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Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Imposing Equal Protection Standards

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WRONG ABOUT THE RIGHT: HOW COURTS UNDERMINE THE FAIR CROSS-SECTION GUARANTEE BY IMPOSING EQUAL PROTECTION STANDARDS

Nina W. Chernoff

Over thirty years ago the Supreme Court established the standard for a violation of the Sixth Amendment right to a jury selected from a fair cross-section of the community. Today the most consistent conclusion one can reach about fair cross-section claims is that they are unsuccessful. This Article asserts that a surprising number of Sixth Amendment claims are being denied because courts are erroneously applying the test for a violation of the Fourteenth Amendment's equal protection guarantee. As a result, criminal defendants are being deprived of the unique Sixth Amendment fair cross-section right, which extends beyond the Fourteenth Amendment's protection from discrimination.

Under the Sixth Amendment, a defendant does not need to 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 jury selection process, whether by accident or design. The equal protection clause, in contrast, demands evidence of discriminatory intent.

This Article reveals that at least eight federal circuits and twenty-eight states have erroneously denied defendants' Sixth Amendment claims for failure to satisfy the equal protection requirement of discriminatory intent. This Article also uses an original survey of federal and state fair cross-section cases to explore the potential scope of the problem for the first time. Courts denied defendants' cross-section claims for failure to meet equal protection standards in over one-third of the cases surveyed. In contrast to scholarship arguing that the fair cross-section standard needs to be revisited, 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 rather from courts' routine importation of equal protection standards into the analysis. The key to enforcing the fair cross-section guarantee for criminal defendants is not to change the standard, but to apply it consistently with the demands of the Sixth Amendment and Supreme Court doctrine.

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WRONG ABOUT THE RIGHT: HOW COURTS UNDERMINE THE FAIR CROSS-SECTION GUARANTEE BY IMPOSING EQUAL PROTECTION STANDARDS

*Nina W. Chernoff**

INTRODUCTION

This Article exposes a judicial phenomenon occurring in contravention of constitutional law and Supreme Court doctrine. The Sixth Amendment does not require a defendant to show evidence of discrimination in order to challenge racial underrepresentation in the jury system. 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.”¹ This Article reveals that federal and state courts have 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. 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.”² 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.³ The Supreme Court has accordingly concluded that the Sixth Amendment “necessarily contemplates an impartial jury drawn from a cross-section of the community.”⁴

* Acting Assistant Professor of Lawyering, NYU School of Law. I am tremendously grateful for the insights and encouragement of Tony Thompson, Kim A. Taylor-Thompson, Erin E. Murphy, Katie Tinto, Anna Roberts, Lily Shapiro, Jamila A. Wideman, Dr. Jay Kadane, and the members of the NYU Lawyering Scholarship Colloquium. I am also grateful for the research assistance of Jared Davidson and Ganaraj Hegde, as well as Whitney Flanagan and Krystan Hitchcock.

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

² *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972); see *Strauder v. State of 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 . . .”)

³ *Williams v. Florida*, 399 U.S. 78, 100 (1970).

⁴ *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946); see *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (“the 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.”⁵ 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 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.⁶

The Court established the standard for a violation of the fair cross-section right in the 1979 case of *Duren v. Missouri*.⁷ 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,”⁸ (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,”⁹ and (3) “this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”¹⁰ “Systematic” means “inherent in the particular jury-selection process utilized” and does not require evidence of intentional exclusion.¹¹

This Sixth Amendment fair-cross section guarantee is distinct from the Fourteenth Amendment right to equal protection of the laws.¹² The equal protection clause protects against discrimination by state actors.¹³ It does not share the fair cross-section's broader interest in reasonable representation in the jury pool; it is limited to the narrower goal of prohibiting discrimination.¹⁴ That “distinction is important. An Equal Protection challenge concerns the process of selecting jurors, or

⁵ *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

⁶ *Taylor*, 419 U.S. at 531 (trial by a lay jury is “critical to public confidence in the fairness of the criminal justice system”); see also, e.g., Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1049 (2003).

⁷ 439 U.S. 357 (1979).

⁸ 439 U.S. at 364.

⁹ 439 U.S. at 364.

¹⁰ *Duren*, 439 U.S. at 364; see also *Berghuis v. Smith*, 130 S.Ct. 1382, 1388 (2010).

¹¹ *Duren*, 439 U.S. at 366; see also *id.* at 372 (Rehnquist, J., dissenting) (“[U]nder Sixth Amendment analysis intent is irrelevant.”).

¹² See Part I, *infra*.

¹³ See Part I, *infra*.

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

the allegation that selection decisions were made with discriminatory intent. The Sixth Amendment, on the other hand, is concerned with impact”¹⁵

When defendants claim that their jury was selected in violation of the Sixth Amendment fair cross-section right – their claims are almost always denied. For example, in my original survey of 167 fair cross-section claims decided by federal circuit courts of appeals and state supreme courts from 2000 to 2011,¹⁶ not one court concluded that the fair cross-section right had been violated.¹⁷ The survey’s limitations mean it can serve only to provide some preliminary suggestions about judicial trends,¹⁸ here, for example, the survey provides some evidence that is consistent with the conventional wisdom that these claims are usually denied.¹⁹ Defendants who allege a violation of the Sixth Amendment fair cross-section right are most often objecting to the systematic exclusion of African-Americans and Hispanics.²⁰ This Article focuses on the underrepresentation of those two groups²¹ for that

¹⁵ *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005), *overruled on other grounds by In re United States*, 426 F.3d 1 (1st Cir. 2005). See also Part I(B)(3), *infra*. 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 Part I, *infra*.

¹⁶ 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, also 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, and the survey data will be available at StatLib (<http://lib.stat.cmu.edu/>), hosted by the Department of Statistics at Carnegie Mellon University. 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*, any case that neither cites *Duren* nor refers to a fair cross-section, and any case 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.

¹⁷ Defendants prevailed on their jury claims in two cases that were omitted from the survey because they were decided pursuant to state statutes. *State v. LaMere*, 2 P.3d 204, 219, 220 (Mont. 2000); *Azania v. State*, 778 N.E.2d 1253, 1259 (Ind. 2002).

¹⁸ See note 16, *supra*.

¹⁹ See, e.g., Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 U. PA. J. CONST. L. 931, 948 (May 2011) (“defendants 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.”) (footnotes omitted).

²⁰ In my survey, for example, discussed at note 16, *supra*, 84 of 167 cases (74 percent) alleged the exclusion of African-Americans and/or Hispanics.

²¹ The fair cross-section right applies to women, *Taylor*, 419 U.S. at 537, and may also apply to other distinctive groups. See, e.g., *United States v. Yazzie*, 660 F.2d 422, 426 (10th Cir. 1981) (Native Americans are distinct group).

reason, and because African-Americans and Hispanics are otherwise overrepresented in the criminal justice system.²²

The most straightforward conclusion to draw from the uniformity 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, "[f]ederal 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 is ultimately selected.²³ Not every disparity is of constitutional magnitude, nor does any particular statistic prove that a case is wrongly decided. But the consistency of the data, 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

²² See *United States v. Pion*, 25 F.3d 18, 27 (1st Cir. 1994) (Torruella, J., dissenting) (citing 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").

²³ *The Nebraska Minority & Justice Task Force, Final Report*, at 17, State Justice Institute, (Jan. 2003) (noting that "many researchers have found that this is 'the rule' rather than the exception."); see, e.g., *Final Report of the Pennsylvania Supreme Ct. Comm. on Racial & Gender Bias in the Justice Sys.*, at 54 (2003) (jury selection policies "fail at each step of the process to include a representative number of minorities."); *South Dakota Equal Justice Comm'n, Final Report & Recommendations*, at 8 (2006) ("Juries in South Dakota rarely represent the racial composition of a community."); *Where the Injured Fly for Justice: A Ten-Year Retrospect on the Report & Recommendations of the Florida Sup. Ct. Racial and Ethnic Bias Study Comm'n*, at 13 (December 2000) ("The present system of selecting jurors . . . does not result in juries which are racial and ethnic composites of the community."); *Minnesota Supreme Ct. Task Force on Racial Bias in the Judicial Sys.*, at S-14 (1993) ("[J]ury pools rarely are representative of the racial composition of our communities."); *New York State Judicial Comm'n on Minorities*, at 242, 248 (1992) ("Minorities are significantly underrepresented on many juries in the court system.").

creates,”²⁴ and describe the evidence of underrepresentation as “disquieting,”²⁵ “troubling,”²⁶ and “worthy of concern.”²⁷ Some courts have gone farther, urging the jury office to take remedial actions, notwithstanding the courts’ conclusions that such steps are not required.²⁸ 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.²⁹ Occasionally courts have even mandated changes to the jury system while still holding that there was no Sixth Amendment violation.³⁰

²⁴ *Green*, 389 F. Supp. 2d at 80.

²⁵ *United States v. Royal*, 174 F.3d 1, 12 (1st Cir. 1999) (“[t]he statistics presented [regarding the representation of African-Americans] are disquieting” and describing the jury system at issue as “a situation leaving much to be desired.”) (footnote omitted); see also *State v. Tremblay*, 2003 WL 23018762, at *15 (R.I.Super. March 19, 2003) (material presented by the defendant is “unsettling” and “disquieting”).

²⁶ *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 also *Diggs v. United States*, 906 A.2d 290, 299 (D.C. 2006).

²⁷ *United States v. Shine*, 571 F. Supp. 2d 589, 599 (D.Vt. 2008); see also *People v. Currie*, 87 Cal.App.4th 225, 235 (Cal. App. 2001) (“underrepresentation of African-Americans on . . . jury venires” is “a long-standing problem”); *Com. v. Tolentino*, 663 N.E.2d 846, 850-51 (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) (“the evidence—both anecdotal and statistical—indicates that there is some underrepresentation in fact.”); *State v. Ramseur*, 524 A.2d 188, 239 (N.J. 1987) (“the results are still far from optimal. Greater representativeness on the jury panels is obviously desirable.”).

²⁸ Sometimes these suggestions are articulated as stern warnings. See, e.g., *Williams*, 525 N.W.2d at 544 (“we 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) (“serious consideration should be given to amending the jury selection procedures”). In other cases they are framed as gentle reminders that changes could help serve the purposes of the Sixth Amendment. See, e.g., *Royal*, 174 F.3d at 12 (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 responsibility.’”) (quoting *Taylor*, 419 U.S. at 530-31).

²⁹ *United States v. Bates*, 2009 WL 5033928, at *16-22 (E.D. Mich. Dec. 15, 2009).

³⁰ See, e.g., *Washington v. People*, 186 P.3d 594, 597 (Colo. 2008) (Court held system was constitutional but “[b]ecause this systematic practice resulted in a statistically significant underrepresentation of African-American and Hispanics on jury panels . . . , we disapprove of it and direct that it be stopped immediately.”); *Williams*, 525 N.W.2d at 544 (exercising “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 room will soon mirror the faces of the people in the community at large.”); *Shine*, 571 F. Supp. 2d at 602 (concluding that “jury selection system meets statutory

Judicial expressions of concern are not proof that the cases are wrongly decided,³¹ 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.”³² That tension leads 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,³³ or who are sure 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.”³⁴

The premise of this Article is that a system of judicial review that uniformly rejects challenges to jury pools that state entities acknowledge are racially underrepresentative, and that occasionally prompts judges to issue directives to fix the very system they have just affirmed, indeed calls for further examination. This Article undertakes that examination and exposes the extent to which courts are misapplying the *Duren* test by allowing Fourteenth Amendment equal protection standards to contaminate the analysis, a phenomenon that has gone largely unacknowledged in the literature.³⁵ I reject the suggestion that

and constitutional minima [but that] does not terminate the discussion” and “that the next Plan should be amended”).

