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## Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection

Nina W. Chernoff

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# Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection

NINA W. CHERNOFF\*

*This Article exposes a surprising doctrinal distortion that has unfolded since the Supreme Court first established the Sixth Amendment standard for the right to a jury selected from a fair cross-section of the community. A significant number of courts are erroneously applying the test for a violation of the Fourteenth Amendment's equal protection guarantee to Sixth Amendment claims. As a result, criminal defendants are being deprived of the unique Sixth Amendment fair cross-section right, which encompasses more than just protection from discrimination.*

*Under the Sixth Amendment, a defendant need not allege that any state actor discriminated in the jury selection process. Instead, a defendant can establish a prima facie violation by showing that the underrepresentation of a distinctive group in the jury pool is inherent in the selection process, whether by accident or design. The equal protection clause, in contrast, demands evidence of discriminatory intent.*

*This Article reveals that at least ten federal circuits and nineteen states have erroneously denied defendants' Sixth Amendment claims for failure to satisfy the Fourteenth Amendment's discrimination requirement. This Article also uses an original survey of federal and state cases to explore the potential scope of the problem. In over one-third of the relevant cases, courts denied defendants' fair cross-section claims for failing to meet equal protection standards.*

*In contrast to scholarship arguing that the underpinnings of the fair cross-section standard need to be revisited, this Article asserts that the key to enforcing the cross-section guarantee is not to change the standard, but to apply it consistently with the Sixth Amendment and Supreme Court doctrine.*

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\* Associate Professor, CUNY School of Law. I am tremendously grateful for the insights and encouragement of Tony Thompson, Kim A. Taylor-Thompson, Erin E. Murphy, Louis Michael Seidman, Katie Tinto, Anna Roberts, Lily Shapiro, Teddy Rave, Jamila Wideman, Dr. Jay Kadane, the members of the NYU Lawyering Scholarship Colloquium, and the late, brilliant, Jonathan Souweine. I am also thankful for the research assistance of Jared Davidson and Ganaraj Hegde, as well as Whitney Flanagan and Krystan Hitchcock.

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## INTRODUCTION

Sixth Amendment doctrine is currently evolving in contravention of the Constitution and Supreme Court case law. The Sixth Amendment does not require a defendant challenging racial underrepresentation in the jury system to show evidence of discrimination. Yet courts across the country have denied claims with holdings like this one: “Because appellant has failed to demonstrate systematic *discrimination*, we reject his Sixth Amendment claim.”<sup>1</sup>

This Article demonstrates that federal and state courts have improperly imported the discrimination requirement of the Fourteenth Amendment’s Equal Protection Clause into Sixth Amendment analysis and are using this contaminated standard to reject criminal defendants’ claims.<sup>2</sup> As a result, defendants are being deprived of the unique protections of the Sixth Amendment right to a jury selected from a fair cross-section of the community.

Under the Sixth Amendment, a person on trial for a criminal offense has a constitutionally protected interest in “having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him.”<sup>3</sup> As the drafters of the Constitution recognized—and the Supreme Court has consistently reinforced—a jury made up of community members acts as an “inestimable safeguard,” screening out prosecutions that result from the malice, mistakes, or apathy of government officials.<sup>4</sup> The Supreme Court has accordingly concluded that the Sixth Amendment “necessarily contemplates an impartial jury drawn from a cross-section of the community.”<sup>5</sup>

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1. *State v. Jones*, 744 N.E.2d 1163, 1173 (Ohio 2001) (emphasis added).

2. The Fourteenth Amendment applies only to states, but the Fifth Amendment is directly applicable to the federal government and contains an equal protection component. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In this Article, references to the equal protection guarantee of the Fourteenth Amendment should be read as encompassing the counterpart right in the Fifth Amendment. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (“This Court’s approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment.” (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)) (alteration in original)).

3. *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972); *see also Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (“The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine . . .”).

4. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). *See, e.g., Akhil Reed Amar, The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 46–65 (2003).

5. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946); *see also Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (“[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.”).

The fair cross-section standard reflects the Court's recognition that—separate and independent from the harm of discrimination—the absence of any distinctive group in the community “deprives the jury of a perspective on human events” that may be critical to evaluating a criminal case.<sup>6</sup> It is the *community's* judgment against which the government's claims are to be tested. When juries are not selected from a fair cross-section of the community and thus fail to fairly and reasonably represent distinctive groups in the community like African-Americans and Hispanics, the defendant's Sixth Amendment right to an impartial jury is violated. Representative juries, moreover, are critical to public confidence in the justice system.<sup>7</sup>

The Court established the standard for a violation of the fair cross-section right in the 1979 case of *Duren v. Missouri*.<sup>8</sup> Under *Duren*, a criminal defendant alleging a cross-section violation must satisfy a three-prong prima facie test by showing that (1) “the group alleged to be excluded [from the jury system] is a ‘distinctive’ group in the community,”<sup>9</sup> (2) “the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community,”<sup>10</sup> and (3) “this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”<sup>11</sup> “Systematic” means “inherent in the particular jury-selection process utilized” and does not require evidence of intentional exclusion.<sup>12</sup>

The Sixth Amendment fair cross-section guarantee is distinct from the Fourteenth Amendment right to equal protection of the laws. The Equal Protection Clause protects against discrimination by state actors.<sup>13</sup> It does not protect the broader interest in reasonable representation in the jury pool; it is limited to the narrower goal of prohibiting discrimination.<sup>14</sup> That “distinction is important. An Equal Protection challenge concerns the process of selecting jurors, or the allegation that

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6. *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

7. See *Taylor*, 419 U.S. at 530 (“Community participation [is] . . . critical to public confidence in the fairness of the criminal justice system.”); see also Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1049 (2003).

8. 439 U.S. 357, 364 (1979).

9. *Id.*

10. *Id.*

11. *Id.*; see also *Berghuis v. Smith*, 130 S. Ct. 1382, 1388 (2010).

12. *Duren*, 439 U.S. at 366; see also *id.* at 371 (Rehnquist, J., dissenting) (“[U]nder Sixth Amendment analysis intent is irrelevant . . .”).

13. See *infra* Part I.

14. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (“[T]he central concern of the . . . Fourteenth Amendment was to put an end to governmental discrimination on account of race.”).

selection decisions were made with discriminatory intent. The Sixth Amendment, on the other hand, is concerned with impact . . . .”<sup>15</sup>

When defendants claim that their jury was selected in violation of the Sixth Amendment fair cross-section right, they are frequently objecting to the systematic exclusion of African-Americans and Hispanics,<sup>16</sup> and their claims are usually denied.<sup>17</sup> The most straightforward conclusion to draw from the consistency of the denials is that people of color are fairly and reasonably represented in jury selection systems in proportion to their population in communities. But there are at least two reasons to explore this Article’s alternative hypothesis that courts are erroneously bestowing constitutional seals of approval on systems that fail to satisfy the Sixth Amendment and the *Duren* standard.

First, some skepticism may be in order where courts consistently conclude that the representation of people of color is “fair and reasonable” when research demonstrates—just as consistently—that African-Americans and Hispanics are underrepresented in jury systems across the country. Indeed, federal and state courts “throughout the country have found minority underrepresentation in jury composition, most notably in the makeup of the jury pool from which the jury

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15. *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (emphasis omitted), *overruled on other grounds by In re United States*, 426 F.3d 1 (1st Cir. 2005); see *infra* Part I.B.3. The scope of the two standards also differs: Equal protection extends to would-be jurors who are denied the opportunity to serve on juries by discriminatory state actors, while the Sixth Amendment protects only criminal defendants. See *infra* Part I.

16. In my survey, for example, discussed *infra* Appendix, 84 of 167 cases (74%) alleged the exclusion of African-Americans and/or Hispanics. For that reason, this Article focuses on the underrepresentation of African-Americans and Hispanics, although the fair cross-section right applies to women, *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975), and may also apply to other distinctive groups, see, e.g., *United States v. Yazzie*, 660 F.2d 422, 426 (10th Cir. 1981) (holding that Native Americans are a distinct group). Claims regarding the exclusion of African-Americans and Hispanics also seem particularly salient because those two groups are otherwise overrepresented in the criminal justice system. See *United States v. Pion*, 25 F.3d 18, 27 (1st Cir. 1994) (Torruella, J., concurring) (“[T]he true distortion of ‘reality’ is the failure of the criminal system, before which is tried a large number of persons from an ethnic group, to include within its mechanisms the peers of those charged, at least in some reasonable measured proportion to their membership in the population.”).

17. See, e.g., Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 U. PA. J. CONST. L. 931, 948 (2011) (“[D]efendants have had little success in federal courts raising Sixth Amendment claims that the juries in their cases were selected from venires that did not reflect a ‘fair cross-section’ of the community. The same has been true for claims raised in state courts across the country.” (footnote omitted)); Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 797 (2011) (“[T]he overwhelming majority of fair, cross section claims have failed . . . .”); Robin E. Schulberg, *Katrina Juries, Fair Cross-Section Claims, and the Legacy of Griggs v. Duke Power Co.*, 53 LOY. L. REV. 1, 18 (2007) (“[J]ury selection systems . . . have been virtually immune from challenge, even if African-Americans were persistently underrepresented on venires.”). The data from my own survey are consistent with the literature. See *infra* Part II.

ultimately is selected.”<sup>18</sup> Not every disparity is of constitutional magnitude, nor does any particular statistic prove that a case is wrongly decided. But the consistency of data that courts themselves have produced, contrasted with the consistency of the outcome of fair cross-section claims, invites scholarly scrutiny.

Second, a closer look at fair cross-section claims is also warranted because some courts, even while denying defendants’ claims, have admitted to being disturbed by the evidence of racial disparities in jury systems. For example, courts have acknowledged that the claims they are denying demonstrate “real problems with the representation of African-Americans on our juries, and the crisis of legitimacy it creates,”<sup>19</sup> and describe the evidence of underrepresentation as “disquieting,”<sup>20</sup> “troubling,”<sup>21</sup> and “worthy of concern.”<sup>22</sup> Some courts have gone further,

18. STATE JUSTICE INST., THE NEB. MINORITY & JUSTICE TASK FORCE, FINAL REPORT 17 (2003) (“[M]any researchers have found that this is ‘the rule’ rather than the exception.”); *see, e.g.*, FLA. SUPREME COURT RACIAL & ETHNIC BIAS COMM’N, “WHERE THE INJURED FLY FOR JUSTICE”: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 13 (Deborah Hardin Wagner ed. 1991) (“The present system of selecting jurors . . . does not result in juries which are racial and ethnic composites of the community.”); PAULA L. HANNAFORD-AGOR & G. THOMAS MUNSTERMAN, NAT’L. CTR. FOR STATE COURTS, THIRD JUDICIAL CIRCUIT OF MICHIGAN JURY SYSTEM ASSESSMENT I (2006) (“[T]he proportion of African-Americans in the . . . jury pool was approximately half of what was expected given their representation in the community.”); MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., FINAL REPORT 32 (1993) (“[J]ury pools rarely are representative of the racial composition of our communities.”); PA. SUPREME COURT COMM. ON RACIAL & GEND. BIAS IN THE JUSTICE SYS., FINAL REPORT 54 (2003) (“[Jury selection policies] fail at each step of the process to include a representative number of minorities.”); S.D. EQUAL JUSTICE COMM., FINAL REPORT AND RECOMMENDATIONS 8 (2006) (“Juries in South Dakota rarely represent the racial composition of a community.”); N.Y. State Judicial Comm’n on Minorities, *Report of the New York State Judicial Commission on Minorities*, 19 FORDHAM URB. L.J. 181, 242 (1992) (“Minorities are significantly underrepresented on many juries in the court system.”); *see also* ALASKA SUPREME COURT ADVISORY COMM. ON FAIRNESS & ACCESS, REPORT 83 (1997); GA. SUPREME COURT COMM’N ON RACIAL & ETHNIC BIAS IN THE COURT SYS., LET JUSTICE BE DONE: EQUALLY, FAIRLY, AND IMPARTIALLY 182 (1995); OHIO COMM’N ON RACIAL FAIRNESS, REPORT 34 (1999); OR. SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYS., REPORT 73 (1994); J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1476 (1996).

19. *United States v. Green*, 389 F. Supp. 2d 29, 80 (D. Mass. 2005).

20. *United States v. Royal*, 174 F.3d 1, 12 (1st Cir. 1999) (describing the statistics offered regarding the representation of African-Americans as “disquieting” and the jury system at issue as “a situation leaving much to be desired”); *see State v. Tremblay*, No. P1 97-1816AB, 2003 WL 23018762, at \*15 (Sup. Ct. R.I. Mar. 19, 2003) (finding the material presented by the defendant “unsettling” and “disquieting”).

21. *United States v. DeFries*, 129 F.3d 1293, 1301 n.5 (D.C. Cir. 1997) (“The import of appellants’ evidence is troubling . . . and . . . the statistical disparities, if supported by [additional evidence], could support an inference that a jury venire was not composed of a fair cross-section of the community.”); *see Diggs v. United States*, 906 A.2d 290, 299 (D.C. Cir. 2006) (“[T]he allegations concerning hardship deferrals and the Monday composition of the jury pool are ‘troubling’ . . .” (quoting *DeFries*, 129 F.3d at 1301 n.5)).

22. *United States v. Shine*, 571 F. Supp. 2d 589, 599 (D. Vt. 2008); *see People v. Currie*, 87 Cal. App. 4th 225, 235 (2001) (“[U]nderrepresentation of African-Americans on . . . jury venires . . . is a

urging the jury office to take remedial actions, notwithstanding the courts' conclusions that such steps are not required.<sup>23</sup> In one illustrative case, a court denied a cross-section challenge to racial disparity in the jury system, and then devoted six pages to a discussion of possible remedies for the problem of racial disparity in that system.<sup>24</sup> The discussion was prompted by "this basic fact: . . . African Americans are consistently and pervasively underrepresented in [the jurisdiction's] juries, from one year, and one jury wheel, to the next."<sup>25</sup> Occasionally courts have even mandated changes to the jury system while still holding that there was no Sixth Amendment violation.<sup>26</sup>

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long-standing problem."); *Commonwealth v. Tolentino*, 663 N.E.2d 846, 851 (Mass. 1996) ("[Evidence] does not negate totally the possibility that jury venires . . . do not adequately reflect the racial and ethnic composition of the county populations."); *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994) ("[T]he evidence—both anecdotal and statistical—indicates that there is some underrepresentation in fact."); *State v. Ramseur*, 524 A.2d 188, 239 (N.J. 1987) ("[T]he results are still far from optimal. Greater representativeness on the jury panels is obviously desirable.").

23. Sometimes these suggestions are articulated as stern warnings. *See, e.g., Williams*, 525 N.W.2d at 544 ("[W]e will not be satisfied until both the reality and the perception of underrepresentation of African-Americans and other distinct minority groups are eliminated."); *United States v. Reyes*, 934 F. Supp. 553, 566 (S.D.N.Y. 1996) ("[S]erious consideration should be given to amending the jury selection procedures . . ."); *United States v. Hernandez-Estrada*, No. 10cro558 BTM, 2011 WL 1119063, at \*12 (S.D. Cal. 2011) ("The District should [inter alia] give serious consideration to . . . supplement[ing] voter registrations lists with DMV lists to increase inclusiveness and provide better representation of the jury-eligible population."). In other cases they are framed as encouragement. *See, e.g., United States v. Rogers*, 73 F.3d 774, 777 n.2 (8th Cir. 1996) ("This author . . . encourages the [jurisdiction] to consider modifying its jury selection plan to increase minority representation in its jury pools."); *Tremblay*, 2003 WL 23018762, at \*15 ("[I]t would be appropriate for [the jurisdiction] to consider instituting further measures in their ongoing efforts to increase jury participation . . . by inner city minority residents."); *Ramseur*, 524 A.2d at 239 ("Jury officials should undertake the improvements suggested by this record, if practical and fair . . ."). Other cases frame these suggestions as gentle reminders that changes could help serve important purposes. *See, e.g., Royal*, 174 F.3d at 12 ("[This jurisdiction] may wish to consider whether taking additional steps that are responsive to the issues that [the defendant] has identified . . . would serve the goals of 'assurance of a diffused impartiality,' encouragement of 'public confidence in the fairness of the criminal justice system,' and 'civil [sic] responsibility.'" (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975))); *Tolentino*, 663 N.E.2d at 852 ("[T]he office of jury commissioner should . . . address[] the problems with jury selection . . . This court believes that such actions are essential to 'increas[ing] confidence in the jury system [and] enhanc[ing] the appearance [and the reality] of fairness' in our trial system." (quoting *Commonwealth v. Bastarache*, 414 N.E.2d 984, 995 (Mass. 1980)) (alterations to quoted text in original)).

24. *United States v. Bates*, No. 05-81027, 2009 WL 5033928, at \*16–22 (E.D. Mich. Dec. 15, 2009).

25. *Id.* at \*17–18 ("Jury Department records also confirm . . . that African Americans are chronically underrepresented in the Court's jury pools.").

26. *See, e.g., Shine*, 571 F. Supp. 2d at 602 ("That [the] jury selection system meets statutory and constitutional minima does not terminate the discussion . . . [T]he next Plan should be amended . . ."); *Washington v. People*, 186 P.3d 594, 596 (Colo. 2008) (holding the system was constitutional but disapproving of it and directing it be stopped immediately because it "resulted in a statistically significant underrepresentation of African-American and Hispanics on jury panels"); *Williams*, 525 N.W.2d at 544 ("We intend to use our supervisory power over the trial courts to insure that the systems used are increasingly inclusive in the hope that the faces of the people in the jury

Judicial expressions of concern are not proof that the cases are wrongly decided,<sup>27</sup> but they raise troubling questions in the context of a standard that recognizes that representative jury systems protect defendants and contribute to public acceptance of jury verdicts. There is some tension between the conclusion that the system has produced a jury pool that is “fair and reasonable,” and a description of disparity in that same system as “a serious problem.”<sup>28</sup> That tension has led to expressions of frustration by judges who either feel “that compliance with Constitutional standards is not enough” to ensure that people of color are adequately represented on juries,<sup>29</sup> or think that there is “something seriously amiss in the jury selection process” before them but feel limited to insisting that any system that produces such results “certainly needs further examination.”<sup>30</sup>

The premise of this Article is that further examination is indeed called for where courts consistently reject challenges to jury systems that have been recognized as racially underrepresentative by state entities, and are occasionally prompted to issue directives to fix the very system they have just affirmed. This Article undertakes that examination and

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room will soon mirror the faces of the people in the community at large.”); *State v. Elbert*, 424 A.2d 1147, 1150 (N.H. 1981) (“[B]lack[s] are [not] presently underrepresented to an unconstitutional extent by systematic exclusion. However, because the system has the potential for such exclusion . . . , we now order that, pursuant to our administrative authority . . . [the manner of selection for] all future jury lists [must be changed] . . .”).

27. See, e.g., *Royal*, 174 F.3d at 12 (“There is a difference between what violates the law and what, while not in violation, is still a situation leaving much to be desired.”).

28. *Commonwealth v. Estes*, 851 A.2d 933, 936 (Pa. Sup. Ct. 2004) (“[U]nderrepresentation of African-Americans in our jury pools is a serious problem which must be corrected.”). If judges (or jurors) are not comfortable with the representation of people of color in the jury system, how comfortable should we expect defendants and the public to be? See, e.g., *United States v. Neighbors*, 590 F.3d 485, 490–91 (7th Cir. 2009) (quoting a prospective juror, sitting on a panel that contained no African-Americans, who said, “If I were sitting in the defendant’s chair, I might be a little concerned that we’re all rather light skinned over here, and isn’t it supposed to be a jury of your peers?”); *United States v. Rogers*, 73 F.3d 774, 775 (8th Cir. 1996) (“[A]ll eighty-nine [summoned jurors] were white. At oral argument, Rogers’ counsel urged our court to consider the difficulty of convincing an African-American client that the system that produced this jury pool is fair.”); Stephanie Domitrovich, *Jury Source Lists and the Community’s Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 45–46 (1994) (“Trial judges who have had the opportunity to talk with jurors after they have rendered their verdicts are frequently faced with the popular question of why not even one black juror was called for service in an African-American defendant’s trial.”).

29. *Bates*, 2009 WL 5033928, at \*21; see also *Rogers*, 73 F.3d at 777 (constrained from finding a prima facie case due to circuit precedent, despite finding that the defendant’s data “establish, at a minimum, a prima facie case that blacks are being systematically excluded from jury service”); *United States v. Green*, 389 F. Supp. 2d 29, 37 (D. Mass 2005) (“[Previous jury challenges have been] unsuccessful, largely because of the rigorous standards imposed by the courts, including the First Circuit. While others have criticized those standards, including judges on this Court, I have no choice but to apply them.”).

30. *Sanders v. State*, 776 S.W.2d 334, 336 (Ark. 1989) (Purtle, J., concurring) (“I concur only because I do not have time to research this issue in depth.”).

exposes the extent to which courts are misapplying the *Duren* test by allowing Fourteenth Amendment equal protection standards to contaminate the Sixth Amendment analysis, a phenomenon that has gone largely unacknowledged in the literature.<sup>31</sup> I reject the suggestion that compliance with the constitutional standard is insufficient to protect the right of defendants to a jury selected from a fair cross-section of the community, and instead argue that the underwhelming track record of the fair cross-section right stems from courts' routine importation of equal protection standards into the analysis. In making this argument I part ways with scholars who, although recognizing that the fair cross-section standard has been an ineffectual tool for alleviating racial disparity in jury systems,<sup>32</sup> have responded by proffering alternative constructions of the fair cross-section right,<sup>33</sup> or alternative legal frameworks to evaluate the problem of underrepresentative juries.<sup>34</sup> In contrast, this Article asserts that the anemic application of the Sixth Amendment guarantee results—not from weaknesses in the underpinnings of the right or the test for enforcing it—but from a consistent judicial failure to actually apply the unadulterated Sixth Amendment standard as articulated in *Duren*.

This Article proceeds in three parts. Part I examines the intertwined history and development of the Fourteenth and Sixth Amendment

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31. Surprisingly little scholarship has considered the ways in which the fair cross-section standard has been compromised by the encroachment of equal protection concepts. For a thoughtful exception, see Schulberg, *supra* note 17, at 3 (asserting that “fair cross-section claims often lose because judges confuse them with equal protection claims” and suggesting borrowing lessons from disparate impact law); see also Melissa K. Gee, Note, *A Jury Drawn from a Fair Cross-Section of the Community—A Fading Memory?*: *People v. Sanders*, 26 U.S.F. L. REV. 785, 792 (1992) (examining the importation of equal protection requirements into two California cases). The articles that have explored the issue have largely focused on the importation of equal protection standards into the discrete question of which groups are cognizable under the fair cross-section test. See *infra* note 75. The problem has also been highlighted by a few judges, as discussed in Part II *infra*.

32. See, e.g., Chhablani, *supra* note 17, at 945 (describing fair cross-section jurisprudence as “largely inefficacious”); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 949 (1998) (“[T]he cross-section requirement has been interpreted by lower courts in a way that makes the doctrine nearly irrelevant.”).

33. See Chhablani, *supra* note 17, at 933 (proposing “an alternate construction of the ‘fair cross-section’ requirement, grounding the jurisprudence in the Sixth Amendment’s vicinage clause”); Leipold, *supra* note 32, at 949, 960 (providing “an alternative explanation for the cross-section requirement” because “the articulated rationale for the doctrine leaves much to be desired”); Richard M. Re, Note, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1570 (2007) (proposing “an enfranchisement conception of jury legitimacy” as a new justification for the fair cross-section right).

