith to ensure that they are truly justified and without bias of the potential juror's race, or other group affiliation for that matter.

This is not to suggest that attorneys must strategically select or disqualify jurors to represent the racial or

ethnic proportions of the community from which the venire is drawn. In fact, any efforts to do so may backfire on the grounds that such jury selection procedures would violate the Equal Protection Clause for the very same reasons described above. However, some legal commentators argue that the harms caused by removing potential jurors due to their ethnicity's overrepresentation in the venire are less significant than those caused by the public's perception of an underrepresented jury.¹¹

A second way for attorneys to ensure that there is a fair cross section of the jury is by appealing to the court when judicial officials do not recognize the concerns of an underrepresented jury. For example, the V&E study's findings were used to appeal several convictions by juries that were mostly, if not entirely, comprised of whites.¹² Similar appeals have been made in other parts of the United States, such as Los Angeles.¹³

Under *Duren v. Missouri*,¹⁴ the Supreme Court required three elements to establish a violated right to a representative jury:

⁸ Principles for Juries and Jury Trials, American Bar Association, available at <http://abanet.org/juryprojectstandards/principles.pdf> (last visited October 10, 2006).

⁹ Page, A. (2005). *Batson's blind-spot: Unconscious stereotyping and the peremptory challenge*. *Boston University Law Review*, 85, 155-283.

¹⁰ Karpinski, A. & Hilton, J. L. (2001). Attitudes and the implicit association test, *Journal of Personality and Social Psychology*, 81, 5, 774-788. Also see <https://implicit.harvard.edu/implicit/demo/background/index.jsp>

¹¹ King, N.J. (1993). Racial jurymantering: Cancer or cure? A contemporary review of affirmative action in jury selection, *New York University Law Review*, 68, 707-780.

¹² Walters, R.C. & Curriden, M., *id.*

¹³ Dooley, L.G. (2004). The dilution effect: Federalization, fair cross-sections, and the concept of community. *DePaul Law Review*, 54, 79-118.

¹⁴ 439 U.S. 357 (1979).

1. the allegedly excluded group is recognized as a “distinctive” group in the community,
2. the representation of this group in the jury pool is not fair and reasonable compared to the number of that group’s members in the community, and
3. the under-representation is systematic, or inherent to the particular jury selection process in use.

Thus, the members of the jury are not required to reflect the proportions of “distinctive” groups in the community. Rather, the courts are required to use a jury selection process that does not systematically exclude particular groups more than others.

Systematic exclusions of distinctive groups often occur indirectly through venire selection procedures and qualification requirements that coincidentally restrict minority group members’ eligibility for jury duty. Two consistently noted procedural errors are in the court’s compilation of source lists from which the venire members are drawn, and the court’s compensation for jury duty. Respective to source lists, many courts rely solely on voter registrations and drivers’ license records, which are known to exclude significant proportions of Latinos.¹⁵ These source pools fail to maintain the addresses of community members who move frequently, resulting in many undeliverable summonses. A potential explanation for this exclusion of Latinos is that they are climbing the social ladder at a pace allowing them to move into nicer residences almost annually. When the already disproportionate venire members are successfully summoned to court, the compensation is often too little for low income earners, more so for those whose employers do not compensate them for work days missed due to jury service. The extent of overlap between low income earners and the Latino population also explains the disproportionate representation of Latinos on jury panels.⁴

Appeals to the court may recommend ways to improve jury representation, if not to establish that such an improvement is feasible. Recently, New York courts made impressive strides in this respect,

setting an example for other courts to follow.¹⁶ Not only did they increase juror compensation to \$40 so that those at an economic disadvantage could participate in jury duty, but they required larger businesses to pay employees for workdays missed due to jury duty. In addition, they overhauled the procedures used to compile and maintain source pools by expanding source lists from voter registration and drivers license databases to include lists from New York state income tax payers as well as state unemployment and welfare rosters. Although these changes required substantial investment, New York courts noted some cost-saving reforms to counter the increased costs.

The existing problems with jury representation have become more pronounced with the increasing immigrant population in the United States and the recent controversies over immigration policies. Trial by a fair and impartial jury remains a fundamental and highly-valued component of the U.S. jury system. The 6th Amendment and the Equal Protection Clause operate to safeguard this component as a Constitutional right, but it may be difficult to uphold when violations tend to be subtle or indirect. Attorneys can help by being conscientious and sensitive to these issues in their reasoning to justify juror excusals. Moreover, attorneys and judicial officials can remind each other of the importance of these issues when problematic venire member and jury selection procedures are known to systematically exclude a distinctive group of the community. The public’s perception of the jury system is of critical importance to its confidence in the legal system. As the United States continues to accommodate immigrant populations, particularly Latinos, judicial officials and attorneys must be able to recognize what constitutes a fair cross-section of the community and whether the jury selection procedures do not detract from a historical ideal of the U.S. Jury System—the right to a representative jury.

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¹⁵ Walters, R.C. & Curriden, M. *id.*

¹⁶ Curriden, M. & Percy, A. (2001). No excuses. *Dallas Morning News* at A1.

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