³¹ 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.”)

³² *Com. v. Estes*, 851 A.2d 933, 936 (Pa. Super. 2004) (“underrepresentation 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) (prospective juror, sitting on a panel that contained no African-Americans, 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) (At trial, all 89 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.”).

³³ *Bates*, 2009 WL 5033928, at *21. See also, e.g., *Rogers*, 73 F.3d at 777 (circuit precedent foreclosed a finding of a Sixth Amendment violation although defendant’s data “establish, at a minimum, a prima facie case that blacks are being systematically excluded from jury service”); *Green*, 389 F. Supp. 2d at 37 (noting that previous jury challenges have all 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”)

³⁴ *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”).

³⁵ Surprisingly little scholarship has considered the ways in which the fair cross-section standard has been compromised by the encroachment of equal protection

compliance with the constitutional standard is insufficient to protect the right of defendants to 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 have recognized that the fair cross-section standard has been an ineffectual tool for alleviating racial disparity in jury systems,³⁶ but have responded by proffering alternative constructions of the fair cross-section right,³⁷ or alternative legal frameworks to evaluate the problem of underrepresentative juries.³⁸ 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 uses the intertwined history and development of the Fourteenth and Sixth Amendment standards as lens for understanding the critical distinctions between the

concepts. See Robin E. Schulberg, *Katrina Juries, Fair Cross-Section Claims, and the Legacy of Griggs v. Duke Power Co.*, 53 LOY. L. REV. 1, 18 (Spring 2007) (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 (Summer 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 note 74, *infra*. The problem has also been highlighted by a few judges, as discussed in Part II *infra*.

³⁶ See, e.g., Chhablani, *supra* note 13, 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, 972 (Feb. 1998) (“the cross-section requirement has been interpreted by lower courts in a way that makes the doctrine nearly irrelevant”).

³⁷ See Chhablani, *supra* note 13, at 933 (“propos[ing] an alternate construction of the ‘fair cross-section’ requirement, grounding the jurisprudence in the Sixth Amendment’s vicinage clause”); Leipold, *supra* note 36, at 960 (“provid[ing] 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 Protection and the Enfranchisement in the American Criminal Jury*, 116 YALE L. J. 1568, 1570 (May 2007) (proposing “an enfranchisement conception of jury legitimacy” as a new justification for the fair cross-section right).

³⁸ Paula Hannaford-Agor, Director, Center for Jury Studies of the National Center for State Courts, *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 (Spring 2011) (“propos[ing] a negligence theory of jury system management”); Schulberg, *supra* note 35, at 3-4, 4 (arguing that disparate impact law “could correct mistakes in the fair cross-section jurisprudence”).

two constitutional tests, as well as why the 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, the question of whether underrepresentation of a distinctive group is "due to systematic exclusion of the group in the jury-selection process."³⁹ These errors include the stark adoption of the equal protection requirement to demonstrate intentional discrimination, as well as the more subtle importation of 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, I assert that 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, I argue that 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. Third, I highlight the ways this stark constitutional error undermines the integrity of the doctrine. 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, DIFFERENT PURPOSES, AND 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 petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."⁴⁰ Up until 1975, the Supreme Court primarily relied on the equal protection clause when evaluating the constitutional requirements for racially

³⁹ *Duren*, 439 U.S. at 364.

⁴⁰ *Taylor*, 419 U.S. at 528.

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 was consistent with the recognition that the two constitutional provisions 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.

1. Predominance of Equal Protection and Doctrinal Entanglement

The constitutionality of racially representative juries has historically been addressed through the lens of equal protection.⁴¹ African-Americans were recognized as part of the community for jury purposes only with the passage of the Fourteenth Amendment in 1868,⁴² and from 1868 to the late 1960s, 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.⁴³ 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.

The civil rights movement and accompanying social changes in the 1960's began to curtail explicit and public acts of discrimination by jury officials.⁴⁴ This trend was manifested and advanced by the passage of the Jury Service and Selection Act (JSSA) in 1968, an explicit

⁴¹ *Holland v. Illinois*, 493 U.S. 474, 479 (1990) (citations omitted) (“[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*, 407 U.S. at 500 n.9 (“The principle of the representative jury was first articulated by this Court as a requirement of equal protection . . .”).

⁴² *Strauder v. State of West Virginia*, 100 U.S. 303, 310 (1879).

⁴³ 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 (Fall 1995) (“The first cases addressing [the issue of racial composition of jury venires and the resulting jury] involved facially discriminatory statutes . . . 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.”).

⁴⁴ 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 (Fall 2007).

legislative effort to combat discriminatory jury selection.⁴⁵ The Act prohibited exclusion based on race or ethnicity, creating a statutory parallel to the equal protection clause.⁴⁶ The JSSA also included a requirement that federal juries be selected from a “fair cross-section of the community,”⁴⁷ 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.”⁴⁸

The Supreme Court responded by waking the Sixth Amendment’s impartial jury right from its slumber. In 1968, six weeks after the JSSA was passed, the Court incorporated the Sixth Amendment, making it applicable to the states.⁴⁹ In 1975 the Court established the fair cross-section right as “an essential component of the Sixth Amendment” in *Taylor*.⁵⁰ And in 1979 the Court established the fair cross-section test in *Duren*. The impartial jury guarantee and the idea of fair cross-section right had essentially lain dormant while the equal protection clause was employed to combat discriminatory jury selection; but when discrimination became less overt, the need for a fair cross-section guarantee was exposed and the Court revitalized the Sixth Amendment right with the *Taylor-Duren* opinions.⁵¹

This shift created a new avenue for litigating racial disparity in the jury system – independently of the question of discrimination – but the language of the new standard reflected the original doctrinal entanglement. *Taylor* established that the “fair cross-section” language

⁴⁵ See 28 U.S.C. §§ 1861-1878; Jon M. Van Dyke, JURY SELECTION PROCEDURES, 86 (1977).

⁴⁶ 28 U.S.C. § 1862.

⁴⁷ 28 U.S.C. § 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., Royal*, 174 F.3d at 10-11, but the statute has additional requirements that can be violated even in the absence of a cross-section problem. 28 U.S.C. § 1867. Similarly, many states have jury selection statutes that are similar to the JSSA, and likewise interpret the fair cross-section requirements of those statutes consistently with the constitutional right. *See, e.g., Currie*, 87 Cal. App. 4th at 232 (California Constitution provides “similar and coextensive right” to Sixth Amendment). This Article addresses the JSSA only to the extent that it influences the constitutional analysis.

⁴⁸ Leipold, *supra* note 36, at 957 (citations omitted).

⁴⁹ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (Sixth Amendment applied to the states through incorporation via the Fourteenth Amendment).

⁵⁰ In *Taylor*, the Court gave a nod to the legislators who had anticipated the recognition of the constitutional right. 419 U.S. at 528 (“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 . . .”).

⁵¹ Leipold, *supra* note 36, at 946 (Following *Taylor*, “Court 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.”).

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,⁵² but also in the application of the Courts’ supervisory powers⁵³ and in equal protection claims.⁵⁴ 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]” excluded⁵⁵ and is still used that way today.⁵⁶ The Supreme Court borrowed the language of “systematic exclusion” for fair cross-section purposes, and adapted it by dropping the intentional and purposeful language. 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. Recognition of Different 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

⁵² *Williams*, 399 U.S. at 100 (Pursuant to Sixth Amendment, number of jurors must be sufficient to “provide a fair possibility for obtaining a representatives cross-section of the community”).

⁵³ *See Glasser v. United States*, 315 U.S. 60, 86 (1942) (Citing “the concept of the jury as a cross-section of the community” and stating that “the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a truly representative of the community”); *Thiel*, 328 U.S. at 220 (“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.”); *Ballard v. United States*, 329 U.S. 187, 192 (1946) (same).

⁵⁴ *See Akins v. State of Tex.*, 325 U.S. 398, 409 (1945) (“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”); *Brown v. Allen*, 344 U.S. 443, 447 (1953) (source lists for juror names should “reasonably reflect[] a cross-section of the population suitable in character and intelligence for that civic duty”); *Carter v. Jury Comm’n of Greene County*, 396 U.S. 320, 332-33 (1970) (declining to delineate “the proper source of jury lists, so long as the source reasonably reflects a crosssection of the population suitable in character and intelligence for that civic duty”); *Peters*, 407 U.S. at 500 (“the exclusion of a discernible class from jury service . . . destroys the possibility that the jury will reflect a representative cross section of the community”); *Apodaca*, 406 U.S. at 412-13 (citing “the principle that the Fourteenth Amendment requires jury panels to reflect a cross section of the community”).

⁵⁵ The Supreme Court first used the phrase to describe jury systems in the 1930s that implicated equal protection. *See Patterson v. State of Alabama*, 294 U.S. 600, 601 (1935); *Pierre v. State of La.*, 306 U.S. 354, 357 (1939).

⁵⁶ *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 275, 276 (2005).

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 system, 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 question of 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.⁵⁷ 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.”⁵⁸ The equal protection clause was thus adopted as a direct attack on discriminatory practices and was explicitly designed to prohibit discriminatory acts.⁵⁹ Moreover, equal protection jurisprudence conceives of the harm of discrimination as extending beyond a criminal defendant, to the community and the excluded jurors.⁶⁰ As a result, jurors have standing to object to equal protection violations,⁶¹ in civil as well as criminal proceedings.⁶² The guarantee is not limited to criminal defendants.

⁵⁷ See Michael Kent Curtis, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS*, 35, 36 (1986); Akhil Reed Amar, *THE BILL OF RIGHTS*, 162 (1998).

⁵⁸ Curtis, *supra* note 57, at 35, 36; Amar, *supra* note 57, at 162.

⁵⁹ See *Strauder*, 100 U.S. at 309 (“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. . . . They [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.”); *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*, 476 U.S. at 87).

⁶¹ See *Carter*, 396 U.S. at 329 (“Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded

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.⁶³ 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.⁶⁴ 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.⁶⁵

The analytical focus of the constitutional protections is accordingly different.⁶⁶ 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.⁶⁷ The injury the Sixth Amendment protects against, however, is an outcome, whether achieved “by accident or design,”⁶⁸ so the question of whether a

from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.”) (footnote omitted).

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

⁶³ *Duncan*, 391 U.S. at 155 (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”) (footnote omitted); Amar, *supra* note 57, at 215 (The rights in the Bill of Rights were “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 Laurie Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081, 1011 (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 35, 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 *Smith*, 130 S. Ct. at 1387 (“The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community.”); *Patton v. United States*, 281 U.S. 276, 297 (1930) (“the 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 (Spring 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 Schulberg, *supra* note 35, 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 36, at 998 (harm in fair-cross section claim is “depriv[ation] . . . of

cognizable injury has occurred is focused on identifying the existence of a particular outcome.⁶⁹

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, however, are quite different.

1. 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.”⁷⁰ 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.⁷¹ In a fair cross-section case “the group alleged to be excluded [must be] a “distinctive” group in the community.”⁷² The group’s historical experience of discrimination is

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 Schulberg, *supra* note 35, 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.”) (footnote omitted); Brown, *supra* note 66, at 446-47 (Contrasting the “substantive goal” of “[t]he selection of representative cross-sections of jurors” with “the more limited goal of restricting the impact of discriminatory intent on jury composition.”)

