SYSTEMATIC NEGLIGENCE IN JURY OPERATIONS: WHY THE DEFINITION OF SYSTEMATIC EXCLUSION IN FAIR CROSS SECTION CLAIMS MUST BE EXPANDED

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I. INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees the right of criminal defendants to "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[1] Interpretation of this provision by the Supreme Court has made it clear the phrase "impartial jury of the State and district wherein the crime shall have been committed" requires the jury be selected from "'a representative cross-section of the community.'"[2] This phrase—a representative or fair cross section of the community—operates as legal shorthand for volumes of caselaw defining (1) the different types of groups making up a "community,"[3] (2) the proper method of measuring representation and the extent of deviation that is unfair for constitutional purposes,[4] and (3) the lengths to which courts are obligated to go in ensuring defendants' rights are adequately protected.[5]

In *Duren v. Missouri*, the Supreme Court articulated a three-prong test defendants must satisfy to establish a prima facie violation of the fair cross section requirement:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that 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; and (3) that this underrepresentation is due to systematic exclusion of the group in the

1. U.S. CONST. amend. VI.

2. Taylor v. Louisiana, 419 U.S. 522, 528 (1975). Congress codified this requirement utilizing the language "fair cross section." Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53, 54 (codified at 28 U.S.C. § 1861 (2006)).

3. *See, e.g.*, United States v. Gelb, 881 F.2d 1155, 1161 (2d Cir. 1989) (citing Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987)) (finding Jews constitute a distinctive group for purposes of the Sixth Amendment); State v. Fulton, 566 N.E.2d 1195, 1201 (Ohio 1991) (finding members of the Amish religion comprise a distinctive group).

4. *See, e.g.*, United States v. Clifford, 640 F.2d 150, 155–56 (8th Cir. 1981) (considering the concepts of "absolute disparity" and "comparative disparity," along with the two concepts' appropriate percentage difference).

5. *See, e.g.*, United States v. Purdy, 946 F. Supp. 1094, 1103 (D. Conn. 1996) (quoting United States v. Rioux, 930 F. Supp. 1558, 1578 (D. Conn. 1995)) ("'[T]he Sixth Amendment does not impose an affirmative obligation on the courts to counteract [such private sector influences as voting patterns, demographic trends, and cultural differences].'" (alteration in original) (citations omitted)).

jury-selection process.[6]

It is fairly well-settled that the first prong of *Duren* refers to gender, race, and ethnicity,[7] or in rare circumstances, religious affiliation[8] and national origin.[9] Most of the reported cases over the past three decades have tended to focus on *Duren*'s second prong, specifically the appropriate way to measure underrepresentation and the extent of underrepresentation that violates constitutional norms.[10] As a practical matter, the amount of underrepresentation must be substantial, and few defendants are able to satisfy this second prong.[11] With few exceptions, the cases that have survived the hurdle of *Duren*'s second prong ultimately fail because the underrepresentation was not the result of "systematic exclusion."[12] Courts have consistently held the Constitution cannot hold trial courts accountable for protecting the rights of defendants if they lack the ability to prevent or

6. Duren v. Missouri, 439 U.S. 357, 364 (1979). The three-prong test was drawn from Justice White's opinion in *Taylor v. Louisiana*. *See id.* at 358–59 (citing Taylor v. Louisiana, 419 U.S. 522 (1975)). *Taylor* was the first Supreme Court case to "squarely h[o]ld that the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." *Taylor*, 419 U.S. at 535–36.

7. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 175 (1986) ("Our prior jury-representativeness cases . . . have involved such groups as blacks, women, and Mexican-Americans . . . . [E]xclusion . . . on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an 'appearance of unfairness.'" (citations omitted)).

8. *See, e.g.*, *Fulton*, 566 N.E.2d at 1201 ("In construing the standard set forth in *Duren* we find that members of the Old Order Amish religious faith do comprise a 'distinctive' group.").

9. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 479–80 (1954) ("The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.").

10. *See, e.g.*, *Rioux*, 97 F.3d at 655–58 (citations omitted) (focusing on the second prong and contrasting the statistical decision theory, comparative disparity method, and the absolute disparity–absolute numbers method to determine whether underrepresentation of blacks and Hispanics was constitutionally significant).

11. *See* People v. Smith, 615 N.W.2d 1, 10 (Mich. 2000) ("[A]lthough defendant could have expected sixty-eight black prospective jurors in the qualified jury pool, the standard deviation for a purely random sample is twenty-six, so the instant allocation is not statistically significant.").

12. *See Rioux*, 97 F.3d at 658 (citing Duren v. Missouri, 439 U.S. 357, 366 (1979)) ("[I]f we assume for the sake of argument that Rioux has established an unfair underrepresentation, he is impaled on the third prong of the *Duren* test . . . [and] [e]ven if [statistics can prove systematic exclusion,] they would have to be of an overwhelmingly convincing nature.").

control the factors that undermine or interfere with those rights.[13] Hence, no constitutional violation occurs when underrepresentation is the result of nonsystematic factors.[14]

This Article argues that in the context of fair cross section jurisprudence, courts' ability to control, or at least greatly mitigate, the extent of minority underrepresentation due to nonsystematic factors is greatly underestimated. Over the past forty years, courts have implemented a number of effective practices to ensure an inclusive and representative master jury list and to minimize undeliverable, nonresponse and failure-to-appear, and excusal rates. All of these techniques demonstrably improve the demographic representation of the jury pool. The vast majority of courts employ these techniques on a routine basis. By perpetuating the misconception that courts have no responsibility to address causes of underrepresentation other than those inherent in the system itself, caselaw has created a functional safe harbor in which courts can ignore substantial minority underrepresentation in their own jury pools as long as they can plausibly deny actively contributing to the problem. Indeed, by exempting minority underrepresentation caused by nonsystematic factors from constitutional enforcement, these cases actually provide some disincentive for some courts to implement effective jury management practices in their routine summoning and qualification procedures.

