

Jury Pools and Fair Cross Section Requirement

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Issue

This report addresses various questions about jury pools and the constitutional requirement that jury pools represent a fair cross section of the community. The Office of Legislative Research is not authorized to issue legal opinions and this report should not be considered as one.

- 1. What are the constitutional limits on a state's authority to target jury summonses geographically or otherwise take steps to ensure that juries are drawn from a fair cross section of the community? Have any courts held or suggested that geographic oversampling (such as targeting summonses to zip codes with higher than average undeliverable rates in previous years) would constitute an equal protection violation?**

Overview

In short, we found few cases directly addressing these issues. While there is considerable case law (both in Connecticut and across the country) involving the “fair cross section” requirement for jury pools, most of the cases involve challenges that a given jury system does not meet the minimum constitutional standards. There are few cases exploring the limits of how far a state could go to ensure that the jury pool represents a fair cross section of the community. We did not find any cases holding or suggesting that geographic oversampling would constitute an equal protection violation. While not addressing geographic oversampling, in *State v. Nims*, the state Supreme Court

noted that it would be constitutionally impermissible to intentionally include or exclude any members of a discernable class in an effort to create a proportional jury panel.

In a 1998 case (*U.S. v. Ovalle*), the Sixth Circuit Court of Appeals struck down the federal Eastern District of Michigan’s “subtraction” method in its jury selection program. Under that method as applied, in an attempt to increase Black representation in jury pools, one in five non-Black prospective jurors were randomly removed from the jury wheel.

As further explained under question 2 below, certain courts across the country use geographic oversampling as a mechanism for increasing minority representation in jury pools. A 2014 report by the National Center for State Courts about one such court (Michigan’s Third Judicial Circuit, which includes Detroit) raised concerns that the existing method could eventually lead to over-representation of Black jurors in the pool, presenting a risk that the system could be subject to legal challenges alleging the systematic exclusion of white jurors. We found a few cases addressing geographic oversampling, but not explicitly addressing the constitutional limits on this practice.

Fair Cross Section Requirement

Challenges that a jury pool does not represent a “fair cross section” of the community generally derive from the U.S. Constitution’s 6th Amendment right to an impartial jury (as incorporated against the states under the 14th Amendment) or the 14th Amendment’s equal protection clause (they also occasionally are presented as due process challenges; see discussion of *State v. Nims* below). While there are similar clauses in the state Constitution, Connecticut state courts generally borrow from federal jurisprudence and apply similar tests as federal courts when analyzing fair cross section challenges.

In *Duren v. Missouri*, the U.S. Supreme Court established a framework to assess fair cross section challenges under the 6th Amendment. To establish a prima facie violation under *Duren*, a defendant must show that (1) the group allegedly 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 community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. If the prima facie case is met, the burden shifts to the state to show a compelling justification for this systematic exclusion (*Duren v. Missouri*, 439 U.S. 357, 364 (1979)). In *Duren*, the Court struck down a Missouri statute that granted women who requested it an automatic exemption from jury service.

To show a prima facie equal protection violation, a litigant must show “(1) underrepresentation of a recognizable group; (2) substantial underrepresentation over a significant period of time; and (3) a

selection procedure susceptible to abuse or not racially neutral” (*State v. Castonguay*, 192 Conn. 416, 421 (1984), citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)). Overall, the analysis of fair cross section challenges under the 6th Amendment and equal protection clause is generally similar, except (1) courts sometimes use different statistical methods to assess whether there was underrepresentation meeting the standards of each test and (2) for equal protection cases, there is an intent element lacking from 6th Amendment cases.

It appears that in most court challenges under these tests, the court holds that the challenger failed to satisfy the tests above, and therefore did not establish a constitutional violation.

For example, in *State v. Gibbs*, 254 Conn. 578 (2000), the state Supreme Court held that the defendant failed to establish a prima facie 6th Amendment or equal protection violation. The court held that the “slight underrepresentation [of Hispanic persons] alleged by the defendant simply fails to rise to the level” of a 6th Amendment violation.