⁷⁰ *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

⁷¹ 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.”) (quotation and citation omitted).

⁷² *Duren*, 439 U.S. at 365 (stating “*Taylor* without doubt established that women ‘are sufficiently numerous and distinct from men’” to satisfy this prong of the Sixth Amendment test) (quoting *Taylor*, 419 U.S. at 531); 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.”).

not relevant.⁷³ This Article does not address the importation of equal protection standards into *Duren's* first prong, but that problem has been explored in the literature.⁷⁴

2. 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 as compared to 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.⁷⁵ The disparity needs to be sufficiently “substantial” 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.*”⁷⁶ The question of “substantial underrepresentation” is also evaluated in equal protection cases in light of whether the jury employs race-neutral polices.⁷⁷ Because the question is whether the system discriminated, a borderline disparity figure looks

⁷³ See, e.g., *Com. 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.”)

⁷⁴ See Chhablani, *supra* note 19, at 947 (asserting that “over 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, *Comment: Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 132 (Jan. 1996); Magid, *supra* note 64, at 1083.

⁷⁵ *Castaneda*, 430 U.S. at 494.

⁷⁶ *Castaneda*, 430 U.S. at 495 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 percent 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 percent threshold it opined on in *Swain*, and lower courts have continued to evaluate equal protection claims pursuant to that figure.

⁷⁷ 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”).

more troubling if the system uses subjective selection policies, and less worrisome if the policies are objective and race-neutral.⁷⁸

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*, “in contrast,” to equal protection cases, 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.”⁷⁹ Because the disparity figure in a fair cross-section case is not being used as evidence of discrimination, it does not need to be substantial enough to indicate discrimination – it simply has to fail to be “fairly representative of the local population otherwise eligible for jury service.”⁸⁰

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 claim 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.⁸¹

⁷⁸ *Castaneda*, 430 U.S. at 495 n.14 (citing “presumption of purposeful discrimination created by the combined force of the statistical showing and the highly subjective method of selection”).

⁷⁹ *Duren*, 439 U.S. at 364 (Specifically, the defendant must compare the “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.”)

⁸⁰ *Taylor*, 419 U.S. at 537. See, e.g., *Washington*, 186 P.3d at 602 n.6 (“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.”); Schulberg, *supra* note 35, at 17 (“Statistics serve a different function in equal protection claims: there, they are circumstantial evidence of discriminatory intent. . . . Fair cross-section claims, however, do not require proof of invidious intent.”) (footnotes omitted). The Supreme Court has also not announced a numerical threshold for what is “fair and reasonable” in the Sixth Amendment context. In *Smith v. Berghuis*, the government urged the Court to adopt a 10 percent disparity requirement, 130 S. Ct. at 1394 n.4 (quoting Brief for the Petitioner, 45-46), but the Court declined to reach the issue, and observed only that under the 10 percent rule, there would be “no remedy for complete exclusion of distinct groups in communities where the population of the distinct group falls below the 10 percent threshold.” *Id.* at (quoting Brief for Respondent, 35).

⁸¹ 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.’”).

There is evidence that courts are importing equal protection principles into *Duren's* second prong, by erroneously importing the equal protection disparity threshold,⁸² imposing the “substantial underrepresentation” requirement,⁸³ and by incorrectly evaluating the degree of disparity in light of the system’s race neutral-policies.⁸⁴ Each of these errors undermines the fair cross-section right, but have received little attention in the literature⁸⁵ or in the courts.⁸⁶

3. The Relationship Between the 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 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 own survey were denied exclusively or in part based on the defendant’s failure to satisfy this prong.⁸⁷

In the equal protection context, a judge evaluating a challenge to the jury selection systems “must keep in mind the fundamental principle that ‘official action will not be held unconstitutional solely because it results in a racially disproportionate impact.’”⁸⁸ Instead: “[p]roof of

⁸² Hannaford-Agor, *supra* note 38, at 767-68 (“Most courts that have adopted absolute disparity as the primary measure of underrepresentation have ruled that absolute disparities less than 10% are insufficient as a matter of law to demonstrate a violation of the fair cross section requirement.”).

⁸³ See, e.g., *Mares v. Scribner*, 389 Fed. App’x 738, 740 (9th Cir. 2010) (denying fair cross-section claim where the disparity does not constitute “substantial underrepresentation”) (citing *Swain*, 380 U.S. at 208-09).

⁸⁴ See, e.g., *United States v. Quiroz*, 137 Fed. App’x 667, 670 (5th Cir. 2005) (evaluating disparity in a cross-section claim in light of jurisdiction’s “use of objective criteria and random selection”).

⁸⁵ For one of the few discussions of this issue in the literature, see Schulberg, *supra* note 35, at 17 (describing the “transposition [of the 10% threshold a]s unsound as a matter of doctrine”).

⁸⁶ For some of the rare judicial recognitions of this problem, see *Green*, 389 F. Supp. 2d at 55 n.52; *Delgado v. Dennehy*, 503 F. Supp. 2d 411, 427 n.17 (D. Mass. 2007); *Waller v. Butkovich*, 593 F. Supp. 942, 954 (M.D. N.C. 1984).

⁸⁷ In my survey, the majority of claims (104 of 167 cases, or 62 percent) were denied solely or in part on the basis of the defendant’s failure to show that any underrepresentation was due to “systematic exclusion.” 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 38, at 763 (“Most of the reported cases over the past three decades have tended to focus on *Duren's* second prong”); but see *Smith*, 130 S. Ct. at 1388 (“the second and third [prongs] are more likely to generate controversy”).

⁸⁸ *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)).

racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”⁸⁹

The Sixth Amendment, however, has no such requirement. The Supreme Court made this point explicitly in *Duren*. The defendant and the United States had cited equal protection cases in their briefs, and the Court made a point of correcting them.⁹⁰ 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.*⁹¹

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.⁹² 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.”⁹³

⁸⁹ *Id.*

⁹⁰ *Duren*, 439 U.S. at 368 n.26.

⁹¹ *Id.* (emphasis added).

⁹² *Ballew v. Georgia*, 435 U.S. 223, 241-42 (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”).

⁹³ 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. *Duren*, 439 U.S. at 371 (Rehnquist, J., dissenting). Justice Thomas picked up this baton in his concurrence in *Smith*, opining that he is “willing to reconsider our precedents articulating the ‘fair cross section’ requirement,” when “[h]istorically juries did not include a sampling of persons from all levels of society or even from both sexes.” *Smith*, 130 S. Ct. at 1396 (Thomas, J., dissenting). Thomas also quoted Rehnquist for

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 . . . that is, inherent in the particular jury-selection process utilized”⁹⁴ 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.⁹⁵ 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.”⁹⁶ For if a disparity occurs once, it could be the produce 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.⁹⁷

The *Duren* Court went on to explain that the defendant “also established when in the selection process the systematic exclusion of women took place.”⁹⁸ 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.⁹⁹ 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

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.’ . . .” *Id.* (quoting *Duren*, 439 U.S. at 372 (Rehnquist, J., dissenting)). Notably, my research did not uncover a single case where the court imported equal protection concepts *because of* the objections Rehnquist articulated. Indeed, the only case where the majority applied the contaminated standard *and* recognized it was importing equal protection concepts was an Eighth Circuit decision, where the panel was “reluctantly” bound by the erroneous importation in the prior binding case, and urged the court to reconsider it en banc. *Rogers*, 73 F.3d at 776.

⁹⁴ *Duren*, 439 U.S. at 364, 366

⁹⁵ See *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.”)

⁹⁶ *Duren*, 439 U.S. at 366.

⁹⁷ See *Green*, 389 F. Supp. 2d at 56 n.53 (quoting Cynthia A. Williams, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 NYU L. REV. 590, 617 (1990) (the question is whether the underrepresentation is “inherent in the system used, rather than a product of random factors on one particular jury venire.”) and James H. Druff, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L.REV. 1555, 1565 (1985) (“individual instance of underrepresentation might be a coincidence, whereas a pattern will betray a systematic procedural abuse”)).

⁹⁸ *Duren*, 439 U.S. at 366.

⁹⁹ *Id.* at 366, 367 (his “statistics and other evidence” demonstrated that the disparity occurred when people were summonsed for service and when people showed up in court at the “final, venire, stage”).

of jury service.¹⁰⁰ The Court observed that Duren had not established which policy was producing the disparity,¹⁰¹ 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.¹⁰² 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."¹⁰³

The question of how precisely the defendant needs to identify the cause of the disparity was recently muddled by the Supreme Court's only post-*Duren* cross-section opinion, *Berghuis v. Smith*, in which the Court seemed to be more significantly more impressed with Duren's evidence than the 1979 *Duren* Court had been.¹⁰⁴ The *Smith* decision arguably

¹⁰⁰ *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 366. And, as the Court noted, one of the government's primary arguments was that "petitioner has not proved that the exemption for woman 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." (citing *Duren*, 439 U.S. at 368–69).

¹⁰¹ *Duren*, 439 U.S. at 367 (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").

¹⁰² *Id.* at 368.

¹⁰³ *Id.* at 367.

¹⁰⁴ According to the Court in *Smith*, Duren "demonstrated systematic exclusion with particularity . . . "[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." 130 S. Ct. at 1388. Of course, Duren did "point to" Missouri's law exempting woman, but the state "pointed to" non-gender based exclusions, and the Court found for Duren without resolving the factual question. 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? For 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*, 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* examined the defendant's

represents a departure from *Duren's* emphasis on the duration of the disparity, in that it suggests that a more particularized showing of the cause of the disparity is required,¹⁰⁵ but it does not add anything new to the distinction between the fair cross-section standard and the equal protection test.¹⁰⁶

4. Burden Shifts to Government

In an equal protection case the government must rebut the inference of discrimination with “evidence either that discriminatory purpose was not involved or that such purpose did not have a determinative effect.”¹⁰⁷ “In contrast, in Sixth Amendment fair-cross-section cases, [where] systematic disproportion itself demonstrates an infringement of the defendant's interest . . . [t]he only remaining question is whether there is adequate justification for this infringement.”¹⁰⁸ A justification is adequate if it “manifestly and primarily” advances “a significant state interest.”¹⁰⁹

5. Differences in Scope

The two constitutional standards also differ in scope. As explained above, the Sixth Amendment fair cross-section right belongs exclusively to a criminal defendant, but the equal protection clause

proof of systematic exclusion with this rosier version of *Duren's* proof in mind, and accordingly faulted the defendant for the imprecision of his evidence.

¹⁰⁵ *Smith* did not repudiate *Duren's* holdings and the precedential value of the decision is cabined by 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 “involv[ed] an unreasonable application o[f] clearly established Federal law.” 130 S. Ct. at 1391 (quoting 28 U.S.C. § 2254).

¹⁰⁶ The Sixth Circuit opinion that was reversed in *Smith* explicitly distinguished the fair cross-section analysis from equal protection analysis. *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, 99 S.Ct. 664. 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.’”) (quoting *Rodriguez-Lara*, 421 F.3d at 939).

