

# Jury Managers' Toolbox

## *A Primer on Fair Cross Section Jurisprudence*

### Overview

The phrase “a jury of one’s peers” brings to mind an image of a jury that perfectly mirrors its community in terms of demographic and attitudinal characteristics. In an ideal world, a perfectly representative jury would be best able to fulfill its role as the conscience of the community in judicial decision-making. As a practical matter, however, the legal requirements governing the composition of the jury do not mandate perfect representation of the jury pool. Rather, they set the minimum standards that state and federal courts must achieve to guarantee the Sixth Amendment and Equal Protection rights of criminal defendants to a jury drawn from a fair cross section of the community.

Originally, the Sixth Amendment right to “a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed” focused on the ability of individual jurors to judge the cases before them fairly and impartially. Over time, however, courts came to recognize the reality that jurors have preexisting life experiences, attitudes and opinions that affect the way they perceive and interpret information. Courts abandoned their insistence on unrealistically stringent criteria for the impartiality of individual jurors (e.g., no relevant life experience, attitude or opinions related to the case). Instead, the theory supporting jury diversity is that biases held by

individual jurors will be balanced or canceled out by competing biases held by other jurors. Gradually, they adopted the idea that the best way to ensure a fair and impartial jury is to ensure a diverse jury pool from which to select juries. An important caveat concerning the fair cross section requirement is that it only applies to the pool from which juries are selected, not to composition of the jury itself.

### Constitutional Basis for the Fair Cross Section Requirement

The fair cross section requirement derives principally from the Sixth Amendment right to an impartial jury and the Equal Protection Clause of the Fourteenth Amendment. These constitutional provisions prohibit exclusion of groups of commonly recognized minorities from being excluded from the jury pool systematically (Sixth Amendment) or intentionally (Equal Protection Clause). As a practical matter, the Sixth Amendment and Equal Protection Clause jurisprudence have tended to merge over time, but originally each provision had slightly different procedural requirements. In addition, the Equal Protection Clause cases tended to focus on grand jury selection procedures while Sixth Amendment cases tended to focus on petit (trial) jury procedures. Some court opinions addressing alleged fair cross section violations will review the facts of the case under both jurisprudential

theories separately. These federal constitutional requirements may also be supplemented by state constitutional or statutory requirements.

The contemporary test to determine whether a violation of the fair cross section has occurred is the *Duren* test, named for *Duren v. Missouri*, a 1979 case decided by the U.S. Supreme Court.<sup>1</sup> In *Duren*, the Court addressed the question of whether an automatic exemption from jury service offered to women was unconstitutional given that it reduced the percentage of women from 46% of the community to 15% of the pool from which the defendant's jury was selected. The Court described three criteria that a defendant must show to establish a *prima facie* violation of the fair cross section requirement: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the group's representation in the jury pool is not fair and reasonable in relation to the number of such persons in the population; and (3) the under-representation of the group results from systematic exclusion of the group in the jury selection process.

Once the defendant has established a *prima facie* violation of the fair cross section requirement, the burden shifts to the State to provide a compelling justification for the systematic exclusion of the distinctive group. *Duren* made it clear, however, that the States retained broad discretion to define eligibility qualifications and exemption criteria for jury service.

### Distinctive or Cognizable Groups

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<sup>1</sup> *Duren v. Missouri*, 439 U.S. 357 (1979).

A "distinctive" group for fair cross section purposes generally refers to groups that see themselves as distinct from other groups, that are seen by others as a distinct group, and that hold values not necessarily held by other groups. Many court opinions also refer to these groups using Equal Protection terminology of "cognizable" groups. In most instances, these groups are defined by immutable characteristics, especially gender, race, and ethnicity (Hispanic/Latino) and are recognized as valid groups under both Sixth Amendment and Equal Protection Clause criteria.<sup>2</sup> In addition to gender, race, and ethnicity, some courts have found groups characterized by religious affiliation or national origin to be distinctive groups under the Sixth Amendment. In most instances, however, distinctive groups characterized by religious affiliation have such a strongly cohesive community that the religious affiliation is similar to ethnicity in terms of its cultural significance (e.g., Jews in New York City<sup>3</sup> and Amish persons in Ohio<sup>4</sup>).

