



JURY NEWS



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A New Take on How Jury Service Is Akin to Voting* **Paula Hannaford-Agor**

I had a very interesting email exchange in late August with a federal public defender. He was asking about the viability of a potential challenge to the jury pool in a court that relies exclusively on the voter registration list as the source list for its master jury list. The state in which the court operates had recently enacted new requirements for voter registration that were being challenged in federal court due to their alleged discriminatory impact on minorities. The attorney wanted to know whether the court's continued use of a juror source list that is created or maintained in a discriminatory manner violates the requirement that juries be selected from a jury pool that reflects a fair cross section of the community. After pondering the question for a while, I've come to the conclusion that this somewhat novel legal theory might just grow legs. It behooves jury managers who serve in similarly situated courts to pay close attention, and maybe even consider using multiple source lists to create the master jury list to preempt a jury challenge in their own courts.

Which Courts Still Rely Exclusively on Voter Registration Lists?

My first thought after reading the email was that this issue was more applicable in federal courts than state courts. The federal Jury Selection and Service Act (JSSA) requires federal district courts to use the list of registered or actual voters as the primary source of jurors. Although the JSSA also requires courts to use supplemental source lists "where necessary to foster the policy and protect the rights secured by [the fair-cross-section requirement and the nondiscrimination provision]," approximately two-thirds of federal district courts still rely exclusively on voter registration or active voter lists as the juror source list.

Most state courts do use multiple source lists, usually a combination of voter registration and licensed drivers/state ID holders. Several states use state income tax rolls, unemployment compensation, and public welfare lists. Two states use

unique statewide lists—the Permanent Fund in Alaska, and an annual statewide census in Massachusetts—both of which are extremely inclusive and representative of the geographic and demographic characteristics of their communities. The reason many states adopted the use of multiple source lists is the demonstrable improvement in the inclusiveness and representativeness of the master jury list. As I did a more thorough review of NCSC records, however, I found several examples of state courts that continue to use voter registration lists exclusively. Courts in two states—Louisiana and Montana—are statutorily required to use voter registration as the sole juror source list, and large pockets of courts in Arkansas, Mississippi, Ohio, and Virginia and a scattering of courts across eight other states reported exclusive use of the voter registration list as recently as 2007. Overall, these courts comprised 14 percent of courts that responded to the NCSC *State-of-the-States Survey of Jury Improvement Efforts*. In the event of a jury challenge, these courts might find it difficult to justify that continued reliance in light of the discriminatory impact of recent voter registration requirements and list maintenance practices.

The Basics of the Fair-Cross-Section Requirement

The jurisprudence of the fair-cross-section requirement has been well-settled law since the U.S. Supreme Court decided *Duren v. Missouri* in 1979.¹ *Duren* articulated a three-pronged test to establish a *prima facie* violation of the requirement that juries be selected from pools that reflect a fair cross section of the community. First, the group excluded from the jury pool must be a “distinctive group.” The term “distinctive group” generally refers to a specific race, gender, or ethnicity. Second, the representation of the distinctive group in the jury pool must be “not fair or reasonable” given the representation of that group in the community. Third, the underrepresentation of the group must be due to “systematic exclusion”—that is, an inherent function of the jury summoning and qualification process.²

The crux of the public defender’s question focuses on the third prong of the *Duren* test. For the past four decades, most courts have ruled that even when the list of registered voters significantly underrepresents minorities, relying on that list as the sole source of the master jury list does not systematically exclude distinctive groups from the jury pool. Court opinions typically articulate two justifications for the constitutionality of voter registration lists. The first is simply deference to the legislature. If the statute mandates that courts use the voter registration list, that list presumptively passes constitutional muster in spite of minority underrepresentation. The second is that courts have no authority to compel members of underrepresented groups to register to vote. Hence, the exclusion is not inherent in the jury selection process, but instead reflects those individuals’ self-exclusion from the jury pool.