¹⁰⁷ *Duren*, 439 U.S. at 366 n.26 (contrasting the burden in equal protection cases to that in fair cross-section cases).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* 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 367-68 (quoting *Taylor*, 419 U.S. at 534).

extends to potential jurors.¹¹⁰ In addition, the equal protection clause applies to the process of voir dire and prohibits discrimination in the selection or strikes of jurors.¹¹¹ In contrast, while the Sixth Amendment 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.¹¹²

The fair cross-section right applies to the first three stages of the four-step jury selection process:¹¹³ (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; but *not* to (4) the creation of twelve-person panels through the voir dire process.¹¹⁴ In sum, the Sixth Amendment guarantees a defendant the next best thing to a petit jury that represents a cross-section: a “fair *possibility* for obtaining a representatives cross-section of the community.”¹¹⁵

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

¹¹⁰ See notes 60 and 65, *infra*.

¹¹¹ *Batson*, 476 U.S. at 87.

¹¹² *Lockhart*, 476 U.S. at 173.

¹¹³ *Taylor*, 419 U.S. at 538 (“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.”); see also *Pope v. United States*, 372 F.2d 710, 725 (8th Cir. 1967) (Blackmun, J.) (“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”) (as quoted in *Lockhart*, 476 U.S. at 174).

¹¹⁴ *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”)

¹¹⁵ *Williams*, 399 U.S. at 100 (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*, 439 U.S. 371 at n.* (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).

recognizing the stark differences between the two standards,¹¹⁶ courts 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 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.

As demonstrated below, the range of circuits and states that have applied the incorrect test demonstrates that these errors are not limited to a few isolated courts. Moreover, the results of my survey suggest that these errors are being made with surprising frequency, in addition to indisputably occurring across jurisdictional lines. Of the 104 cases in my survey that evaluated the merits of the "systematic exclusion" prong, 41 cases (39 percent) involved a Category A error, and in 24 cases (23 percent) the courts made a Category B error. Because courts made both types of errors in 11 of the cases, the total number of survey cases that involved 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,¹¹⁷ but in conjunction with the cases discussed in this Article, it at least suggests that this

¹¹⁶ A number of courts have recognized that a fair cross-section claim does not require an inference of discrimination, *see, e.g., Royal*, 174 F.3d at 6; *U.S. v. Jackman*, 46 F.3d 1240, 1245 (2d Cir. 1995); *United States v. Weaver*, 267 F.3d 231, 244 (3d Cir. 2001); *Reyes*, 252 Fed. App'x at 662; *Randolph v. People of the State of Cal.*, 380 F.3d 1133, 1141 (9th Cir. 2004); *Bowen v. Kemp*, 769 F.2d 672, 683, 684 n.7 (11th Cir. 1985); *Parker*, 717 F. Supp. 2d at 328; *French v. Wolfenbarger*, 2010 WL 335304, at *4 (E.D. Mich. 2010); *State v. Gibbs*, 758 A.2d 327, 335; *State v. Cienfuegos*, 25 P.3d 1011, 1017 (Wash. 2001); *Ramirez v. State*, 575 S.E.2d 462, 466-67 (Ga. 2003); *Washington*, 186 P.3d at 600 n.4; *State v. Fulton*, 566 N.E.2d 1195, 1200 (Ohio 1991); *United States v. Jenison*, 485 F. Supp. 655, 660 (D.C. Fla. 1979); *Bastarache*, 414 N.E.2d at 992; or consideration of whether selection policies are race-neutral or susceptible to abuse, *see, e.g., Rodriguez-Lara*, 421 F.3d at 940; *Francis v. Fabian*, 669 F. Supp. 2d 970, 983 (D. Minn. 2009); *Bates*, 2009 WL 3270190, at *9-10; *People v. Buford*, 182 Cal. Rptr. 904, 908-09 (Cal. App. 1982); that systematic exclusion can be demonstrated by disparity over time, *see, e.g., Weaver*, 267 F.3d at 244-45; *Biaggi*, 680 F. Supp. at 648-49; *Alston v. Manson*, 791 F.2d 255, 258 (2d Cir. 1986); 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 (1st Cir. 1999); *Smith v. Com.*, 649 N.E.2d 744, 746 (Mass. 1995).

¹¹⁷ *See* note 16, *supra*, and the Appendix.

doctrinal contamination is occurring in more cases than might be expected.¹¹⁸

A. *Category A Errors: Requiring Proof of Intentional and 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.¹¹⁹ It specifically does *not* impose the equal protection requirement of “[p]roof of racially discriminatory intent or purpose.”¹²⁰ Yet courts evaluating fair cross-section claims frequently deny the claim because the defendant has failed to prove purposeful exclusion or discrimination.

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 that “Because [the defendant] has failed to demonstrate systematic *discrimination*, we reject his Sixth Amendment claim.”¹²¹ 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,¹²² Fourth,¹²³ Fifth,¹²⁴ Sixth,¹²⁵ Seventh,¹²⁶ Eighth,¹²⁷

¹¹⁸ No less a figure than Justice Kennedy made this mistake cited *Duren* and *Taylor* in asserting that “There is no doubt under our precedents, therefore, that the Equal Protection Clause prohibits sex discrimination in the selection of jurors.”¹¹⁸ But, of course, *Duren* and *Taylor* are Sixth Amendment cases that expressly disavow the equal protection framework. See *Duren*, 439 U.S. at 363 n.9 (“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 (Rhenquist, J., dissenting) (“The Court steadfastly maintained in *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), . . . 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”).

¹¹⁹ *Duren*, 439 U.S. at 366.

¹²⁰ *Hernandez*, 500 U.S. at 359-60 (internal quotations omitted).

¹²¹ *Jones*, 744 N.E.2d at 1173 (internal quotations and citations omitted, emphasis added).

¹²² See, e.g., *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985) (en banc) (permitting “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”) (emphasis added).

¹²³ See, e.g., *United States v. McGrady*, 1999 WL 95633, at *2-3 (4th Cir. Feb. 17, 1999) (disparity in case 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) (“it is sufficient that the selection be in terms of a ‘fair cross-section’ gathered without *active discrimination*.”) (emphasis added).

Ninth,¹²⁸ and Eleventh¹²⁹ Circuits, by federal district courts,¹³⁰ and state

¹²⁴ See, e.g., *Rivas v. Thaler*, 432 Fed. App'x 395, 402 (5th Cir. 2011) (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); *Atwell v. Blackburn*, 800 F.2d 502, 505 (5th Cir. 1986) (petitioner in 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); *United States v. Steen*, 55 F.3d 1022, 1030 (5th Cir. 1995) (quoting *United States v. Lopez*, 588 F.2d 450, 451-52 (5th Cir. 1979), for the point that defendant must prove that "'the exclusion of a particular minority group from jury service is due to some form of *intentional discrimination*'") (emphasis added).

¹²⁵ See, e.g., *United States v. Booker*, 367 Fed. App'x 571, 575 (6th Cir. 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*, 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*, 40 Fed. App'x 93, 96 (6th Cir. 2002); *United States v. Davis*, 27 Fed. App'x 592, 597-98 (6th Cir. 2001); *Ford v. Seabold*, 841 F.2d 677, 685 (6th Cir. 1988).

¹²⁶ See, e.g., *United States v. Phillips*, 239 F.3d 829, 842 (7th Cir. 2001) (evaluating "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) (No systemic exclusion because defendant "does not allege any other *discriminatory actions* on the part of the state that could account for the total disparity.") (emphasis added).

¹²⁷ See, e.g., *United States v. Tripp*, 370 Fed. App'x 753, 759 (8th Cir. 2010) ("The Constitution . . . merely prohibits *deliberate exclusion* of an identifiable racial group from the juror selection process.") (internal quotations and citations omitted, emphasis added); see also *United States v. Horne*, 4 F.3d 579, 588 (8th Cir. 1993) (discussed in text, *infra*).

¹²⁸ See, e.g., *United States v. Hara*, 237 Fed.App'x 263, 265 (9th Cir. 2007) (Where defendant raised both a fair cross-section claim and an equal protection claim, court held that: "To prevail on either claim, Appellant must show a prima facie case for discrimination.").

¹²⁹ See, e.g., *United States v. Carver*, 422 Fed. App'x 796, 807 (11th Cir. 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*, 205 Fed. App'x 713, 715 (11th Cir. 2006) (defendants "failed to 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).

¹³⁰ See, e.g., *Stukes v. Lawler*, 2011 WL 1988375, 15 (M.D. Pa. Apr. 19, 2011) (For 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.") (citations omitted, emphasis added); *Scott v. Sobrina*, 2010 WL 8128749, at *18 (E.D. Pa. Jan. 29, 2010) (Under Sixth Amendment "Underrepresentation 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) ("it is sufficient that the selection be in terms of a fair cross-section gathered without *active discrimination*.")) (emphasis added) (quoting *Cecil*, 836

courts in Alabama,¹³¹ Arkansas,¹³² California,¹³³ Georgia,¹³⁴ Illinois,¹³⁵
Indiana,¹³⁶ Kansas,¹³⁷ Michigan,¹³⁸ Mississippi,¹³⁹ Nebraska,¹⁴⁰

F.2d at 1445); *Warren v. Sherman*, 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).

¹³¹ 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).

¹³² 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) (Under Sixth Amendment “appellant has not met his burden of establishing a prima facie case of *purposeful discrimination*”); see also *Navarro v. State*, 264 S.W.3d 530, 540 (Ark. 2007); *State v. Fudge*, 206 S.W.3d 850, 862 (Ark. 2005).

¹³³ 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, citations omitted).

¹³⁴ See, e.g., *Smith v. State*, 571 S.E.2d 740, 748 (Ga. 2002) (no systematic exclusion 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).

¹³⁵ See, e.g., *People v. Bradley*, 810 N.E.2d 494, 496 (Ill. App. 2004) (“we 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, (Ill. App. 1989) (“the trial court properly determined that defendant failed to establish a prima facie case of *racial discrimination* in the jury selection process”) (emphasis added).

¹³⁶ 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 recognized.”) (emphasis added); see also *Highler v. State*, 834 N.E.2d 182, 188 (Ind. App. 2005), *affirmed in part, vacated in part on other grounds by Highler v. State*, 854 N.E.2d 823 (Ind. 2006).

¹³⁷ See, e.g., *State v. Lewis*, 161 P.3d 807, 811-12 (Kan. App. 2007) (denying Sixth Amendment claim because “According to *Swain*, this disparity [demonstrated by defendant] does not establish purposeful *discrimination*.”) (emphasis added).

Nevada,¹⁴¹ New York,¹⁴² North Carolina,¹⁴³ Ohio,¹⁴⁴ Pennsylvania,¹⁴⁵ Rhode Island,¹⁴⁶ Tennessee,¹⁴⁷ Washington,¹⁴⁸ and Wisconsin.¹⁴⁹ Nine

¹³⁸ See, e.g., *People v. Ward*, 2007 WL 3226309, at *6 (Mich. 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*. . . . defendant has not shown a prima facie case of *racial discrimination*, and his Sixth Amendment claim fails.”) (emphasis added).

¹³⁹ 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).

¹⁴⁰ 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).

¹⁴¹ 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).

¹⁴² See, e.g., *People v. Henderson*, 490 N.Y.S.2d 94, 96-97 (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).

¹⁴³ See, e.g., *State v. Golphin*, 533 S.E.2d 168, 192 (N.C. 2000) (described in text, *infra*); see also *State v. Williams*, 565 S.E.2d 609, 638 (N.C. 2002).

¹⁴⁴ See, e.g., *Jones*, 744 N.E.2d at 1173 (described in text, *supra*); see also *State v. Jackson*, 836 N.E.2d 1173, 1193 (Ohio 2005).