### Fair and Reasonable Representation

The second requirement under *Duren* is that the representation of the group alleged to be excluded is not fair and reasonable compared to the proportion of that group in the community. An important caveat related to this requirement is that the relevant "community" consists of individuals who are eligible for jury service in the jurisdiction – that is, they are *qualified and*

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<sup>2</sup> Under the Equal Protection Clause of the Fourteenth Amendment, these three demographic characteristics are accorded "strict scrutiny" by courts, requiring the government to offer a compelling justification for disparate treatment.

<sup>3</sup> *U.S. v. Gelb*, 881 F. 2d 1155 (2d Cir. 1989).

<sup>4</sup> *State v. Fulton*, 566 N.E. 2d 1195 (Ohio 1991).

*available* for jury service. Qualifications for jury service in most jurisdictions include U.S. citizenship, residency in the geographic area served by the court, adult (age 18 or over), able to speak and understand English, and not subject to other legal disqualifications (e.g., previous felony conviction, mental incompetency). Availability refers to the ability to serve on the date summonsed; thus, unavailability refers to any of several situations in which the individual who is summonsed for jury service cannot be located (summons returned undeliverable by the US Postal Service, juror failed to appear for jury service) or is exempt or excused from jury service. In many jurisdictions, these qualification and availability requirements result in significant differences between the demographic characteristics of the jury-eligible population and those of the total population. For example, the jury-eligible population for communities with large Hispanic or Asian populations is often proportionately much smaller than that of the total population as individuals in those groups are disqualified due to non-citizenship or inability to speak and understand English. Similarly, undeliverable, disqualification, excusal and failure-to-appear rates tend to disproportionately decrease minority representation due to socio-economic factors such as mobility rates, criminal records, and financial hardship for lower-income individuals.

With respect to how the representation of distinctive groups in the jury pool compares to their representation in the community, the law does not require that demographic characteristics exactly mirror one another. Some deviation ordinarily occurs, for example, due to the random selection process. Several

measures can be used to determine the extent to which the jury pool demographics differ from those of the community. The two measures most frequently used by courts are absolute disparity and comparative (relative) disparity.<sup>5</sup> Absolute disparity describes the proportional difference in the representation of the distinctive group. In *Duren*, for example, the absolute disparity for women was 31% (46% women in the community - 15% women in the jury pool = 31% absolute disparity).

Comparative disparity is a second measure of representational disparity. Comparative disparity measures the percentage by which the number of distinctive group members in the jury pool falls short of their number in the community. The formula for calculating comparative disparity is the absolute disparity divided by the percentage of the distinctive group in the jury-eligible community. The comparative disparity in *Duren*, for example, was 67% (31% absolute disparity ÷ 46% jury-eligible population = 67%), indicating that the percentage of women in the jury pool was 67% less than would ordinarily be expected for the

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<sup>5</sup> A number of additional measures of representational disparity are often used by expert witnesses testifying in jury challenges. These include statistical significance tests, which indicate whether the amount of disparity reflects an actual difference is or simply the result of random chance in the selection process, and disparity of risk analyses, which quantify the representational difference in terms of the probability that the jury pool would have the same percentage of the distinctive group as the result of random chance. Richard Seltzer et al., *Fair Cross-Section Challenges in Maryland: An Analysis and Proposal*, 25 U. Balt. L. Rev. 127, 141 (1996).

female population of Jackson County, Missouri, in 1976 when the trial took place.

Comparative disparity can be a very useful measure for describing the level of disparity when the proportion of the distinctive group in the jury-eligible population is relatively small (e.g., less than 10%) and the level of absolute disparity would not necessarily reach the threshold needed to establish a prima facie violation of the fair cross section requirement. For example, if African-Americans represented 12% of a jury-eligible community, but only 4% of the jury pool, the absolute disparity would be 8% and the comparative disparity would be 67%. If previous case law had established the requisite threshold for absolute disparity at 10%, a defendant would not be able to demonstrate a violation of the fair cross section requirement, even though the proportion of African-Americans in the jury pool was fully two-thirds less than expected given their representation in the jury-eligible community!