There is, however, an important caveat that accompanies justifications for continuing to use a voter registration list that underrepresents minorities. If the voter registration list was created in a manner that unconstitutionally discriminates against minorities, that taint would apply to its use as a source list for creating the master jury list. Several cases dating to the 1970s and 1980s reference obstacles to voter registration such as poll taxes, literacy tests, and other state and locally imposed barriers as the types of practice that would tarnish the suitability of the voter registration list as the sole juror source list. But in each of those cases, the court explained that “any danger of such discrimination . . . is largely a matter of the past.”³

I suspect that underlying the reluctance to acknowledge the shortcomings of voter registration lists was the absence of viable alternatives. At the time, the voter registration list was likely the single best list available. The technologies that made the use of multiple source lists possible did not become widely available until the 1980s. Today the sophisticated techniques involved in merging and purging duplicates from multiple lists is extremely widespread and highly accurate, and the processing costs and time are negligible. Rigorous analyses confirm that the use of multiple lists greatly increases the geographic and demographic inclusiveness and representativeness of the master jury list, which improves the likelihood that the jury pool will reflect a fair cross section of the community, as well as distribute the burden of jury service more equitably across the jury-eligible population. It is hard to imagine why anyone would continue to rely on the voter list exclusively given the success that other courts have experienced.

Discrimination in Voter Registration List Creation and Maintenance Practices

In 2013 the U.S. Supreme Court decided *Shelby County v. Holder*, which invalidated Section 5 of the Voting Rights Act of 1965 on grounds that requiring certain states and local governments to obtain preclearance from the U.S. Department of Justice before enacting changes in voting law or preferences violated constitutional principles of federalism and state sovereignty.⁴ Since then, a number of states and localities that were previously subject to the Justice Department preclearance rules have enacted new voter registration requirements and list maintenance procedures. For example:

- Kansas and Georgia now require documentary proof of citizenship to register to vote; merely affirming on penalty of perjury is no longer sufficient.
- Georgia also enacted legislation mandating that the information reported on new voter registration applications must exactly match corresponding information in the Georgia Department of Drivers Services (DDS) or Social

Security Administration (SSA) databases. An analysis of the matching process revealed that applications submitted by blacks, Latinos, and Asians were disproportionately rejected.

- Other states have enacted voter identification requirements, but the federal Real ID Act, enacted in 2005, requires states to obtain proof of legal status and date of birth before issuing a driver's license or state identification card. Legal challenges consistently claimed that the new requirements imposed a disproportionate impact on minorities, infringing on their right to vote due to the costs associated with obtaining certified copies of birth certificates or other documentary proof of citizenship.

Several federal district courts have ruled the new voter registration requirements unconstitutional, and lawsuits are currently pending.

State efforts to purge the records of inactive voters from the voter registration list have also come under scrutiny in recent years. For example, state officials from at least 27 states participate in the Interstate Voter Registration Crosscheck (IVRC) Program, which was developed by Kris Kobach, the Kansas Secretary of State, to identify individuals who are registered to vote in multiple states and use the information to purge the records of individuals who are no longer eligible to vote in the state. An independent analysis of the methods employed by IVRC cast grave doubts on the accuracy of the matching criteria, estimating that Crosscheck's proposed purging strategy "would eliminate about 200 registrations used to cast legitimate votes for every one registration used to cast a double vote."⁵ According to a 2016 analysis, misidentification of blacks, Hispanics, and Asians was consistently more likely than whites due to the frequency with which certain surnames occur in minority populations.⁶

Finally, a case challenging one of the practices employed by Ohio to identify and remove voters who are no longer eligible to vote due to a change in residence is currently before the U.S. Supreme Court. That procedure identifies registered voters who have not engaged in any voting activity for two years to send a confirmation notice to verify the voter's continued eligibility. Among the many objections to Ohio's "Supplemental Process" raised in *Husted v. A. Philip Randolph Institute*⁷ is that it disproportionately results in the removal of minorities from the voter registration list.⁸

What Is the Likelihood of a Successful Jury Challenge?