The court also held that, even if it assumed that the defendant met the second prong of the equal protection test, he could not meet the third prong because “the factors that the defendant claims as proof of discriminatory intent, for example, the use of outdated addresses, and the number of no-shows for jury service in the Hispanic community, clearly were shown to be the product either of random chance, or of factors external to the system” (*id.* at 596). In addition, the court concluded that the statutory requirement that jurors be proficient at English did not violate the equal protection clause.

Following are examples of cases in which the court did find a violation of the fair cross section requirement.

- *U.S. v. Jackman*, 46 F. 3d. 1240 (2d Cir. 2000): due to procedural errors, all Hartford and New Britain residents were excluded from the jury pool for a certain period in the Hartford Jury Division of the federal district court. (For example, a programming error caused the letter “d” in Hartford to indicate to the computer system that all potential Hartford jurors were deceased and thus unavailable for jury service.) Due to the demographics of these cities and the district as a whole, this led to a significant underrepresentation of Black and Hispanic persons in the pool.

In an earlier case, the district court ruled that this procedure constituted a 6th Amendment violation (*U.S. v. Osario*, 801 F. Supp. 966 (D. Conn. 1992)). In *Jackman*, the Second Circuit concluded that the jury clerk’s attempted resolution of this issue had been inadequate, leading to a 6th Amendment violation. The clerk had still used the prior jury pool (missing Hartford and New Britain residents) as the first list to draw from, and supplemented it with a new corrected list, rather than relying only on the new list with both cities included.

- *Alston v. Manson*, 791 F.2d. 255 (2d Cir. 1986): the Second Circuit upheld the district court's determination that Connecticut's jury selection system as used in 1975 constituted an equal protection violation. At that time, state law "established a strict quota system which favored representation of the smaller towns" and it was "undisputed that a larger concentration of the black population in Connecticut lives in the more populated urban settings" (*id.* at 256).

State v. Nims and Proportional Representation

In *State v. Nims*, 180 Conn. 589 (1980), the state Supreme Court held that it violated due process for the jury clerk to have kept separate piles of juror cards for men and women, and for the juror panel to have been selected from those separate piles. The court noted that "[H]owever well intentioned, the separation was a conscious effort by the jury clerk to take a person's sex into account in the selection of the jury panel" (*id.* at 594).

The court noted that a defendant is entitled to a jury drawn from a fair cross section of the community but is not guaranteed a jury that is proportional to the population. The court continued (*id.* at 595-96):

Nor is a proportionally represented jury constitutionally mandated... To the contrary, any effort to create a proportionally representative jury is constitutionally impermissible. *Cassell v. Texas*, 339 U.S. 282, 286-87 (1950). In *Shepherd v. Florida*, 341 U.S. 50, 54-55 (1951), the United States Supreme Court, on the basis of *Cassell*, reversed a state court decision which upheld the selection of a grand jury on the basis of proportional representation. The principle which evolves from these cases is that any attempt to stack a jury panel by intentionally including or excluding any members of a discernable class runs afoul of both due process and the right to a jury trial. *United States v. Hawkins*, 566 F.2d 1006, 1015 (5th Cir. 1978) (some internal citations omitted or truncated).

U.S. v. Ovalle, 136 F.3d 1092 (6th Cir. 1998)

In this case, Hispanic defendants challenged the Eastern District of Michigan's jury selection system. The court held that the district's jury selection plan violated both federal law and equal protection principles.

Under the district's jury selection plan, if the court determined that a cognizable group was substantially overrepresented in the jury wheel, "the Chief Judge shall order the Clerk to remove randomly a specific number of names so that the population of each cognizable group in the qualified wheel closely approximates the percentage of the population of each group in the area of each place of holding court[.]" The district's chief judge later signed an administrative order implementing this plan, requiring the removal of one-fifth of non-Black jurors from the wheel.

The court held that where “race is the predominant factor in excluding certain individuals from the jury wheel there must be a compelling governmental interest for such action and the means chosen must be narrowly tailored to meet that interest.”