In *Berghuis v. Smith*,<sup>66</sup> the US Supreme Court revisited the fair cross section requirement for the first time since *Duren*. The opinion strongly reaffirms *Duren's* three-prong test as the appropriate analytical framework for considering jury challenges based on fair cross section claims, but disavowed that *Duren* specified a particular method or test that courts should employ to measure under-representation. It recognized that lower courts had employed a number of different measures of disparity, but found that all of them could be misleading, particularly with respect to comparatively small populations of distinctive groups. It approvingly cited the Michigan

Supreme Court's admonition that "provided that the parties proffer sufficient evidence, the results of all of the tests should be considered."

The threshold at which under-representation reaches unconstitutional levels is rarely articulated as a fixed value in court opinions. Most cases that discuss absolute disparity in detail tend to cite values of 10% to 12% absolute disparity as sufficient to establish a prima facie violation of the fair cross section requirement while the threshold level for comparative disparity is generally cited as 40% to 50%. In the *Berghuis* decision, however, the Court explicitly rejected a proposal to adopt a bright-line 10% absolute disparity threshold in *Berghuis* and declined to consider the constitutional significance of such a rule, which may suggest that a purely mechanical approach to fair cross section jurisprudence might be viewed with disfavor if it were raised in an appropriate case.

### Systematic Exclusion

The final prong of the *Duren* test is that under-representation of the distinctive group is the result of intentional discrimination (Equal Protection) or systematic exclusion (Sixth Amendment). Systematic exclusion does not have to be intentional, but merely an inherent result of the jury selection process. In *Duren*, the Supreme Court found that the policy of offering automatic exemptions to women was systematic exclusion insofar that it was inherent in the jury selection process.

More recent examples of systematic exclusion are often related to the automation used in the

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<sup>66</sup> *Berghuis v. Smith*, 559 U.S. \_\_\_\_ (2010).

jury selection process. In *U.S. v. Osorio*,<sup>7</sup> for example, the length of the database field for the prospective juror's city of residence in the master jury list was truncated, causing the system to misread the eighth character as the jurors' status. As a result, all of the records for individuals living in Hartford were mistakenly excluded from jury service because the system interpreted the "d" in Hartford to mean "deceased." At that time, the largest single concentration of Hispanics in the state resided in the city of Hartford. In another example, during a routine upgrade to the jury automation system in Kent County, Michigan, the software was mistakenly programmed to randomly select names from the first 125,000 records on the master jury list rather than from the entire list, which was more than 500,000 records in length.<sup>8</sup> The list was sorted alphabetically by zip code and the largest proportion of African-Americans in Kent County resided in the sequentially higher zip codes.

Non-systematic exclusion, in contrast, is the under-representation of distinctive groups in the jury pool due to factors beyond the control of the court. Common examples of non-systematic exclusion include disproportionately low rates of voter registration by minorities that result in under-representation by those groups on the master jury list and subsequently in the jury pool.<sup>9</sup> Courts have no authority to compel members of those groups to register to vote. Another factor commonly related to under-representation of minorities is undeliverable

rates, which are strongly correlated with lower socio-economic status and, in turn, correlated with minority status. Courts similarly have no authority to compel individuals to provide the US Postal Service with a forwarding address or to require the agencies that provide the source files for the master jury list to improve their record maintenance procedures. Failure-to-appear rates and excusal rates are likewise highly correlated with socio-economic status and have historically been considered forms of non-systematic exclusion.

Nevertheless, the question of whether the impact of socio-economic factors on the demographic composition of the jury pool could support a fair cross section claim is still unsettled. Some courts in recent years have expanded the scope of systematic exclusion to include factors that may fall outside of the court's ability to prevent, but for which reasonably effective and cost-efficient remedies exist. One of the earliest examples was *People v. Wheeler*,<sup>10</sup> in which the Supreme Court of California found that exclusive reliance on the voter registration list as the sole source of names for the master jury list systematically excluded Blacks and Hispanics from the jury pool. Technological advances had made it possible for courts to merge multiple source lists to create a more inclusive and representative master jury list, making the argument that low voter registration rates by African-Americans and Hispanics no longer justifiable. In *People v. Harris*, the California Supreme Court explicitly warned against under-representation "stemming from negligence or inertia" in the jury selection process, citing

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<sup>7</sup> *U.S. v. Osorio*, 801 F. Supp. 966 (D. Conn. 1992).