34. See Schulberg, *supra* note 17, at 4 (arguing that disparate impact law “could correct mistakes in the fair cross-section jurisprudence”); Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 764 (2011) (proposing “a negligence theory of jury system management”).

standards. It then identifies the critical distinctions between the two constitutional tests, as well as reasons why courts may be confusing them.

Part II explores the manner in which equal protection standards have been erroneously imported into the third prong of *Duren's* prima facie test: whether underrepresentation of a distinctive group is “due to systematic exclusion of the group in the jury-selection process.”<sup>35</sup> This Part demonstrates that courts in at least ten federal circuits and nineteen states have improperly adopted the equal protection requirement to demonstrate intentional discrimination—a standard that has no basis in Sixth Amendment law. Additional courts have made the more subtle mistake of importing equal protection’s focus on the culpability and choices of jury administrators and potential jurors, rather than the effect of those choices on the rights of defendants.

Part III examines the nature of the harm engendered by the application of the wrong standard. First, limiting the scope of the fair cross-section right to the more narrow confines of equal protection jurisprudence deprives defendants of their substantive Sixth Amendment rights that are distinct from the right to be free from discrimination. Second, an analysis focused on intent fails to take into account both the unintentional ways in which modern day jury systems produce racially underrepresentative jury pools and the real ways jury systems affect ostensibly private choices. Finally, this stark constitutional error undermines the integrity of the doctrine, particularly because no court has acknowledged or explained the adoption of equal protection requirements. The Article concludes that the key to enforcing the impartial jury guarantee for criminal defendants is not to change the *Duren* test, but to apply it consistently with the demands of the Sixth Amendment and Supreme Court doctrine.

## I. FAIR CROSS-SECTION AND EQUAL PROTECTION: OVERLAPPING DEVELOPMENT BUT TWO DISTINCT TESTS

### A. OVERLAPPING DEVELOPMENT BUT DIFFERENT PURPOSES

The historical relationship between equal protection and fair cross-section doctrine reveals two points that are critical for understanding why courts might be confusing the two standards and why that confusion is so problematic.

First, while the right to an impartial jury of one’s peers was firmly established at the time of America’s founding, the modern version of the fair cross-section challenge was not established until 1975, when the Court explicitly recognized in *Taylor v. Louisiana* that “the selection of a

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35. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial.”<sup>36</sup> Up until 1975, the Supreme Court had primarily relied on the Equal Protection Clause when evaluating the constitutional requirements for racially representative juries, and intertwined Sixth and Fourteenth Amendment doctrine when discussing the fair cross-section right. This doctrinal entanglement and historical predominance of the Equal Protection Clause may explain in part why courts are importing equal protection concepts into the Sixth Amendment test today.

Second, the Court’s decision in *Taylor* establishing the fair cross-section guarantee as a distinct Sixth Amendment right solidified the distinctions between the two constitutional provisions, which serve different purposes, guarantee different rights, and protect different people. This explicit delineation by the Supreme Court helps illustrate why it is so critical that courts not confuse the two constitutional tests.

### *I. Doctrinal Entanglement and the Predominance of Equal Protection*

The constitutionality of racially representative juries has historically been addressed through the lens of equal protection.<sup>37</sup> African-Americans were recognized as part of the community for jury purposes only with the passage of the Fourteenth Amendment in 1868,<sup>38</sup> and for the next 100 years, overt and explicit discrimination in jury selection was routine, such that claims about racial *disparity* in jury selection were inevitably claims about racial *discrimination* in jury selection.<sup>39</sup> It was arguably unnecessary for the Court to consider the exact implications of the Sixth Amendment’s impartial jury guarantee, because discriminatory jury selection fell so neatly into the jurisdiction of the Equal Protection Clause. Moreover, until 1968, the Court had not determined that the Sixth Amendment was applicable to the states.<sup>40</sup>

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36. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

37. *Holland v. Illinois*, 493 U.S. 474, 478 (1990) (“[R]acial groups cannot be excluded from the venire from which a jury is selected. That constitutional principle was first set forth not under the Sixth Amendment but under the Equal Protection Clause.”); *Peters v. Kiff*, 407 U.S. 493, 500 n.9 (1972) (“The principle of the representative jury was first articulated by this Court as a requirement of equal protection . . .”).

38. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

39. See, e.g., Mark McGillis, *Jury Venires: Eliminating the Discrimination Factor by Using a Statistical Approach*, 3 HOW. SCROLL SOC. JUST. L. REV. 17, 20–21 (1995) (“The first cases addressing [the issue of racial composition of jury venires and the resulting jury] involved facially discriminatory statutes . . . . Consequently, racial exclusion was evident and not at issue. The issue in these early cases . . . was whether such complete exclusion was a violation of the Fourteenth Amendment.”).

40. See Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 536 (1986) (“Until the sixth amendment was deemed to be incorporated into the fourteenth amendment in 1968, the Court likely saw no other constitutional

The civil rights movement and accompanying social changes in the 1960s began to curtail explicit and public acts of discrimination by jury officials.<sup>41</sup> This trend was manifested and advanced by the passage of the Jury Service and Selection Act (“JSSA”) in 1968, an explicit legislative effort to combat discriminatory jury selection.<sup>42</sup> One provision of the JSSA prohibited exclusion based on race or ethnicity, creating a statutory parallel to the Equal Protection Clause.<sup>43</sup> But another provision included a requirement that federal juries be selected from a “fair cross section of the community,”<sup>44</sup> and “some members of Congress acted on the belief (or at least argued to their colleagues) that the Sixth Amendment imposed [the fair cross-section] requirement.”<sup>45</sup>

At the same time—and perhaps influenced by the passage of the JSSA<sup>46</sup>—the Supreme Court woke the Sixth Amendment’s impartial jury right from its slumber. Six weeks after the JSSA was passed in 1968, the Court incorporated the Sixth Amendment, making it applicable to the states.<sup>47</sup> In 1975 the Court established the fair cross-section right as “an essential component of the Sixth Amendment” in *Taylor*.<sup>48</sup> And in 1979 the Court established the test for a fair cross-section violation in *Duren*.<sup>49</sup> The impartial jury guarantee and the idea of a fair cross-section right had essentially lain dormant for 100 years while the Equal Protection Clause

text that would allow it to correct the patent and egregious violation of the rights of black male citizens.”).

41. See Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT’L & COMP. L. 89, 96 (2007).

42. 28 U.S.C. §§ 1861–78 (2006); see JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 86 (1977).

43. 28 U.S.C. § 1862.

44. *Id.* § 1861. Courts generally identify the test for evaluating a fair cross-section violation as the same under either the Sixth Amendment or the JSSA. See, e.g., *United States v. Royal*, 174 F.3d 1, 10–11 (1st Cir. 1999). Similarly, many states use the same standard for alleged violations of state constitutions, see, e.g., *State v. Bowman*, 509 S.E.2d 428, 434 (N.C. 1998) (applying the *Duren* standard to claims under the state and federal constitutions). In addition, both the JSSA and state statutory equivalents have requirements that can be violated even in the absence of a cross-section problem. See 28 U.S.C. § 1867; see, e.g., Colo. Rev. Stat. § 13-71-139 (2001). This Article addresses the JSSA only to the extent that it influences the constitutional analysis.

45. Leipold, *supra* note 32, at 957.

46. The Court in *Taylor* gave a nod to the legislators who had anticipated the recognition of the constitutional right. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (“Recent federal legislation governing jury selection within the federal court system has a similar thrust.”); *id.* at 530 (“Debate on the floors of the House and Senate on the Act invoked [inter alia] the Sixth Amendment . . . .”); see *Bloom v. Illinois*, 391 U.S. 194, 212 (1967) (Fortas, J., concurring) (citing, inter alia, the JSSA and stating that “[t]he Congress, state courts, and state legislatures have moved forward with the advancing conception of human rights in according procedural as well as substantive rights to individuals accused of conflict with the criminal laws”).

47. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

48. *Taylor*, 419 U.S. at 528.

49. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

was employed to combat discriminatory jury selection, but at the time when discrimination was becoming less overt and the need for a fair cross-section guarantee may have been exposed, the Court revitalized the Sixth Amendment right in the course of a decade with the *Duncan-Taylor-Duren* trio.

This shift created a new avenue for litigating racial disparity in the jury system—independent of the question of discrimination.<sup>50</sup> But the language of the new standard reflected the original doctrinal entanglement. *Taylor* established that the “fair cross-section” language was now explicitly a Sixth Amendment concept. Before 1975, however, the Supreme Court had affirmed the importance of a jury selected from a “fair cross section of the community” not just in Sixth Amendment cases,<sup>51</sup> but also in the application of the Court’s supervisory powers<sup>52</sup> and in equal protection claims.<sup>53</sup> The “systematic exclusion” language that is part of the third prong of the *Duren* test for a fair cross-section violation is also intertwined with equal protection doctrine. The term was originally used in equal protection cases where groups had been “intentionally and systematically” or “purposeful[ly] and systematic[ally]” excluded<sup>54</sup> and is still used that way today.<sup>55</sup> The Supreme Court borrowed the language of “systematic exclusion” for fair

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50. *Leipold*, *supra* note 32, at 947 (“[Following *Taylor*,] [c]ourt officials no longer had a duty just to avoid intentional discrimination when calling citizens for jury service; now they had to ensure that no ‘distinctive group’ was significantly underrepresented in the jury pool.”).

51. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (indicating that, pursuant to the Sixth Amendment, number of jurors must be sufficient to “provide a fair possibility for obtaining a representatives cross-section of the community”).

52. *See Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”); *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’ . . . [that] comport[s] with the concept of the jury as a cross-section of the community.”); *see also Ballard v. United States*, 329 U.S. 187, 192 (1946) (quoting *Thiel*, 328 U.S. at 220).

53. *See Peters v. Kiff*, 407 U.S. 493, 500 (1972) (“[T]he exclusion of a discernible class from jury service . . . destroys the possibility that the jury will reflect a representative cross section of the community.”); *Apodaca v. Oregon*, 406 U.S. 404, 412 (1972) (citing “the principle that the Fourteenth Amendment requires jury panels to reflect a cross section of the community”); *Carter v. Jury Comm’n of Greene Cnty.*, 396 U.S. 320, 332–33 (1970) (“[We need not delineate] the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.”); *Brown v. Allen*, 344 U.S. 443, 474 (1953) (“[S]ource[s] of jury lists . . . [should] reasonably reflect[] a cross-section of the population suitable in character and intelligence for that civic duty.”); *Akins v. Texas*, 325 U.S. 398, 409 (1945) (Murphy, J., dissenting) (“If a jury is to be fairly chosen from a cross section of the community it must be done without limiting the number of persons of a particular color, racial background or faith . . .”).

54. The Supreme Court first used the phrase to describe jury systems in the 1930s that implicated equal protection. *See Pierre v. Louisiana*, 306 U.S. 354, 354 (1939); *Patterson v. Alabama*, 294 U.S. 600, 601 (1935).

55. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 276 (2005) (Thomas, J., dissenting).

cross-section purposes, and adapted it by dropping the intentional and purposeful language.<sup>56</sup> The overlapping language reflects the doctrines' overlapping roots and, together with the historical predominance of equal protection doctrine, may be part of the reason modern courts confuse the two standards.

2. *Supreme Court Recognition of Distinct Purposes and Analytical Focus*

After the Court's decision in *Taylor*, the fair cross-section right was exclusively tied to the Sixth Amendment (rather than the equal protection guarantee or courts' supervisory powers), and the Sixth Amendment's impartial jury guarantee was now explicitly a right to a jury selected from a fair cross-section of the community (not just a jury selected by non-discriminatory means or a jury made up of unbiased individuals). Equal protection continued to be the basis for claims alleging the *intentional* exclusion of people of color in jury systems, but *Taylor* and *Duren* served to break the Equal Protection Clause's quasi-monopoly on the issue of race and the jury.

This separation of the Sixth Amendment from the Fourteenth Amendment's focus on discrimination was consistent with the recognition that the two constitutional provisions serve different purposes, guarantee different rights, and protect different people. The Fourteenth Amendment was enacted in 1866 by Union legislators anticipating the return to Congress of representatives of the Confederate states.<sup>57</sup> The Union congressmen were troubled by the Confederate states' discriminatory Black Codes, so as a condition of rejoining the union—and thus regaining congressional representation—the Union required Confederate states to agree to the adoption of the Fourteenth Amendment and its guarantee that no state would deny a citizen “the equal protection of the laws.”<sup>58</sup> The Equal Protection Clause was thus adopted as a direct attack on discriminatory practices and was explicitly

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56. The immediate path of the term “systematic exclusion” into the fair-cross action analyses can be traced through the progression of the Court's decisions in *Ballard*, *Taylor*, and *Duren*. In *Ballard* the Court exercised its supervisory power to correct “the purposeful and systematic exclusion of women from the panel in this case.” 329 U.S. at 193. Then in *Taylor*, the Court borrowed the term “systematic” from *Ballard*, but eliminated the reference to internal or purposeful exclusion. *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975) (“We are also persuaded that the fair-cross-section requirement is violated by the systematic exclusion of women . . .”). Finally, in *Duren* the Court incorporated *Taylor*'s “systematic exclusion” language to establish the fair cross-section standard. *Duren v. Missouri*, 439 U.S. 357, 358–59 (1979) (citing *Taylor*, 419 U.S. at 526–31, 538).

57. See AKHIL REED AMAR, *THE BILL OF RIGHTS* 162 (1998); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 35–36 (1986).

58. AMAR, *supra* note 57, at 162; CURTIS, *supra* note 57, at 35–36.

designed to prohibit discriminatory acts.<sup>59</sup> Moreover, equal protection jurisprudence conceives of the harm of discrimination as extending beyond a criminal defendant to the community and the excluded jurors.<sup>60</sup> As a result, jurors have standing to object to equal protection violations<sup>61</sup> in civil as well as criminal proceedings.<sup>62</sup> The guarantee is not limited to criminal defendants.

In contrast, the Sixth Amendment was ratified almost 100 years earlier in 1791, not to prevent discrimination, but to place a check on the government's power to use the criminal law to deprive a citizen of life and liberty.<sup>63</sup> The right is not just to a jury selected without the taint of discrimination, but to a jury selected from a fair cross-section of the community.<sup>64</sup> The Sixth Amendment, moreover, is concerned only with the defendant's right to the judgment of the community and does not extend to the community's right to participate in that judgment.<sup>65</sup>

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59. See *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) ("The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. . . . It was well known that in some States laws making such discriminations then existed, and others might well be expected. . . . [African-Americans] especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted." (citation omitted)); *Slaughter-House Cases*, 83 U.S. 36, 81 (1872) ("The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this [equal protection] clause, and by it such laws are forbidden.").

60. *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) ("[T]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986))).

61. See *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 329 (1970) ("Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.").

62. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 617 (1991).

63. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."); AMAR, *supra* note 57, at 215 ("The original Bill [of Rights] also focused centrally on empowering the people collectively against government agents following their own agenda. The Fourteenth Amendment, by contrast, focused on protecting minorities against . . . majoritarian government.").

64. See *United States v. Armsbury*, 408 F. Supp. 1130, 1140 (D. Or. 1976) ("The very philosophy and purpose of the Sixth Amendment require that I focus on the issue of a fair cross section and not on the issue of discrimination."); Laurie Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081, 1111 (1987) ("The primary goal of the constitutional guarantee to equal protection of law is to protect groups from invidious discrimination. . . . The primary goal of the fair cross-section requirement is to provide the individual defendant with a fair and impartial jury as required by the sixth amendment."); Schulberg, *supra* note 17, at 3 ("[T]he two claims protect different values. Whereas the Equal Protection Clause prohibits discrimination, the fair cross-section requirement of the Sixth Amendment defines the type of jury to which criminal defendants are entitled: a jury drawn from a representative pool.").

65. *Berghuis v. Smith*, 130 S. Ct. 1382, 1387 (2010) ("The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section

The analytical focus of the constitutional protections is accordingly different.<sup>66</sup> Because the injury the Fourteenth Amendment protects against is discriminatory intent (manifested in action), it follows that the question of whether a cognizable injury has occurred is focused on identifying a discriminatory person or policy.<sup>67</sup> The injury the Sixth Amendment protects against, however, is an outcome, whether achieved “by accident or design,”<sup>68</sup> so the question of whether a cognizable injury has occurred is focused on identifying the existence of a particular outcome.<sup>69</sup>

## B. DISTINCT CONSTITUTIONAL TESTS

Because the two constitutional provisions serve different purposes, and have a different analytical focus, the Supreme Court has crafted distinct tests to implement their guarantees. The tests are structurally similar, in that the moving party has the burden to establish a three-pronged *prima facie* case, which in turn shifts the burden to the government. The substantive requirements needed to establish each of

of the community.”); *Patton v. United States*, 281 U.S. 276, 297 (1930) (“[T]he framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.”).

66. Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL’Y & L. 445, 463 (1994) (“The Sixth Amendment . . . instead of requiring claimants to prove exclusion of certain citizens was the primary purpose of jury officials, focuses on the impact that selection procedures have on the jury pool and panel.”).

67. *See United States v. Grisham*, 63 F.3d 1074, 1081 (11th Cir. 1995) (“[W]hereas the inquiry in a fair cross-section claim focuses on the representativeness of the jury venire, the focus of an equal protection claim is whether members of a discrete group have been intentionally denied the opportunity to serve on a jury.”); Schulberg, *supra* note 17, at 27–28 (“The Equal Protection Clause prohibits intentional discrimination but does not assure equal outcomes. Hence, judges thinking in equal protection terms look for wrongdoing.”).

68. *Anaya v. Hansen*, 781 F.2d 1, 9 (1st Cir. 1986) (Bownes, J., concurring); *see also* *Leipold*, *supra* note 32, at 998 (noting the harm in a fair cross-section claim to be the “depriv[ation] . . . of a community perspective the legislature has said should be taken into account” as a result of “excluding distinctive groups from the jury pool”).

69. *See United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (“While the equal protection clause of the fourteenth amendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination, [t]he sixth amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of . . . motive.” (alterations in original) (citation omitted) (internal quotation marks omitted)); *Smith v. Commonwealth*, 649 N.E.2d 744, 746 (Mass. 1995) (“[T]he inquiry does not focus on the jury selection process itself, but instead focuses on the result of the process using an analysis of the process. Thus, if exclusion of a particular group arises as a result of the system by which potential jurors are chosen, that exclusion is ‘systematic.’”); Brown, *supra* note 65, at 463 (“The Sixth Amendment . . . instead of requiring claimants to prove exclusion of certain citizens was the primary purpose of jury officials, focuses on the impact that selection procedures have on the jury pool and panel.”); Schulberg, *supra* note 17, at 29 (“The value protected by the Sixth Amendment is a criminal defendant’s right not to be deprived of his liberty except by an impartial jury of his peers. Hence, it does not matter why an aspect of the jury selection process filters out the group. What matters is that the group is systematically filtered out.”).

these prongs, however, are quite different. Likewise, the two provisions proceed differently when a *prima facie* case has been established, imposing different burdens on the government if it is to defeat the infringement claim.

### I. Differences in Scope

The tests differ substantively because the two constitutional standards differ in scope. The Sixth Amendment fair cross-section right applies only in criminal cases, as it belongs exclusively to a criminal defendant.<sup>70</sup> The Equal Protection Clause, in contrast, applies in both civil and criminal cases and extends to all litigants and potential jurors.<sup>71</sup> In addition, the Equal Protection Clause applies to the process of *voir dire* and prohibits discrimination in the selection or strikes of jurors.<sup>72</sup> The Sixth Amendment, however, guarantees a defendant a jury *selected from* a fair cross-section of the community; it does not guarantee a jury that actually *includes* a fair cross-section of the community.<sup>73</sup>

The fair cross-section right applies to the first three stages of the four-step jury selection process:<sup>74</sup> (1) assembling a pool of potential jurors from source lists, such as the list of registered voters; (2) assembling a pool of qualified jurors (by identifying members of the pool of potential jurors who are eligible for jury service); and (3) assembling the jury venires (made up of members of the pool of qualified jurors who are summoned and arrive at the courthouse) from which twelve-person panels are selected.<sup>75</sup> But it *does not* apply to the final steps in the process, that is, the creation of twelve-person panels through the *voir dire* process.<sup>76</sup> In sum, the Sixth Amendment guarantees a defendant the next best thing to a petit jury that represents a cross-

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70. See *supra* note 65.

71. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994) (“[W]hether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.”); *supra* notes 60 and 61.

72. *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986).

73. *Lockhart v. McCree*, 476 U.S. 162, 173 (1986).

74. See *Taylor v. Louisiana*, 419 U.S. 522, 538 (1974) (“Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.” (citation omitted)); see also *Lockhart*, 476 U.S. at 174 (“The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn.” (quoting *Pope v. United States*, 372 F.2d 710, 725 (8th Cir. 1967) (Blackmun, J.))).

75. *Lockhart*, 476 U.S. at 173 (“We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.”).

76. *Id.*

section: a “fair *possibility* for obtaining a representative cross-section of the community.”<sup>77</sup>

## 2. *Differences in Identifying the Group in Question*

The constitutional standards share, as the first prong of their test, a requirement that the moving party identify a particular group that is not sufficiently represented. For equal protection purposes, the movant must identify a “recognizable, distinct class, singled out for different treatment under the laws, as written or as applied.”<sup>78</sup> The emphasis on “different treatment” reflects the equal protection focus on discrimination, and has accordingly been interpreted to require evidence that the group has historically experienced discrimination.<sup>79</sup>

In a fair cross-section case, “the group alleged to be excluded [must be] a ‘distinctive’ group in the community.”<sup>80</sup> The group’s historical experience of discrimination is not relevant.<sup>81</sup> The extent to which courts have imported equal protection standards into *Duren’s* first prong is not addressed here, but that problem has been identified and explored by other scholars.<sup>82</sup>

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77. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (emphasis added). This limitation is arguably confusing because many of the justifications for a jury selected from a fair cross-section are premised on ideas about how important it is for the petit jury to be representative. See *Duren v. Missouri*, 439 U.S. 357, 371 at n.\* (1979) (Rehnquist, J., dissenting). The Court has explained that “[t]he limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly ‘representative’ petit jury.” *Lockhart*, 476 U.S. at 173–74. More importantly, the limitation stakes out a compromise position in the “struggle to increase minority representation without abandoning principles of color-blind justice in favor of quotas and racial balancing.” JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 107 (1994).

78. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

79. See, e.g., *Parker v. Phillips*, 717 F. Supp. 2d 310, 335 (W.D.N.Y. 2010) (“Standards under fair cross-section requirements and the equal protection clause differ somewhat in that fair cross-section ‘distinctiveness’ encompasses the broader principle that juries should be drawn from a source fairly representative of the community, whereas equal protection focuses upon classes which have historically been discriminatorily excluded or substantially underrepresented based upon race or national origin, etc.”).

80. *Duren*, 439 U.S. at 364 (“*Taylor* without doubt established that women ‘are sufficiently numerous and distinct from men’ . . . [to satisfy] the Sixth Amendment’s fair-cross-section requirement . . .” (quoting *Taylor v. Louisiana*, 419 U.S. 522, 531 (1974))); see also *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (“[T]he concept of ‘distinctiveness’ must be linked to the purposes of the fair-cross-section requirement.”).

81. See, e.g., *Commonwealth v. Bastarache*, 414 N.E.2d 984, 992 (Mass. 1980) (“The focus of the equal protection clause has been on classes that have historically been saddled with disabilities or subjected to unequal treatment. . . . Central to the Sixth Amendment, on the other hand, is the broader principle that juries should be drawn from a source fairly representative of the community.”).