Part II provides a brief overview of contemporary fair cross section jurisprudence with an in-depth examination of several examples of systematic and nonsystematic exclusion that have formed the basis of various jury challenges in recent years. Part III describes a number of proven jury management practices that are highly effective remedies for many of the nonsystematic factors associated with minority underrepresentation. Part IV proposes a negligence theory of jury system management and argues that if a court's failure to manage its jury system in a reasonably effective manner contributes to legally insufficient minority representation in the jury pool, the court's negligent jury management is itself systematic exclusion. Finally, the Article concludes with some caveats about the reach of this theory due to limited court resources and the legal deference given to state policymakers with respect to

13. *See, e.g.*, United States v. Biaggi, 909 F.2d 662, 677 (2d Cir. 1990) (discussing underrepresentation of African-Americans and Hispanics in the jury venire as influenced by those groups' failure to register to vote).

14. *See id.*

qualification, exemption, and excusal requirements for jury service.

II. OVERVIEW OF CONTEMPORARY FAIR CROSS SECTION JURISPRUDENCE

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.[15] These constitutional provisions prohibit minorities from being excluded from the jury pool systematically or intentionally.[16] These provisions may also be supplemented by state constitutional or statutory requirements.

As noted above, the contemporary test to determine whether a violation of the fair cross section has occurred is the *Duren* test. In *Duren*, the Court addressed the question of whether an automatic exemption from jury service offered to women was unconstitutional given the percentage of women in the pool from which the jury was selected was reduced from 46% of the community to 15% of the pool from which the defendant's jury was selected.[17] The Court noted once the defendant has met the three-prong test, thereby establishing a prima facie violation of the fair cross section requirement, the burden shifts to the state to demonstrate that "attainment of a fair cross section [is] incompatible with a significant state interest."[18] *Duren* made it clear, however, that the states retain broad discretion to define eligibility qualifications and exemption criteria for jury service.[19]

15. *See* Taylor v. Louisiana, 419 U.S. 522, 525–26 (1975).

16. The historical progression of fair cross section jurisprudence is interesting:

> [T]he 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.

NAT'L CTR. FOR STATE COURTS, JURY MANAGERS' TOOLBOX: A PRIMER ON FAIR CROSS SECTION JURISPRUDENCE 1–2 (2010) [hereinafter NCSC PRIMER], *available at* http://www.jurytoolbox.org/more/Primer%20on%20Fair%20Cross%20Section.pdf; *see also* Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 335–43 (2005).

17. *Duren*, 439 U.S. at 365–66.

18. *Id.* at 368.

19. *Id.* at 367–68.

A. *Distinctive or Cognizable Groups*

A "distinctive" group for fair cross section purposes often encompasses groups that see themselves as distinct from other groups, are seen by others as a distinct group, and hold values not necessarily held by other groups. Many court opinions also refer to these groups using equal protection terminology of "cognizable" groups.[20] In most instances, these groups are defined by immutable characteristics—especially gender, race, and ethnicity—and are recognized as valid groups under both Sixth Amendment and Equal Protection Clause criteria.[21] Some courts have also found groups characterized by religious affiliation or national origin to be distinctive groups under the Sixth Amendment.[22] 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—Jews in New York City[23] and Amish persons in Ohio,[24] for example.

B. *Fair and Reasonable Representation*

The second requirement under *Duren* is the representation of the group alleged to be excluded is not fair and reasonable compared to the proportion of that group in the community.[25] An important caveat related to this requirement is the relevant "community" consists of individuals who are eligible for jury service in the jurisdiction—they are *qualified* for jury service.[26] To qualify for jury service in most jurisdictions, the person must be a United States citizen, reside in the geographic area served by the court, have reached the state's age of majority, be able to speak and understand English, and not be subject to other legal disqualifications, such as having a previous felony conviction or being mentally incompetent.[27] In many jurisdictions, these qualification requirements result in significant

20. *See, e.g.*, United States v. Gelb, 881 F.2d 1155, 1161 (2d Cir. 1989) ("Jews are a cognizable group . . . .").

21. Under Supreme Court doctrine interpreting the Fourteenth Amendment's Equal Protection Clause, these three demographic characteristics are accorded strict scrutiny, which requires the government to offer a compelling justification for disparate treatment.

22. *See, e.g.*, *Gelb*, 881 F.2d at 1161.

23. *Id.*

24. State v. Fulton, 566 N.E.2d 1195, 1201 (Ohio 1991).

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

26. *See* Berghuis v. Smith, 130 S. Ct. 1382, 1385 (2010).

27. *See, e.g.*, 28 U.S.C. § 1865 (2006) (listing qualifications for jury service in the district courts).

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 noncitizenship or the inability to speak and understand English.

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.[28] Some deviation ordinarily occurs 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 disparity.[29] Absolute disparity describes the numerical difference in the representation of the distinctive group. In *Duren*, for example, the absolute disparity for women was 39.5%.[30] Very few court opinions specify a threshold value over which the absolute disparity signifies a constitutional violation, but in the cases in which a constitutional violation was found, the absolute disparity was generally 10% or more.[31] Most

28. *See, e.g.*, United States v. Biaggi, 909 F.2d 662, 677 (2d Cir. 1990) (citing Alston v. Manson, 791 F.2d 255, 258 (2d Cir. 1986)) (stating a jury selection system that "significantly" underrepresents a minority group *may* violate the fair cross section analysis).