<sup>8</sup> G. Thomas Munsterman, *Jury Management Study for Kent County, Michigan* (May 6, 2003).

<sup>9</sup> See, e.g., *U.S. v. Biaggi*, 909 F. 2d 662, 676-78 (2d Cir. 1990).

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<sup>10</sup> *People v. Wheeler*, 503 P.2d 748 (Cal. 1978).

cases that recognize that “official compilers of jury lists may drift into discrimination by not taking affirmative action to prevent it.”<sup>11</sup>

In *U.S. v. Green*,<sup>12</sup> the U.S. District Court for the Eastern District of Massachusetts ruled that the court’s failure to take reasonable steps to address undeliverable and failure-to-appear rates for jurors living in predominately minority zip codes violated the federal Jury Selection and Service Act. The court proposed over-sampling from predominantly minority zip codes as a remedy in that case.<sup>13</sup>

The most recent discussion of this question occurred in *Berghuis v. Smith*. The federal Sixth Circuit Court of Appeals had ruled that the trial court’s excusal policy, which “allowed prospective jurors to essentially ‘opt out’ of jury service if jury duty would constitute a hardship based on child care concerns, transportation issues, or the inability to take time from work” was a systematic exclusion that produced unacceptable under-representation in the jury pool.<sup>14</sup> As the Sixth Circuit stated, “the Sixth

Amendment is concerned with social or economic factors when the particular *system* of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel.” Upon review, the US Supreme Court concluded that there was insufficient evidence that the trial court’s excusal policy caused the under-representation of African-Americans and thus declined to address the question directly.

### **An Uneasy Relationship between the Second and Third Prongs of *Duren***

The *Duren* test requires that all three elements be satisfied to find a violation of the fair cross section requirement. Yet a close examination of contemporary cases reveals an ongoing ambiguity about whether the ultimate objective of the requirement is a more representative jury pool or a non-exclusionary jury system. In some cases, courts have determined that the fair cross section requirement is satisfied provided that the process of summoning and qualifying jurors does not systematically exclude distinctive groups. Other courts have found fair cross section violations in cases with comparatively low levels of disparity if there is any evidence of systematic exclusion.<sup>15</sup> It remains to be seen whether the more recent expansion of the definition of systematic exclusion will relieve or further exacerbate this tension. Nevertheless, an effective jury system will ensure that jury operations are free of systematic exclusions and that the resulting jury

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<sup>11</sup> *People v. Harris*, 36 Cal. 3d 36, 58 (1984).

<sup>12</sup> *United States v. Green*, 389 F. Supp. 2d 29 (D. Mass. 2005).

<sup>13</sup> The U.S. Court of Appeals for the First Circuit subsequently overturned the order on grounds that the remedy unlawfully supplemented the Jury Plan for the Eastern District of Massachusetts. *In re U.S.*, 426 F. 3d 1 (1st Cir. 2005). In 2006, the U.S. District Court for the Eastern District of Massachusetts amended its Jury Plan to respond to an undeliverable summons by sending an additional summons to the same zip code.

<sup>14</sup> *Smith v. Burghuis*, 543 F.3d 326 (2008), *cert. granted*, (U.S. Sept. 30, 2009) (No. 08-1402). Reducing the term of service, ideally to one day or one trial, reduces the financial impact on prospective jurors, making it possible for people to serve who would otherwise be excused for financial hardship.

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<sup>15</sup> The tension between process and outcome is evident in other areas of law involving race and gender discrimination, of course.

pool is a reasonable reflection of community demographic characteristics.

### **Further Reading**

JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (Harvard University Press, 2000).

ABA *PRINCIPLES FOR JURIES AND JURY TRIALS* (August 2005).