82. See Chhablani, *supra* note 17, at 947 (“[O]ver time courts have largely conflated the scope of the Cross-Section Clause with the Equal Protection Clause. Specifically, lower courts have treated the ‘distinct group’ requirement of the cross-section requirement as identical to the ‘suspect class’ requirement of the Fourteenth Amendment.”); see also Mitchell S. Zuklie, *Rethinking the Fair Cross-*

### 3. Differences in Measuring Disparity

Both tests have a second prong that seeks to measure the degree of disparity between the proportion of the group in the community and the proportion of that group in the jury system, but the standards for measuring that disparity are different.

In an equal protection claim, the movant must show “substantial underrepresentation” of the group in question.<sup>83</sup> The disparity needs to be “sufficiently large” such that “it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that *racial or other class-related factors entered into the selection process.*”<sup>84</sup> The question of “substantial underrepresentation” is also evaluated in equal protection cases in light of whether the jury employs race-neutral polices.<sup>85</sup> Because the question is whether the system discriminated, a borderline disparity figure looks more troubling if the system uses subjective selection policies, and less worrisome if the polices are objective and race-neutral.<sup>86</sup>

In contrast, it is irrelevant to a Sixth Amendment claim whether jury selection policies are race-neutral or whether the disparity is substantial enough to indicate discrimination. As the Court announced in *Duren*, “systematic disproportion itself demonstrates an infringement of the defendant’s interest in a jury chosen from a fair community cross section.”<sup>87</sup> Because the disparity figure in a fair cross-section case is not being used as evidence of discrimination, it does not need to be

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*Section Requirement*, 84 CALIF. L. REV. 101, 132 (1996) (“[Courts] conflate[] two distinct inquires: ‘distinctiveness’ under the Sixth Amendment with ‘suspectness’ under the Due Process Clause of the Fourteenth Amendment.”); Magid, *supra* note 64, at 1083 (“The two chief limitations on equal protection claims that have been applied improperly to fair cross-section claims are those related to standing and to the definition of what constitutes a group whose exclusion cannot be permitted.”).

83. *Castaneda*, 430 U.S. at 494.

84. *Id.* at 494 n.13 (emphasis added). In that context—where the disparity figure is serving as evidence of discrimination—the Supreme Court employed a threshold of 10% disparity for showing “purposeful discrimination” in the 1965 case of *Swain v. Alabama*, 380 U.S. 202, 208–09 (1965) (“We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%.”). Although the “Court has never announced mathematical standards for the demonstration of ‘systematic’ exclusion” in the context of an equal protection claim, *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972), it has never revisited the 10% threshold it opined on in *Swain* for equal protection claims, and lower courts have continued to evaluate equal protection claims pursuant to that figure.

85. See *Castaneda*, 430 U.S. at 494 (“[A] selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.”).

86. *Id.* at 495 n.14 (“[T]he presumption of purposeful discrimination [is] created by the combined force of the statistical showing and the highly subjective method of selection.”).

87. *Duren v. Missouri*, 439 U.S. 357 at 368 n.26 (1979). Specifically, the defendant must compare “the percentage of the community made up of the group” with the “representation of this group in venires from which juries are selected.” *Id.* at 364 (“The second prong of the prima facie case was established by petitioner’s statistical presentation.”).

substantial enough to indicate discrimination—it simply has to fail to be “fairly representative of the local population otherwise eligible for jury service.”<sup>88</sup>

Just as evidence indicating purposeful exclusion is irrelevant to a Sixth Amendment analysis, so too are the race-neutral policies employed by a jury office. A policy that would allow jury administrators to consider the race of prospective jurors could be a red flag in an equal protection case where the specter of discrimination has been raised. But in cross-section claims, the question of whether underrepresentation is “fair and reasonable” involves only a comparison of the group’s representation in the community and on the jury venires.<sup>89</sup>

There is evidence that courts are importing equal protection principles into *Duren’s* second prong by erroneously importing the equal protection disparity threshold,<sup>90</sup> imposing the “substantial underrepresentation” requirement,<sup>91</sup> and by incorrectly evaluating the

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88. *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). *See, e.g., Washington v. People*, 186 P.3d 594, 602 n.6 (Colo. 2008) (“By requiring ‘substantial underrepresentation’ in equal protection challenges, *Castaneda* implies that the burden of proof for establishing that the underrepresentation is unfair and unreasonable in an equal protection challenge is higher than it is in a fair cross-section challenge.”); *United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (“[T]he sixth amendment is stricter [than the Equal Protection Clause] because it forbids any substantial underrepresentation of minorities, regardless of . . . motive.” (quoting *Alston v. Manson*, 791 F.2d 255, 257 (2d Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987)) (final alteration in original)); Schulberg, *supra* note 17, at 17 (“Statistics serve a different function in equal protection claims: there, they are circumstantial evidence of discriminatory intent.”). The Supreme Court has also not announced a numerical threshold for what is “fair and reasonable” in the Sixth Amendment context. In *Berghuis v. Smith*, the government urged the Court to adopt a 10% disparity requirement, 130 S. Ct. 1382, 1394 n.4, but the Court declined to reach the issue, and observed only that under the 10% rule, there would be no remedy for a distinct group’s complete exclusion if its population in a given community did not reach the 10% threshold. *Id.*

89. *See United States v. Rodriguez-Lara*, 421 F.3d 932, 940 (9th Cir. 2005) (“Unlike the equal protection challenge, the fair cross-section claim does not require a showing that the selection procedure is susceptible of abuse or not race-neutral; the defendant must only show that the exclusion of his or her group is ‘systematic.’”).

90. “[M]ost courts have continued to apply the 10% absolute disparity floor set in *Swain* for equal protection cases in order to determine whether a sixth amendment violation has been demonstrated.” Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590, 611 (1990). But it is not appropriate to import the 10% threshold to cross-section cases. *See United States v. Green*, 389 F. Supp. 2d 29, 55 n.52 (D. Mass. 2005) (“[T]he 10% rule adopted by some courts is a contrivance, and one based on faulty precedent.”); *Waller v. Butkovich*, 593 F. Supp. 942, 954 (M.D.N.C. 1984) (declining to adopt the 10% rule because “[w]hether a fair cross section exists is entirely different from whether intentional discrimination occurred”); Schulberg, *supra* note 17, at 17 (“[T]he transposition [of the 10% threshold] is unsound as a matter of doctrine.”); Williams, *supra*, at 611 (“A claimant raising an equal protection challenge should be required to show a greater disparity than one alleging a violation of the sixth amendment.”); *see also Delgado v. Dennehy*, 503 F. Supp. 2d 411, 426 n.17 (D. Mass. 2007) (citing *Greene*, 389 F. Supp. 2d at 55 n.52; *Waller*, 593 F. Supp. at 954).

91. *See, e.g., Mares v. Scribner*, No. 07-56058, 2010 WL 2994032, at \*1 (9th Cir. July 29, 2010) (denying a fair cross-section claim where the disparity did not constitute “substantial underrepresentation” (citing *Swain v. Alabama*, 380 U.S. 202, 208–09 (1965))); *United States v.*

degree of disparity in light of the system's race-neutral policies.<sup>92</sup> Although not the subject of this Article, each of these errors undermines the fair cross-section right.

#### 4. *Differences in the Relationship Between Disparity and the State*

The third prong of the prima facie case for both the Sixth Amendment and the equal protection standards examines the relationship between the disparity and the government. This Article focuses on this third prong of the test, both because it is here that the two constitutional standards diverge the most, and because the majority of claims in my survey were denied at least in part based on the defendant's failure to satisfy this prong.<sup>93</sup>

In the equal protection context, a judge evaluating a challenge to the jury selection system "must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact.'" <sup>94</sup> Instead, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."<sup>95</sup>

The Sixth Amendment, however, has no such requirement. The Supreme Court made this explicit in *Duren*. The defendant and the United States had cited equal protection cases in their briefs, and the

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Booker, No. 05-1929, 2007 WL 2492427, at \*2 (6th Cir. Sept. 5, 2007) ("[Defendant] has not shown, for starters, that the representation of either group was not 'fair and reasonable,' *Duren*, 439 U.S. at 364, which is to say, that either of these groups was 'substantially underrepresented' in the jury wheel, *Castaneda v. Partida*, 430 U.S. 482, 495 n.14.").

92. See, e.g., *United States v. Quiroz*, No. 03-5120, 2005 WL 1427692, at \*2 (5th Cir. June 20, 2005) (evaluating disparity at the second prong of a cross-section claim in light of the jurisdiction's "use of objective criteria and random selection").

93. In my survey, the majority of claims (104 of 167 cases, or 62%) were denied solely or in part on the basis of the defendant's failure to show that any underrepresentation was due to "systematic exclusion." *Infra* Appendix. The centrality of *Duren's* third prong in my survey is inconsistent with the assumption articulated elsewhere that the second prong is the focus of courts' analysis. See, e.g., *Hannaford-Agor*, *supra* note 34, at 763 ("Most of the reported cases over the past three decades have tended to focus on *Duren's* second prong . . ."). But see *Berghuis v. Smith*, 130 S. Ct. 1382, 1388 (2010) ("[T]he second and third [prongs] are more likely to generate controversy.").

94. *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)).

95. *Id.* An exception to the intent requirement is made only when the state action is facially discriminatory. See, e.g., *Monroe v. City of Charlottesville*, 579 F.3d 380, 388 (4th Cir. 2009). Notably, although both *Taylor* and *Duren* involved jury provisions that facially differentiated between men and women, the Court did not rely on the facially discriminatory aspects of the jury system when defining "systematic exclusion." Instead, the Court explicitly contrasted the cross-section standard with the requirement for evidence of "discriminatory purpose," *Duren*, 439 U.S. at 368 n.26, and observed that the "systematic" nature of the disparity was "manifestly indicate[d]," *id.* at 366, by the duration of the disparity. Similarly, in *Smith*, the Court did not premise the denial of the defendant's claim on the absence of any facially exclusive provision. 130 S. Ct. at 1382.

Court made a point of correcting them.<sup>96</sup> As the Court explained, in the cited equal protection cases, the defendants had provided evidence:

of another essential element of the constitutional violation—discriminatory purpose. Such evidence is subject to rebuttal evidence either that discriminatory purpose was not involved or that such purpose did not have a determinative effect. *In contrast, in Sixth Amendment fair-cross-section cases*, systematic disproportion itself demonstrates an infringement of the defendant’s interest in a jury chosen from a fair community cross section.<sup>97</sup>

Because the Sixth Amendment does not require evidence of discrimination, a jury system that does not violate the Equal Protection Clause can still be in violation of the fair cross-section right.<sup>98</sup> This distinction may have been most forcefully delineated by Justice Rehnquist in his dissents in *Taylor* and *Duren*. Rehnquist did not agree that there was an independent constitutional basis for the fair cross-section right established in *Taylor*, but he recognized that pursuant to the majority’s approach: “under equal protection analysis *prima facie* challenges are rebuttable by proof of absence of intent to discriminate, while under Sixth Amendment analysis intent is irrelevant.”<sup>99</sup>

Instead of demonstrating discrimination, a defendant raising a fair cross-section claim has to show that the underrepresentation is “due to systematic exclusion of the group in the jury-selection process,” by showing that “the cause of the underrepresentation was systematic—that

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96. *Duren*, 439 U.S. at 368 n.26.

97. *Id.* (emphasis added) (citation omitted).

98. *Ballew v. Georgia*, 435 U.S. 223, 242 (1978) (“Even though the facts of this case would not establish a jury discrimination claim under the Equal Protection Clause, the question of representation does constitute one factor of several that, when combined, create a problem of constitutional significance under the Sixth and Fourteenth Amendments.”); *see also Duren*, 439 U.S. at 365 n.24 (referring to a case that “involved an equal protection challenge to a jury-selection process” and noting that “proof of such a claim is in certain respects not analogous to proof of a cross-section violation”).

99. *Duren*, 439 U.S. at 371 (Rehnquist, J., dissenting). Specifically, Rehnquist argued that the majority’s new distinction between equal protection cases and fair cross-section cases was a “fiction,” and that *Duren* and *Taylor* had introduced a “hybrid doctrine” where holdings were characterized as Sixth Amendment decisions but actually drew their support from equal protection principles. *Id.* at 370–71. Justice Thomas picked up this baton in his concurrence in *Smith*, quoting Rehnquist for the view that the introduction of the cross-section right “rests less on the Sixth Amendment than on an ‘amalgamation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.’” 130 S. Ct. at 1396 (Thomas, J., concurring) (quoting *Duren*, 439 U.S. at 372 (Rehnquist, J., dissenting)). Thomas opined that he is “willing to reconsider our precedents articulating the ‘fair cross section’ requirement,” because “[h]istorically juries did not include a sampling of persons from all levels of society or even from both sexes.” *Id.* Importantly, although Rehnquist argued that the Sixth Amendment doctrine established by the majority was invalid (because it was based on equal protection principles), he was clear that the new (objectionable) standard was distinct from the test for equal protection violations. *Duren*, 439 U.S. at 370–71 (Rehnquist, J., dissenting). As discussed at Part III.C *supra*, my research did not uncover a single case where the court imported equal protection concepts *because of* the objections Rehnquist articulated.

is, inherent in the particular jury-selection process utilized.”<sup>100</sup> The most straightforward reading of *Duren* implies that showing a disparity over time can alone “manifestly indicate” that the disparity is “inherent” in the system and not the product of chance or fluke.<sup>101</sup> In *Duren*, the Court held that the defendant’s “undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year *manifestly indicates* that the cause of the underrepresentation was systematic.”<sup>102</sup> For if a disparity occurs once, it could be the product of chance or happenstance, but if it happens “in every weekly venire for . . . a year,” the court can be sure that something “inherent” is causing it, even if it is not clear exactly what aspect of the system is the source.<sup>103</sup>

The *Duren* Court went on to explain that the defendant “also established when in the selection process the systematic exclusion [of women] took place.”<sup>104</sup> He was not able to do so with particularity, but he was able to narrow the possibilities down to two stages of the selection process.<sup>105</sup> And he posited, but did not prove, that the disparity was due to the state policy and practice of allowing women to choose to opt out of jury service.<sup>106</sup> The Court observed that *Duren* had not established which

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100. *Duren*, 439 U.S. at 364, 366.

101. See, e.g., *United States v. Weaver*, 267 F.3d 231, 244 (3d Cir. 2001) (“Under *Duren*, ‘systematic exclusion’ can be shown by a large discrepancy repeated over time such that the system must be said to bring about the underrepresentation . . . .”); *United States v. Biaggi*, 680 F. Supp. 641, 653 (S.D.N.Y. 1988) (“*Duren* permits the defendant to focus solely on the composition of the venires over time, not on the intent of the registrars, in endeavoring to assemble that proof.”); Williams, *supra* note 90, at 617 (“[D]emand[ing] a showing that the disproportionate representation is inherent in the system used, rather than a product of random factors on one particular jury venire . . . is the most natural reading of *Duren* . . . .”).

102. *Duren*, 439 U.S. at 366 (emphasis added).

103. See *United States v. Green*, 389 F. Supp. 2d 29, 56 n.53 (D. Mass. 2005) (“[T]he question is whether the underrepresentation [is] ‘inherent in the system used, rather than a product of random factors on one particular jury venire.’” (quoting Williams, *supra* note 90, at 617)); James H. Druff, Note, *The Cross-Section Requirement and Jury Impartiality*, 73 CALIF. L. REV. 1555, 1565 (1985) (“[I]ndividual instance of underrepresentation might be a coincidence, whereas a pattern will betray a systematic procedural abuse.”).

104. *Duren*, 439 U.S. at 366.

105. *Id.* at 366–67 (demonstrating with “statistics and other evidence” that the disparity occurred either when people were summoned for service or when people showed up in court at the “final, venire, stage”).

106. *Id.* at 368, 369. The holes in *Duren*’s “systematic” theory did not go unnoticed: The Missouri Supreme Court pointed out that *Duren* “had not unequivocally demonstrated the extent to which the low percentage of women appearing for jury service was due to the automatic exemption for women, rather than to sex-neutral exemptions.” *Id.* at 363. And, as the Court noted, one of the government’s primary arguments was that “petitioner has not proved that the exemption for women had ‘any effect’ on or was responsible for the underrepresentation of women on venires.” *Id.* at 368; see *People v. Morales*, 770 P.2d 244, 277 (Cal. 1989) (Broussard, J., dissenting) (“[I]n *Duren* itself, the court rejected the idea that defendant had to show that the underrepresentation was not caused by jurors seeking exemptions under provisions which were not subject to attack.”).

policy was producing the disparity<sup>107</sup> and acknowledged the state supreme court's suggestion that the disparity may have been due to the private choices of women to claim exemptions for jury service.<sup>108</sup> Nonetheless, the Court concluded the underrepresentation of women "was quite obviously due to the system by which juries were selected. . . . Women were therefore systematically underrepresented . . . ."<sup>109</sup>

The Supreme Court arguably departed from *Duren's* emphasis on the duration of the disparity in its only subsequent cross-section opinion, *Berghuis v. Smith*.<sup>110</sup> Although the Court adopted the fair cross-section standard exactly as it was articulated in *Duren*,<sup>111</sup> the analysis suggests<sup>112</sup> that a more particularized showing of the cause of the disparity is required.<sup>113</sup> *Smith* did not, however, add anything new to the distinction

107. *Duren*, 439 U.S. at 367 (explaining the disparity was due to either "the automatic exemption for women or other statutory exemptions"); *id.* at 369 ("The other possible cause of the disproportionate exclusion of women on Jackson County jury venires is, of course, the automatic exemption for women.").

108. *Id.* at 368.

109. *Id.* at 367.

110. 130 S. Ct. 1382 (2010).

111. *Id.* at 1388.

112. *Smith* involved the application of the limited standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which restricted the Court's analysis to the question of whether the Michigan Supreme Court's decision "involved an unreasonable application of[] clearly established Federal law." *Id.* at 1391 (quoting 28 U.S.C. § 2254 (2012)).

113. *See id.* at 1395 ("No 'clearly established' precedent of this Court supports Smith's claim that he can make out a prima facie case merely by pointing to a host of factors that, individually or in combination, might contribute to a group's underrepresentation."). In making this demand for specificity, the 2010 Court seemed to be more impressed with *Duren's* evidence than the 1979 Court had been. According to the Court in *Smith*, "[t]o show the 'systematic' cause of the underrepresentation, *Duren* pointed to Missouri's law exempting women from jury service, and to the manner in which Jackson County administered the exemption," and *Duren* "demonstrated systematic exclusion with particularity." *Id.* at 1388, 1392. Of course, *Duren* did "point to" Missouri's law exempting women, but the state "pointed to" non-gender based exclusions, and the Court found for *Duren* without resolving the factual question. *See People v. Bell*, 778 P.2d 129, 171 (Cal. 1989) (Broussard, J., dissenting) ("[Th]e *Duren* court never determined whether the underrepresentation of women in Jackson County, Missouri, occurred as a result of facially neutral state exemptions or the county's automatic exemption for women."). Was it the passage of thirty years that made *Duren's* case look so much more compelling? Or was it that the *Smith* opinion was written by *Duren's* attorney, and her convictions about what she had "established" as an advocate were more powerful than the Court's tempered description of that proof? *Duren's* lead attorney was Ruth Bader Ginsburg, then of the American Civil Liberties Union, and Justice Ginsburg was the author of *Smith*. In her brief on behalf of *Duren*, Ginsburg described the state's argument that the defense had not "established a causal link" between the disparity and the gender-based exemption as "an argument of extraordinary fancy," and asserted that the "only genuine explanation for the gross underrepresentation of females" is the state's exemption for women. Reply Brief for Petitioner, *Duren v. Missouri*, 439 U.S. 357 (1979) (No. 77-6067), 1978 WL 207151, at \*4, \*6. Perhaps an advocate's assertion about the "only genuine explanation" in 1979 was transformed into a Justice's conclusion about the "altogether obvious explanation" in 2010, without accounting for the Court's recognition of what remained unexplained. In any event, the Court in *Smith* appeared to examine the defendant's proof of systematic exclusion with this rosier version of *Duren's* proof in mind, and accordingly faulted the defendant for the imprecision

between the Sixth and Fourteenth Amendment standards, and the circuit opinion that was reversed in *Smith* had explicitly distinguished the fair cross-section analysis from equal protection analysis.<sup>114</sup>

##### 5. *Differences in Government's Burden*

In an equal protection case the government must rebut the inference of discrimination with evidence that there was no discriminatory purpose or, if a discriminatory purpose existed, it did not have a “determinative effect.”<sup>115</sup>

“In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant’s interest . . . .”<sup>116</sup> The government’s rebuttal is therefore limited to “[t]he only remaining question”—whether there is “adequate justification for this infringement.”<sup>117</sup> A justification is adequate if it “manifestly and primarily” advances “a significant state interest.”<sup>118</sup>

Despite the unique importance of the fair cross-section guarantee and the clarity of the Supreme Court’s distinctions between the two constitutional tests—as well as the significant amount of case law recognizing the stark differences between the two standards<sup>119</sup>—courts

of his evidence.

114. *Smith v. Berghuis*, 543 F.3d 326, 335–36 (6th Cir. 2008) (“[A] party need not show that the underrepresentation of a distinctive group came as a result of intentional discrimination. *Duren*, 439 U.S. at 368 n.26. Rather, as other circuits have observed, “[u]nlike the equal protection challenge, the fair cross section claim does not require a showing that the selection procedure is susceptible [to] abuse or not race-neutral; the defendant must only show that the exclusion of his or her group is ‘systematic.’ *United States v. Rodriguez-Lara*, 421 F.3d 932, 939 (9th Cir. 2005).” (alterations in original)).

115. *Duren*, 439 U.S. at 368 n.26 (contrasting the burden in equal protection cases to that in fair cross-section cases).

116. *Id.*

117. *Id.*

118. *Id.* at 367. Moreover, “it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest.” *Id.* at 368. The right to a proper jury, however, “cannot be overcome on merely rational grounds.” *Id.* at 367 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975)).

119. A number of courts have recognized that a fair cross-section claim does not require an inference of discrimination, *see, e.g.*, *United States v. Reyes*, No. 06-41457, 2007 WL 3208785, at \*662 (5th Cir. Oct. 29, 2007); *Randolph v. People*, 380 F.3d 1133, 1141 (9th Cir. 2004); *United States v. Weaver*, 267 F.3d 231, 244 (3d Cir. 2001); *United States v. Royal*, 174 F.3d 1, 6 (1st Cir. 1999); *United States v. Jackman*, 46 F.3d 1240, 1245 (2d Cir. 1995); *Bowen v. Kemp*, 769 F.2d 672, 683, 684 n.7 (11th Cir. 1985); *Parker v. Phillips*, 717 F. Supp. 2d 310, 328 (W.D.N.Y. 2010); *French v. Wolfenbarger*, No. 07-11075, 2010 WL 335304, at \*4 (E.D. Mich. Jan. 29, 2010); *United States v. Manbeck*, 514 F. Supp. 141, 147 (D.C.S.C. 1981); *United States v. Jenison*, 485 F. Supp. 655, 660 (S.D. Fla. 1979); *United States v. Armsbury*, 408 F. Supp. 1130, 1140 (D. Or. 1976); *Washington v. People*, 186 P.3d 594, 600 n.4 (Colo. 2008); *State v. Gibbs*, 758 A.2d 327, 335 (Conn. 2000); *Ramirez v. State*, 575 S.E.2d 462, 466–67 (Ga. 2003); *Commonwealth v. Bastarache*, 414 N.E.2d 984, 992 (Mass. 1980); *State v. Fulton*, 566 N.E.2d 1195, 1200 (Ohio 1991); *State v. Cienfuegos*, 25 P.3d 1011, 1017 (Wash. 2001), or consideration of whether selection policies are race-neutral or susceptible to abuse, *see, e.g.*, *Rodriguez-Lara*, 421

are erroneously applying the equal protection standard to fair cross-section claims with surprising frequency.