29. *See, e.g.*, People v. Smith, 615 N.W.2d 1, 8–9 (Mich. 2000) ("Most frequently, courts employ the absolute disparity test in Sixth Amendment cases. . . . Courts [also] frequently discuss the second method, comparative disparity . . . ."). Courts also employ a third test—the Standard Deviation test—although this test is typically employed only in Fourteenth Amendment cases and courts have stated, "'[N]o court in the country has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges.'" *Id.* at 9–10 (alteration in original) (quoting United States v. Rioux, 97 F.3d 648, 655 (2d Cir. 1996)); *see also* People v. Bryant, No. 280073, 2010 WL 2836119, at *4 (Mich. App. July 20, 2010). 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 or is 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 the jury pool would have the same percentage of the distinctive group as the result of random chance. Richard Seltzer, John M. Copacino & Diana Roberto Donahoe, *Fair Cross-Section Challenges in Maryland: An Analysis and Proposal*, 25 U. BALT. L. REV. 127, 141 (1996).

30. Fifty-four percent (54%) women in the community minus 14.5% women in the jury pool equals 39.5% absolute disparity. *Duren*, 439 U.S. at 362.

31. *See, e.g.*, United States v. Rioux, 930 F. Supp. 1558, 1570 (D. Conn. 1995)

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.[32]

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* was 73%,[33] indicating the percentage of women in the jury pool was 73% less than would ordinarily be expected for the female population of Jackson County, Missouri, in 1976.[34]

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—less than 10%, for example—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 10% of a jury-eligible community, but only 4% of the jury pool, the absolute disparity would be 6% and the comparative disparity would be 60%. If previous caselaw 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 almost two-thirds less than expected, given their representation in the jury-eligible community. Like absolute disparity, few courts have articulated the degree of underrepresentation that reflects a constitutional violation using this measure. Most courts that have discussed this issue cite values of 50%

(citations omitted) ("[S]ome courts have found disparities of between 10% and 16% sufficient to establish underrepresentation.").

32. *See, e.g.*, United States v. Shinault, 147 F.3d 1266, 1273 (10th Cir. 1998) (citing *Rioux*, 930 F. Supp. at 1570) ("Courts generally are reluctant to find that the second element of a prima facie Sixth Amendment case has been satisfied when the absolute disparities are less than 10%.").

33. Thirty-nine and a half percent (39.5%) absolute disparity divided by 54% jury-eligible population equals 73% comparative disparity.

34. *See Smith*, 615 N.W.2d at 9 (quoting Ramseur v. Beyer, 983 F.2d 1215, 1231–32 (3d Cir. 1992)) (explaining what the comparative disparity percentage indicates).

comparative disparity or higher to establish a fair cross section claim.[35]

C. *Systematic Exclusion*

The final prong of the *Duren* test requires the underrepresentation of the distinctive group be the result of intentional discrimination or systematic exclusion.[36] Systematic exclusion does not have to be intentional, but merely an inherent result of the jury selection process.[37] In *Duren*, the Supreme Court found the policy of offering automatic exemptions to women was systematic exclusion insofar as it was inherent in the jury selection process.[38] Most of the recent examples of systematic exclusion discussed in caselaw are related to the automation used in the jury selection process. In *United States v. Osorio*, for example, the length of the database field for the prospective jurors' city of residence in the master jury list was truncated, causing the system to misread the eighth character as the jurors' status.[39] As a result, all the records for individuals living in Hartford were mistakenly excluded from jury service because the system interpreted the "d" in Hartford to mean "deceased."[40] In addition, the registered voters list for the city of New Britain, Connecticut, was inadvertently excluded during the compilation of the master jury list.[41] Between the computer software error and the omission of the New Britain voter registration list from the master jury wheel, no juror qualification questionnaires were sent to residents of either locality from 1990, when the court began using the newly compiled master jury wheel, through at least 1992.[42] At that time, the largest single concentration of both blacks and Hispanics in the state resided in these cities.[43]

35. *See, e.g.*, *Shinault*, 147 F.3d at 1273 ("The comparative disparities are larger: 48%, 50%, and almost 60%. While these numbers may be more indicative of a Sixth Amendment violation . . . .").

36. Duren v. Missouri, 439 U.S. 357, 366 (1979).

37. *See id.* at 366–67 (holding the unintentional exclusion of women through the exemption system still constituted unconstitutional systematic exclusion).

38. *Id.*

39. United States v. Jackman, 46 F.3d 1240, 1242–43 (2d Cir. 1995) (citing United States v. Osorio, 801 F. Supp. 966, 972–73 (D. Conn. 1992)).

40. *Id.*

41. *Osorio*, 801 F. Supp. at 972.

42. *Id.* at 969–71.

43. Combined, the cities of Hartford and New Britain accounted for nearly 17% of the total population of the Hartford Division of the United States District Court, District of Connecticut. *Id.* at 972. More pointedly, they also accounted for 63% of the voting-age African-American population and 68% of the voting-age Hispanic population for the Hartford Division. *Id.*

Another example of systematic exclusion resulting from an inadvertent computer software error occurred in Kent County, Michigan, from late 2001 through July 2002. During a routine computer upgrade, 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 contained more than 500,000 records.[44] 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.[45] In at least one of the cases that challenged the jury system during that time, African-Americans comprised only 2.2% of the defendant's jury venire, compared to 7.3% of the adult population of the county.[46]

A common pitfall for some courts involves the use of suppression files in their jury automation systems to exclude individuals who have been previously deemed ineligible for jury service.[47] Beginning in 2002, individuals living in Wayne County, Michigan, who had been sent a qualification questionnaire were listed as "active" on the master jury list, a status that suppressed the record from being selected again and sent a second qualification questionnaire.[48] A program to follow up on nonresponders was abandoned because staff felt the program was not worth the time and effort.[49] The result was that those who never responded to the questionnaire remained in "active" status indefinitely, effectively removing them forever from consideration for jury service. Because the nonresponse rate was disproportionately high for predominantly African-American neighborhoods, especially in the City of Detroit, it resulted in substantial underrepresentation of African-Americans in the county-wide jury pools.[50] Similar problems involving the use of suppression files have also been reported in Santa Barbara County, California,[51] and in the D.C.