¹⁴⁵ See, e.g., *Com. 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. . . . Proof 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.”) (citations omitted, emphasis added); *Com. 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); *Com. v. Estes*, 851 A.2d 933, 936 (Pa. Super. 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).

¹⁴⁶ See, e.g., *State v. Lawless*, 996 A.2d 166, 169 (R.I. 2010) (quoting *State v. Perry*, 725 A.2d 264, 268 (R.I. 1999), for the point that defendants “failed to meet their burden of proof to show that the state engaged in any *discriminatory practices*” and *State v. Gaines*, 528 A.2d 305, 308-09 (R.I. 1987) for the point that where “defendant makes 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 * * * defendant has clearly not met his burden of proof.”) (emphasis added); *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).

¹⁴⁷ See, e.g., *State v. Taylor*, 1996 WL 580997, at *18-19 (Tenn. Crim. App. 1996) (“In order to establish a prima facie case of purposeful *discrimination*, the defendant

additional states signed onto an amicus brief in *Berghuis v. Smith*, asserting that in order to prove the systematic exclusion of African-Americans, a defendant “ha[s] to prove that African Americans were treated differently,” specifically, that “the juror selection system is administered in [sic] discriminatory manner,” by providing “evidence of actual discriminatory or exclusionary practices.”¹⁵⁰

The judicial decisions are striking for their imprecise treatment of the two constitutional standards. Consider the Supreme Court of North Carolina’s conclusion in 2000 that: “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.*’”¹⁵¹

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.”¹⁵² The Eighth Circuit likewise

must show that: [citing *Duren* factors.]” (emphasis added) (citing *Duren*, 439 U.S. at 364).

¹⁴⁸ See, e.g., *State v. Palomares*, 2007 WL 1649904, at *3-4 (Wash. App. June 7, 2007). (“Under the sixth and fourteenth amendments to the United States Constitution and article I, section 22 of the Washington Constitution The defendant bears the burden of proving that *discrimination* in the selection of the jury pool occurred.”) (emphasis added).

¹⁴⁹ See, e.g., *State v. Blanks*, 1996 WL 346263, at *3 (Wis. 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. . . . there 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).

¹⁵⁰ Brief of States Connecticut, Arizona, Colorado, Idaho, Maryland, New Mexico, North Dakota, South Carolina, and South Dakota, Ohio, Pennsylvania, Tennessee, and Wisconsin as Amicus Curiae in Support of Petitioner, *Berghuis v. Smith*, 2009 WL 4247967, at *33 (quoting from *United States v. Ireland*, 62 F.3d 227, 231 (8th Cir. 1995), at *34 (quoting from *Cecil*, 836 F.2d at 1446). 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.” 2009 WL 4307581, at *1 (Nov. 24, 2009).

¹⁵¹ *Golphin*, 533 S.E.2d at 192 (emphasis added) (quoting *State v. Avery*, 261 S.E.2d 803, 806 (N.C. 1980), which is in turn quoting from the equal protection case of *Washington v. Davis*, 426 U.S. 229, 239 (1976)); see also *Williams*, 565 S.E.2d at 638 (same).

¹⁵² *Phillips*, 239 F.3d at 842 (emphasis added). The court cited *Swain v. Alabama*, an 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

denied a claim where the defendant had not satisfied “[t]he third *Taylor–Duren* requirement, a showing that the particular jury pool plan utilized is being administered in a *deliberately discriminatory manner*.”¹⁵³ 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.”¹⁵⁴

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*.”¹⁵⁵ 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.¹⁵⁶ 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 essential element of a claim of racial discrimination in the jury process.”¹⁵⁷ 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*.”¹⁵⁸

This type of Category A error (explicitly requiring evidence of discrimination)¹⁵⁹ has garnered sharp criticisms from the few judges who

in the administration of justice violates the Equal Protection Clause.” *Swain*, 380 U.S. at 203-04.

¹⁵³ *Horne*, 4 F.3d at 588 (emphasis added).

¹⁵⁴ *Davis*, 27 Fed. App’x at 597-98 (citing *Duren*, 439 U.S. at 364) (emphasis added).

¹⁵⁵ *Warren v. Sherman*, 2007 WL 2683210, at *3 (W.D. Mich. Sept. 7, 2007) (“The Report and Recommendation of the Magistrate Judge (Docket # 21) is approved and adopted as the opinion of the Court.”) (citing Report and Recommendation, Timothy P. Greeley, United States Magistrate Judge). The quoted text is from the adopted opinion of the Magistrate Judge.

¹⁵⁶ *Warren*, 2007 WL 2683210, at *3. 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 polices that were] allegedly discriminatory.” *Id.* Indeed, the question in *Miller-El* was whether “the jury selection procedures violated the Equal Protection Clause.” *Miller-El*, 537 U.S. at 326.

¹⁵⁷ *Warren*, 2007 WL 2683210, at *3 (citing *Miller-El*, 537 U.S. at 326).

¹⁵⁸ *Ford*, 628 So.2d at 1069 (emphasis added).

¹⁵⁹ In the survey, 28 of the 104 “systematic exclusion claims” involved this type of Category A error.

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 California Supreme Court, have criticized their colleagues' erroneous importation of equal protection concepts,¹⁶⁰ accusing them of "break[ing] rank with established Supreme Court precedent"¹⁶¹ and "mistakenly import[ing] an equal protection concept into a fair cross-section challenge."¹⁶² But each of those jurisdictions has continued to apply elements of the equal protection standard.¹⁶³

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.¹⁶⁴ 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."¹⁶⁵ Yet the race-neutral nature of jury selection policies is irrelevant to a Sixth Amendment claim.¹⁶⁶ The emphasis in both federal¹⁶⁷ and state¹⁶⁸ cases on the race-neutral nature of the

¹⁶⁰ *Barber*, 772 F.2d at 1004 (Bownes, J., dissenting, joined by Judge Coffin) ("Their finding that evidence of intentional discrimination is required is directly counter to the law the Court stated in [*Duren*]") (internal citation omitted); *see also Anaya*, 781 F.2d at 9 (Bownes, J., concurring); *Cecil*, 836 F.2d at 1464 (Phillips, J. dissenting in relevant part, joined by Judges Winter and Murnaghan) ("*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"); *Rogers*, 73 F.3d at 776 (in a prior case "our court introduced an element of intentional discrimination not required by the Supreme Court"); *Footracer*, 189 F.3d at 1069 (Pregerson, J., dissenting) ("requiring 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.") (footnotes omitted); *Parker*, 717 F. Supp. 2d at 336 (authored by Judge Victor E. Bianchini) ("the Appellate Division conflated the elements of a Due Process/Equal Protection jury pool claim with those of a Sixth Amendment fair cross-section claim"); *Biaggi*, 680 F. Supp. at 648-49 (authored by Judge Constance Baker Motley) (criticizing Second Circuit decision that incorporated discrimination requirement as "flatly contradictory of the Supreme Court's ruling in *Duren*"); *People v. Bell*, 778 P.2d 129, 170 (Cal. 1989) (in 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 Morales*, 48 Cal.3d at 579-80 (Broussard, J., dissenting).

¹⁶¹ *Barber*, 772 F.2d at 1004 (Bownes, J., dissenting, joined by Judge Coffin)

¹⁶² *Footracer*, 189 F.3d at 1069 (Pregerson, J., dissenting)

¹⁶³ *See* Part II(A) *supra*.

¹⁶⁴ In the survey, 12 of the 104 "systematic exclusion claims" involved this type of Category A error.

¹⁶⁵ *Currie*, 87 Cal. App. 4th at 235.

¹⁶⁶ *See* note 116, *supra*.

¹⁶⁷ *See, e.g., United States v. Smith*, 247 Fed. App'x. 321, 323 n.2 (3d Cir. 2007) ("jury selection procedures using voter registration and motor vehicle records [are] . . .

selection policies imports the explicit equal protection concern with race-neutrality,¹⁶⁹ and 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.”¹⁷⁰ 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.¹⁷¹

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

procedures constituted using facially neutral criteria [that] allow no opportunity for subjective or racially motivated judgments.”) (quotations and citations omitted); *United States v. Pritt*, 2010 WL 2342440, at *6 (M.D.Fla. 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 Fed. App’x 591, 593 (4th Cir. 2005); *United States v. Clark*, 112 Fed. App’x 481, 484 (6th Cir. 2004), *vacated on other grounds in Clark v. United States*, 545 U.S. 1101 (2005).

¹⁶⁸ *See, e.g., State v. Thomas*, 637 N.W.2d 632, 652 (Neb. 2002) (“permissible racially neutral selection criteria and procedures were used which produced the monochromatic result” where the venire panel “was selected on a random basis without reference to race or the race of the defendant being tried”); *People v. Alvarez Hernandez*, 2002 WL 31109621, at *9-10 (N.Y.Co.Ct. 2002) (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 Com. v. Johnson*, 815 A.2d 563, 575 (Pa. 2002); *People v. Anderson*, 22 P.3d 347, 364 (Cal. 2001); *State v. Blakeney*, 531 S.E.2d 799, 809 (N.C. 2000); *State v. Casillas*, 205 P.3d 830, 838 (N.M. App. 2009).

¹⁶⁹ *See, e.g., Rodriguez-Lara*, 421 F.3d at 940 (“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.’”)

¹⁷⁰ *United States v. Bullock*, 550 F.3d 247, 251-52 (2d Cir. 2008).

¹⁷¹ *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 Fed. 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, 627 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.”).

Americans.”¹⁷² In other words, because a computer cannot discriminate, a computer-generated list cannot result in systematic exclusion. Similarly, courts emphasize that the selection system was *designed* to avoid systematic exclusion,¹⁷³ or that there is evidence that jury administrators have affirmatively tried to include African-Americans and Hispanics.¹⁷⁴ Both the focus on 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 – reflect the problematic focus on the intent behind the selection system, and not the results.¹⁷⁵

¹⁷² See, e.g., *United States v. Wheeler*, 79 Fed. 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.”); *Com. 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.”) (citations omitted); *Price v. State*, 66 S.W.3d 653, 665 (Ark. 2002) (“Under [state statute] the jury venire is chosen at random by computer selection from voter registration lists. . . . that guarantees that there can be no purposeful exclusion of African Americans.”); 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

¹⁷³ See, e.g., *United States v. Tillman*, 80 Fed. 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 239 (“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*, 2006 WL 2708400, at *4; *State v. Blakeney*, 531 S.E.2d 799, 809 (N.C. 2000). In the survey, 6 of the 104 “systematic exclusion claims” involved this type of Category A error.

¹⁷⁴ See, e.g., *Bullock*, 550 F.3d at 251-52 (“Bullock loses because he has not established any “systematic exclusion.” . . . To the contrary, . . . The motor vehicle roll was included specifically ‘to make sure that [the] jury pool [wa]s balanced.’”); *Anthony*, 138 Fed. App’x at 593, 594 (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 *Booker*, 367 Fed. App’x at 575; *People v. Burney*, 212 P.3d 639, 662-63 (Cal. 2009); *Smith*, 571 S.E.2d at 748-49. In the survey, 5 of the 104 “systematic exclusion claims” involved this type of Category A error.

¹⁷⁵ As explained above, 41 of the 104 “systematic exclusion denials” (39 percent), 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, and 5 because the intentions of jury officials were benign. (These numbers add up to more than 41 cases because some claims were denied for more than one of these reasons.) Again, my core hypothesis is not that 39 percent 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.