## II. EQUAL PROTECTION STANDARDS ARE CONTAMINATING THE FAIR CROSS-SECTION ANALYSIS

Courts are importing equal protection concepts into the third prong of *Duren's* fair cross-section test, which focuses on systematic exclusion, in two ways. First, in what I refer to as “Category A errors,” courts are requiring proof of intentional and discriminatory action to establish systematic exclusion. Second, in “Category B errors,” courts are evaluating the question of systematic exclusion with a focus on fault and the opportunities of jurors to serve.

A wide range of courts have made Category A errors: At least ten federal circuits and nineteen states have erroneously denied defendants’ Sixth Amendment claims for failure to satisfy the Fourteenth Amendment’s equal protection requirement of discriminatory intent.<sup>120</sup> Other courts have made Category B errors, denying cross-section claims using an analysis focused on equal protection and its attention to fault and opportunities for jurors to serve.<sup>121</sup> Moreover, the results of my original survey suggest that these errors are being made with surprising frequency, in addition to indisputably occurring across jurisdictional lines.

These conclusions derive from my examination of 167 federal and state appellate fair cross-section claims decided between 2000 and 2011.<sup>122</sup> Courts denied defendants’ claims in all 167 of those cases,<sup>123</sup> and denied

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F.3d at 940; *United States v. Bates*, No. 05-81027, 2009 WL 3270190, at \*9–10 (E.D. Mich. Oct. 29, 2009); *Francis v. Fabian*, 669 F. Supp. 2d 970, 983 (D. Minn. 2009); *People v. Buford*, 182 Cal. Rptr. 904, 908–09 (Cal. Ct. App. 1982), that systematic exclusion can be demonstrated by disparity over time, *see, e.g., Weaver*, 267 F.3d at 244–45; *Alston v. Manson*, 791 F.2d 255, 258 (2d Cir. 1986); *United States v. Biaggi*, 680 F. Supp. 641, 648–49 (S.D.N.Y. 1988), and that the analysis is focused on the result of the selection process rather than the intentions of those who designed and operate it, *see, e.g., Royal*, 174 F.3d at 9 n.7; *Smith v. Commonwealth*, 649 N.E.2d 744, 746 (Mass. 1995).

120. *See infra* Appendix.

121. *See infra* Appendix.

122. To produce the survey I examined all opinions decided by state supreme courts or federal circuit courts of appeals from January 1, 2000 to July 30, 2011 that cited the case of *Duren v. Missouri*. I also searched for federal circuit court cases post-January 1, 2000, using the terms (*fair /s (cross /2 section) % Duren*). After omitting cases that did not address the merits of a Sixth Amendment fair cross-section claim, 167 cases remained. The limitations of this approach, and the details of my methodology, are discussed in full in the Appendix. The survey’s most significant limitations are the temporal limitation to 2000–2011; the exclusion of state fair cross-section cases that do not cite *Duren*, cases that neither cite *Duren* nor refer to a fair cross-section, and cases not available on Westlaw; and the exercise of subjective judgment in omitting cases that did not involve the merits of a Sixth Amendment fair cross-section claim. Of course, by limiting the survey to appellate cases, I have also necessarily excluded cross-section decisions in trial courts that were not appealed.

123. Defendants prevailed on their jury claims in two cases that were omitted from the survey

104 of the 167 cases (62%) at least in part on the basis of the defendant's failure to satisfy *Duren's* third prong—the failure to show that any underrepresentation was due to “systematic exclusion.” Examination of this group of 104 “systematic exclusion” denials revealed that 43 cases (41%) involved a Category A error and that the courts made a Category B error in 24 cases (23%). Because courts made both types of errors in 13 of the cases, the total number of survey cases involving one of the two categories of equal protection error was 54 of 104. As explained above, the limitations of the survey significantly restrict the conclusions one can draw from the data.<sup>124</sup> But in conjunction with the cases discussed in this Article, they at least suggest that this doctrinal contamination is occurring in more cases than might be expected.

#### A. CATEGORY A ERRORS: REQUIRING PROOF OF INTENTIONAL OR DISCRIMINATORY ACTION TO ESTABLISH SYSTEMATIC EXCLUSION

The third prong of the *Duren* test, as explained above, asks whether the disparity between the representation of the distinctive group in the population and in the jury system is “systematic,” or “inherent” in the selection process.<sup>125</sup> It specifically does *not* impose the equal protection requirement of “[p]roof of racially discriminatory intent or purpose.”<sup>126</sup> Yet courts evaluating fair cross-section claims frequently deny the claim because the defendant has failed to prove purposeful exclusion or discrimination.

##### 1. *Requiring Proof of Intentional or Discriminatory Action in Jury Selection*

On the spectrum of judicial errors, mixing up constitutional amendments and imposing requirements that do not exist is a relatively dramatic mistake. Yet courts frequently conclude, for example, that because the defendant “has failed to demonstrate systematic *discrimination*, we reject his Sixth Amendment claim.”<sup>127</sup> Indeed, the mistake of denying Sixth Amendment claims for the failure to satisfy the Fourteenth Amendment requirement of intentional and discriminatory exclusion has been made by the First,<sup>128</sup> Third,<sup>129</sup> Fourth,<sup>130</sup> Fifth,<sup>131</sup>

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because they were decided pursuant to state statutes. See *Azania v. State*, 778 N.E.2d 1253, 1259 (Ind. 2002); *State v. LaMere*, 2 P.3d 204, 219, 220 (Mont. 2000).

124. See *infra* Appendix.

125. *Duren*, 439 U.S. at 366.

126. *Hernandez v. New York*, 500 U.S. 352, 359–60 (1991).

127. *State v. Jones*, 744 N.E.2d 1163, 1173 (Ohio 2001) (emphasis added).

128. See, e.g., *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985) (en banc) (“[Allowing] a fair degree of leeway in designating jurors so long as the state or community does not *actively prevent people from serving or actively discriminate*, and so long as the system is reasonably open to all.”)

Sixth,<sup>132</sup> Seventh,<sup>133</sup> Eighth,<sup>134</sup> Ninth,<sup>135</sup> and Eleventh<sup>136</sup> Circuits, by federal district courts,<sup>137</sup> and by state courts in Alabama,<sup>138</sup> Arkansas,<sup>139</sup>

(emphasis added)).

129. Hayer v. Univ. of Med., 2012 WL 3090912, at \*2 (3d Cir. June 8, 2012) (“Plaintiff’s . . . argument . . . is that the jury selection process violated her right to *equal protection* because the jury did not represent a fair cross-section of the community. . . . To prevail on this claim, plaintiff must show that the underrepresentation resulted from ‘purposeful discrimination’ by demonstrating [the three *Duren* factors].” (quoting *Duren*, 439 U.S. at 364) (emphasis added)).

130. See, e.g., *United States v. McGrady*, Nos. 96-4269, 96-4270, 96-4271, 1999 WL 95633, at \*2-3 (4th Cir. Feb. 17, 1999) (“[The disparity does not] demonstrate that the exclusion of minorities was due to the sort of *discriminatory* ‘system’ outlawed in *Taylor* and *Duren*.” (emphasis added)); *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988) (“[I]t is sufficient that the selection be in terms of a ‘fair cross-section’ gathered without *active discrimination*.” (emphasis added) (internal quotation marks omitted)).

131. See, e.g., *Rivas v. Thaler*, No. 10-70007, 2011 WL 2748394, \*403 (5th Cir. July 14, 2011) (“[The defendant’s evidence] does not constitute the type of *affirmative barrier* to selection for jury service that is the hallmark of a Sixth Amendment violation.” (emphasis added)); *United States v. Steen*, 55 F.3d 1022, 1030 (5th Cir. 1995) (“[T]he exclusion of a particular minority group from jury service [must be] due to some form of *intentional discrimination*.” (emphasis added) (quoting *United States v. Lopez*, 588 F.2d 450, 451-52 (5th Cir. 1979))); *Atwell v. Blackburn*, 800 F.2d 502, 505 (5th Cir. 1986) (“[The petitioner in a fair cross-section claim] bears the burden of proving, at the least, that a constitutionally distinctive group or identifiable segment of the community was *purposefully excluded* from his grand jury venire by the jury selection process.” (emphasis added)); see also *Murphy v. Johnson*, 205 F.3d 809, 818 (5th Cir. 2000) (“[T]he Supreme Court had consistently held that racial *discrimination* in the selection of grand juries was violative of the fair cross-section requirement.” (citing two equal protection cases)).

132. See, e.g., *United States v. Booker*, No. 05-1929, 2007 WL 2492427, at \*5 (6th Cir. Sept. 5, 2007) (“Nor has [the defendant] shown that the system of jury selection in the district *facially targets* one of the underrepresented groups . . .” (emphasis added)); *Polk v. Hunt*, No. 95-5323, 1996 WL 47110, at \*2 (6th Cir. Feb. 5, 1996) (“A panel of prospective jurors represents a fair cross-section of the community if it is gathered without active discrimination.”); see also *United States v. Johnson*, No. 00-2443, 2002 WL 1402157, at \*96 (6th Cir. June 27, 2002); *United States v. Davis*, No. 00-3974, 2001 WL 1662485, at \*597-98 (6th Cir. Dec. 27, 2001); *Ford v. Seabold*, 841 F.2d 677, 685 (6th Cir. 1988).

133. See, e.g., *United States v. Phillips*, 239 F.3d 829, 842 (7th Cir. 2001) (“[The defendants] challenged the jury composition under the Sixth Amendment, which forbids *racial discrimination* in the selection of jurors.” (emphasis added)); *Johnson v. McCaughtry*, 92 F.3d 585, 594 (7th Cir. 1996) (finding no systemic exclusion because the defendant “[did] not allege any other *discriminatory actions* on the part of the state that could account for the total disparity” (emphasis added)); *United States v. Gometz*, 730 F.2d 475, 478 (7th Cir. 1984) (en banc) (“The Sixth Amendment has been interpreted to forbid racial discrimination in the selection of jurors . . . [but the claim is denied because] [s]ystematic discrimination . . . has not been shown.”).

134. See, e.g., *United States v. Tripp*, No. 08-2065, 2010 WL 1267153, at \*759 (8th Cir. May 13, 2010) (“The Constitution . . . merely prohibits *deliberate exclusion* of an identifiable racial group from the juror selection process.” (emphasis added)); see also *United States v. Horne*, 4 F.3d 579, 588 (8th Cir. 1993) (discussed in text, *infra* note 160).

135. See, e.g., *United States v. Hara*, No. 06-10192, 2007 WL 1814078, at \*265 (9th Cir. June 21, 2007) (holding, where defendant raised both a fair cross-section claim and an equal protection claim, that “[t]o prevail on either claim, Appellant must show a *prima facie* case for discrimination”).

136. See, e.g., *United States v. Carver*, No. 10-11599, 2011 WL 1304757, at \* 807 (11th Cir. Apr. 6, 2011) (“Moreover, Carver presents no evidence that the five-county area from which the jury venire was chosen was *gerrymandered to exclude* African Americans.” (emphasis added)); *United States v. Hester*, No. 05-12285, 2006 WL 3248012, at \*715 (11th Cir. Sept. 18, 2006) (“[Defendants] failed to

California,<sup>140</sup> Georgia,<sup>141</sup> Illinois,<sup>142</sup> Indiana,<sup>143</sup> Kansas,<sup>144</sup> Michigan,<sup>145</sup>  
Mississippi,<sup>146</sup> Nebraska,<sup>147</sup> Nevada,<sup>148</sup> New York,<sup>149</sup> North Carolina,<sup>150</sup>

present evidence that African-Americans are systematically underrepresented in the jury pool. Moreover, [the defendants] acknowledged in the district court that they *could not show bad will in the process as a whole . . .*” (emphasis added).

137. See, e.g., *Stukes v. Lawler*, No. 4-10-CV-24, 2011 WL 1988375, at \*15 (M.D. Pa. Apr. 19, 2011) (“[For a Sixth Amendment violation,] *[p]roof is required of an actual discriminatory practice* in the jury selection process, not merely underrepresentation of one particular group. The defendant bears the initial burden of presenting prima facie evidence of *discrimination* in the jury selection process.” (emphasis added) (citation omitted)); *Scott v. Sobrina*, No. 09-1081, 2010 WL 8128749, at \*18 (E.D. Pa. Jan. 29, 2010) (explaining that under the Sixth Amendment “[u]nder-representation of a particular group is insufficient to prove unconstitutional *discrimination*” (emphasis added)); *United States v. Kellam*, 498 F. Supp. 2d 875, 882 (W.D. Va. 2007) (“[I]t is sufficient that the selection be in terms of a fair cross-section gathered without *active discrimination*.” (emphasis added) (quoting *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988))); *Warren v. Sherman*, No. 2-05-CV-118, 2007 WL 2683210, at \*3 (W.D. Mich. Sept. 7, 2007) (“Petitioner’s Sixth Amendment fair cross-section claim . . . would still fail because it lacked an essential element—that the exclusion of African-Americans and other minorities must be *intentional*.” (emphasis added)); *Cross v. Johnson*, 169 F. Supp. 2d 603, 620 (N.D. Tex. 2001) (“An assertedly *discriminatory* selection of a jury venire may be challenged under the Sixth Amendment when the venire fails to reflect a fair cross-section of the community. There is no evidence to even suggest that the venire was selected pursuant to a practice that provided an opportunity for *discrimination*.” (emphasis added)).

138. See, e.g., *Calhoun v. State*, 932 So. 2d 923, 939 (Ala. Crim. App. 2005) (“Calhoun had the burden of establishing a prima facie showing of *racial discrimination*.” (emphasis added)); *Ford v. State*, 628 So. 2d 1068, 1069 (Ala. Crim. App. 1993) (citing requirement to establish “primary inference of *invidious discrimination*” (emphasis added)).

139. See, e.g., *Thomas v. State*, 257 S.W.3d 92, 99 (Ark. 2007) (“We have held that when the jury venire is drawn by random selection, the mere showing that it is not representative of the racial composition of the population will not make a prima facie showing of *racial discrimination*.” (emphasis added)); *Ellis v. State*, No. CR 05-643, 2006 WL 2708400, at \*4 (Ark. Sept. 21, 2006) (“[A]ppellant has not met his burden of establishing a prima facie case of *purposeful discrimination* [under the Sixth Amendment].” (emphasis added)); see also *Navarro v. State*, 264 S.W.3d 530, 540–41 (Ark. 2007); *State v. Fudge*, 206 S.W.3d 850, 862 (Ark. 2005).

140. See, e.g., *People v. Ayala*, 1 P.3d 3, 21 (Cal. 2000) (“The [jurisdiction’s method of jury selection] does not *discriminate on the basis of ethnicity or national origin*. Hence, defendant has not shown that the jury selection process contained an ‘improper feature.’” (emphasis added) (citation omitted)).

141. See, e.g., *Smith v. State*, 571 S.E.2d 740, 748 (Ga. 2002) (“[No systematic exclusion existed where] [t]here was no showing of any effort to *impede Hispanic voter registration* in Hall County . . . [and] also no evidence that the jury commission *acted in a discriminatory manner by limiting or excluding Hispanic participation* in the Hall County jury pool.” (emphasis added)).

142. See, e.g., *People v. Bradley*, 810 N.E.2d 494, 496 (Ill. App. Ct. 2004) (“[W]e find that an underrepresentation of African-American people on one jury panel does not allow for the conclusion that evidence of *systematic and purposeful* exclusion must exist.” (emphasis added)); *People v. Saunders*, 543 N.E.2d 1078, 1085 (Ill. App. Ct. 1989) (“[T]he trial court properly determined that defendant failed to establish a prima facie case of *racial discrimination* in the jury selection process.” (emphasis added)).

143. See, e.g., *James v. State*, 613 N.E.2d 15, 29 (Ind. 1993) (“The issue of the racial composition of the jury, when raised by a defendant, requires a demonstration of *purposeful discrimination* against that racial group. The defendant bears the burden of showing that the *discrimination* was due to a systematic exclusion of that particular group. Absent such *purposeful discrimination and systematic exclusion*, defendants’ claims relating to the racial composition of jury panels have not been

Ohio,<sup>151</sup> Pennsylvania,<sup>152</sup> Rhode Island,<sup>153</sup> Tennessee,<sup>154</sup> Washington,<sup>155</sup> and Wisconsin.<sup>156</sup> Nine additional states signed onto an amicus brief in

recognized.” (emphasis added) (citations omitted)); *see also* Highler v. State, 834 N.E.2d 182, 188 (Ind. Ct. App. 2005), *aff’d in part, vacated in part on other grounds*, 854 N.E.2d 823 (Ind. 2006).

144. *See, e.g.*, State v. Lewis, 161 P.3d 807, 811–12 (Kan. Ct. App. 2007) (“[There is no Sixth Amendment claim because.] [a]ccording to *Swain*, this disparity [demonstrated by defendant] does not establish purposeful *discrimination*.” (emphasis added)).

145. *See, e.g.*, People v. Ward, No. 265839, 2007 WL 3226309, at \*6 (Mich. Ct. App. Nov. 1, 2007) (“To succeed on a claim of *racial discrimination* in the composition of the jury venire or pool that violates the Sixth Amendment, defendant must first show a prima facie case of *racial discrimination*. . . . [D]efendant has not shown a prima facie case of *racial discrimination*, and his Sixth Amendment claim fails.” (emphasis added)).

146. *See, e.g.*, Yarbrough v. State, 911 So. 2d 951, 956 (Miss. 2005) (“Yarbrough has offered no evidence, either in his motion at trial or on appeal, which alleges the type of systematic exclusion of a distinctive group found in either *Duren* or *Gathings*. In fact, during the hearing on Yarbrough’s motion, the prosecution noted that Yarbrough had offered no evidence which suggested *racial discrimination* in the drawing or selection of jurors. We agree.” (emphasis added)).

147. *See, e.g.*, State v. Thomas, 637 N.W.2d 632, 652 (Neb. 2002) (“A defendant cannot, under either a Sixth Amendment or an equal protection challenge, simply allege that no minorities are on the jury, but has the burden of establishing systematic exclusion and *purposeful discrimination*.” (emphasis added)).

148. *See, e.g.*, Williams v. State, 125 P.3d 627, 632 (Nev. 2005) (“The third prong of the Sixth Amendment’s guarantee requires systematic *discrimination*.” (emphasis added)).

149. *See, e.g.*, People v. Davis, 522 N.Y.S.2d 1017, 1020 (N.Y. Sup. Ct. 1987) (“As to the fair cross-section claim, defendant is only entitled to a hearing if his motion sufficiently specifies some facts establishing systematic *discrimination* in the jury selection process.” (emphasis added)); People v. Henderson, 490 N.Y.S.2d 94, 97 (N.Y. City Ct. 1985) (denying claim where “although the discriminatory effect may be the same, it is significant that Blacks and Hispanics are *not targeted as such for exclusion* from the jury panel. . . . Blacks and Hispanics are not excluded from the jury pool by reason of any *discriminatory purpose*.” (emphasis added)).

150. *See, e.g.*, State v. Golphin, 533 S.E.2d 168, 192 (N.C. 2000) (described in text, *infra* note 158); *see also* State v. Williams, 565 S.E.2d 609, 638 (N.C. 2002).

151. *See, e.g.*, State v. Jones, 744 N.E.2d 1163, 1173 (Ohio 2001) (described in text, *supra* note 127); State v. Dunn, No. 16904, 2000 WL 1433873, at \*10 (Ohio Ct. App. Sept. 29, 2000) (“Ohio courts have defined ‘systematic’ as ‘the *intentional* exclusion of a distinctive group.’” (emphasis added)); *see also* State v. Jackson, 836 N.E.2d 1173, 1193 (Ohio 2005).

152. *See, e.g.*, Commonwealth v. Johnson, 838 A.2d 663, 682 (Pa. 2003) (“To establish a prima facie violation of the requirement that a jury array fairly represent the community . . . [p]roof is required of an actual *discriminatory practice* in the jury selection process, not merely under-representation of one particular group. The defendant bears the initial burden of presenting prima facie evidence of *discrimination* in the jury selection process.” (emphasis added) (citations omitted)); Commonwealth v. Craver, 688 A.2d 691, 696 (Pa. 1997) (“The United States Supreme Court likewise requires a showing of actual *discriminatory practice* to prevail on this issue.” (emphasis added)); Commonwealth v. Estes, 851 A.2d 933, 936 (Pa. Sup. Ct. 2004) (“The mere showing of underrepresentation, absent an actual *discriminatory practice* in the jury selection process, causes Appellant’s constitutional claim to fail.” (emphasis added)).

153. *See, e.g.*, State v. Lawless, 996 A.2d 166, 169 (R.I. 2010) (supporting decision with cases finding that defendants “failed to meet their burden of proof to show that the state engaged in any *discriminatory practices*” and that defendant had “clearly not met his burden of proof” because he made “neither an allegation nor a showing that the jury-selection process . . . has resulted in the *systematic and deliberate* exclusion of members of a particular race” (alteration in original) (emphasis added) (quoting State v. Perry, 725 A.2d 264, 268 (R.I. 1999); State v. Gaines, 528 A.2d 305, 308–09

*Berghuis v. Smith*, asserting that in order to prove the systematic exclusion of African-Americans, a defendant has “to prove that African Americans were treated differently,” specifically, that “the juror selection procedure is administered in [a] discriminatory manner,” by providing “evidence of actual discriminatory or exclusionary practices.”<sup>157</sup>

The judicial decisions are striking for their imprecise treatment of the two constitutional standards. Consider the conclusion of the North Carolina Supreme Court in 2000: “As to the third prong of *Duren*, this Court has held ‘[t]he fact that a particular jury or series of juries does not statistically reflect the racial composition of the community does not in itself make out an *invidious discrimination forbidden by the [Equal Protection] Clause*.’”<sup>158</sup>

This kind of baffling confusion is not limited to state courts. For example, in 2004 the Seventh Circuit analyzed a challenge to “the jury composition under the Sixth Amendment, which forbids *racial discrimination* in the selection of jurors.”<sup>159</sup> The Eighth Circuit likewise

(R.I. 1987)); *State v. Sosa*, 839 A.2d 519, 528 (R.I. 2003) (“The Sixth Amendment is designed to prevent the state from utilizing a system that *deliberately excludes* groups of potential jurors from the entire jury pool.” (emphasis added)).

154. See, e.g., *State v. Taylor*, No. 02C01-9501-CR-00029, 1996 WL 580997, at \*18–19 (Tenn. Crim. App. Oct. 10, 1996) (“In order to establish a prima facie case of purposeful *discrimination*, the defendant must show that: [citing *Duren* factors].” (emphasis added) (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979))).

155. See, e.g., *State v. Palomares*, No. 24658-2-III, 2007 WL 1649904, at \*3–4 (Wash. Ct. App. June 7, 2007). (“Under the sixth and fourteenth amendments to the United States Constitution and article I, section 22 of the Washington Constitution . . . [t]he defendant bears the burden of proving that *discrimination* in the selection of the jury pool occurred.” (emphasis added)).

156. See, e.g., *State v. Blanks*, No. 95-2944-CR-NM, 1996 WL 346263, at \*3 (Wis. Ct. App. June 26, 1996) (“The trial court found that the absence of any African-Americans in the venire was ‘just the luck of the draw.’ The trial court’s comments belie any contention of systematic exclusion of African-Americans as jurors. . . . [T]here was nothing to suggest that the venire pool was *designed in any way to avoid* having a fair cross section of the community represented.” (emphasis added)).