44. G. Thomas Munsterman, *Jury Management Study for Kent County, Michigan* (May 6, 2003).

45. *Id.* The programming error was acknowledged in a number of cases. *See* Michigan v. Bryant, 2004 Mich. App. LEXIS 712, at *10–11 (Mar. 16, 2004).

46. *Bryant*, 2004 Mich. App. LEXIS 712, at *7–8.

47. *See generally* Paula Hannaford-Agor, *Jury News: Suppression Files: Valuable Tools or Traps for the Unwary?*, 23 CT. MANAGER., no. 3, 2008, at 75 (discussing examples of suppression file errors).

48. PAULA L. HANNAFORD-AGOR & G. THOMAS MUNSTERMAN, THIRD JUDICIAL CIRCUIT OF MICHIGAN JURY SYSTEM ASSESSMENT 2–3, 14–15 (2006).

49. *Id.* at ii n.*.

50. *Id.* at 14–15.

51. Blair v. Superior Court, 14 Cal. Rptr. 3d 602 (Ct. App. 2004) (involving suppression of nonresponders). The County voluntarily changed its jury selection

Superior Court.[52]

Other systematic exclusion problems sometimes arise as a result of courts trying to simultaneously manage the jury systems for multiple localities.[53] For example, from the mid-1980s until July 1992, the circuit court for Kalamazoo County, Michigan, used an allocation system to manage the jury systems for the circuit court—the county-wide general jurisdiction court—and three different divisions of the district court—limited jurisdiction courts serving the cities of Kalamazoo, Portage, and the remaining localities in the county.[54] To manage the four separate jury systems, the jury coordinator first selected an adequate number of records from the master jury list to satisfy the demand for jurors for each division of the district court.[55] All records remaining on the master jury list after the allocations to the district court divisions were reserved for use by the circuit court jury system.[56] The demand for jurors by the Kalamazoo division of the district court effectively removed all residents of Kalamazoo from the circuit court jury pool.[57] The largest concentration of African-Americans in Kalamazoo County resided in the city of Kalamazoo.[58] According to one expert's estimation, this juror allocation system removed an estimated 75% of the jury-eligible African-Americans in Kalamazoo County from consideration in the county-wide jury pool.[59]

process while Blair's appeal was pending. Blair v. Superior Court, 101 P.3d 508, 508 (Cal. 2004).

52. United States v. Powell, 2008 D.C. Super. LEXIS 2, at *29 (Super. Ct. of D.C., Crim. Div. June 17, 2008) (involving suppression of convicted felons and individuals with pending criminal charges).

53. *See* People v. Hubbard, 552 N.W.2d 493, 499–500 (Mich. Ct. App. 1996).

54. *Id.* at 499.

55. *Id.*

56. *Id.* The circuit court in Kent County, Michigan, employed a similar juror allocation process for the twelve municipal courts in Kent County during the same approximate time period. *See* Berghuis v. Smith, 130 S. Ct. 1382, 1389–90 (2010). The impact of this allocation system became one of the contested issues in *Berghuis*, the first case directly involving the fair cross section requirement for which the United States Supreme Court had granted certiorari since *Duren* in 1979. The actual impact of the allocation system in *Berghuis* was much more attenuated, however, and the Court ultimately determined the Supreme Court of Michigan was reasonable in finding the defendant had not provided sufficient evidence the juror allocation system caused the underrepresentation of African-Americans in the Kent County jury pool. *Id.* at 1394.

57. *Hubbard*, 552 N.W.2d at 500.

58. *Id.*

59. *Id.*

D. *Nonsystematic Exclusion*

As a practical matter, valid instances of systematic exclusion are extremely rare.[60] In the vast majority of cases in which the alleged cause of underrepresentation is reported or discussed at any length, courts have ultimately concluded the underrepresentation is the result of various types of nonsystematic exclusion—factors not inherent in the jury selection process itself, but rather "private sector" influences beyond the control of the court.[61] As one court explained, "Because the Sixth Amendment does not impose an affirmative obligation on the courts to counteract [such private sector influences as voting patterns, demographic trends, and cultural differences], the failure to do so cannot constitute systematic exclusion."[62]

1. *Examples of Nonsystematic Exclusion*

Some of the earliest examples of nonsystematic exclusion cited in caselaw involved allegations that the source lists used to compile the master jury list, especially voter registration lists, significantly underrepresented minorities.[63] Typically, these opinions have focused on two justifications for the constitutionality of voter registration or other specified lists. The first is simply deference to the legislature. Depending on the jurisdiction in which the case arises, either Congress or the state legislature expressly mandates that the courts identified in the statute employ the voter registration list or other identified lists as the source of juror names for the master jury list. Unless those lists were created in a manner that unconstitutionally discriminates against minorities, they

60. Or, to be more precise, valid instances of systematic exclusion that result in observable distortions in the demographic composition of the jury pool are extremely rare. This author personally believes the types of automation-related or procedural errors described in these examples are actually quite common but often go undetected because they do not affect the demographic composition of the jury pool.

61. *See, e.g.*, United States v. Rioux, 930 F. Supp. 1558, 1578 (D. Conn. 1995) (citations omitted) ("Discrepancies caused by private sector influences, rather than affirmative governmental action, are not systematic . . . .").

62. United States v. Purdy, 946 F. Supp. 1094, 1103 (D. Conn. 1996) (alteration in original) (quoting *Rioux*, 930 F. Supp. at 1578).