The court determined that the government had a compelling interest in ensuring that jury pools represented a fair cross section of the community, but the plan was not narrowly tailored to meet that objective, and thus was unconstitutional. Following is an excerpt of the court’s discussion of this issue:

First, although one purpose of the plan is to ensure that all citizens have an opportunity to be considered for service on grand and petit juries, clearly the one-in-five white or other jurors eliminated from this qualified jury wheel did not have the same opportunity to serve as did the African-American members of the wheel who were protected from elimination.

Second, although the government contends that the Jury Selection Plan is designed to create a jury wheel that represents a fair cross section of the community, the plan is not designed in such a way to ensure that a fair cross section of the community is represented in the qualified jury wheel. The plan does not even attempt to assure that Hispanics or any other cognizable group except for African-Americans are appropriately represented on the jury wheel....

Rather than affirmatively removing otherwise qualified jurors because of their racial status, alternative methods of broadening membership in the jury pool could have been utilized. The Eastern District of Michigan could have chosen to supplement the voters’ list and drivers’ license list to diversify the pool of potential jurors... What is not permitted is the exclusion of potential jurors for the sole reason that they are not African-American, absent a showing that such exclusion is a narrowly-tailored remedy to meet a compelling governmental interest (*U.S. v. Ovalle*, 136 F.3d 1092, 1106-07).

Cases Referencing Geographic Oversampling

Following are examples of cases which in some manner reference geographic oversampling or similar means to increase the representation of minority groups in the jury pool. In these cases, the court did not directly address the constitutional limits of these methods.

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

In this case, the Second Circuit Court of Appeals upheld the defendant’s federal conviction. The defendant’s principle argument was that the New Haven Division of the District of Connecticut’s jury selection system underrepresented Black and Hispanic individuals, in violation of the 6th Amendment. The court held that the defendant failed to establish the second or third prong of the *Duren* test: unfair underrepresentation and systematic exclusion.

The defendant contended, among other things, that systematic exclusion of minority populations could be shown by the district court’s failure to adopt the recommendations of

the Magistrate Judge, who was overseeing the implementation of the district’s jury selection system. The Appellate Court discussed this issue as follows:

Magistrate Margolis recommended that the District of Connecticut should “oversample” Hispanic communities—meaning that these communities should receive concentrated mailings in an attempt to increase responses from the community. The failure to adopt this recommendation does not illustrate systematic exclusion. As the district court recognized, such a targeting of a specific minority population might well be self-defeating since it would undermine the randomness of selection—an attribute of jury selection that is keenly desired.

Furthermore, the failure to accept this recommendation is not an inherent feature of the jury selection system. In short, there is no persuasive evidence that the underrepresentation is due to the failure to adopt this recommendation (*U.S. v. Rioux*, 97 F.3d 648, 658-59 (2d Cir. 1996)).

- *In re United States*, 426 F.3d 1 (1st Cir. 2005)

In this case, a federal district court ordered changes to the jury selection process for the Eastern Division of the District of Massachusetts to ameliorate a racial disparity.] Among other things, the judge directed the jury administrator to draw an additional name from the master wheel, from the same zip code, for each questionnaire that was (1) returned “undeliverable” or (2) not returned after two attempted mailings.

On appeal, the First Circuit concluded that the district court’s proposal was a de facto amendment to the district’s jury selection plan, and thus was invalid because, among other things, it did not satisfy the law’s procedural requirements for plan amendments.

The entire district later implemented a jury plan that oversamples undeliverable summonses, in a similar method to the district court’s plan in this case (see question 2 below).

2. What changes have other states taken to their jury summoning process to increase the diversity of their jury pools?

With the help of the National Center for State Courts’ [Center for Jury Studies](#), we were able to identify three states (Illinois, Georgia, and Michigan) that have attempted to adjust their juror summoning process to increase the fair cross section of jury pools.

Additionally, at least three federal district courts have jury plans that allow oversampling for such things as undeliverable summonses or nonresponses. (As cited in a 2018 [law review article](#) on jury selection, in an unreported 2009 federal District Court case, the court suggested in dicta that such jury plans emphasizing proportional representation of a district’s geographic subdivisions are less

vulnerable to equal protection challenges (*U.S. v. Bates*, No. 05-81027 (E.D. Mich. Dec. 15, 2009).) (Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 U. Mich. J. L. Reform 1 (2018)).