157. Brief of the States of Connecticut, Arizona, Colorado, Idaho, Maryland, New Mexico, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah and Wisconsin as Amici Curiae in Support of Petitioner at 32–33, *Berghuis v. Smith*, 130 S. Ct. 1382 (2010) (No. 08-1402), 2009 WL 4247967, at \*32–33 (quoting *United States v. Ireland*, 62 F.3d 227, 231 (8th Cir. 1995); *United States v. Cecil*, 836 F.2d 1431, 1446 (4th Cir. 1988)). The Court’s opinion makes no mention of the states’ argument, which was echoed in the amicus brief of the Criminal Justice Legal Foundation, an organization concerned in part with “rapid, efficient, and reliable determination of guilt and swift execution of punishment.” Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 1, *Berghuis*, 130 S. Ct. 1382 (No. 08-1402), 2009 WL 4307581, at \*1. These states were not included in the list of nineteen states that have made Category A errors, because the amicus brief does not constitute a judicial decision. It does, of course, reflect the erroneous interpretation of the law by the states’ attorney generals’ offices.

158. *State v. Golphin*, 533 S.E.2d 168, 192 (N.C. 2000) (alterations in original) (emphasis added) (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976); *State v. Avery*, 261 S.E.2d 803, 806 (N.C. 1980)); see *State v. Williams*, 565 S.E.2d 609, 638 (N.C. 2002) (quoting same language).

159. *United States v. Phillips*, 239 F.3d 829, 842 (7th Cir. 2001) (emphasis added).

denied a claim where the defendant had not satisfied the “third *Taylor-Duren* requirement, a showing that the particular jury pool plan utilized is being administered in a *deliberately discriminatory manner*.”<sup>160</sup> And the Sixth Circuit issued the following convoluted holding:

The United States Supreme Court has explicitly held that, in order to establish that a jury is not picked from a fair cross-section of the community, a defendant must show [the three *Duren* factors. The defendant’s] failure to meet these evidentiary burdens dooms his claim of a denial of *equal protection* guarantees.<sup>161</sup>

To add insult to constitutional injury, some courts reprimand the defendant who suggests he is not required to prove discriminatory intent. According to one district court addressing a cross-section claim, “even if Petitioner was correct that African-Americans were excluded from the jury pool . . . his claim would still fail because it lacked an essential element—that the exclusion of African-Americans and other minorities must be *intentional*.”<sup>162</sup> The court acknowledged that the defendant-petitioner “contends” that the state appellate court “applied the wrong law to the facts of his claim” by applying an equal protection case.<sup>163</sup> But the court was not impressed and cited the same equal protection case for the point that the “United States Supreme Court has ruled that a showing of purposeful discrimination is [an] essential element of a claim of racial discrimination in the jury process.”<sup>164</sup> Similarly, an Alabama court took to task the defendant who “misapprehends the nature of the fair cross-section requirement of the Sixth Amendment,” and faulted him for failing to “establish a primary inference of *invidious discrimination*.”<sup>165</sup>

This type of Category A error (explicitly requiring evidence of discrimination in jury selection)<sup>166</sup> has garnered sharp criticisms from the few judges who have recognized that their colleagues were applying a tainted test. Judges in the First, Fourth, Eighth, and Ninth Circuits, as well as district court judges in the Second Circuit and a judge on the

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160. *United States v. Home*, 4 F.3d 579, 588 (8th Cir. 1993) (emphasis added).

161. *United States v. Davis*, 27 F. App’x 592, 597–98 (6th Cir. 2001) (emphasis added) (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

162. *Warren v. Sherman*, No. 2:05-cv-1118, 2007 WL 2683210, at \*3 (W.D. Mich. Sept. 7, 2007) (emphasis added) (“The Report and Recommendation of the Magistrate Judge (Docket # 21) is approved and adopted as the opinion of the Court.”).

163. *Id.* The defendant argued that the court’s reliance on *Miller-El v. Cockrell*, 537 U.S. 322 (2003), “was erroneous because that case dealt with [jury selection policies that were] allegedly discriminatory.” *Warren*, 2007 WL 2683210, at \*3. Indeed, the question in *Miller-El* was whether “the jury selection procedures violated the Equal Protection Clause.” *Miller-El*, 537 U.S. at 326.

164. *Warren*, 2007 WL 2683210, at \*3 (citing *Miller-El*, 537 U.S. at 322).

165. *Ford v. State*, 628 So. 2d 1068, 1069 (Ala. Crim. App. 1993) (emphasis added).

166. In the survey, 28 of the 104 “systematic exclusion claims” involved this type of Category A error.

California Supreme Court, have criticized their colleagues' erroneous importation of equal protection concepts,<sup>167</sup> accusing them of “break[ing] rank with established Supreme Court precedent”<sup>168</sup> and “mistakenly import[ing] an equal protection concept into a fair cross-section challenge.”<sup>169</sup> But each of those jurisdictions has continued to apply elements of the equal protection standard.<sup>170</sup>

In another manifestation of the focus on intentional discrimination, courts have denied systematic exclusion claims where the defendant has failed to demonstrate that the jury selection process is based on race.<sup>171</sup> These courts assert that “underrepresentation of minority groups resulting from race-neutral . . . practices does not amount to ‘systematic exclusion’ necessary to support a representative cross-section claim.”<sup>172</sup> Yet the race-neutral nature of jury selection policies is irrelevant to a Sixth Amendment claim.<sup>173</sup> The emphasis in both federal<sup>174</sup> and state<sup>175</sup>

167. *Barber v. Ponte*, 772 F.2d 982, 1004 (5th Cir. 1985) (Bownes, J., dissenting, joined by Coffin, J.) (“Their finding that evidence of intentional discrimination is required is directly counter to the law the Court stated in [*Duren*] . . . .”); see *United States v. Footracer*, 189 F.3d 1058, 1069 (9th Cir. 1999) (Pregerson, J., dissenting) (“[R]equiring a defendant to show disparate treatment requires him to show discriminatory intent, which is not an element of a Sixth Amendment fair cross-section challenge.” (footnote omitted)); *United States v. Rogers*, 73 F.3d 774, 776 (8th Cir. 1996) (“In [a prior case], our court introduced an element of intentional discrimination not required by the Supreme Court.”); *United States v. Cecil*, 836 F.2d 1431, 1464 (4th Cir. 1988) (Phillips, J., dissenting in relevant part, joined by Winter & Murnaghan, JJ.) (“*Duren* thus undermines the critical assumption made by this court that the fair-cross-section requirement only protects against intentional discrimination in the jury selection process . . . .”); *Anaya v. Hansen*, 781 F.2d 1, 9 (1st Cir. 1986) (Bownes, J., concurring); *Parker v. Phillips*, 717 F. Supp. 2d 310, 336 (W.D.N.Y. 2010) (Bianchini, J.) (“[T]he Appellate Division conflated the elements of a Due Process/Equal Protection jury pool claim with those of a Sixth Amendment fair cross-section claim . . . .”); *United States v. Biaggi*, 680 F. Supp. 641, 653 (S.D.N.Y. 1988) (Motley, J.) (criticizing a Second Circuit decision that incorporated a discrimination requirement as “flatly contradictory of the Supreme Court’s ruling in *Duren*”); *People v. Bell*, 778 P.2d 129, 170 (Cal. 1989) (en banc) (Broussard, J., dissenting) (“The majority’s erroneous definition of ‘systematic exclusion’ betrays their inability or unwillingness to comprehend the difference between an equal protection analysis and a representative cross-section analysis.”); see also *People v. Morales*, 48 Cal. 3d 527, 579–80 (1989) (Broussard, J., dissenting).

168. *Barber*, 772 F.2d at 1004 (Bownes, J., dissenting, joined by Coffin, J.).

169. *Footracer*, 189 F.3d at 1069 (Pregerson, J., dissenting).

170. See *supra* Part II.A.

171. In the survey, 12 of the 104 “systematic exclusion claims” involved this type of Category A error.

172. *People v. Currie*, 87 Cal. App. 4th 225, 236 (2001) (alteration in original).

173. See *supra* Part II.B.3.

174. See, e.g., *United States v. Smith*, 247 F. App’x 321, 323 n.2 (3d Cir. 2007) (“[J]ury selection procedures using voter registration and motor vehicle records [are] procedures constituted using facially neutral criteria [that] allow no opportunity for subjective or racially motivated judgments.”); *United States v. Pritt*, No. 6:09-cr-110-Orl-28KRS, 2010 WL 2342440, at \*6 (M.D. Fla. June 8, 2010) (“[T]here are no allegations that the process is not executed in a neutral and random manner. [The defendant] only objects that the neutral process results in the underrepresentation of Blacks and Hispanics. This does not amount to systematic exclusion under the Sixth Amendment.”); see also *United States v. Anthony*, 138 F. App’x 591, 593 (4th Cir. 2005); *United States v. Clark*, 112 F. App’x

cases on the race-neutral nature of the selection policies imports the explicit equal protection concern with race-neutrality,<sup>176</sup> and it reflects an erroneous focus on the intent of the administrators who create and enforce the policies—instead of the results of those policies. In a 2008 Second Circuit case, for example, the court recognized that “the district court failed in its attempt to *achieve* [a racial] balance” but held that “does not detract from the court’s demonstrably *race-neutral approach* to juror selection.”<sup>177</sup> In some cases the court assures the defendant that because the jury administrators are not aware of the race of the people in the jury pool, the administrators cannot possibly be systematically excluding them.<sup>178</sup>

In the same vein, courts sometimes emphasize that jurors are “randomly” selected by a computer and assert that this process “guarantees that there can be no purposeful exclusion of African Americans.”<sup>179</sup> In other words, because a computer cannot discriminate, a computer-generated list cannot result in systematic exclusion. Similarly,

481, 485–86 (6th Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005).

175. *See, e.g.*, *State v. Thomas*, 637 N.W.2d 632, 652 (Neb. 2002) (“[P]ermissible racially neutral selection criteria and procedures were used which produced the monochromatic result . . . [T]he venire panel . . . was selected on a random basis without reference to race or the race of the defendant being tried.”); *People v. Alvarez Hernandez*, No. 1352/00, 2002 WL 31109621, at \*10 (N.Y. Cnty. Ct. Feb. 13, 2002) (finding no systematic exclusion where the jury selection process “involves indiscriminate and arbitrary selection from several nondiscriminatory source lists and, therefore, is race-neutral and does not discriminate against any distinctive and cognizable group”); *see also* *People v. Anderson*, 22 P.3d 347, 364 (Cal. 2001); *State v. Casillas*, 205 P.3d 830, 838 (N.M. Ct. App. 2009); *State v. Blakeney*, 531 S.E.2d 799, 809 (N.C. 2000); *Commonwealth v. Johnson*, 815 A.2d 563, 575 (Pa. 2002).

176. *See, e.g.*, *United States v. Rodriguez-Lara*, 421 F.3d 932, 940 (9th Cir. 2005) (“Unlike the equal protection challenge, the fair cross-section claim does not require a showing that the selection procedure is susceptible of abuse or not race-neutral; the defendant must only show that the exclusion of his or her group is ‘systematic.’”).

177. *United States v. Bullock*, 550 F.3d 247, 252 (2d Cir. 2008) (emphasis added).

178. *See, e.g.*, *State v. Holland*, 976 A.2d 227, 239 (Me. 2009) (“[T]he questionnaires sent to prospective jurors seek no information concerning their race, making it impossible for individuals of any particular race to be systematically excluded from the jury pool.”); *see also* *Clark*, 112 F. App’x at 484; *Thomas v. State*, 257 S.W.3d 92, 99 (Ark. 2007); *State v. Jackson*, 836 N.E.2d 1173, 1193 (Ohio 2005). It is of questionable comfort, of course, to be assured that your rights are not being violated because no one is keeping track of whether they are violating your rights. *See, e.g.*, *Williams v. State*, 125 P.3d 627, 632 n.18 (Nev. 2005) (“[W]ithout knowledge of the composition of the jury pool and jury lists, an assertion that they provide juries comprising a fair cross section of the community is mere speculation.”).

179. *Price v. State*, 66 S.W.3d 653, 665 (Ark. 2002); *see, e.g.*, *United States v. Wheeler*, 79 F. App’x 656, 661 (5th Cir. 2003) (“Because the district court determined that the selection process was random and computer-generated, there could be no ‘systematic exclusion’ of African-Americans.”); *Commonwealth v. Romero*, 938 A.2d 362, 374 (Pa. 2007) (“[A] computer randomly selects names from the list. There is no way for the system to include or exclude venire persons based on race or gender.” (citation omitted)); *see also* *State v. Fudge*, 206 S.W.3d 850, 862 (Ark. 2005); *Le v. State*, 913 So. 2d 913, 925 (Miss. 2005); *Pritt*, 2010 WL 2342440, at \*6. In the survey, 6 of the 104 “systematic exclusion claims” involved this type of Category A error.

courts emphasize that the selection system was *designed* to avoid systematic exclusion,<sup>180</sup> or that there is evidence that jury administrators have affirmatively tried to include African-Americans and Hispanics.<sup>181</sup> The focus on both the way the system was intended to operate and the benign intentions of jury officials—like the emphasis on race-neutral policies and random selection—reflects the problematic attention given to the intent behind the selection system and not the results.

## 2. *Requiring Proof of Intentional or Discriminatory Action in Voter Registration*

The demand for evidence of discrimination is also frequently manifested in cases where the court concludes or assumes that (a) African-Americans and/or Hispanics are underrepresented in the jury pool; (b) the underrepresentation is caused by the jury office's use of voter registration lists as the source of juror names; because (c) African-Americans and/or Hispanics are underrepresented on voter lists in that jurisdiction. In these "voter registration claim" cases, courts often deny the defendant's fair cross-section claim based on the absence of proof that people are discriminated against in registering to vote.<sup>182</sup>

For example, in a 2009 opinion the Second Circuit held that "absent positive evidence that some groups have been hindered in attempting to register to vote, a jury venire drawn from voter registration lists violates neither the Sixth Amendment's fair cross-section requirement nor the Fifth Amendment's guarantee of Equal Protection."<sup>183</sup> State courts and at

180. See, e.g., *United States v. Tillman*, 80 F. App'x 520, 522 (7th Cir. 2003) ("The district court's 'Plan for the Random Selection of Jurors' does not provide any factual basis for a finding of impropriety."); *Holland*, 976 A.2d at 238 ("There is no evidence in the record to suggest that, even if underrepresentation had been shown, it was due to systematic exclusion of any group in jury selection processes. Maine jury selection practices are designed to ensure that no such systemic exclusion could occur."); see also *Ellis v. State*, No. CR 05-643, 2006 WL 2708400, at \*4 (Ark. Sept. 21, 2006); *Blakeney*, 531 S.E.2d at 809. In the survey, 6 of the 104 "systematic exclusion claims" involved this type of Category A error.

181. See, e.g., *Bullock*, 550 F.3d at 251-52 ("Bullock loses because he has not established any 'systematic exclusion.' . . . To the contrary, . . . [t]he motor vehicle roll was included specifically 'to make sure that [the] jury pool [wa]s balanced.'"); *United States v. Anthony*, 138 F. App'x at 591, 593, 594 (4th Cir. July 12, 2005) (citing "a 'direct effort' to include more African-Americans" and "a direct attempt to increase the number of African-Americans in the jury venire"); see also *United States v. Booker*, 367 F. App'x 571, 575 (6th Cir. 2007); *People v. Burney*, 212 P.3d 639, 662-63 (Cal. 2009); *Smith v. State*, 571 S.E.2d 740, 748-49 (Ga. 2002). In the survey, 5 of the 104 "systematic exclusion claims" involved this type of Category A error.

182. In the survey, 20 of the 104 "systematic exclusion claims" involved a Category B error in a claim based on disparity resulting from reliance on underrepresentative voter lists.

183. *United States v. Carter*, No. 07-5756-cr, 2009 WL 765004, at \*1 (2d Cir. Mar. 25, 2009) (quoting *United States v. Miller*, 116 F.3d 641, 659 (2d Cir. 1997)). The fact that the Second Circuit had made this same mistake and then corrected itself in a prior case, only to make it again in *Carter*, is discussed in more detail below. See *supra* Part III.C.

least three other circuits have similarly denied fair cross-section claims because the defendant offered no evidence that the unrepresentative voter registration lists (and thus the jury lists) were the product of discriminatory voter registration policies, or that voter lists were compiled in anything but a racially neutral (that is, non-discriminatory) manner.<sup>184</sup> In another variation on this theme, courts recite that they have previously approved of the use of voter registration lists as source lists— notwithstanding any resulting underrepresentation—and then cite equal protection cases that approved of such lists in the context of discrimination claims.<sup>185</sup>

Proof that a stage of the jury selection system does not discriminate is not relevant to a legal standard that does not require evidence of discrimination. As the Tenth Circuit explained: “It is not a sufficient defense, of course, merely to argue . . . that voter registration lists can never be exclusionary so long as eligible voters of all races are equally allowed to register. That might be a defense to an *equal protection challenge* to the right to vote,” but it is not relevant to “the issue of whether jurors are selected in a way that results in the systematic exclusion of a cognizable group.”<sup>186</sup> The conclusion that a system that

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184. *United States v. Greatwalker*, 356 F.3d 908, 911 (8th Cir. 2004) (“[Defendant] has not attempted to prove Native Americans, in particular, face obstacles to registering to vote in presidential elections . . . . [and thus] has failed to show Native Americans are systematically excluded from jury pools . . . .”); *United States v. Cecil*, 836 F.2d 1431, 1448 (4th Cir. 1988) (“[T]he use of voter registration lists . . . will not be invalidated because a group chooses not to avail itself of the right to register without any discrimination of any kind . . . .”); *United States v. Joost*, No. 95-2031, 1996 WL 480215, at \*8 (1st Cir. Aug. 7, 1996) (“As for *Duren*’s third prong . . . [w]hat would have to be demonstrated would be either the use of suspect voter-registration qualifications or discriminatory administration of the jury-selection procedure.”); *Commonwealth v. Johnson*, 815 A.2d 563, 575 (Pa. 2002) (“[A] criminal defendant may not attack the racial composition of jury panels drawn from voter registration lists on the theory that blacks are underrepresented in voter lists because such computer generated lists are compiled without regard to race.”); see also *Smith*, 571 S.E.2d at 748-49; *State v. Tremblay*, No. P1 97-1816AB, 2003 WL 23018762, at \*7 (Sup. Ct. R.I. Mar. 19, 2003). In the survey, 6 of the 104 “systematic exclusion claims” involved a Category A error based on a finding that non-discriminatory voter registration lists could not give rise to a cross-section claim.

185. See, e.g., *Soria v. Johnson*, 207 F.3d 232, 249 (5th Cir. 2000) (“This Court has held that ‘[t]he fact that an identifiable minority group votes in a proportion lower than the rest of the population and is therefore underrepresented on jury panels presents no constitutional issue.’” (quoting *United States v. Brummitt*, 665 F.2d 521, 527 (5th Cir. 1981))); *United States v. Brummitt*, 665 F.2d 521, 527 (5th Cir. 1981) (“A *prima facie* case of *discrimination* cannot rest merely on statistics. The fact that an identifiable minority group votes in a proportion lower than the rest of the population and is therefore underrepresented on jury panels presents no constitutional issue.” (emphasis added) (citing *United States v. Lopez*, 588 F.2d 450, 452 (5th Cir. 1979))); *United States v. Lopez*, 588 F.2d 450, 451-52 (5th Cir. 1979) (citing the equal protection case of *Castaneda v. Partida*, 430 U.S. 482, 493 (1977), for the rule that a defendant must show that the exclusion of a particular minority group from jury service is “due to some form of intentional discrimination”).

186. *United States v. Ruiz-Castro*, 92 F.3d 1519, 1527 (10th Cir. 1996) (emphasis added), *overruled on other grounds* by *United States v. Flowers*, 464 F.3d 1127 (10th Cir. 2006); see *United States v. Weaver*, 267 F.3d 231, 244-45 (3d Cir. 2001) (responding to the government’s point that “there has

relies on non-discriminatory source lists is immune to challenge—just like the conclusion that a system that operates in a nondiscriminatory manner is immune to challenge—reflects the importation of equal protection standards.<sup>187</sup>

#### B. CATEGORY B ERRORS: FOCUSING ON FAULT AND OPPORTUNITIES FOR JURORS WHEN ANALYZING SYSTEMATIC EXCLUSION

In addition to affirmatively imposing equal protection requirements, courts often borrow two concepts from equal protection jurisprudence: a focus on fault and a concern with the opportunities of jurors to serve. This most commonly occurs in cases where the court has concluded that the underrepresentation of African-Americans and/or Hispanics is due to the disproportionate failure of people of color to receive the jury summons, respond to the jury summons, or make themselves available to serve.<sup>188</sup> It also occurs in the type of “voter registration claim” cases described above.<sup>189</sup>

Courts have consistently held that disparity is not the result of systematic exclusion when it is due to the failure of people of color to receive or return the jury summons.<sup>190</sup> Courts reach this conclusion while

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been no showing of anything in the system that has discouraged or prevented a group from participating,” by noting that “intentional discrimination need not to be shown to prove a Sixth Amendment fair cross section claim,” and that “if the use of voter registration lists over time did have the effect of sizably underrepresenting a particular class or group on the jury venire, then under some circumstances, this would violate the Sixth Amendment”); *Bryant v. Wainwright*, 686 F.2d 1373, 1378 n.4 (11th Cir. 1982) (“[I]f the use of voter registration lists as the origin for jury venires were to result in a sizeable underrepresentation of a particular class or group on the jury venires, then this could constitute a violation of a defendant’s ‘fair cross-section’ rights under the sixth amendment.”); *United States v. Armsbury*, 408 F. Supp. 1130, 1139 (D. Or. 1976) (“I reject the views of those courts which hold that the use of voter lists cannot deny a fair cross section unless discrimination in voter registration is shown to exist.”); *see also* *United States v. Rodriguez-Lara*, 421 F.3d 932, 945 (9th Cir. 2005); *United States v. Biaggi*, 909 F.2d 662, 677–78 (2d Cir. 1990).

187. As explained above, 43 of the 104 “systematic exclusion denials” (41%), were denied at least in part on the defendant’s failure to show intentional and discriminatory action: 28 claims were explicitly denied at least in part for the failure to show discrimination, 12 for the failure to show race-based classifications, 6 because the system was not designed to exclude, 6 because selection was done by computer, 5 because the intentions of jury officials were benign, and 6 for the failure to show discrimination in voter registration. (These numbers add up to more than 43 cases because some claims were denied for more than one of these reasons.) Again, my core hypothesis is not that 41% of all prong-three denials demand evidence of discrimination, but rather that the requirement of discriminatory intent in any fair cross-section claim represents a misapplication of the *Duren* test which infringes on the constitutional rights of defendants, and that it is happening in more cases than might be expected.

188. In the survey, 4 of the 104 “systematic exclusion claims” involved a Category B error in a claim based on disparity resulting from higher rates of undeliverable summons, unanswered summons, and failures to appear by people of color.

189. In the survey, 20 of the 104 “systematic exclusion claims” involved a Category B error in a claim based on disparity resulting from reliance on underrepresentative voter lists.