63. *See, e.g.*, United States v. Lewis, 10 F.3d 1086, 1089–90 (4th Cir. 1993); United States v. Biaggi, 909 F.2d 662, 676–78 (2d Cir. 1990); United States v. Cecil, 836 F.2d 1431, 1444–56 (4th Cir. 1988); United States v. Clifford, 640 F.2d 150, 156 (8th Cir. 1981); *see also* HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 44–47 (1993) [hereinafter FUKURAI] (arguing for the use of multiple source lists).

presumptively pass constitutional muster in spite of the existence of any evidence showing significant underrepresentation of minorities.[64]

The second justification is that courts have no authority to compel members of underrepresented groups to register to vote, obtain a state driver's license, or otherwise secure a place on the juror source list.[65] Hence, the exclusion of underrepresented groups is not inherent in the jury selection process; rather, it reflects the self-exclusion of those individuals from juror source lists, which does not violate the fair cross section requirement.[66]

Similar logic applies to disproportionately low minority representation at subsequent stages of the jury selection process. Another factor often associated with underrepresentation of minorities is the percentage of juror qualification questionnaires and jury summonses that are undeliverable. Local migration rates are highly correlated with socioeconomic status, which in turn is correlated with minority status.[67] Individuals with lower socioeconomic statuses tend to change their place of residence more frequently, making it more difficult for courts to locate

64. *Cecil*, 836 F.2d at 1445. The court found:

> The use of [the voter registration list] as the source for jury selection in federal courts has been expressly sanctioned by Congress in 28 U.S.C. § 1863(b)(2). In so doing Congress obviously recognized that such use would necessarily exclude from jury service those individuals, whatever their race, color, gender, or age, who had not registered to vote, but it determined that this use of the voter registration list or list of voters would meet the constitutional requirement of a 'fair cross section' of the community, since no cognizable group would be systematically excluded.

Id.

65. *Id.*

66. *See id.*

67. Compare, for example, the average annual migration rate for whites—15%—and the median per capita income—$29,818—reported by the United States Census Bureau for 2005–2009 to that for African-Americans (20%, $17,887), American Indians and Native Alaskans (19%, $16,716), Asians (18%, $29,679), Native Hawaiians and Pacific Islanders (22%, $20,180), other races (19%, $14,871), two or more races (21%, $14,694), and Hispanics (19%, $15,505). *American FactFinder: 2005–2009 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/DatasetTableListServlet?_ds_name=ACS_2009_5YR_G00_&_type=table&program=ACS&_lang=en&_ts=316460745889 (select tables B07004A–G, B07004I & B19301A–I; then click "Next"; then click "Add"; then click "Show Result") (last visited Apr. 10, 2011). The correlation between migration rate and per capita income by race is marginally significant. *Pearson* correlation coefficient = -.692; $p = .085$.

them for the purpose of delivering a jury summons. Courts have no authority to compel individuals to provide the United States 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.[68]

Failure-to-appear rates are likewise highly correlated with socioeconomic status. In 1998, the American Judicature Society published a study that investigated the reasons some jurors fail to respond to a jury summons.[69] It found nonresponders had significantly less education, perceived themselves as having less knowledge about court proceedings, and were less likely to contact the court to request to be excused or deferred from jury service after receiving a jury summons.[70] More tellingly, the study also found that when socioeconomic factors were taken into account, the impact of race and ethnicity completely disappeared as factors related to nonresponse.[71] That is, a low-income white person was just as likely as a low-income black person to fail to appear for jury service.[72] Because race, ethnicity, and socioeconomic status are so highly correlated, the effect on the jury pool is that disproportionately fewer minorities serve as jurors.[73] The single biggest predictor of nonresponse rates, however, was the jurors' expectations about what would happen if they failed to appear.[74] Individuals who believed nothing would happen were significantly less likely to appear for service than those who believed they would be punished for their failure to appear.[75]

68. *See* United States v. Bates, 2009 U.S. Dist. LEXIS 117073, at *8–9 (E.D. Mich. Dec. 15, 2009).

69. ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS 68 (1998). In the study, Boatright surveyed individuals who failed to appear to a jury summons in Maricopa County, Arizona; Montgomery County, Pennsylvania; King County, Washington; and the United States District Court for the Western District of Tennessee. *Id.* at 31–38.

70. *Id.* at 72–74.

71. *Id.* at 74. Boatright found a significant attitudinal difference regarding jury service between blacks and whites when education, income, and jurisdiction were controlled, but he found no difference in other respects. *Id.*

72. *Id.*

73. FUKURAI, *supra* note 63, at 3–4.

74. BOATRIGHT, *supra* note 69, at 68–69.

75. *Id.* at 72.

2. *Underrepresentation Due to Socioeconomic Factors Is Generally Ruled to Be Nonsystematic Exclusion*

Notwithstanding increased understanding about the factors that lead to increased nonresponse rates, and substantial clues about the types of efforts that courts could undertake to address nonresponse, they are still considered forms of nonsystematic exclusion for the purpose of fair cross section claims. In a formal assessment of the jury system for the Third Judicial Circuit of Michigan, for example, the National Center for State Courts (NCSC) found that disproportionately high nonresponse rates for predominantly African-American neighborhoods in Wayne County, Michigan, accounted for approximately five percentage points of the 13.9% absolute disparity in African-American representation in the jury pool.[76] In a subsequent challenge to the jury system, in which the NCSC assessment was cited as expert evidence, the court ruled the amount of disparity in African-American representation attributable to nonresponse could not be considered for purposes of estimating absolute or comparative disparity in the *Duren* test's second prong because the underlying cause was the result of socioeconomic factors rather than systematic exclusion.[77]