B. Category B Errors: Focusing on Fault and Opportunities for Jurors when Analyzing Systematic Exclusion

In addition to affirmatively imposing equal protection requirements, courts 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 when the courts conclude that the underrepresentation of African-Americans and/or Hispanics in the jury pool is due to either (1) the use of voter registration lists as the source of juror names when people of color are underrepresented on those lists,¹⁷⁶ or (2) the disproportionate failure of people of color to receive the jury summons, respond to the jury summons, or make themselves available to serve.¹⁷⁷

Courts have consistently held that there is no systematic exclusion where the racial disparity results from the use of voter registration lists or voter lists as the source lists for voter names.¹⁷⁸ This conclusion is not affected by the recognition that voter registration lists underrepresent African-Americans and Hispanics,¹⁷⁹ and that the jurisdiction made an affirmative decision to use the voter lists as the only source of juror names.¹⁸⁰ Similarly, courts have concluded that

¹⁷⁶ 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.

¹⁷⁷ 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.

¹⁷⁸ See, e.g., *United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006); *United States v. Clifford*, 640 F.2d 150 (8th Cir. 1981); *United States v. Rioux*, 930 F. Supp. 1558, 1572 (D. Conn. 1995) (“the circuits are in complete agreement that use of voter registration lists as the sole source of potential jurors comports with the Sixth Amendment”).

¹⁷⁹ 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.”); *United States v. Barnes*, 1996 WL 684388, at *5-6 (D. Conn. June 26, 1996) (underrepresentation of Hispanics in the jury system 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.”).

¹⁸⁰ States make independent decisions about what source lists to use. Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole L. Waters, Ph.D, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, National Center for State Courts, 13 (April 2007). As discussed *infra*, federal jurisdictions must use voter lists but are required supplement those lists if necessary to achieve a fair cross-section. 28 U.S.C. § 1863(b)(2).

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.¹⁸¹ Courts reach this conclusion while acknowledging evidence that the rate of undeliverable summons¹⁸² and unreturned summons is higher for people of color,¹⁸³ and that the jury office makes affirmative decisions about to which addresses summons will be sent,¹⁸⁴ and what actions to take regarding non-responders or undeliverable summons.¹⁸⁵

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 the 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, both by highlighting the absence of discriminatory restrictions on service and the operation of juror choice. 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.¹⁸⁶

¹⁸¹ See, e.g., *Rivas*, 432 Fed. App'x at 402-03 (“the fact that certain 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*, 2010 WL 4722634, at *24 (N.D. Cal. Nov. 12, 2010) (no systematic exclusion where “the disparity in representation is attributable to the disproportionately high rate of failure to appear by those summoned for service”) (quotation and citation omitted); *Kellogg v. Peterson*, 1996 WL 33362172, at *2 (Mich. 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 *Bates*, 2009 WL 5033928, at *16; *United States v. Purdy*, 946 F. Supp. 1094, 1104 (D. Conn. 1996).

¹⁸² “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.

¹⁸³ See, e.g., *Com. 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.”); *United States v. Murphy*, 1996 WL 341444, at *5 (N.D. Ill. June 18, 1996) (“poor African-Americans failed to respond to jury notices at a much higher rate than wealthy whites.”); *Barnes*, 1996 WL 684388, at *5-6 (citing “high rate of questionnaires mailed to Hispanic communities which are returned as undeliverable”); see also *Royal*, 174 F.3d at 5; *People v. Robinson*, 2009 WL 3365778, at *3 (Mich. App. Oct. 20, 2009).

¹⁸⁴ *State-of-the-States Survey*, supra note 180, at 15.

¹⁸⁵ *Id.* at 22; see also, e.g., *Purdy*, 946 F. Supp. at 1104 (citing jurisdiction’s “failure to mail follow-up questionnaires to persons who did not respond to” first summons).

¹⁸⁶ See Schulberg, supra note 35 at 19-24, 19 (describing 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

1. Focus on Fault

In evaluating the use of voter lists, courts emphasize the “private choices”¹⁸⁷ of putative jurors to “willfully exclude themselves”¹⁸⁸ 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.”¹⁸⁹ 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 underrepresentation of Hispanics on grand juries.”¹⁹⁰ 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.¹⁹¹

Courts likewise emphasize that non-response rates are the fault of jurors who refuse to serve, rather than the fault of jury officials.¹⁹² 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

cross-standard that focuses on results and an analysis that looks at intent. *See* Leipold, *supra* note 36, at 999-1000.

¹⁸⁷ *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 also, e.g., 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*.”).

¹⁸⁸ *Le*, 913 So.2d at 925; *see also, e.g., Weaver*, 267 F.3d at 244 (“where 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”); *Pritt*, 2010 WL 2342440, at *4 (no systematic exclusion where disparity occurs “just because a certain group registers to vote in lower proportions than the rest of the population”).

¹⁸⁹ *Cecil*, 836 F.2d at 1445.

¹⁹⁰ *United States v. Ortiz*, 897 F. Supp. 199, 204 (E.D. Pa. 1995) (emphasis added)

¹⁹¹ *People v. Taylor*, 743 N.Y.S.2d 253, 263 (N.Y. Sup. 2002).

¹⁹² *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”); *Ortiz*, 897 F. Supp. at 204 (“their non-registration is a result of their own inaction; not a result of affirmative conduct by others to bar their registration”) (quotation and citation omitted); *Williams*, 525 N.W.2d at 544 (contrasting disparity due to “unfair or inadequate selection procedures used by the state rather than, e.g., a higher percentage of ‘no shows’ on the part of people belonging to the group in question”); *see also Boyd v. City of Wilmington*, 2007 WL 174135, at *3 (D.Del. 2007); *Robinson*, 2009 WL 3365778, at *3; *Tremblay*, 2003 WL 23018762, at *11.

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.”¹⁹³ Courts characterize the jury offices as passive witnesses to the private choices of the only actors with agency, the would-be jurors who “chose not to respond,”¹⁹⁴ “fail[] to appear,”¹⁹⁵ and stubbornly “appear in numbers unequal to their proportionate representation in the community.”¹⁹⁶ The opinions make clear that “jury departments have no control over” these factors.¹⁹⁷ 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.”¹⁹⁸

Courts rely on this same fault contrast even 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.¹⁹⁹ As the Second Circuit explained, “[t]he 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.”²⁰⁰ It may be that “the postal system is to blame,”²⁰¹ or “stale addresses resulting from population mobility,”²⁰² 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”

¹⁹³ *Murphy*, 1996 WL 341444, at *5.

¹⁹⁴ *Kellogg*, 1996 WL 33362172, at *2.

¹⁹⁵ *Horel*, 2010 WL 4722634, at *24.

¹⁹⁶ *Rivas*, 432 Fed. App’x at 402-03.

¹⁹⁷ *Bates*, 2009 WL 5033928, at *16 (“jury departments have no control over the decisions of private individuals to complete and return juror questionnaires”).

¹⁹⁸ *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. Missouri allowed women to choose not to serve on juries, either if they officially requested not to serve, or “did not return the summons,” or if they simply “fail[ed] to appear for jury service on the appointed day.” *Duren*, 439 U.S. at 360, 361, 362. The disparity was thus due in part to the 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

¹⁹⁹ *See, e.g., Ortiz*, 897 F. Supp. at 204 (“[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.”); *Com. v. Arriaga*, 781 N.E.2d 1253, 1266 (Mass. 2003) (data showed that “that a disproportionate number of undeliverable summonses are addressed to inner city locations” where majority of state’s Hispanic residents live).

²⁰⁰ *Rioux*, 97 F.3d at 658.

²⁰¹ *Ortiz*, 897 F. Supp. at 205 (“To the extent that the postal system is to blame, the district[] . . . cannot be held responsible.”)

²⁰² *Gibbs*, 758 A.2d at 334.

might be the product of socio-economic factors.²⁰³ Recognizing the role of socio-economic 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 socio-economic factors “are all factors beyond the control of the criminal justice system.”²⁰⁴ The focus on the blameworthiness of would-be jurors or the blamelessness of jury officials reflects an equal protection construct.

To be clear, it is not that the choices of potential jurors or socioeconomic factors that affect those choices are completely irrelevant to the question of systematic exclusion. But the courts err in directing their discussion at 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.²⁰⁵

2. Focus on Opportunities for Citizens to Serve on Juries

The opportunity for citizens to serve on juries is exclusively an equal protection concern. Yet courts often emphasize the absence of barriers to jury service (and the absence of discrimination) in claims where the disparity stems from the use of underrepresentative voter lists. Specifically, courts support their conclusion relying on voter rolls as source lists is constitutional by pointing out that no one is purposefully excluded from registering to vote,²⁰⁶ and/or emphasizing the racially-

²⁰³ See, e.g., *Robinson*, 2009 WL 3365778, at *3 (“the 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”).

²⁰⁴ *Id.* 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 *Smith*. 130 S. Ct. at 1395 n.6. See also *California v. Harris*, 468 U.S. 1303, 1303 (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*.”) (citation omitted).

²⁰⁵ See Schulberg, *supra* note 35, at 23.

²⁰⁶ See, e.g., *United States v. Carter*, 2009 WL 765004, at *1 (2d Cir. March 25, 2009) (“[A]bsent 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.”) (internal quotations, citations, and modifications omitted); *United States v. Greatwalker*, 356 F.3d 908, 911 (8th Cir. 2004) (no systematic

neutral nature of voter lists.²⁰⁷ Courts make these assertions even where the defendant has not made any claim regarding discrimination. In another variation on the theme, courts recite that they have previously approved of the use of voter registration lists, and then cite equal protection cases that approved of such lists in the context of a discrimination claim.²⁰⁸ Proof that a system does not discriminate is, of course, not relevant to a legal standard that does not require evidence of discrimination. Nor are the opportunities for would-be jurors relevant to a standard exclusively concerned with the defendant.²⁰⁹

The precise problem with considering barriers to voting in the context of a fair cross-section claim was articulated by the Tenth Circuit: “[i]t 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

exclusion where defendant “has not attempted to prove Native Americans, in particular, face obstacles to registering to vote in presidential elections”); *Cecil*, 836 F.2d at 1448 (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*, 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.”) (internal quotation and citation omitted); see also *United States v. Test*, 550 F.2d 577, 583-84 (10th Cir. 1976); *Smith*, 571 S.E.2d at 748-49; *Tremblay*, 2003 WL 23018762, at *7.

²⁰⁷ See, e.g., *United States v. Smith*, 247 Fed. App’x 321, 323 (3d Cir. 2007) (“We have affirmed the validity of jury selection procedures using voter registration and motor vehicle records as procedures constituted using facially neutral criteria that allow no opportunity for subjective or racially motivated judgments.”) (internal quotations, citations, and modifications omitted); *Johnson*, 815 A.2d at 575 (“[A] criminal defendant may not attack the racial composition of jury panels drawn from voter registration lists . . . because such computer generated [voter] lists are compiled without regard to race.”).

²⁰⁸ 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 *Brummitt*, 665 F.2d at 527); *Brummitt*, 665 F.2d at 527 (“in making out a “prima facie case of *discrimination* . . . [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.”) (emphasis added) (citing *Lopez*, 588 F.2d at 451-52); *Lopez*, 588 F.2d at 452 (citing equal protection case of *Castaneda v. Partida* for the rule that defendant must show that the exclusion of a particular minority group from jury service is “due to some form of intentional discrimination”).