190. *See, e.g., Rivas v. Thaler*, 432 F. App’x 395, 402–03 (5th Cir. 2011) (“[T]he fact that certain

acknowledging evidence that the rate of undeliverable summons<sup>191</sup> and unreturned summons is higher for people of color,<sup>192</sup> and that the jury office makes affirmative decisions about to which addresses summons will be sent<sup>193</sup> and about what actions to take regarding non-responders or undeliverable summons.<sup>194</sup> Similarly, courts have concluded that there is no systematic exclusion in voter registration claim cases.<sup>195</sup> This conclusion is not affected by the recognition that voter registration lists underrepresent African-Americans and Hispanics,<sup>196</sup> and that the

groups of persons called for jury service appear in numbers unequal to their proportionate representation in the community does not support Rivas's allegation that Dallas County systematically excludes them in its jury selection process."); *Johnson v. Horel*, No. C 07-4483 PJH (PR), 2010 WL 4722634, at \*24 (N.D. Cal. Nov. 12, 2010) (finding no systematic exclusion where "the disparity in representation is attributable to the disproportionately high rate of failure to appear by those summoned for service"); *Kellogg v. Peterson*, No. 178760, 1996 WL 33362172, at \*2 (Mich. Ct. App. Aug. 2, 1996) ("That a certain segment of Detroit residents chose not to respond to questionnaires cannot be considered 'inherent' to the jury selection process."); *see also* *United States v. Bates*, No. 05-81027, 2009 WL 5033928, at \*16 (E.D. Mich. Dec. 15, 2009); *United States v. Purdy*, 946 F. Supp. 1094, 1104 (D. Conn. 1996).

191. "Undeliverable" summons are notices that have been returned by the post office as undeliverable; unreturned summons, or "non-responses," are summons that are not returned because they were not received or because the individual declined to return it.

192. *See, e.g.*, *United States v. Barnes*, No. 3:94CR1112(AHN), 1996 WL 684388, at \*5 (D. Conn. June 29, 1996) ("[U]nderrepresentation . . . results from the high rate of questionnaires mailed to Hispanic communities which are returned as undeliverable."); *United States v. Murphy*, No. 94 CR 794, 1996 WL 341444, at \*5 (N.D. Ill. June 18, 1996) ("[P]oor African-Americans failed to respond to jury notices at a much higher rate than wealthy whites."); *Commonwealth v. Fryar*, 680 N.E.2d 901, 907 (Mass. 1997) ("[T]he representation of Blacks and Hispanics in the jury pool was adversely affected because the communities with the highest percentage of Blacks and Hispanics have the highest nonresponse rate."); *see also* *United States v. Royal*, 174 F.3d 1, 5 (1st Cir. 1999); *People v. Robinson*, No. 285416, 2009 WL 3365778, at \*3 (Mich. Ct. App. Oct. 20, 2009).

193. GREGORY E. MIZE ET AL., *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 15* (2007).

194. *Id.* at 22; *see Purdy*, 946 F. Supp. at 1104 (citing jurisdiction's "failure to mail follow-up questionnaires to persons who did not respond" to the first summons).

195. *See, e.g.*, *United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006); *United States v. Clifford*, 640 F.2d 150, 156 (8th Cir. 1981); *United States v. Rioux*, 930 F. Supp. 1558, 1573 (D. Conn. 1995) ("[T]he circuits are in complete agreement that use of voter registration lists as the sole source of potential jurors comports with the Sixth Amendment.").

196. *See, e.g.*, *United States v. Rodriguez*, 581 F.3d 775, 790 (8th Cir. 2009) ("As African-Americans and Hispanics in North Dakota participated in the 2004 election at lower rates than the state's whites, the proportion of minorities in the 590-person venire was lower than the overall proportion of minorities in North Dakota."); *Barnes*, 1996 WL 684388, at \*5 ("The underrepresentation of Hispanics in the . . . jury system is caused [in part] by . . . the failure of Hispanics to register to vote at the same rate as non-Hispanics."). The fact that voter registration lists underrepresent African-Americans and Hispanics has been widely recognized in the literature. *See, e.g.*, *Brown*, *supra* note 66, at 446 ("[R]andom selection from the most common source list for juries, voter registration rolls, consistently underrepresents racial minorities across both jurisdiction and time.").

jurisdiction made an affirmative decision to use the voter lists as the only source of juror names.<sup>197</sup>

In rejecting both types of claims, courts define the cause of the disparity as the fault of the would-be jurors and contrast it with the faultless conduct of the jury office. The cases essentially proffer the recalcitrant, unavailable potential jurors as an answer to a question the Sixth Amendment does not ask: Who is to *blame* for this disparity? The decisions also emphasize the extent to which the opportunity for jurors to serve is not inhibited. But the Sixth Amendment is concerned only with the rights of defendants; the opportunities denied to would-be jurors are exclusively an equal protection question.<sup>198</sup>

### I. Focus on Fault

In evaluating the use of voter lists, courts emphasize the “private choices”<sup>199</sup> of putative jurors to “willfully exclude themselves”<sup>200</sup> from the jury pool. As the Fourth Circuit chose to put it, the fair cross-section right does not address “underrepresentation created simply because some members of a class itself had by sloth failed to register.”<sup>201</sup> The focus on “sloth” or self-exclusion is implicitly contrasted with the actions of jury officials. Courts highlight this contrast by explaining, for example, that “it was the unfortunate failure of Hispanics either to register to vote or to return the jury questionnaires, *through no fault or encouragement of the court’s jury selection procedures*, which may have produced any

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197. States make independent decisions about what source lists to use. *MIZE*, *supra* note 193, at 13. As discussed *infra*, federal jurisdictions must use voter lists but are required to supplement those lists if necessary to achieve a fair cross-section. 28 U.S.C. § 1863(b)(2) (2006).

198. See Schulberg, *supra* note 17, at 19–24 (describing the denial of claims based on reliance on voter registration lists and the failure to update addresses as a “line of reasoning” that “reflects an equal protection paradigm.”). Although other scholars have not defined the focus on the actions of jury officials or jurors as a manifestation of equal protection standards, they have highlighted the inconsistency between a fair cross-section standard that focuses on results and an analysis that looks at intent. See Leipold, *supra* note 32, at 999–1000.

199. *Orange*, 447 F.3d at 800 (“Discrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*.”); see *Rioux*, 930 F. Supp. at 1572 (“Discrepancies resulting from private sector influences rather than affirmative governmental action do not reflect the constitutional infirmities contemplated by the systematic exclusion prong of *Duren*.”).

200. *Le v. State*, 913 So. 2d 913, 925 (Miss. 2005); see *United States v. Weaver*, 267 F.3d 231, 244 (3d Cir. 2001) (“[W]here substantial representation is traceable solely to the exclusive reliance on voter registration lists, and the underrepresented group has freely excluded itself quite apart from the system itself, the third prong has not been fulfilled.”); *United States v. Pritt*, No. 6:09-cr-110-Orl-28KRS, 2010 WL 2342440, at \*5 (M.D. Fla. June 8, 2010) (finding no systematic exclusion where disparity occurs “just because a certain group registers to vote in lower proportions than the rest of the population”).

201. *United States v. Cecil*, 836 F.2d 1431, 1448 (4th Cir. 1988).

underrepresentation of Hispanics on grand juries.”<sup>202</sup> The contrast between the “voluntary and unencouraged behavior patterns” of people of color and the blamelessness of jury officials reflects an underlying focus on intent rather than results.<sup>203</sup>

Courts likewise emphasize that non-response rates are the fault of jurors who refuse to serve, rather than the fault of jury officials.<sup>204</sup> In a representative example of this culpability contrast, the Northern District of Illinois denied a systematic exclusion claim where the evidence showed lower jury summons return rates for African-Americans: “The jury selection system . . . is not excluding African-Americans as a group, but many African-American individuals are excluding themselves by not responding to jury questionnaires.”<sup>205</sup> Courts characterize the jury offices as passive witnesses to the private choices of the only actors with agency, the would-be jurors who “cho[ose] not to respond,”<sup>206</sup> “fail[] to appear,”<sup>207</sup> and stubbornly “appear in numbers unequal to their proportionate representation in the community.”<sup>208</sup> The opinions make clear that “jury departments have no control over” these factors.<sup>209</sup> As a result, courts routinely conclude that a “high nonresponse rate is not a factor inherent in the Juror Selection Plan, even though that high nonresponse rate, and its effects on the representation of African Americans . . . are undeniable.”<sup>210</sup>

202. *United States v. Ortiz*, 897 F. Supp. 199, 205 (E.D. Pa. 1995) (emphasis added).

203. *People v. Taylor*, 743 N.Y.S.2d 253, 263 (N.Y. Sup. Ct. 2002).

204. *See, e.g., Pritt*, 2010 WL 2342440, at \*6 (“Pritt has not identified anything inherent in the system itself that causes underrepresentation of Blacks and Hispanics. It is rather the private choices of individuals that cause any underrepresentation . . .”); *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994) (contrasting disparity due to “unfair or inadequate selection procedures used by the state” to, for example, “a higher percentage of ‘no shows’ on the part of people belonging to the group in question”); *Ortiz*, 897 F. Supp. at 204 (“[T]heir non-registration is a result of their own inaction; not a result of affirmative conduct by others to bar their registration.”); *see also Boyd v. City of Wilmington*, No. Civ. 05-178-SLR, 2007 WL 174135, at \*3 (D. Del. Jan. 16, 2007); *People v. Robinson*, No. 285416, 2009 WL 3365778, at \*3-4 (Mich. Ct. App. Oct. 20, 2009); *State v. Tremblay*, No. P1 97-1816AB, 2003 WL 23018762, at \*11 (Sup. Ct. R.I. Mar. 19, 2003).

205. *United States v. Murphy*, No. 94 CR 794, 1996 WL 341444, at \*5 (N.D. Ill. June 18, 1996).

206. *Kellogg v. Peterson*, No. 178760, 1996 WL 33362172, at \*2 (Mich. Ct. App. Aug. 2, 1996).

207. *Johnson v. Horel*, No. C 07-4483 PJH (PR), 2010 WL 4722634, at \*24 (N.D. Cal. Nov. 12, 2010).

208. *Riva v. Thaler*, 432 F. App’x 395, 402-03 (5th Cir. 2011).

209. *United States v. Bates*, No. 05-81027, 2009 WL 5033928, at \*16 (E.D. Mich. Dec. 15, 2009) (“[J]ury departments have no control over the decisions of private individuals to complete and return juror questionnaires . . .”).

210. *Id.* Defining disparity that results from the private choices of people not to respond to jury summons as outside the scope of *Duren* is particularly inappropriate—because the disparity in *Duren* was due in part to willful non-responders. As the government pointed out in its brief, “[W]omen are automatically included in the jury list. They are excused from jury service only when they take affirmative steps to notify the court that they do not wish to serve.” Brief for Petitioner at \*8, *Duren v. Missouri*, 439 U.S. 357 (1979) (No. 77-6067), 1978 WL 223238. The disparity was thus due in part to the

Courts rely on this same rationale when the issue is the rate of undeliverable summons: The “failure” to receive a summons is connected to the would-be juror, rather than the jury office.<sup>211</sup> As the Second Circuit explained, the “inability to serve juror questionnaires because they were returned as undeliverable is not due to the system itself, but to outside forces, such as demographic changes.”<sup>212</sup> It may be that “the postal system is to blame,”<sup>213</sup> or “stale addresses resulting from population mobility,”<sup>214</sup> but it is certainly not the fault of the jury system. In some cases, courts temper their discussion of the private choices of potential jurors with an acknowledgement that such “choices” might be the product of socioeconomic factors.<sup>215</sup> Recognizing the role of socioeconomic factors shifts the discussion away from the “sloth” of racial and ethnic groups, but it retains the focus on the non-culpability of jury officials. Specifically, courts make clear that the underrepresentation connected to socioeconomic factors “are all factors beyond the control of the criminal justice system.”<sup>216</sup> The focus on the blameworthiness of would-be jurors or the blamelessness of jury officials reflects an equal protection construct.

To be clear, the choices of potential jurors or socioeconomic factors that affect those choices are not completely irrelevant to the question of systematic exclusion.<sup>217</sup> But the courts err in directing their discussion at

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private choices of women—which jury officials could not control—to refuse to serve on juries. The Supreme Court still held, however, that the disparity was the result of systematic exclusion. *Duren*, 439 U.S. at 360.

211. See, e.g., *United States v. Ortiz*, 897 F. Supp. 199, 204 (E.D. Pa. 1995) (“[M]any Hispanics are poor. Like other poor people, they are apt to move more frequently than the more affluent, with their mail not being forwarded to their new address. Secondly, poor people in general have less reliable mail service.”); *Commonwealth v. Arriaga*, 781 N.E.2d 1253, 1266 (Mass. 2003) (citing data showing that “a disproportionate number of undeliverable summonses are addressed to inner city locations” where the majority of the state’s Hispanic residents live).

212. *United States v. Rioux*, 97 F.3d 648, 658 (2d Cir. 1996).

213. *Ortiz*, 897 F. Supp. at 205 (“To the extent that the postal system is to blame, the district[] . . . cannot be held responsible.”).

214. *State v. Gibbs*, 758 A.2d 327, 334 (Conn. 2000).

215. See, e.g., *People v. Robinson*, No. 285416, 2009 WL 3365778, at \*4 (Mich. Ct. App. Oct. 20, 2009) (“[T]he fact that more African-Americans had higher no-response rates to questionnaires, is not due to the system itself, but is due to outside sources, such as demographic or socioeconomic changes.”).

216. *Id.* at \*3. The Supreme Court has never decided “whether the impact of social and economic factors can support a fair-cross-section claim,” and declined to consider the issue in *Berghuis v. Smith*, 130 S. Ct. 1382, 1395 n.6 (2010); see *California v. Harris*, 468 U.S. 1303, 1304 (1984) (Rehnquist, J., sitting as a single justice on a motion to stay) (“Whether this sort of jury selection procedure can be described as ‘systematically’ excluding classes that do not register to vote in proportion to their numbers, and whether the need for efficient jury selection may not justify resort to such neutral lists as voter registration rolls even though they do not perfectly reflect population, are by no means open and shut questions under *Duren*.”).

217. See *infra* Part III.C.

exonerating jury officials from any connection to the racial disparity—largely by describing potential jurors as blameworthy and the only actors with any agency. These analytical approaches—even considered independently of the outcome—reflect equal protection concerns with culpability, just as the emphasis on race-neutral policies in the Section above reflects an improper concern with the equal protection issue of race-based procedures.<sup>218</sup>

## 2. *Focus on Opportunities for Citizens to Serve on Juries*

When courts focus on the absence of barriers to voter registration in fair cross-section claims, they are often mistakenly adopting the discrimination requirement.<sup>219</sup> But the discussion of barriers to jury service also reflects a more subtle concern with a purely equal protection interest: the opportunity for citizens to serve on juries.<sup>220</sup> Opinions that rely on the unfettered opportunity of citizens to register to vote or serve on juries are inconsistent with a standard exclusively concerned with the defendant.<sup>221</sup> After all, the “fair cross-section principle . . . is designed to achieve results, not just assure opportunities.”<sup>222</sup>

The concern with juror opportunities is frequently introduced through reliance on the JSSA, which functions as a doctrinal Trojan horse for the importation of equal protection interests. The JSSA requires federal jury selection plans to select the names of prospective jurors from voter registration and voter lists.<sup>223</sup> As a result, courts frequently conclude that the use of voter lists, even when they produce underrepresentative jury pools, cannot violate the Sixth Amendment because they have been “expressly sanctioned by Congress.”<sup>224</sup>

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218. See Schulberg, *supra* note 17, at 23.

219. See *supra* Part II.A.2.

220. See Leipold, *supra* note 32, at 970–71 (“[Focusing on removing] barriers to voter registration . . . makes sense if the goal of the cross-section doctrine is to protect jurors, far less sense if we are seeking to protect the accused.”).

221. See Williams, *supra* note 90, at 629 (“Th[e] logic [behind opinions denying voter registration claims] confuses the equal protection standard with the sixth amendment standard. The right protected by the sixth amendment is not the right of any particular *juror* to be on the jury source list. That right is protected by the equal protection clause.”).

222. State v. Ramseur, 524 A.2d 188, 239 (N.J. 1987) (“[W]e cannot concur in the suggestion, frequently made, that jury selection systems based on voter lists are effectively insulated from constitutional attack since random selection from a properly compiled voter list can never amount to a ‘systematic exclusion’ as required under the third prong of the *Duren* test.”).

223. 28 U.S.C. § 1863(b)(2) (2006) (requiring that federal jury selection plans “specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division”).

224. Polk v. Hunt, No. 95-5323, 1996 WL 47110, at \*2 (6th Cir. Feb. 5, 1996); see United States v. Odeneal, 517 F.3d 406, 412 (6th Cir. 2008); United States v. Orange, 447 F.3d 792, 800 (10th Cir. 2006); United States v. Cecil, 836 F.2d 1431, 1445 (4th Cir. 1988); United States v. Clifford, 640 F.2d 150, 156 (8th Cir. 1981).

Specifically, courts assert that “Congress has determined that this use of voter registration lists meets the Sixth Amendment’s fair cross section requirement *because everyone has the opportunity* to place their name on the voter registration list.”<sup>225</sup> And indeed, Congress designated voter registration lists as a source for jury names in order to further the JSSA’s equal protection goals: prohibiting discrimination in jury selection<sup>226</sup> and providing citizens with the opportunity to serve on juries.<sup>227</sup> But a source list that ensures equal protection opportunities (and avoids discrimination) does not necessarily satisfy the Sixth Amendment right to a list that represents a cross-section of the community.<sup>228</sup>

Voter lists only serve the JSSA’s additional purpose of selecting juries from a fair cross-section<sup>229</sup> to the extent that they remain the largest available and updated lists.<sup>230</sup> Importantly, the JSSA provides that federal jury selection plans “shall prescribe some other source or sources of names in addition to voter lists where necessary to foster” either the equal protection or fair cross-section policies.<sup>231</sup> The JSSA thus makes clear that voter lists must be supplemented when there is evidence of

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225. *State v. Pelican*, 580 A.2d 942, 949 (Vt. 1990) (emphasis added); see *Cecil*, 836 F.2d at 1445 (“The use of voter registration lists was chosen by Congress in part because it provided each qualified citizen with an equal opportunity to cause his name to be among those from which random selection is made . . . .”); *Clifford*, 640 F.2d at 156 (“The use of voter registration lists in almost every instance provides each qualified citizen an equal opportunity to be selected in random drawing to serve on a petit jury.”); *United States v. Test*, 550 F.2d 577, 587 n.10 (10th Cir. 1976) (“[I]n adopting the voter registration lists as the ‘preferred source’ of names for prospective jurors, Congress . . . intended to provide a . . . source of names . . . to which all potential jurors would have equal access . . . .”).

226. 28 U.S.C. § 1863(b)(2) (“No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.”).

227. *Id.* § 1861 (“It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States . . . .”).

228. See *Williams*, *supra* note 90, at 602–03 (“The JSSA largely solved equal protection problems in federal jury source list representativeness by eliminating discretionary procedures that created opportunities for discrimination. However, the JSSA did not ensure that the sixth amendment fair-cross-section requirement would be satisfied.”).

229. 28 U.S.C. § 1861 (“It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”).

230. *Cecil*, 836 F.2d at 1445 (“[T]he use of voter registration lists was chosen by Congress in part because . . . it was the largest generally available random source that was frequently updated.” (quoting *United States v. Hanson*, 472 F. Supp. 1049, 1054 (D. Minn. 1979), *aff’d*, 618 F.2d 1261 (8th Cir. 1980))); *Test*, 550 F.2d at 587 n.10 (“[I]n adopting the voter registration lists as the ‘preferred source’ of names for prospective jurors, Congress . . . intended to provide a relatively large and easily accessible source of names . . . .”).

231. 28 U.S.C. § 1863(b)(2) (“The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title.”).

discrimination<sup>232</sup> or where those lists are not representative.<sup>233</sup> Accordingly, while it might make sense to cite the JSSA's use of non-discriminatory voter registration lists to defeat an equal protection claim, the Act does not suggest that the use of non-representative voter lists should defeat a fair cross-section claim.<sup>234</sup>

The emphasis on opportunities for would-be jurors—like the consistent use of language that contrasts the culpability of potential jurors with the blamelessness of jury officials—reflects the infiltration of equal protection concepts into a Sixth Amendment analysis.

### III. HARM RESULTING FROM APPLICATION OF THE CONTAMINATED CROSS-SECTION ANALYSIS

The intent-focused analysis described in the preceding Section undermines the unique substantive guarantees of the Sixth Amendment, fails to take account of how jury systems operate today, and damages the integrity of the doctrine.

#### A. UNDERMINES UNIQUE SIXTH AMENDMENT PROTECTIONS

Courts obviate the Sixth Amendment guarantee when they import the requirement to show intent and focus on fault, as the use of such a tainted test limits the jury rights of defendants to those protected by the Equal Protection Clause. What are lost are the unique Sixth Amendment protections that go beyond the right to be protected from state discrimination.<sup>235</sup>

For example, a fair cross-section claim in the District of Connecticut revealed that African-Americans and Hispanics were underrepresented in the jury pool because no jury summons had ever been sent to either

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232. See *Cecil*, 836 F.2d at 1448 (“[I]t is likely that Congress, writing in the midst of the civil rights legislation, was thinking of the possible vestiges of discrimination in registration to vote that might have remained in certain areas and wished to offer some safeguard against that condition by this provision for supplementation.”).

233. See Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 156 (1998) (“Congress mandated an *affirmative* or *positive* requirement that the master jury wheel *actually* be representative of the community.”); Schulberg, *supra* note 17, at 20 (“[The JSSA] recognized that voter registration lists would have to be supplemented if they resulted in underrepresentation of a distinct group in jury pools . . .”).

234. See *Duren v. Missouri*, 439 U.S. 357, 365 n.23 (1979) (“[T]he fair-cross-section requirement involves a comparison of the makeup of jury venires or other sources from which jurors are drawn with the makeup of the *community*, not of voter registration lists.”).

235. See *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (“Even practices that are race-neutral but have a disparate impact on the representation of a cognizable class in the jury venire fit within the Sixth Amendment’s protections, while they would not be cognizable under the Equal Protection clause.”); Brown, *supra* note 66, at 446 (“The selection of representative cross-sections of jurors is a substantive goal that requires different, more closely examined procedures than the more limited goal of restricting the impact of discriminatory intent on jury composition.”).

Hartford or New Britain, the counties that contained over 60% of the voting-age black and Hispanic population.<sup>236</sup> The culprit turned out to be “a computer programming error [that] had caused the letter ‘d’ in ‘Hartford’ to communicate to the computer that all potential jurors from Hartford were deceased and thus unavailable for jury service.”<sup>237</sup> Interestingly, no explanation was offered for the exclusion of New Britain residents, but there was no allegation that it was a purposeful exclusion.<sup>238</sup> There was no equal protection injury because there was no allegation or evidence of discrimination. And indeed, the equal protection claim of a defendant tried under the flawed jury system was denied because there was no “showing of discriminatory intent.”<sup>239</sup> But there was still a Sixth Amendment injury because a distinctive group was missing from the defendant’s jury pool due to something in the operation of the jury selection system.<sup>240</sup> In a case like this, if the equal protection requirement of intent was imported into the analyses, there would be no constitutional remedy for a constitutional injury.

The problem with eliminating the unique Sixth Amendment protection is that the Equal Protection Clause is concerned only with the particular damage wrought when the government discriminates.<sup>241</sup> It does not encompass the Sixth Amendment’s concern for the injury inflicted when a criminal defendant is deprived of the safeguard of the community’s judgment.<sup>242</sup> The constitutional value of the jury is obviated if the ultimate decision about life or liberty is made by a jury that does not represent the community.<sup>243</sup> It is immaterial whether it is discrimination, accident, or an unexplainable factor that has produced that result: “[I]f the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool”<sup>244</sup> the fair cross-section right is violated.

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236. *United States v. Jackman*, 46 F.3d 1240, 1242 (2d Cir. 1995) (citing *United States v. Osorio*, 801 F. Supp. 966 (D. Conn. 1992)).

237. *Id.* at 1242–43.

238. *Id.* at 1243.

239. *United States v. Peck*, 829 F. Supp. 555, 560 (D. Conn. 1992), *overruled on other grounds by United States v. Tarascio*, 15 F.3d 224, 225 (2d Cir. 1993) (“The Hartford approach was not designed to favor towns with lower minority populations . . . . Therefore, absent a showing of discriminatory intent underlying the process, the court finds that there has been no Fifth Amendment violation.”).