A recent case before the United States Supreme Court broached the question about whether socioeconomic factors could ever be used to support a fair cross section claim.[78] Ultimately, the Court declined to rule on the question, but arguments for and against the proposition were extensively discussed in the underlying cases.[79] In that case, the defendant, Diapolis Smith, had been convicted of second-degree murder and sentenced to life imprisonment in the Circuit Court of Kent County, Michigan, in 1993.[80] During jury selection for the trial, Smith objected to the jury venire on grounds it underrepresented African-Americans.[81] The

76. HANNAFORD-AGOR & MUNSTERMAN, *supra* note 48, at i–ii, 6–7, 17–22. Other factors contributing to underrepresentation of African-Americans included the juror source list—licensed drivers—and the impact of a suppression file to exclude persons who had previously been sent a qualification questionnaire. *Id.*

77. Michigan v. Robinson, No. 06 009711-01, slip op. at 13–14 (Mich. Cir. Ct. Nov. 12, 2007).

78. *See* Berghuis v. Smith, 130 S. Ct. 1382, 1387–88, 1395–96 (2010) (discussing "siphoning" as a systematic exclusion).

79. *Id.* at 1395–96. The Court decided the case on the fact that fair cross section claims like the type Smith raised were not "clearly established," and therefore, the Sixth Circuit Court of Appeals erred in granting Smith habeaus corpus relief. *Id.*

80. *Id.* at 1387, 1389.

81. *See id.* at 1387–89.

initial jury panel consisted of sixty to one hundred prospective jurors, of which, at most, three were identified as African-American.[82] At the time, 7.28% of the adult population in Kent County was classified as African-American.[83] The jury that convicted Smith consisted solely of white jurors.[84] Smith claimed one of the factors contributing to the underrepresentation of African-Americans was the juror-excusal policy employed by the trial court—the court routinely granted excusal requests for hardship due to loss of income, lack of transportation, and lack of childcare, which disproportionately released African-Americans from jury service.[85] At the time of Smith's trial, the Kent County Circuit Court had a three-week term of service and paid jurors only $15 per day.[86]

On appeal, the Supreme Court of Michigan considered Smith's allegations of systematic exclusion based on the excusal policy and concluded that, although socioeconomic characteristics likely contributed to the disproportionate excusal rates for African-Americans, those characteristics were not inherent in the circuit court's jury selection process and thus did not systematically exclude them from jury service.[87] The United States Court of Appeals for the Sixth Circuit, reviewing Smith's habeas corpus application, took issue with the Michigan Supreme Court's conclusions about the disproportionate exclusion of African-Americans due to socioeconomic factors.[88] As the Sixth Circuit stated, "[T]he 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."[89] The Sixth Circuit granted Smith's application for habeas relief and ordered the State of Michigan to either retry Smith within 180 days of the opinion or release him from prison.[90]

82. *Id.* at 1389.

83. *Id.* at 1387.

84. *Id.*

85. *See id.* at 1389–90.

86. Paula Hannaford-Agor, *Jury News: The Fair Cross Section Requirement in the Wake of* Berghuis v. Smith, 25 CT. MANAGER., no. 2, 2010, at 66, *available at* http://www.ncsconline.org/D_Research/cjs/JuryNews2010Vol25Vol2.pdf.

87. People v. Smith, 615 N.W.2d 1, 12–13 (Mich. 2000), *habeas corpus review denied, Berghuis*, 130 S. Ct. 1382.

88. *Berghuis*, 130 S. Ct. at 1391–92.

89. Smith v. Berghuis, 543 F.3d 326, 341 (6th Cir. 2008), *rev'd, Berghuis*, 130 S. Ct. 1382.

90. *Id.* at 345.

These two competing arguments reveal a fundamental difference of opinion on the appropriate way to frame the question. For the Supreme Court of Michigan, the essential fact was that purely socioeconomic factors resulted in disproportionately high excusal rates for African-Americans—an unfortunate outcome to be sure, but not one that violated the Sixth Amendment fair cross section requirement.[91] For the Sixth Circuit Court of Appeals, the essential fact was that "the particular jury selection process employed by Kent County made social or economic factors relevant to whether a[] . . . juror would be excused from service; and because . . . [those] factors disproportionately impact African Americans," they produced systematic exclusion under *Duren*.[92] The question of whether minority underrepresentation is caused by socioeconomic factors or by the policies and practices employed by the court in the jury underlies virtually all cases alleging underrepresentation of minorities. As Professor Abramson wryly noted in his expert report on a jury challenge in the United States District Court for the District of Massachusetts, "'Metaphorically speaking, there has to be a statute of limitations on how long a District can lament the undesirability of the underrepresentation of minorities in its jury pools without feeling compelled to act with imagination to do better.'"[93]

3. *Ineffective Court Policies and Practices Can Lead to Systematic Exclusion*

The former viewpoint—minority underrepresentation due to socioeconomic factors is nonsystematic exclusion—has prevailed in the vast majority of cases in which the issue has been addressed directly.[94] But a small handful of cases adopted the latter viewpoint, at least with respect to factors falling outside of the court's ability to prevent, for which reasonably effective and cost-efficient remedies exist.

One of the earliest examples is *People v. Harris*, in which the

91. *Smith*, 615 N.W.2d at 13 (holding defendant did not prove African-Americans were systematically excluded from the jury pool).

92. *Berghuis*, 543 F.3d at 342.

93. United States v. Green, 389 F. Supp. 2d 29, 40 (D. Mass. 2005) (quoting JEFFREY ABRAMSON, REPORT ON DEFENDANT'S CHALLENGE TO THE RACIAL COMPOSITION OF JURY POOLS IN THE EASTERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS 64–65 (2005)).

94. *See* United States v. Bates, 2009 U.S. Dist. LEXIS 117073, at *50 (E.D. Mich. Dec. 15, 2009) ("The consensus among courts is that, like nonresponses, [socioeconomic] factors are usually not inherent to the jury-selection plans. Therefore, even if such things . . . substantially reduce the presence of minorities in jury pools, this does not amount to systematic exclusion.").