Finally, you may find New York's Office of Court Research 2011 [report](#) on jury representativeness in Monroe County helpful. The report studied, among other things, the potential impact of oversampling to increase minority representation.

Other State Actions

Illinois. The Illinois Conference of Chief Circuit Judges [convened](#) a special committee on jury representation. The Jury Representation Committee conducted a six-month pilot program in five counties designed to study the representation in jury pools from some of the most diverse counties in the state through alternative summoning procedures.

Michigan (Third Judicial Circuit Court). In 2013, Michigan's Third Judicial Circuit Court upgraded its jury automation system. As part of the upgrade, the court converted its juror summoning and qualification process from a two-step to a one-step process. The Court decided to continue to augment the jury pool with supplemental jury summonses to certain municipalities (e.g., Detroit). Under the one-step process, there is a follow-up on jurors who fail to appear for jury service by sending postcards advising them to call and reschedule for a new date.

A 2014 report by the National Center for State Courts (see attached) raised concerns that the existing method could eventually lead to over-representation of Black jurors in the pool, presenting a risk that the system could be subject to legal challenges alleging the systematic exclusion of white jurors. The report notes that there is some persuasive authority that suggests using supplementation to achieve the objective of a fair cross section in the jury pool is permissive, but it should be done only with explicit court authority and only to compensate for underrepresentation that cannot be remedied through other means. (For more information see pages 8-10 of the report.)

Georgia (Repealed "Forced Balancing" in 2011). In 2011, Georgia [passed](#) the Jury Composition Reform Act that ended "forced balancing" of juries. "Forced balancing" was a method that ensured the adequate representation of women and African-Americans on juries. The bill's sponsor argued that the repeal was needed because forced balancing oftentimes failed to produce venires that reflected distinct groups and the venires were vulnerable to statutory and constitutional challenges. These challenges could be due to forced balancing using data from the last decennial census. Because there had been significant demographic changes between census

years, forced balancing would sometimes lead to jury pools that were not reflective of the current population. (In 2004, the Georgia Supreme Court held that the forced balancing system did not violate the defendant's equal protection rights, but as noted above, the 6th Circuit invalidated a race-based system of removing non-Black names from jury lists to achieve balancing.)

The process of forced balancing looked at the absolute disparity to determine whether the jury lists adversely underrepresents whites, blacks, men, or women. Absolute disparity is calculated by subtracting the percentage of the group in the jury venire from the group's percentage in the county's population. The difference shows the group's degree of underrepresentation. Jury commissioners were required to balance the jury box if there was more than a 5% disparity. But the calculations were only for "Males," "Females," "African-Americans," and "Whites."

For a comprehensive discussion of Georgia's former "forced balancing" approach and subsequent changes, see this 2012 *Georgia Bar Review* [article](#) (starting on page 13).

Federal District Courts

Illinois. In 2013, the Northern District of Illinois [adopted](#) a zip code-weighted mailing plan for both undeliverable summonses and non-responses. For all juror notifications that are returned as "undeliverable," the clerk must issue the same number of new juror notifications to be mailed in the same zip code. Additionally, if there is no response to a juror notification letter after 14 days, the clerk must mail a paper juror qualification questionnaire. If there is still no response, the clerk must issue the same number of new juror notification letters to addresses within the same zip code as the non-responding questionnaires had been sent.

Kansas. The federal District Court of Kansas [adopted](#) a plan similar to Illinois' Northern District with the clerk issuing the same number of forms within the same zip code where the undeliverable or non-responding forms were sent.

Massachusetts. The federal District Court of Massachusetts [allows](#) oversampling of jury summonses. The jury plan allows the clerk to make an initial random drawing from the Master Jury Wheel. For each summons returned as "undeliverable" the clerk must draw at random from the supplemental jury wheel of someone who lives in the same zip code as the undeliverable summons.

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