240. *United States v. Osorio*, 801 F. Supp. 966, 980 (D. Conn. 1992) (noting that the exclusion of Hartford and New Britain residents violated the defendant’s Sixth Amendment right to a fair cross-section of the community).

241. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986); *see also supra* Part I.A.

242. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (“In the ultimate analysis, only the jury can strip a man of his liberty or his life.”); *see also supra* Part I.A.

243. *Batson*, 476 U.S. at 87 n.8 (“For a jury to perform its intended function as a check on official power, it must be a body drawn from the community.”).

244. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

The underrepresentation of African-Americans and Hispanics, in particular, diminishes the quality of deliberation about issues frequently relevant in criminal trials.<sup>245</sup> Whites and people of color have, as a general rule,<sup>246</sup> different life experiences based in part on race.<sup>247</sup> There is substantial evidence, presumably as a result of those experiences, that people of color (again, as a group if not as individuals) have different perspectives on police and the justice system.<sup>248</sup> The Supreme Court has recognized that jurors' deliberations are substantively enriched by the diverse perspectives brought to bear by people with different life experiences. This diversity of experience is particularly important because jurors do not simply decide the existence of objective facts, they make subjective judgments that depend on discretion, morality, determinations of credibility, and life experiences.<sup>249</sup> "When cognizable segments of the community are excluded from jury participation, the

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245. See, e.g., *State v. LaMere*, 2 P.3d 204, 212 (Mont. 2000) ("Underlying [the concern for jury composition] is the belief in American jurisprudence that a jury constituted of individuals with diverse perspectives, coming from the various classes of society, is greater than the sum of its respective parts and can better arrive at a common sense judgment about a set of facts than can any individual. . . . In short, it is believed that diversity begets impartiality."); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1028 (2003) ("Compared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial (e.g., . . . witnesses who did not testify).").

246. Of course, aggregate data about white and black perspectives cannot predict how individual black and white people will vote on a particular case. See, e.g., Sommers & Ellsworth, *supra* note 245, at 1018 ("In many of the mock juror studies reviewed above, black jurors rated black defendants as more likely to be guilty than not and demonstrated conviction rates as high as 80%."). But as explained in Part I.A, the fair cross-section right deals with the aggregate representation of groups in the jury system, not the presence of individual group members on the jury. See, e.g., *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) ("It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.").

247. For example, even controlling for other factors, minorities are more likely to be stopped by police and are more likely to be arrested. See, e.g., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 2 (2008) (citing Fredrik H. Leinfelt, *Racial Influences on the Likelihood of Police Searches and Search Hits: A Longitudinal Analysis from an American Midwestern City*, 79 POLICE J. 238 (2006)).

248. As a general rule, black people are less likely than white people to view the criminal justice system as fair. See, e.g., Karen McGuffee et al., *Is Jury Selection Fair? Perceptions of Race and the Jury Selection Process*, 20 CRIM. JUST. STUD. 445, 452 (2007). African-Americans are also less likely than whites to have confidence in the police. See, e.g., Ronald Weitzer & Steven A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQUENCY 494, 505 (1999).

249. See, e.g., Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133, 140 (1996) ("To the extent that jury questions are subjective, representative panels make for better decision-makers. . . . Only a representative jury can accurately anticipate what society itself would deem to be just were all of its members privy to trial information.").

decision-making process of the jury runs the risk of being seriously impaired.”<sup>250</sup>

Limiting the fair cross-section right to the confines of the Equal Protection Clause also ignores the Sixth Amendment’s unique and exclusive concern with the criminal defendant.<sup>251</sup> In the context of equal protection, the interests of both the defendant and would-be jurors align—both are harmed by the discriminatory intent of state actors.<sup>252</sup> But in fair cross-section claims, the defendant’s interests might be at odds with those of potential jurors. For example, it might further a defendant’s Sixth Amendment interest to have jurors arrested on warrants for failure to appear for jury service.<sup>253</sup> This is presumably not an interest the arrested juror shares,<sup>254</sup> but that juror’s interests are immaterial to the fair cross-section analysis. Similarly, a defendant may decline to raise a cross-section claim if she is content with unrepresentative jury pool. The right belongs only to the defendant: Absent proof of discrimination, jurors excluded by this system have no remedy.

It is an equal protection construct to conceive of the competing interests as a split between the defendant and jurors on one side, and the state on the other. In the cross-section context, the interests can sometimes be split between the defendant on one side—and the jurors and the state on the other. The defendant’s right is “not to have the pool diminished at the start by the actions or inactions of public officials, nor by the inertia, indifference, or inconvenience of any substantial group or class who do not choose to vote or to serve on juries.”<sup>255</sup> The defendant’s Sixth Amendment interest is in having a jury pool that represents the community:

To him it is a matter of indifference as to whether a diminished pool is due to action or inaction of third persons, whether public or private. . . . In this connection jury duty is an obligation owed to the defendant, not

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250. *Smith v. State*, 571 S.E.2d 740, 751–52 (Ga. 2002) (Benham, J., dissenting).

251. *See supra* note 65.

252. *Batson v. Kentucky*, 476 U.S. 79, 88 (1986) (“The harm from discriminatory jury selection . . . [is] inflicted on [both] the defendant and the excluded juror . . .”).

253. 28 U.S.C. § 1866(g) (2006) (“Any person summoned for jury service who fails to appear as directed may be ordered by the district court to appear forthwith and show cause for failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than \$1000, imprisoned not more than three days, ordered to perform community service, or any combination thereof.”).

254. *See Jackson v. Hoylman*, 12 F.3d 212 (6th Cir. 1993) (considering a § 1983 claim filed against marshals who arrested a man in his home on a bench warrant for failure to appear for grand jury service).

255. *United States v. Burkett*, 342 F. Supp. 1264, 1265 (D. Mass. 1972). *Burkett* is a pre-*Duren* opinion by the late, great Judge Charles E. Wyzanski, “a profound legal thinker,” Eric Pace, *Charles E. Wyzanski, 80, Is Dead; Judge on U.S. Court for 45 Years*, N.Y. TIMES, Sept. 5, 1986, at A20, who clerked for Learned Hand, and “became a member of the ‘brain trust’ of Franklin D. Roosevelt,” *Progressive District Judge Wyzanski Is Dead at 80*, HARVARD CRIMSON, Sept. 5, 1986.

a privilege which at the juror's pleasure the juror may choose to exercise or forego.<sup>256</sup>

Application of the contaminated tests fails to protect the defendant's interests that exist apart from, and sometimes in conflict with, the interests of potential jurors. Although the jury office's responsibility for the "action or inaction of third persons" is not limitless,<sup>257</sup> under the Sixth Amendment, that responsibility is not confined to refraining from discrimination.<sup>258</sup>

#### B. INCOMPATIBLE WITH OPERATION OF MODERN JURY SYSTEMS

A focus on the intent of jury officials also undermines the impartial jury right because it fails to take account of how modern jury systems actually operate. In the past, the issue of racial exclusion or underrepresentation on juries always arose in the context of intentional, race-based decisions.<sup>259</sup> But a search for a bad actor is not responsive to the reality that well-meaning administrators can make racially neutral decisions (or inadvertent mistakes) that result in the significant underrepresentation of people of color.<sup>260</sup>

Computer programming has been introduced into jury selection processes to increase efficiency and facilitate random selection, but as the Connecticut example illustrates, computers are programmed by humans and are accordingly vulnerable to human errors.<sup>261</sup> Underrepresentative jury pools have been created, for example, by a computer program that arranged lists of qualified jurors "alphabetically by the fifth letter of the last name," a system which was "impartial . . . unintentional, . . . blind and benign."<sup>262</sup> But the process inadvertently grouped different ethnic groups onto the same jury panels: one panel included "an inordinate number of persons with apparently Jewish names. [Another] include[d] 19 of 65 names with apparently Italian names," and in another, "10% of

256. *Burkett*, 342 F. Supp. at 1265.

257. The administrative burden of selecting juries from a cross-section of the community may be considerable, but it cannot be *implicitly* prioritized over the Sixth Amendment right at stake. *See infra* Part III.C.

258. *See* Leipold, *supra* note 32, at 971 ("[T]he government's obligation to do more than remove barriers seemed to be the message of *Duren v. Missouri*."); Schulberg, *supra* note 17, at 24 ("At the very least, the fair cross-section requirement imposes a duty on jury officials to adopt procedures to remedy underrepresentation.").

259. McGillis, *supra* note 39, at 20.

260. *See* *People v. Morales*, 770 P.2d 244, 276 (Cal. 1989) (Broussard, J., dissenting) ("The Fourteenth Amendment protects against *intentional* discrimination in the selection of venires, but the Sixth Amendment protects against *unintentional* deviations from the constitutional standard." (citation omitted)).

261. *See supra* notes 236–238 and accompanying text.

262. *State v. Long*, 499 A.2d 264, 268 (N.J. Sup. Ct. Law Div. 1985).

the panel [had] the last name ‘Williams.’”<sup>263</sup> Other jurisdictions created underrepresentative jury pools when a computer error accidentally set the parameters for the selection of names such that only the lower number zip codes were used as a source of names, and the urban area with the largest percentage of people of color had a higher number zip code.<sup>264</sup> Elsewhere, a system organized the townships in the jury pool in alphabetical order and limited jury summons to the first 10,000 jurors on the list, thereby excluding “Wayne Township” residents, who constituted 75.1% of the county’s African-American population.<sup>265</sup> In Washington, D.C., a computer programming error excluded all persons with misdemeanor convictions (where the law only disqualified persons with felony convictions), and *permanently* excluded from jury service any person who had indicated a temporary disqualification because they had a pending criminal charge or had not yet satisfied the residency requirement.<sup>266</sup> Even properly functioning computer programs have had unexpected results: One program for identifying duplicate names to eliminate from the jury list compared the full last name and the first four letters of the first name; if there was a match, the name was dropped from the jury list.<sup>267</sup> But because “many members of the Hispanic community share common surnames and first names” the evidence showed that Hispanics were likely erroneously deleted.<sup>268</sup>

Other innocuous steps taken by jury officials, often in an effort to make jury service less onerous, have inadvertently led to underrepresentative pools. For example, a county in Alaska sought to make jury service less burdensome by limiting the selection of jurors to people who lived within fifteen miles of the courthouse, which had the unintended effect of eliminating “residents of virtually all Native villages” from the jury pool.<sup>269</sup> Efforts to send jurors to courthouses closer to their residence similarly resulted in the underrepresentation of African-Americans in Los Angeles County,<sup>270</sup> New York,<sup>271</sup> and Florida.<sup>272</sup>

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263. *Id.* at 269 n.3.

264. *Ambrose v. Booker*, 781 F. Supp. 2d 532, 538 (E.D. Mich. 2011); *see also* *People v. Bryant*, No. 241442, 2004 WL 513664, at \*4 (Mich. Ct. App. Mar. 16, 2004) (“[A] computer program used to select potential jurors chose a disproportionately large number of jurors from areas with lower zip codes, which had the unintended effect of selecting fewer jurors from areas of the county where African-Americans live.”).

265. *Azania v. State*, 778 N.E.2d 1253, 1257–59 (Ind. 2002).

266. *United States v. Powell*, DAILY WASH. L. RPTR., Oct. 3, 2008, at 2149 (D.C. Sup. Ct. Crim. June 17, 2008).

267. *People v. Ramirez*, 139 P.3d 64, 94 (Cal. 2006).

268. *Id.*

269. *Alvarado v. State*, 486 P.2d 891, 895 (Ala. 1971) (deciding, pursuant to the Sixth Amendment, a fair cross-section right despite being a pre-*Duren* case).

270. *People v. Jenkins*, 997 P.2d 1044, 1100 (Cal. 2000); *see also* Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT’L BLACK

The potential for innocuous juror assignment policies to cause racial disparities was vividly demonstrated in *Berghuis v. Smith*.<sup>273</sup> The defendant in *Smith* was an African-American man convicted of murder by an all-white jury, selected from a venire that included three African-Americans out of a group of between 60 and 100 people, in a county where 7.28 percent of the jury-eligible population was black.<sup>274</sup> His jury had been selected through a process where eligible jurors were sent first to local courts and, after local needs were filled, were sent to countywide courts that heard felony cases like *Smith*'s.<sup>275</sup> The month after *Smith*'s jury had been selected, however, the county reversed the assignment order<sup>276</sup> because the Jury Office concluded that the assignment order "essentially swallowed up most of the minority jurors, leaving [felony courts like *Smith*'s] with a jury pool that did not represent the entire county."<sup>277</sup> This conclusion was joined by the Jury Minority Representation Committee of the Bar Association.<sup>278</sup> For example, "in the six months prior to *Smith*'s trial, African-Americans were, on average, 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list."<sup>279</sup> And, in fact, when the county discontinued the assignment policy, "the comparative disparity, on average, dropped from 18% to 15.1%."<sup>280</sup> *Smith* did not prevail because, pursuant to the Court's arguably narrow reading of *Duren*,<sup>281</sup> his

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L.J. 238, 256–58 (1994).

271. See, e.g., *People v. Henderson*, 490 N.Y.S.2d 94, 96–97 (Buffalo City Ct. 1985) ("In the instant case the proof has shown that Blacks are called 61% less frequently in a county-based jury pool than if they were drawn from a pool made up only of residents of the City of Buffalo, and Hispanics 45% less frequently . . . . Their relative exclusion occurs because they are represented in greater numbers in an urban setting and the City of Buffalo, the largest city in the county, has the only local court in the county of sufficient size to require it to operate during regular daytime hours and thus the only local court that is compatible with a central jury pool. Therefore Blacks and Hispanics are not excluded from the jury pool by reason of any discriminatory purpose. Their exclusion is an inadvertent effect of an effort to set up, as far as practicable, a central jury pool for the entire county.").

272. See *Spencer v. State*, 545 So. 2d 1352, 1353–54 (Fla. 1989) (noting that the separation of division into two districts was designed "to reduce substantial travel time for jurors and alleviate unnecessary expense to the state" but served to "remove[] from the jury pool for [one] district a significant concentration of the black population").

273. *Berghuis v. Smith*, 130 S. Ct. 1382 (2010).

274. *Id.* at 1389–90.

275. *Id.* at 1388.

276. *Id.* at 1389.

277. *Id.* (internal quotation marks omitted).

278. *Id.* at 1389–90.

279. *Id.* at 1390.

280. *Id.*

281. It was true that "the record established that some officials and others in [the] County *believed* that the assignment order created racial disparities, and the County reversed the order in response," but "the belief was not substantiated by *Smith*'s evidence." *Id.* at 1394. And it was true that "*Smith*'s best evidence of systematic exclusion was . . . [the] decline in comparative underrepresentation, from

“evidence scarcely shows that the assignment order he targets caused underrepresentation,”<sup>282</sup> but the facts of his claim highlight the potential effects of non-discriminatory jury selection policies.

Similarly, an effort to “reduce the likelihood that some prospective jurors in the jury wheel will be selected for jury duty more often than others” by assigning jurors a rank based on times of service had the inadvertent result of underrepresenting African-Americans and Hispanics.<sup>283</sup> And the decision to grant all deferral requests and group the deferred jurors together for later jury selection—when deferral requests were disproportionately made by whites—has also led to jury pools that underrepresented people of color.<sup>284</sup> Underrepresentation can also be caused by the numeric increment used to randomly select jurors from the jury pool<sup>285</sup> or the use of telephones to summon jurors.<sup>286</sup> Finally, when a source list is not racially representative, even random, race-neutral selection from that list by a computer program will produce an underrepresentative jury pool. “[M]any ‘random’ procedures regularly yield very predictable, non-random deficiencies in their outcomes.”<sup>287</sup>

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18 to 15.1%, after [the] County reversed the assignment order,” but “in view of AEDPA’s instruction . . . this decrease could not fairly be described as ‘a big change.’” *Id.* (quoting acknowledgement by counsel for Smith at oral argument). Most importantly, Smith had identified “a host of factors” in addition to the assignment order that he claimed contributed to the underrepresentation but no “‘clearly established’ precedent of this Court supports Smith’s claim that he can make out a prima facie case merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group’s underrepresentation.” *Id.* at 1388. This was one of the “marked differences between Smith’s case and Duren’s,” and the Court accordingly concluded that the state court’s rejection of Smith’s fair cross-section claim did not represent an “unreasonable application of clearly established federal law.” *Id.* at 1391. *See supra* note 113, for a critique of the Court’s comparison of Smith and Duren’s proffers.

282. *Berghuis*, 130 S. Ct. at 1394.

283. *Washington v. People*, 186 P.3d 594, 597–98 (Colo. 2008).

284. *United States v. Clay*, 159 F. Supp. 2d 1357, 1362–64 (M.D. Ala. 2001).

285. *State v. Hester*, 324 S.W.3d 1, 44 (Tenn. 2010) (“[T]he increment used to draw names from the driver’s license list changes when a new venire is selected. These changes have a significant effect on the drawing of names from the list. . . . [A]ssuming [the county’s] Hispanic population generally is at the end of the list because Hispanics disproportionately have higher driver’s license numbers . . . decreasing the increment will have a tendency to increase the possibility that Hispanics will not be considered for jury service.”).

286. *See State v. LaMere*, 2 P.3d 204, 221 (Mont. 2000) (noting that the use of the telephone to summon jurors resulted in an underrepresentative pool when 29% of Native American households in one county have no phone service, while “[i]n stark contrast . . . only 5% [of Anglo-American households in the same county] are without phone service”); *see also United States v. Nakai*, 413 F.3d 1019, 1022 (9th Cir. 2005).

287. *Brown*, *supra* note 66, at 446 (“For instance, random selection from the most common source list for juries, voter registration rolls, consistently underrepresents racial minorities across both jurisdiction and time.”). *See Brooks v. Beto*, 366 F.2d 1, 23 (5th Cir. 1966) (“Even random selection from broad lists, such as voter registration records . . . inescapably requires a basic preliminary test: do each, or all, or some, give a true picture of the community and its components?”).

None of these errors reflect intentional discrimination or even intentional action, as courts have recognized: “[A]s often happens in overburdened courts (like other institutions), the failure to adopt a proper procedure might have resulted simply from the unwarranted assumptions by all concerned” that the system is operating as it should.<sup>288</sup> But notwithstanding the absence of discriminatory or purposeful action, each of these errors introduce the possibility that a defendant will be deprived of her Sixth Amendment right to a jury selected from a fair cross-section of the community. Thus an analysis limited to identifying instances of discriminatory intent will fail to remedy cross-section violations occasioned by these modern-day errors.

The focus on the equal protection questions of fault and opportunities for people to serve on juries similarly fails to take account of the ways modern jury systems affect ostensibly private choices. For example, every jury office has to make a decision whether to send potential jurors a single form that combines a summons to jury service and a jury qualification form (a one-step process), or to send the qualification form first and then send the summons to those who qualify (a two-step process). Data from the National Center for State Court’s State-of-the-States Survey demonstrate that this decision by the jury office can significantly affect the rates of undeliverable mailings, non-response rates, and failures to appear.<sup>289</sup> A focus on fault and the private choices of jurors masks the reality that the affirmative choices that jury offices make (in conjunction with the actions of potential jurors) affect the “private choices” that contribute to underrepresentative jury pools.

Indeed, there is substantial evidence that jury systems’ operational choices significantly influence the very factors that courts attribute to the private choices of citizens. The Center for Jury Studies of the National Center for State Courts documents that jurisdictions have affected the “private choices” of citizens to exercise requests for excusals (by shifting to a one-day or one-trial service term<sup>290</sup> or increasing the amount of juror pay<sup>291</sup>), the “private choices” of citizens to appear for jury service (by following up on or enforcing unreturned summons),<sup>292</sup> and the

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288. *United States v. Jackman*, 46 F.3d 1240, 1245 (2d Cir. 1995).

289. Systems that chose the one-step process have an average undeliverable rate of 14.6%, and states that chose the two-step process have an average undeliverable rate of 9.2%. MIZE ET AL., *supra* note 193, at 22 tbl.16. Similarly, offices that chose a one-step process have non-response/failure to appear rates at an average of 8.9%, compared to 6% for offices that chose the two-step process. *Id.*

290. *Id.* at 24 tbl.18 (“[C]ourts with a one day or one trial term of service had significantly lower excusal rates than those with longer terms of service (6.0 percent versus 8.9 percent, respectively).”).

291. *Id.* at 23 (“Moreover, courts with juror fees exceeding the national average (\$21.95 flat fee or \$32.34 graduated rate) also had significantly lower excusal rates—6.8 percent compared to 8.9 percent for courts whose juror fees were lower than the national average.”).

292. *Id.* at 24–25 (“[F]ollow-up programs that involved a second summons or qualification, or that

socioeconomic factors that affect the rate of undeliverable summons (by using an address-updating service<sup>293</sup> and updating addresses more frequently<sup>294</sup>). In sum, “courts have implemented a number of effective practices to ensure an inclusive and representative master jury list . . . . All of these techniques demonstrably improve the demographic representation of the jury pool.”<sup>295</sup> Courts implicitly recognize this point when they hold there is no systematic exclusion, but proceed to order changes to the jury system anyway.<sup>296</sup> When courts limit their focus to the question of whether citizens have been denied the opportunity to serve on juries, they fail to consider how jury offices affect the “private” choice to take advantage of that opportunity.

### C. ERODES DOCTRINAL INTEGRITY

Courts’ application of the contaminated test, in the words of one dissenting judge, reflects “their inability or unwillingness to comprehend the difference between an equal protection analysis and a representative cross-section analysis.”<sup>297</sup> Although it is not clear which of the two is to blame, if we assume the normative value of competent judges<sup>298</sup> and internally consistent doctrine,<sup>299</sup> then either courts’ inability to distinguish the doctrines or their unwillingness to do so threatens both the integrity of the law and public acceptance of judicial decisions.<sup>300</sup>

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involved some other approach (*e.g.*, bench warrant), significantly reduced non-response/FTA rates.”); *id.* at 25 (“Courts that had no follow-up program had significantly higher non-response/FTA rates.”); Hannaford-Agor, *supra* note 17, at 784 (“[T]he enforcement of jury summonses can be highly effective in ensuring a representative jury pool—a phenomenon documented by numerous studies conducted in state and local courts.”). To be clear, Hannaford-Agor adopted (and arguably endorsed) the definition of disparity related to voter registration non-response rates as “nonsystematic exclusion.” *Id.* at 772.

293. Hannaford-Agor, *supra* note 17, at 783.

294. *Id.* at 788.

295. *Id.* at 764.

296. *See, e.g.*, United States v. Murphy, No. 94 CR 794, 1996 WL 341444, at \*5 (N.D. Ill. June 18, 1996) (noting that, after the court decided to send additional mailings to people who failed to respond to the summons, “the percentage of African-Americans on the master and qualified jury wheels increased with each subsequent mailing”).

297. *People v. Bell*, 778 P.2d 129, 170 (Cal. 1989) (en banc) (Broussard, J., dissenting).

298. *See* United States v. Will, 449 U.S. 200, 217 (1980) (citing “the public interest in a competent and independent judiciary”); *In re Loyd*, 384 N.W.2d 9, 13 (Mich. 1986) (“[T]he maintenance of the public’s confidence in a competent judiciary is of utmost importance.”).

299. *See* Citizens United v. FEC, 130 S. Ct. 876, 920 (2010) (citing the value of “evenhanded, predictable, and consistent development of legal principles” and ensuring that “the law will not merely change erratically, but will develop in a principled and intelligible fashion”); Judge Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1258–59 (2006) (“[Stare Decisis] was designed to keep courts principled and consistent—to prevent courts from acting arbitrarily or capriciously, deciding the same facts one way in Jones’s case and another way in Smith’s case.”).