Supreme Court of California ruled that exclusive reliance on the voter registration as the sole source of names for the master jury list led to a jury pool that was not an accurate representation of the community.[95] Technological advances in the 1960s and 1970s made it possible for courts to merge multiple source lists to create a more inclusive and representative master jury list; hence, the proposition that low voter registration rates by African-Americans and Hispanics lead to underrepresentation in the jury pool was no longer justifiable.[96] The California Supreme Court explicitly warned against underrepresentation "'stemming from negligence or inertia'" in the jury selection process, citing cases that recognize "'official compilers of jury lists may drift into discrimination by not taking affirmative action to prevent it.'"[97]

More recently, the United States District Court for the District of Massachusetts ruled that failure to take reasonable steps to address undeliverable and failure-to-appear rates for jurors living in zip codes comprised predominately of minorities violated the federal Jury Selection and Service Act.[98] The court proposed remailing undelivered summonses to different addresses in the same zip code as a remedy.[99]

Perhaps more telling than the cases discussed, however, is the fact trial courts across the country have increasingly implemented jury system procedures designed specifically to address and mitigate these types of nonsystematic exclusion.[100] They do so both because they perceive these

95. People v. Harris, 679 P.2d 433, 446 (Cal. 1984) (quoting People v. Superior Court, 113 Cal. Rptr. 732, 736 (Ct. App. 1974)).

96. Hannaford-Agor, *supra* note 86, at 69. *Harris* also noted that 29 of 46 California counties were already using multiple source lists to compile the master jury list. *Id.* at 437.

97. *Harris*, 679 P.2d at 446 (quoting People v. Superior Court, 113 Cal. Rptr. 732, 736 (Ct. App. 1974)).

98. United States v. Green, 389 F. Supp. 2d 29, 38 (D. Mass. 2005).

99. *Id.* at 75. The United States Court of Appeals for the First Circuit subsequently overturned the order on grounds the remedy unlawfully supplemented the jury plan for the Eastern District of Massachusetts. *In re* United States, 426 F.3d 1, 9 (1st Cir. 2005). In 2006, the United States District Court for the District of Massachusetts amended its jury plan to respond to an undeliverable summons by sending an additional summons to the same zip code. DIST. OF MASS., U.S. DIST. COURT, PUBLIC NOTICE REGARDING MODIFICATIONS TO THE JURY PLAN OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS: PLAN FOR RANDOM SELECTION OF JURORS § 7 (2006), *available at* http://www.mad.uscourts.gov/general/pdf/a2006/JuryPlanandNotes.pdf.

100. Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 97–99 (detailing efforts by

efforts to be morally imperative, if not constitutionally so, and because contemporary principles of effective jury system management now recognize these types of efforts as standard practices that should be observed by all responsibly managed trial courts.[101]

III. PRACTICAL REMEDIES FOR NONSYSTEMATIC EXCLUSION

A. *Using Multiple Source Lists to Create a More Inclusive and Representative Master List*

Courts have no control over whether an individual chooses to register to vote, but as the Supreme Court of California recognized, courts do have control over which source lists to use in compiling the master jury list.[102] Technology permitting courts to merge two or more source lists and identify and remove duplicate records has existed for many years.[103] This allows courts to create more inclusive and representative master jury lists than would be possible using any single list. As recently as 2008, only 71% of the voting-aged citizens in the United States were registered to vote.[104] Had the courts in this country continued to rely exclusively on voter registration lists for the sole source of juror names, they would have fallen far short of the 85% inclusiveness suggested by the NCSC.[105] They would

trial courts to craft jurisdiction-specific solutions).

101. *See, e.g.*, *Green*, 389 F. Supp. 2d at 37–38 ("The Constitution provides a floor, not a ceiling, to the Court's obligation to provide representative juries."); COMM. ON JURY STANDARDS, AM. BAR ASS'N, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 13–17 (1993) [hereinafter ABA STANDARDS] (detailing types of lists that may be used when creating jury pools and suggested steps for implementation).

102. People v. Wheeler, 583 P.2d 748, 758 (Cal. 1978).

103. G. THOMAS MUNSTERMAN, JURY SYSTEM MANAGEMENT 10–11 (1996).

104. SARAH CRISSEY & THOM FILE, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008 1 (2010) [hereinafter U.S. CENSUS BUREAU], *available at* http://www.census.gov/prod/2010pubs/p20-562.pdf.

105. *See* MUNSTERMAN, *supra* note 103, at 4–5 (explaining the difficulties in exclusively using voter lists to meet jury selection goals and defining inclusiveness as "the completeness of the list or combined lists"); *see also* BUREAU OF JUSTICE ASSISTANCE, TRIAL COURT PERFORMANCE STANDARDS AND MEASUREMENT SYSTEM IMPLEMENTATION MANUAL, Measure 3.2.1, at 111 (1997) [hereinafter BJA MANUAL], *available at* http://www.ncjrs.gov/txtfiles/161567.txt ("A standard of 85 percent inclusiveness has been suggested for any list . . . ." (citing NAT'L CTR. FOR STATE COURTS, METHODOLOGY MANUAL FOR JURY SYSTEMS, NCSC Publication CJS-004 (1981))). The ABA's *Principles for Juries and Jury Trials* does not specify a numerical standard for inclusiveness but recommends "the jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction." AM. JURY PROJECT, AM. BAR ASS'N, PRINCIPLES

have also fallen far short of the goal of representativeness, as racial and ethnic minorities are still significantly less likely to register to vote than whites, in spite of several decades of voter registration efforts.[106] The American Bar Association has formally endorsed the use of multiple source lists to create a master jury list.[107] As the commentary to Principle 10(A) of *Principles for Juries and Jury Trials* explains, "By striving for inclusiveness[,] we generally advance representativeness. . . . [and] distribute the experience and educational value of jury service across the greatest proportion of the population."[108] The use of multiple source lists to improve the demographic representation of the master jury list is perhaps the most significant step courts have undertaken since they abandoned the key-man system in favor of random selection from broad-based lists.[109]