²⁰⁹ See *Leipold*, *supra* note 36, at 970-71 (focus on absence of “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”).

systematic exclusion of a cognizable group.”²¹⁰ Although it is true that all jurors have the opportunity to register to vote, the “fair cross-section principle . . . is designed to achieve results, not just assure opportunities . . .”²¹¹

Courts also import the focus on jurors’ opportunities and discriminatory intent by relying on the JSSA, which operates as a doctrinal Trojan horse for the importation of equal protection concerns. The JSSA requires federal jury selection plans to select the names of prospective jurors from voter registration and voter lists,²¹² and as a result courts frequently conclude that the use of voter lists, even when underrepresentative, cannot violate the Sixth Amendment because they have been “expressly sanctioned by Congress.”²¹³ But the JSSA relies on voter lists to achieve equal protection goals, as well as serve fair cross-section interests.²¹⁴

Congress designated voter registration lists as a source for jury names in order to further the JSSA’s purpose to prohibit discrimination

²¹⁰ *United States v. Ruiz-Castro*, 92 F.3d 1519, 1527 (10th Cir. 1996) (emphasis added), overruled on other grounds by *United States v. Flowers*, 441 F.3d 900 (10th Cir. 2006); see also *Weaver*, 267 F.3d at 244, 244-45 (responding to government’s point that “there has 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 (11th Cir. 1982) (“if 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”); see also *Rodriguez-Lara*, 421 F.3d at 945; *United States v. Biaggi*, 909 F.2d 662, 677-78 (2d Cir. 1990).

²¹¹ *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.”) (internal citations and quotations omitted).

²¹² 28 U.S.C. § 1863(b)(2) (that federal jury selection plans “shall—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.”).

²¹³ *Polk*, 1996 WL 47110, at *2; see also, e.g., *Cecil*, 836 F.2d at 1445; *United States v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008); *Orange*, 447 F.3d at 800; *Clifford*, 640 F.2d at 156; *State v. Pelican*, 580 A.2d 942, 949 (Vt. 1990).

²¹⁴ See *United States v. Scrushy*, 2007 WL 1296000, at *10 (M.D. Ala. May 1, 2007) (“[Section] 1861 of the JSSA adopts the fair cross section language of the Sixth Amendment and § 1862 prohibits the type of intentional discrimination prohibited by the Fifth Amendment.”). Moreover, the JSSA extends the fair cross-section right to any litigant, not just the criminal defendant with whom the Sixth Amendment is concerned. 28 U.S.C. § 1861.

in jury selection²¹⁵ (as per the equal protection clause) and to provide citizens with the opportunity to serve on juries²¹⁶ (also an equal protection interest). Voter lists only serve the JSSA's additional purpose of selecting juries from a fair cross-section²¹⁷ to the extent that they remain the largest available and updated lists.²¹⁸ 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.²¹⁹ Thus the JSSA does not suggest that the un-supplemented use of voter registration lists was considered sufficient to satisfy the fair cross-section right for criminal defendants. Accordingly, while it might make sense to cite the JSSA's use of non-discriminatory voter registration lists to defeat an equal protection claim, it does not add value to the analysis of a potential fair cross-section violation.

The consistent use of language that contrasts the culpability of potential jurors with the blamelessness of jury officials, and the emphasis on the lack of barriers to jury service, reflect an equal protection focus on

²¹⁵ 28 U.S.C. § 1862 ("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."); *see also* 28 U.S.C. § 1863(a) ("Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title . . .").

²¹⁶ 28 U.S.C. § 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 . . .").

²¹⁷ 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.")

²¹⁸ *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, and also 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 ("in adopting the voter registration lists as the 'preferred source' of names for prospective jurors, Congress not only intended to provide a relatively large and easily accessible source of names, but one to which all potential jurors would have equal access and which disqualified jurors solely on the basis of objective criteria.").

²¹⁹ 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."); *see Schulberg, supra* note 35, 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"); Jeffery 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").

intent and would-be jurors that is irrelevant to a Sixth Amendment analysis.

IV 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 the 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.²²⁰

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 Hartford or New Britain, the counties that contained over 60 percent of the voting-age Black and Hispanic population.²²¹ 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.”²²² Interestingly, “[n]o explanation [was] ever been provided as to why the names of New Britain residents were never even entered into the computer,” but there was no allegation that it was a purposeful exclusion.²²³ There was no equal protection injury, because there was no allegation or evidence of discrimination. But there was a Sixth Amendment injury, because a distinctive group was missing from

²²⁰ See *Green*, 389 F. Supp. 2d at 51 (“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”) (citing Gertner & Mizner, *THE LAW OF JURIES*, at §§ 2-10-2-13 (1997); *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.”)).

²²¹ *Jackman*, 46 F.3d at 1242 (citing *United States v. Osorio*, 801 F. Supp. 966 (D. Conn. 1992)).

²²² *Id.* at 1242-43.

²²³ *Id.* at 1243

the defendant's jury pool due to something in the operation of the jury selection system. 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 equal protection clause is concerned only with the particular damage wrought when the government discriminates.²²⁴ 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.²²⁵ 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.²²⁶ It is immaterial whether it is discrimination, accident, or an unexplainable factor that has produced that result: "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool"²²⁷ the fair cross-section right is violated.

The underrepresentation of African-Americans and Hispanics, in particular, diminishes the quality of deliberation about issues frequently relevant in criminal trials.²²⁸ Whites and people of color have, as a general rule,²²⁹ different life experiences based in part on race.²³⁰ There

²²⁴ *Batson*, 476 U.S. at 85. See Part I(A), *supra*.

²²⁵ *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 Part I(A), *supra*.

²²⁶ *Batson*, 476 U.S. at 87 n.8 (noting, in equal protection case: "For a jury to perform its intended function as a check on official power, it must be a body drawn from the community").

²²⁷ *Taylor*, 419 U.S. at 530.

²²⁸ See, e.g., *LaMere*, 2 P.3d at 219, 220 (citing "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."); Dr. Samuel R. Sommers and Dr. 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, 1027-28 (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).").

²²⁹ 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 228, 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*, 407 U.S. at 503-04 ("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.").

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.²³¹ 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.²³² "When cognizable segments of the community are excluded from jury participation, the decision-making process of the jury runs the risk of being seriously impaired."²³³

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.²³⁴ In the context of equal protection, the defendant and the would-be jurors interests align – both are harmed by the discriminatory intent of state actors.²³⁵ But in fair cross-section claims, the defendant's interests might be at odds with that 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.²³⁶ This is presumably not an interest the arrested

²³⁰ 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., *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, The Sentencing Project, at 2 (2008) (citing Leinfelt, F. H., *Racial Influences on the Likelihood of Police Searches and Search Hits: A Longitudinal Analysis from an American Midwestern City*, *Police Journal*, 79(3): 238–257 (2006)).

²³¹ 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, Tammy S. Garland & Helen Eigenberg, *Is Jury Selection Fair? Perceptions of Race and the Jury Selection Process*, *Criminal Justice Studies*, 20:4, 445-468, at 452 (2007). African-Americans are also less likely than whites to have confidence in the police. See, e.g., Ronald Weltzer & Steven A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, *Crime and Delinquency* 45: 494, at 505 (1999).

²³² See, e.g., Douglas G. Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133, 140 (1996) (footnotes omitted) ("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.") (as quoted in Leipold);

²³³ *Smith*, 571 S.E.2d at 751-52 (Benham, J., dissenting).

²³⁴ See note 65, *supra*.

²³⁵ *Batson*, 476 U.S. at 88 (referring to the "harm from discriminatory jury selection . . . inflicted on the defendant and the excluded juror").

²³⁶ 28 U.S.C. § 1866(g) ("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 \$1,000, imprisoned not

juror shares,²³⁷ 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 he is content with unrepresentative jury pool. Although this runs counter to the Supreme Court's understanding of the impartial jury guarantee, the right belongs only to the defendant – and 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 are 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.”²³⁸ 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 a privilege which at the juror's pleasure the juror may choose to exercise or forego.²³⁹

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,²⁴⁰ under the

more than three days, ordered to perform community service, or any combination thereof.”).

²³⁷ See *Jackson v. Hoylman*, 12 F.3d 212 (6th Cir. 1993) (Section § 1983 claim filed against marshals who arrested man in home on a bench warrant for failure to appear for grand jury service)

²³⁸ *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,” “Charles E. Wyzanski, 80, is Dead; Judge on U.S. Court for 45 Years,” Eric Pace, *The New York Times* (Sept. 5, 1986) 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).

²³⁹ *Burkett*, 342 F. Supp. at 1265.

²⁴⁰ 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. The Supreme Court in *Taylor* specifically recognized that the unconstitutional jury system at issue was administratively expedient for jury officials, but held 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.” *Taylor*, 419 U.S. at 535. The same point was reiterated in *Duren*, 439 U.S. at 369, and aligns with the

Sixth Amendment, that responsibility is not confined to refraining from discrimination.²⁴¹

B. *Inconsistent 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.²⁴² But a search for a bad actor is not responsive to the reality that today well-meaning administrators can make racially-neutral decisions (or inadvertent mistakes) that result in the significant underrepresentation of people of color.²⁴³

Computer programming has been introduced into jury selection processes to increase efficiency and facilitate random selection, but as the Connecticut example illustrates, ultimately computers are programmed by humans and are accordingly vulnerable to human errors. Underrepresentative jury pools have been created, for example, by a computer programs that arranged lists of qualified jurors “alphabetically by the fifth letter of the last name,” a system which was “impartial . . . unintentional, . . . blind and benign.”²⁴⁴ But the process inadvertently grouped different ethnic groups onto the same jury panels: one panel “include[d] 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 the panel [had] the last name ‘Williams.’”²⁴⁵ 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 highest percentage of people of color had a higher number zipcode;²⁴⁶ or organized the

general principle that the government’s interest in avoiding administrative burdens cannot unilaterally justify the violation of fundamental rights. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

²⁴¹ *See* Leipold, *supra* note 36, at 971 (“[T]he government’s obligation to do more than remove barriers seemed to be the message of *Duren v. Missouri*.”); Shulberg, *supra* note 35, at 24 (“At the very least, the fair cross-section requirement imposes a duty on jury officials to adopt procedures to remedy underrepresentation.”).

²⁴² McGillis, *supra* note 43, at 20.

²⁴³ *See Morales*, 770 P.2d at 277 (Broussard, J., dissenting) (“The Fourteenth Amendment protects against intentional discrimination in the selection of venire, but the Sixth Amendment protects against unintentional deviations from the constitutional standard.”) (citations omitted).

²⁴⁴ *State v. Long*, 499 A.2d 264, 268 (N.J. Super. L. 1985).

²⁴⁵ *Id.* at 269 n.3.

²⁴⁶ *Ambrose v. Booker*, 781 F. Supp. 2d 532, 538 (E.D. Mich. 2011); *see also People v. Bryant*, 2004 WL 513664, at *4 (Mich. App. March 16, 2004) (“computer program

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.²⁴⁷ Even properly functioning computer programs have had unexpected results: one program for identifying duplicate names to be eliminated 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.²⁴⁸ But “[b]ecause many members of the Hispanic community share common surnames and first names” the evidence showed that Hispanics were likely erroneously deleted.²⁴⁹

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 15 miles of the courthouse, which had the unintended affect of eliminating “residents of virtually all Native villages” from the jury pool.²⁵⁰ Effort to send jurors to courthouses closer to their residence similarly resulted in the underrepresentation African-Americans in Los Angeles County,²⁵¹ New York,²⁵² and Florida.²⁵³ The potential for innocuous juror assignment policies to cause racial disparities was vividly demonstrated in the Supreme Court’s

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”).