300. *See* Republican Party of Minn. v. White, 536 U.S. 763, 793 (2002) (“Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments.”).

The best evidence that courts are simply making a mistake, rather than affirmatively attempting to modify the doctrine, is the absence of any opinions explaining why—or even acknowledging—that the court is applying a modified version of the cross-section test. My research uncovered only one case where the court recognized that it was applying the standard from equal protection, and it did so under protest. In *United States v. Rogers*, the Eighth Circuit recognized that in a prior cross-section case, “our court introduced an element of intentional discrimination not required by the Supreme Court.”<sup>301</sup> Notwithstanding their awareness that the discrimination requirement was erroneously imported, the court’s hands were tied by the earlier case.<sup>302</sup> With the exception of *Rogers*, I have not identified a single case in which a court acknowledged that it was introducing a requirement not found in *Duren*, or that it was borrowing from the equal protection standard. Moreover, the few dissenting judges who have criticized the majority’s application of the tainted test have not objected to the majority’s *rationale*; instead, they have accused the majority of making an ill-considered *error*.<sup>303</sup>

To the extent that the distorted doctrine can be attributed to mistakes, the problem may lie with the intertwined development of the two constitutional standards combined with the operation of precedent.<sup>304</sup> For example, in 2010 the Eighth Circuit denied a defendant’s fair cross-section claim in *United States v. Tripp*, asserting that the Constitution “merely prohibits deliberate exclusion of an identifiable racial group from the juror selection process.”<sup>305</sup> The *Tripp* court was quoting a 1982

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301. *United States v. Rogers*, 73 F.3d 774, 776 (8th Cir. 1996) (“Our court stated: ‘Garcia does not contend that Iowa law imposes any suspect voter registration qualifications or that the Plan is administered in a discriminatory manner. Garcia has not made any showing that African Americans or Hispanics are systematically excluded from the jury-selection process. A numerical disparity alone does not violate any of Garcia’s rights and thus will not support a challenge to the Iowa Plan.’” (quoting *United States v. Garcia*, 991 F.2d 489, 491 (8th Cir.1993))).

302. *Id.* at 776 (“Although we affirm [the defendant’s] convictions, we do so reluctantly with respect to [the defendant’s] challenge of the Iowa jury-selection plan. We recognize that we are bound by a previous decision by our court . . . Nevertheless, we feel compelled to discuss our concerns on this issue and to encourage the court en banc to reconsider *Garcia* on this appeal.”).

303. *See, e.g.*, *Barber v. Ponte*, 772 F.2d 982, 1004 (5th Cir. 1985) (Bownes, J., dissenting, joined by Coffin, J.) (“[M]y colleagues focus only on the law of equal protection challenges to the exclusion of sixth amendment principles. Their finding that evidence of intentional discrimination is required is directly counter to the law the Court stated in [*Duren*] . . .”).

304. *See generally* Leval, *supra* note 299, at 1256 (“[The mistake of accepting] prior dictum as if it were binding law [] results in some part from time pressures on an overworked judiciary, the ever-increasing length of judicial opinions, and the precision-guided weaponry of computer research—all of which contribute to our taking previously uttered statements out of context, without a careful reading to ascertain the role they played in the opinion.”).

305. *United States v. Tripp*, 370 F. App’x 753, 759 (8th Cir. 2010) (quoting *United States v. Jones*, 687 F.2d 1265, 1269 (8th Cir. 1982)).

decision<sup>306</sup> that itself quoted a pre-*Duren* opinion<sup>307</sup> that in turn quoted the seminal equal protection case of *Swain v. Alabama*.<sup>308</sup> Confusing the two standards is an error even venerable judges have made.<sup>309</sup> It may be due to the fact that busy clerks and judges have little time to track down the origins of oft-cited language, and as a result the wrong standards have the opportunity to work their way into the Sixth Amendment analysis.<sup>310</sup> The likelihood of getting mixed up increases with every opinion that muddles the tests, and confused parties contribute to the confusion of the courts.<sup>311</sup>

Although it may be understandable that courts mistakenly import equal protection standards, it is less obvious why they appear content to keep making that mistake. Consider the Eighth Circuit cases discussed

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306. *Id.*

307. *United States v. Jones*, 687 F.2d 1265, 1269 (8th Cir. 1982) (quoting *United States v. Turcotte*, 558 F.2d 893, 895 (8th Cir. 1977)).

308. *United States v. Turcotte*, 558 F.2d 893, 895 (8th Cir. 1977) (quoting *Swain v. Alabama*, 380 U.S. 202, 208 (1965)).

309. For example, Judge Posner authored an en banc opinion that stated, “The Sixth Amendment has been interpreted to forbid racial discrimination in the selection of jurors,” found the defendant’s “only evidence of racial discrimination” wanting, and concluded that “[s]ystematic discrimination . . . has not been shown.” *United States v. Gometz*, 730 F.2d 475, 478 (7th Cir. 1984) (en banc). Similarly, Justice Kennedy cited *Duren* and *Taylor* in asserting that “[t]here is no doubt under our precedents, therefore, that the Equal Protection Clause prohibits sex discrimination in the selection of jurors.” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring). But, of course, *Duren* and *Taylor* are Sixth Amendment cases that expressly disavow the equal protection framework. *See Duren v. Missouri*, 439 U.S. 335, 364 n.19 (1979) (“The decision below also rejected petitioner’s challenge under the Equal Protection Clause of the Fourteenth Amendment. This challenge has not been renewed before this Court.”); *id.* at 370 (Rehnquist, J., dissenting) (“The Court steadfastly maintained in [*Taylor*] . . . that its holding rested on the jury trial requirement of the Sixth and Fourteenth Amendments and not on the Equal Protection Clause of the Fourteenth Amendment.”).

310. For example, in 2004 the Seventh Circuit analyzed a challenge to “the jury composition under the Sixth Amendment, which forbids racial discrimination in the selection of jurors.” *United States v. Phillips*, 239 F.3d 829, 842 (7th Cir. 2001). *Phillips* cited *Swain v. Alabama*, a seminal equal protection case, in concluding that the defendants “fail to make a showing under the third prong that there was a systematic exclusion of African Americans and Hispanics.” *Id.* The cited portion of *Swain* recites the premise that “a State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.” *Swain v. Alabama*, 380 U.S. 202, 203–04 (1965); *see State v. Golphin*, 533 S.E.2d 168, 192 (N.C. 2000) (“As to the third prong of *Duren*, . . . [t]he fact that a particular jury or series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause.” (quoting the equal protection case *Washington v. Davis*, 426 U.S. 229, 239 (1976))); *United States v. Biaggi*, 680 F. Supp. 641, 653 (S.D.N.Y. 1988) (noting that fair cross-section decision that imported equal protection concepts “relied upon cases . . . that were actually decided pursuant to law other than the Sixth Amendment,” including equal protection and the Jury Selection and Service Act).

311. *See, e.g.*, Brief for the United States at 79–80, *United States v. Quiroz*, 37 F. App’x 667 (5th Cir. 2005) (No. 03-50120), 2005 WL 2480726. (“The Sixth Amendment forbids racial discrimination in the selection of jurors, requiring that the jury venire from which the petit jury is selected represents a fair cross-section of the community.”).

above: Despite being alerted to the problem in 1996 by the *Rogers* panel, in 2010 the court in *Tripp* is still relying on equal protection case law to demand evidence of discrimination.<sup>312</sup> The inconsistencies in Second Circuit fair cross-section doctrine provide another prime illustration both that the introduction of equal protection is a mistake and that courts can continue to make that mistake even after the error is brought to their attention.

The Second Circuit originally held in *United States v. Young* that reliance on voter lists was constitutional, “absent a showing of *discrimination* in the compiling of such voter registration lists,”<sup>313</sup> and further held that when “defendants have made no showing that any part of the process of selecting the venire was tainted by discrimination, [they] have therefore failed to establish a prima facie violation of their sixth amendment right to a cross-sectional jury panel.”<sup>314</sup> Judge Constance Baker Motley<sup>315</sup> critiqued the *Young* decision in a subsequent district court case, pointing out that *Young*’s “approach appears to obliterate the substantive distinction between the equal protection and sixth amendment tests.”<sup>316</sup> It was not only inconsistent with an earlier Second Circuit decision recognizing that the Sixth Amendment applies “regardless of whether the State’s motive is discriminatory;”<sup>317</sup> it was also “flatly contradictory of the Supreme Court’s ruling in *Duren*,” because “*Duren* permits the defendant to focus solely on the composition of the venires over time, not on the intent of the registrars.”<sup>318</sup>

The Second Circuit acknowledged that it had made a mistake. On appeal from Judge Motley’s decision, the Second Circuit admitted that it “arguably blurred that distinction” between the two constitutional standards, and reasserted that it “agree[s] with Judge Motley that discriminatory intent is not an element of a Sixth Amendment ‘fair cross-section claim.’”<sup>319</sup> But then in 2009, the equal protection requirement was

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312. *United States v. Tripp*, 370 F. App’x at 753, 759 (8th Cir. 2010).

313. *Biaggi*, 680 F. Supp. at 653 (emphasis added) (quoting *United States v. Young*, 822 F.2d 1234, 1239 (2d Cir. 1987)).

314. *Young*, 822 F.2d at 1240.

315. Judge Motley’s legal experience and acumen likely made her less inclined to apply a slipshod analysis to questions of discrimination or underrepresentation. Motley, the first African-American woman ever to argue a case before the U.S. Supreme Court or be appointed to a federal court judgeship, was the attorney for the petitioner before the Supreme Court in several landmark civil rights cases, including James Meredith’s effort to be the first black student to attend the University of Mississippi in 1962. Of the ten cases she argued before the Supreme Court, Motley lost only one: the seminal equal protection case regarding jury discrimination, *Swain*, 380 U.S. 202 (*Swain* was eventually overturned in *Batson v. Kentucky*, 476 U.S. 79, 96 (1986)).

316. *Biaggi*, 680 F. Supp. at 653.

317. *Id.* (quoting *Alston v. Manson*, 791 F.2d 255, 258–59 (2d Cir. 1986)).

318. *Id.*

319. *United States v. Biaggi*, 909 F.2d 662, 677–78 (2d Cir. 1990).

reintroduced by a different panel of the court which held that “absent positive evidence that some groups have been hindered in attempting to register to vote, a jury venire drawn from voter registration lists violates neither the Sixth Amendment’s fair cross-section requirement nor the Fifth Amendment’s guarantee of Equal Protection.”<sup>320</sup> The 2009 decision ignored without discussion Judge Motley’s criticism and the correction articulated by the prior panel. Similarly, other courts have imposed the wrong standard in the face of critiques from their judicial colleagues<sup>321</sup> and the significant body of law highlighting the differences between the two tests.<sup>322</sup>

But if it is not simply a mistake, what could explain the willingness of courts to apply an incorrect standard that curtails access to representative juries? An exploration of that question is outside the scope of this Article, but one can imagine both doctrinal and outcome-based reasons that courts might resist applying the cross-section standard stripped of the equal protection discrimination requirement. Perhaps courts are resistant to the *Duren* doctrine either because they are more comfortable with a doctrine that interprets racial disparity as the product of a malevolent bad actor, rather than the result of unconscious bias or benign actions,<sup>323</sup> or because they agree with Justice Rehnquist that the separate Sixth Amendment right rests on a faulty premise<sup>324</sup> and are introducing equal protection concepts in an end-run effort to mitigate the “harm” introduced by an illegitimate doctrine.<sup>325</sup> (Of course, adoption of this theory would require the Court to reverse *Duren* and *Smith*, an approach that at least one state’s Attorney General’s office is pursuing in ongoing litigation.<sup>326</sup>) Perhaps courts do not identify the outcome of

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320. *United States v. Carter*, No. 07-5756, 2009 WL 765004, at \*1 (2d Cir. Mar. 25, 2009) (reasoning that, because the defendant has presented no evidence that “members of any ethnic group had been hindered in their attempts to register to vote . . . and did not show any other kind of systematic exclusion of ethnic minorities,” there was no Sixth Amendment violation).

321. *See supra* note 166.

322. *See supra* note 118.

323. Linda Hamilton Kreiger discussed this phenomenon in the context of Title VII employment discrimination claims, observing that the doctrinal model has failed to take account of the shift from “conscious, deliberate discrimination” to “forms of intergroup bias stemming from social categorization and the cognitive distortions which inexorably flow from it.” Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1241 (1995). Kreiger argues that the manner in which “Title VII jurisprudence constructs discrimination, while sufficient to address the deliberate discrimination prevalent in an earlier age, is inadequate to address the subtle, often unconscious forms of bias that . . . represent today’s most prevalent type of discrimination.” *Id.* at 1164.

324. *Duren v. Missouri*, 439 U.S. 335, 370–71 (1979) (Rehnquist, J., dissenting).

325. *See Re, supra* note 33, at 1602 (suggesting that when Justice Kennedy referred to *Taylor* and *Duren* as equal protection cases, he was “tacitly endors[ing a] . . . revisionist interpretation” of *Taylor* and *Duren* that understands the cases to actually be based on equal protection principles).

326. Brief on Appeal of Attorney General Bill Schuette as Amicus at 17, *People v. Bryant*,

underrepresentative jury pools as a harm that truly needs remedying, either because they do not feel any affinity for a legal rule that recognizes race “matters,”<sup>327</sup> or because they recognize race does matter but are not invested in seeing the perspective of people of color represented in jury pools,<sup>328</sup> or because they do not place much value on decision making by juries of any composition.<sup>329</sup>

Perhaps—at least with respect to cases where the analysis is focused on fault—judges are wary of embracing a rule that would impose unreasonable burdens on jury officials to operate representative jury systems. Indeed, at some point the responsibility of the jury office to ensure a fair cross-section ends, and the private choices of citizens control. But as yet, courts have not addressed the question of where to draw that line or how to apportion the responsibility. Instead, they have employed a binary paradigm that assumes the jury system has no influence on juror participation rates—an assumption that the evidence shows is incorrect.<sup>330</sup> There is no reason why a principled limitation on the definition of “systematic exclusion” cannot be formulated in a way that is both consistent with *Duren* and avoids placing an unreasonable burden on jury officials. But it will never be articulated or deliberated if courts *implicitly* prioritize administrative interests over fair cross-section

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491 Mich. 575 (2012) (No. 141741) (arguing that the fair cross-section right announced in *Duren* “is no longer necessary, should be overruled, and that all claims regarding jury composition should be evaluated under the equal protection clause”). This argument was also made by the Criminal Justice Legal Foundation, in its amicus brief to the Supreme Court in *Berghuis v. Smith*. Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 1, *Berghuis v. Smith*, 130 S. Ct. 1382 (2010) (No. 08-1402), 2009 WL 4307581. Andre Leipold has also asserted that “the fair cross-section doctrine in its current form [is not] really necessary,” but his focus is on the “Court’s inability to articulate a more vigorous defense of diverse juries” rather than the absence of such a defense. Leipold, *supra* note 32, at 996 (emphasis added). As Leipold observes, “such a defense is not hard to make.” *Id.*

327. See generally Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1595 (2009) (describing the legal theory of post-racialism that “race does not matter, and should not be taken into account or even noticed”). Recognizing that race matters in the context of jury selection up until the point that the petit jury is chosen, moreover, is in tension with the equal protection prohibition on considering race during petit jury selection. See, e.g., Leipold, *supra* note 32, at 964 (“Although the cross-section doctrine is premised on the notion that different races and genders often view the world differently, *Batson* has declared these differences legally irrelevant.”); Chhablani, *supra* note 17, at 946 (“Consider . . . the doctrinal paradox that has arisen between the ‘fair cross-section’ jurisprudence and the Court’s jurisprudence regarding discrimination in jury selection.”).

328. See, e.g., Tanya E. Coke, *Lady Justice May Be Blind, but Is She a Souls Sister? Race-Neutrality and the Idea of Representative Juries*, 69 N.Y.U. L. REV. 327, 347 (1994) (“[M]any lawyers and judges still tend to view whites as presumptively impartial on legal controversies, especially those with racial implications. By contrast, racial minorities are seen as self-interested on such issues, as though they are marked by ‘race’ but whites are not.” (footnote omitted)).

329. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 156–57 (1968) (“We are aware of the long debate . . . as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings.”).

330. See *supra* Part III.B.

interests, using the language of equal protection law rather than explaining their analysis.<sup>331</sup>

The key point is that courts have not proffered any of these explanations for their application of equal protection standards; they have provided no explanations at all. Thus, it is impossible to determine whether the fault lies with “their inability or unwillingness” to distinguish the doctrines, and it follows that any arguments for modifying the *Duren* standard—from the objectionable to the persuasive—are left unstated and unexamined. The unexplained distortion of the fair cross-section standard undermines the coherence of Sixth Amendment doctrine and public confidence in the expertise of the court.<sup>332</sup>

### CONCLUSION

“One thing is, or should be, clear: Sixth Amendment analysis does not require proof that a cognizable group has been excluded [from the jury pool] because of discrimination, as in the case of an Equal Protection challenge . . . .”<sup>333</sup> Yet as this Article reveals, the distinction between the two constitutional standards is extremely unclear to many courts. It is accordingly inappropriate (or at least premature) to suggest that the *Duren* standard needs to be revisited, or that courts should employ an alternative framework when evaluating cross-section claims. The rights of criminal defendants will be better protected if courts simply apply the unadulterated Sixth Amendment standard.

It will require additional scholarship to explore how often the importation of equal protection concepts results in the denial of a meritorious claim,<sup>334</sup> how frequently courts make this error,<sup>335</sup> why courts

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331. See *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (“We should not lightly create a new judicial rule, in the guise of constitutional interpretation, to achieve [a desired] end.”); *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (stating that the government’s interest in avoiding administrative burdens cannot unilaterally justify the violation of fundamental rights); *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (reasoning that “the administrative convenience” of the state’s approach that systematically excluded women “is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials”).

332. See *Payne v. Tennessee*, 501 U.S. 808, 852–53 (1991) (Marshall, J., dissenting, joined by Blackmun, J.) (“[F]idelity to precedent is part and parcel of a conception of the judiciary as a source of impersonal and reasoned judgments. Indeed, this function of stare decisis is in many respects even more critical in adjudication involving constitutional liberties . . . . [T]his Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing principles founded in the law rather than in the proclivities of individuals.” (citation omitted) (internal quotation marks omitted)).

333. *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005).

334. To the extent that courts are routinely denying cross-section claims, see *supra* note 17, the indication is that they are not erring on the side of defendants. See generally *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (holding in a pre-*Duren* equal protection case that, “[i]n light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for

may be making this mistake,<sup>336</sup> and what is the best way to remedy the problem.<sup>337</sup> As this Article demonstrates, however, courts must be more circumspect in their analysis of fair cross-section claims. Defendants' unique Sixth Amendment rights are jeopardized each time a court contaminates *Duren's* standard for systematic exclusion with either the discrimination requirement or conceptual focus of equal protection.

#### APPENDIX

To produce the survey for this Article, I examined all opinions decided by state supreme courts or federal circuit courts of appeals from January 1, 2000, to July 30, 2011, that cited the case of *Duren v. Missouri*.<sup>338</sup> This search produced a total of 181 cases. From this list I omitted 44 cases that did not actually address the Sixth Amendment's fair cross-section standard. Specifically, I omitted (a) six federal and state cases where, although the court included a citation to *Duren*, there was no fair cross-section claim at issue; (b) three federal cases decided exclusively under the Jury Service and Selection Act ("JSSA")<sup>339</sup> and three state cases decided exclusively under state statutes; (c) one federal case and three state cases where *Duren* was cited in the context of a claim exclusively about the defendant's entitlement to discovery; (d) one federal case and two state cases where the decision was addressed on appeal by another case in the survey or by the United States Supreme Court; (e) one federal and one state case where *Duren* was cited only by the dissent; (f) four state cases denying an ineffective assistance of counsel claim with no discussion of the underlying fair cross-section claim, other than stating that the defendant had failed to make out a prima facie case; (g) three state cases granting or denying a Certificate of Appeal with no discussion of the fair cross-section claim; (h) three federal cases where the fair cross-section claim was barred or waived and the merits of claim were not considered; and (i) one federal civil case. This process produced a list (which I refer to as the "federal and state *Duren*-citing list") of 137 cases.

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challenging the jury to too many defendants, rather than giving it to too few" (footnote omitted)).

335. My survey represents a first foray into answering this question, but the limitations of the survey to cases that cite *Duren* and federal cases that discuss a fair cross-section, *see infra* Appendix, limit my ability to extrapolate from my results.

336. *See supra* Part III.C.

337. For some innovative suggestions, see Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1053-58 (2003); Hannaford-Agor, *supra* note 17, at 779-88; G. Thomas Munsterman & Janice T. Munsterman, *The Search for Jury Representativeness*, 2 JUST. SYS. J. 59, 74 (1986).

338. *Duren v. Missouri*, 439 U.S. 357 (1979).

339. Jury Selection Act, 28 U.S.C. §§ 1861-78 (2006).

Second, I searched for federal circuit court cases, also post-January 1, 2000, using the terms (*fair /s (cross /2 section) % Duren*). This resulted in a list of 124 cases (which I refer to as the “federal search terms list”), only 30 of which actually addressed the merits of fair cross-section claims. Of the remaining 94 cases, 20 considered jury selection at the petit jury stage (i.e., preemptory strikes); 22 referred to the fair cross-section right but did not address the merits of a Sixth Amendment claim (that is, they addressed only discovery, or a claim under the JSSA, or concluded that the cross-section claim was time-barred); 51 did not involve a fair cross-section claim in any way (that is, they used the language in another substantive context); and one case was a prior decision in a case that was already included in the survey. I did not examine state cases that were identified by these search terms. The combination of the “federal and state *Duren*-citing list” and the “federal search terms list” produced the master list of 167 cases.

The master list of 167 cases does not capture every case that addresses the fair cross-section issue. It excludes cases not decided between 2000 and 2011, state cases that do not cite *Duren*, cases that neither cite *Duren* nor refer to a fair cross-section,<sup>340</sup> cases that were not available on Westlaw, and any trial decisions that were not appealed. These limitations are the reason I use the survey to highlight troubling trends, rather than to make assertions that depend on exact figures or to extrapolate from my findings.

With regard to the coding of cases included in the survey, 152 of the 167 cases in the survey were coded first by a research assistant and a second time by me. The coding was not blind; I had access to the research assistant’s coding when I read the cases and coded it myself. Fifteen of the 167 cases in the chart were coded only by me. With regard to the cases omitted from the “federal and state *Duren*-citing list,” each of the 16 omitted federal circuit court cases and the 28 omitted state supreme court cases were read and reviewed first by a research assistant and a second time by me. With regard to the “federal search terms list,” only 8 of the 95 omitted cases were read and reviewed separately by a research assistant and by me; the remaining 87 cases were omitted by a research assistant on the basis of my instructions to omit cases that did not consider the merits of a Sixth Amendment fair cross-section claim.

Finally, the percentages referenced in this Article have been rounded up or down for readability. For example, 0.438 is rounded up to 44% and 0.434 is rounded down to 43%.

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340. See, e.g., *Hearn v. Cockrell*, No. 02-10913, 2003 WL 21756441, at \*5-6 (5th Cir. June 23, 2003) (concluding that the underrepresentation alleged by defendant was not unconstitutional, referring to the requirement of a “representative cross-section” and citing only *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975)).

I welcome questions and criticism of the survey methodology, and am happy to share case citations and a full record of my coding with any interested readers. Please contact me at [nina.chernoff@law.cuny.edu](mailto:nina.chernoff@law.cuny.edu) for more information.