At the beginning of this column, I predicted that a jury challenge arguing that reliance on voter registration as the sole juror source list might satisfy the third prong of *Duren* in jurisdictions that have enacted new voter registration or list

maintenance requirements. Given the consistency of court holdings that minority underrepresentation on voter registration lists is, at best, non-systematic exclusion, this would be a rather significant sea change in the case law on fair-cross-section claims. But two things have changed making the argument more persuasive today than when those earlier cases were decided. First is the widespread and relatively inexpensive technology capable of creating the master jury list from multiple juror source lists. The vast majority of courts across the country now use multiple lists and have done so for decades. There is no credible justification for continuing to rely exclusively on voter registration lists, particularly when they are known to underrepresent distinctive racial or ethnic groups in their communities. Second, many state and federal court judges appear less willing to turn a blind eye to executive and legislative efforts to marginalize disadvantaged communities or to undermine fundamental rights of citizenship, such as the right to vote or the right to participate in the jury system.⁹

Of course, the fact that judges may be more open to novel interpretations of fair-cross-section claims does not necessarily mean that those claims will ultimately prove successful. *Duren* articulates a three-prong test, and the second prong—that representation in the jury pool is not fair or reasonable—is still a formidable hurdle. In most jurisdictions, the degree of underrepresentation of a distinctive group sufficient to satisfy *Duren's* second prong must be completely due to systematic exclusion, not to a combination of systematic and non-systematic factors.¹⁰ It should be noted, however, that in *Berguis v. Smith*¹¹ the U.S. Supreme Court declined to adopt a bright-line threshold for the degree of underrepresentation needed to satisfy the second prong of *Duren*, and some courts have since ruled that smaller disparities in minority representation than had been previously recognized were sufficient to establish a *prima facie* violation of the fair-cross-section requirement.¹²

Finally, it is not clear how much proof a trial judge might require to find that a state discriminated in voter registration or list maintenance procedures. Some judges might be willing to consider evidence of discriminatory treatment while others might require a formal judicial decision, which is a considerably higher bar. Although a successful jury challenge might still be out-of-reach in many courts, experienced jury managers know that any serious challenge to the integrity of the jury system is time-consuming, expensive, and extremely stressful for everyone involved. For this reason, if not others, courts that are aware that their jury pools underrepresent minorities, and either know or strongly suspect that their reliance on the voter registration list substantially contributes to the underrepresentation of

the pool, should strongly consider moving to multiple source lists to minimize the risk of jury challenges raising these arguments.

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¹ 439 U.S. 357 (1979). For a more detailed description, see [A Primer on Fair Cross Section Jurisprudence](#) (NCSC 2010).

² If the defendant establishes a *prima facie* violation of the fair-cross-section requirement, the burden shifts to the State to show a compelling governmental justification for the exclusion. *Id.* at 367-69.

³ *U.S. v. Cecil*, 836 F.2d 1431, 1448 (1988).

⁴ *Shelby County v. Holder*, 570 U.S. 2 (2013).

⁵ Sharad Goel et al., [One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections](#) (Jan. 13, 2017).

⁶ Greg Palast, [The GOP's Stealth War Against Voters](#), ROLLING STONE (Aug. 24, 2016).

⁷ See [SCOTUS Blog](#).

⁸ Andy Sullivan & Grant Smith, [Use It or Lose It: Occasional Ohio Voters May Be Shut Out in November](#), Reuters (June 2, 2016).

⁹ Linda Greenhouse, [The Courts Begin to Call Out Legislators](#), NEW YORK TIMES (Aug. 12, 2016).

¹⁰ See, e.g., *Michigan v. Robinson*, No. 06-009711-01 (Mich. 3d Cir., Nov. 12, 2007); *Michigan v. Jackson*, No. 00-000792 (Mich. 3d Cir., Nov. 12, 2007).

¹¹ 130 S. Ct. 1382 (2010).

¹² See, e.g., *Garcia-Dorantes v. Warren*, 801 F.3d 584, 600-04 (6th Cir. 2015)(absolute disparity of 3.45% and comparative disparity of 42% sufficient to satisfy *Duren*); *State v. Plain*, No. 16-0061 (Iowa June 30, 2017) (7.1% absolute disparity and 79% comparative disparity). A close examination of contemporary cases also reveals an ongoing ambivalence about whether the ultimate objective of the requirement is a more representative jury pool or a nonexclusionary 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, even if the level of underrepresentation is substantial. Other courts have found fair-cross-section violations in cases with comparatively low levels of disparity if there is any evidence of systematic exclusion.