²⁴⁷ *Anzania*, 778 N.E.2d at 1257-59.

²⁴⁸ *People v. Ramirez*, 139 P.3d 64, 94-95 (Cal. 2006)

²⁴⁹ *Id.*

²⁵⁰ *Alvarado v. State*, 486 P.2d 891, 895 (Ala. 1971) (A pre-*Duren* case that was nonetheless decided pursuant the Sixth Amendment fair cross-section right).

²⁵¹ *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 L. J. 238, 256-58 (Fall 1994).

²⁵² See, e.g., *People v. Henderson*, 490 N.Y.S.2d 94, 96-97 (N.Y.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.”)

²⁵³ See also *Spencer v. State*, 545 So.2d 1352, 1353-54 (Fla. 1989) (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”)

only post-*Duren* fair cross-section decision, *Berghuis v. Smith*.²⁵⁴ 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 between 60 and 100 people, in a county where 7.28 percent of the jury-eligible population was Black.²⁵⁵ 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.²⁵⁶ The month after *Smith*'s jury had been selected, however, the county reversed the assignment order,²⁵⁷ 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.”²⁵⁸ This conclusion was joined by the Jury Minority Representation Committee of the Bar Association, of which the Court Administrator was a member.²⁵⁹ 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.”²⁶⁰ And, in fact, when the jury office reversed the assignment order, “the comparative disparity, on average, dropped from 18% to 15.1%.”²⁶¹ *Smith* did not prevail because, pursuant to the Court's strained reading of *Duren*,²⁶² his “evidence scarcely shows that the assignment order he

²⁵⁴ 130 S. Ct. 1382.

²⁵⁵ *Id.* at 1389, 1390.

²⁵⁶ *Id.* at 1389.

²⁵⁷ *Id.*

²⁵⁸ *Id.* (citations to record omitted).

²⁵⁹ *Id.* at 1389-90 (citations to record omitted).

²⁶⁰ *Id.* at 1390.

²⁶¹ *Id.* (citations to record omitted).

²⁶² 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 1384 (emphasis in original). And it was true that “*Smith*'s best evidence of systematic exclusion was . . . [the] decline in comparative underrepresentation, from 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.* at 1394-95 (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 “[n]o ‘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 1395 (emphasis in original). 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. Even the narrowest reading of *Duren*, however, implies that the third prong can be demonstrated by evidence of

targets caused underrepresentation,”²⁶³ 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 score based on times of service had the inadvertent result of underrepresenting African-Americans and Hispanics.²⁶⁴ 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.²⁶⁵ Underrepresentation can also be caused by the numeric increment used to randomly select jurors from the jury pool,²⁶⁶ or the use of telephones to summon jurors.²⁶⁷ Finally, when a source list is not racially representative, even random, race-neutral selection from that list by a computer program will produce underrepresentative jury pool. “Many ‘random’ procedures regularly yield very predictable, non-random deficiencies in their outcomes.”²⁶⁸

None of these errors reflect intentional discrimination, or even intentional action, as courts have recognized: “as 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.²⁶⁹ But notwithstanding the absence of discriminatory or purposeful action, each

disparity over time combined with a theory – but not necessarily proof – for how the operation of the system produces that disparity. See Part I(B)(3), *supra*.

²⁶³ *Id.* at 1394.

²⁶⁴ *Washington*, 186 P.3d at 597.

²⁶⁵ *United States v. Clay*, 159 F. Supp. 2d 1357 (M.D. Ala. 2001).

²⁶⁶ *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.” If the 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.”).

²⁶⁷ *LaMere*, 2 P.3d at 219, 220 (Use of telephone to summon jurors resulted in underrepresentative pool when 29% of Native American households in one county and 44% in a second county have no phone service, while “[i]n stark contrast . . . only 5% [of Anglo-American households] . . . are without phone service.”); see also *United States v. Nakai*, 413 F.3d 1019, 1022 (9th Cir. 2005).

²⁶⁸ *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) (Pointing out in context of equal protection claim that “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?”).

²⁶⁹ *Jackman*, 46 F.3d at 1243.

of these errors introduce the possibility that a defendant will be deprived of his 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 demonstrates that this decision by the jury office can significantly affect the rates of undeliverable mailings, non-responses rate, and failures to appear.²⁷⁰ 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 courts attribute to private choices. The Center for Jury Studies of the National Center for State Courts documents that jurisdictions have affected the "private choices" of citizen to exercise requests for excusals (by shifting to a one-day or one-trial service term²⁷¹ or increasing the amount of juror pay²⁷²), the "private choices" of citizens to appear for jury service (by following up on or enforcing unreturned summons²⁷³), and the

²⁷⁰ Systems that chose the one-step process have an average undeliverable rate of 14.5 percent, and states that chose the two-step process have an average undeliverable rate of 9.2 percent. *State-of-the-States Survey*, *supra* note 180, at 22, Table 16. Similarly, offices that chose a one-step process have non-response/failure to appear rates on average of 8.9 percent, compared to 6 percent for offices that chose the two-step process. *Id.*

²⁷¹ *Id.* at 45, Table 18 ("courts 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)").

²⁷² *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").

²⁷³ *Id.* at 24-25 (footnote omitted) ("follow-up programs that involved a second summons or qualification, or that 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.") footnote omitted); Hannaford-Agor, *supra* note 38, at 784 ("the 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

socioeconomic factors that affect the rate of undeliverable summons (by using an address updating service²⁷⁴ and updating addresses more frequently²⁷⁵). 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.”²⁷⁶ Courts implicitly recognize this point when they hold there is no systematic exclusion, but proceed to order changes to the jury system anyway.²⁷⁷ 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. Damages Doctrinal Integrity

Confusing constitutional standards undermines the integrity of the doctrine and raises questions of judicial expertise. The inconsistencies in Second Circuit fair cross-section doctrine provide a prime example. The Circuit originally held that reliance on voter lists was constitutional, “absent a showing of *discrimination* in the compiling of such voter registration lists,”²⁷⁸ but then corrected itself in response to the pointed critique of Judge Constance Baker Motley.²⁷⁹ As Motley recognized, “[t]his approach appears to obliterate the substantive distinction between the equal protection and sixth amendment tests”²⁸⁰ It was not only inconsistent with an earlier Second Circuit decision that recognized that the Sixth Amendment applies “regardless of whether

adopted (and arguably endorsed) the definition of disparity related to voter registration rates non-response rates as “nonsystematic exclusion.” *Id.* at 772.

²⁷⁴ *Id.* at 783.

²⁷⁵ *Id.* at 788.

²⁷⁶ *Id.* at 764.

²⁷⁷ *See, e.g., Murphy*, 1996 WL 341444, at *5 (noting that after court decided to send an 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.”).

²⁷⁸ *United States v. Biaggi*, 680 F. Supp. 641, 648-49 (S.D.N.Y. 1988) (emphasis added) (quoting *United States v. Young*, 822 F.2d 1234, 1239) (2d Cir. 1987).

²⁷⁹ 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 v. Alabama*. (*Swain* was, of course, eventually overturned in *Batson v. Kentucky*, 476 U.S. 79 (1986)).

²⁸⁰ *Biaggi*, 680 F. Supp. at 648-49.

the State's motive is discriminatory,”²⁸¹ it was “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.”²⁸²

The Second Circuit corrected its mistake – only to reintroduce the error later. On appeal from Judge Motley’s decision, the Second Circuit admitted that it “arguably blurred that distinction” between the two constitutional standards, and reasserted it “agree[s] with Judge Motley that discriminatory intent is not an element of a Sixth Amendment ‘fair cross-section claim.’”²⁸³ But then in 2009, the equal protection requirement was 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.”²⁸⁴ The 2009 decision ignored, without discussion, Judge Motley’s criticism and the correction articulated by the prior panel. This type of inconsistent, and ultimately erroneous, articulation of constitutional law undermines the coherence of Sixth Amendment doctrine and the expertise of the court. Whether courts’ routine application of the contained tests reflects “their inability or unwillingness to comprehend the difference between an equal protection analysis and a representative cross-section analysis,”²⁸⁵ the integrity and coherence of the doctrine is undercut with each erroneous analysis.

Finally, to the extent that racially representative juries promote public confidence in the justice system,²⁸⁶ an artificially restrictive fair cross-section standard also has the potential to undermine public confidence in the criminal justice system.

CONCLUSION

“One thing is, or should be, clear: Sixth Amendment analysis does not require proof that a cognizable group has been excluded [from

²⁸¹ *Id.* at 648-49 (quoting *Alston*, 791 F.2d at 258-59).

²⁸² *Id.*

²⁸³ *United States v. Biaggi*, 909 F.2d 662, 677-78 (2d Cir. 1990).

²⁸⁴ *Carter*, 2009 WL 765004, at *1 (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) (internal quotations, citations, and modifications omitted).

²⁸⁵ *Bell*, 778 P.2d at 170 (Broussard, J., dissenting).

²⁸⁶ *See, e.g.*, Abramson, *supra* note 115, at 202-03 (“[T]he jury’s ability to maintain public confidence in the administration of justice is fragile. It depends in part on drawing the jury from the community at large so that all groups have a potential say in how justice is done.”).

the jury pool] because of discrimination, as in the case of an Equal Protection challenge”²⁸⁷ 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 result in the denial of a meritorious claim,²⁸⁸ how frequently courts make this error,²⁸⁹ why courts may be making this mistake, and what is the best way to remedy the problem. At the very least, courts need to impose more rigor on their analysis of fair cross-section claims, and ensure that they are not contaminating *Duren*'s standard for systematic exclusion with the requirements or conceptual focus of the equal protection standard.

²⁸⁷ *Green*, 389 F. Supp. 2d at 51.

²⁸⁸ To the extent that courts are routinely denying cross-section claims, see note – *supra*, the indication is that they are not erring on the side of defendants. *See generally*, *Peters*, 407 U.S. at 504 (holding in pre-*Duren* equal protection case that: “In 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 challenging the jury to too many defendants, rather than giving it to too few.”) (footnote omitted).

²⁸⁹ 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 note 16, *supra*, limit my ability to extrapolate from my results.

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*.²⁹⁰ 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 12 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)²⁹¹ 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.

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 (i.e., 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 (i.e., 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.

²⁹⁰ 439 U.S. 357 (1979).

²⁹¹ 28 U.S.C. §§ 1861-1878.

The master list of 167 cases does not capture every case that addresses the fair cross-section issue. It excludes cases that were not available on Westlaw; state cases that do not cite *Duren*, and any case that neither cites *Duren* nor refers to a fair cross-section.²⁹² These limitations are the reason I use the survey to highlight troubling trends, rather than make assertions that depend on exact figures or 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 percent and 0.434 is rounded down to 43 percent.

My survey, including all case citations and a full record of my coding, will be available at StatLib (<http://lib.stat.cmu.edu/>), hosted by the Department of Statistics at Carnegie Mellon University for inspection and comment.

²⁹² See, e.g., *Hearn v. Cockrell*, No. 02-10913, 2003 WL 21756441, at *5-6 (5th Cir. June 23, 2003) (concluding that underrepresentation alleged by defendant is not unconstitutional, referring to the requirement of a "representative cross-section" and citing only *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975)).