Today, the vast majority of state courts and a sizeable number of federal courts have adopted the use of multiple lists as the starting point for a defensible jury system. Forty-three states and the District of Columbia permit the use of two or more source lists to compile master jury lists, of which thirty-one mandate the use of at least two lists and eleven mandate the use of three or more lists—typically, registered voter, licensed driver, and state income or property tax lists.[110] Connecticut, New York, and the

FOR JURIES AND JURY TRIALS, Principle 10(A)(2), at 11 (2005) [hereinafter ABA PRINCIPLES], *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf.

106. *See* U.S. CENSUS BUREAU, *supra* note 104, at 2–5. The United States Census Bureau reports that 73.5% of non-Hispanic white citizens are registered to vote compared to 69.7% of blacks, 55.3% of Asians, and 59.4% of Hispanics. *Id.* at 4, tbl. 2.

107. ABA PRINCIPLES, *supra* note 105, Principle 10(A)(1), at 10 ("The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction."). Principle 10(A)(1) was based on the earlier Standard 2(a). AM. BAR ASS'N, FINAL COMMENTARY ON PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 10 cmt., at 55 (2005) [hereinafter ABA COMMENTARY], *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/american_jury/final_commentary_july_1205.authcheckdam.pdf.

108. ABA COMMENTARY, *supra* note 107, Principle 10(A) cmt., at 56.

109. *See generally* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99–131 (1994) (providing a historical overview of the jury summoning and qualification process in the twentieth century).

110. ALA. R. JUD. ADMIN. 40 (LexisNexis 2005 & Supp. 2010); ALASKA STAT. § 09.20.050 (2010); ARIZ. REV. STAT. ANN. § 21-301(B) (Supp. 2010); CAL. CIV. PRO. CODE § 197(a)–(b) (West 2006); COLO. REV. STAT. § 13-71-107(1) (2010); CONN. GEN. STAT. § 51-222a(a)–(c) (2005); D.C. CODE § 11-1905 (LexisNexis 2010); GA. CODE ANN. § 15-12-40 (West 2003 & Supp. 2010); HAW. REV. STAT. § 612-11(a) (1993 &

District of Columbia use those three lists plus a list of persons receiving unemployment compensation, and New York and the District of Columbia also add persons receiving public welfare benefits.[111] Only seven states restrict the master jury list to a single source list: Arkansas, Mississippi, and Rhode Island use the list of registered voters;[112] Florida, Michigan, and Oklahoma use the list of licensed drivers and state identification card holders;[113] and Massachusetts uses the annual census conducted by each locality.[114] At the federal level, thirty-three of the ninety-four district courts also use supplemental lists, usually combining the lists of registered voters and licensed drivers.[115]

Supp. 2007); IDAHO CODE ANN. § 2-207 (2010); 705 ILL. COMP. STAT. 310/2 (2007); IND. CODE § 33-28-5-13 (2004 & Supp. 2010); IOWA CODE § 607A.22 (2009); KAN. STAT. ANN. § 43-162 (2000); KY. REV. STAT. ANN. § 29A.040(1)–(3) (LexisNexis 1998 & Supp. 2010); LA. CODE CRIM. PROC. ANN. art. 408.1 (2003); ME. REV. STAT. ANN. tit. 14, § 1252-A(1) (2003); MD. CODE ANN., CTS. & JUD. PROC. § 8-206(b) (LexisNexis 2006); MO. ANN. STAT. § 494.410(2) (West 1996 & Supp. 2011); MONT. CODE ANN. §§ 3-15-402, 61-5-127 (2009); NEB. REV. STAT. ANN. § 25-1628 (LexisNexis 2004 & Supp. 2010); NEV. REV. STAT. §§ 6.045, 482.171, 483.225 (2009); N.H. REV. STAT. ANN. § 500-A:1 (LexisNexis 2009); N.J. STAT. ANN. § 2B:20-2 (West 1994 & Supp. 2010); N.M. STAT. ANN. § 38-5-3 (1998); N.Y. JUD. LAW § 506 (McKinney 2003); N.C. GEN. STAT. § 9-2 (2009); N.D. CENT. CODE § 27-09.1-05 (2006); OHIO REV. CODE ANN. § 2313.08 (LexisNexis 2010); OR. REV. STAT. ANN. § 10.215 (West 2003 & Supp. 2010); 42 PA. CONS. STAT. ANN. § 4521 (West 2004 & Supp. 2010); S.C. CODE ANN. § 14-7-130 (Supp. 2010); S.D. CODIFIED LAWS § 16-13-4.1 (2004); TENN. CODE ANN. § 22-5-302 (2009); TEX. GOV'T CODE ANN. § 62.001 (West 2005); UTAH CODE ANN. § 4-404 (LexisNexis 2002); VT. STAT. ANN. tit. 4, § 953 (2005 & Supp. 2010); VA. CODE ANN. § 8.01-345 (2007); WASH. REV. CODE ANN. § 2.36.055 (West 2004 & Supp. 2010); W. VA. CODE ANN. § 52-1-5 (LexisNexis 2009); WIS. STAT. ANN. § 756.04 (West 2001); WYO. STAT. ANN. § 1-11-106 (2009); PETIT JURY PLAN OF THE SUPER. CT. OF THE STATE OF DEL. § 4, at 1 (2002), *available at* http://courts.delaware.gov/Superior/pdf/petitjury_plan.pdf; MINN. R. PRAC. 806 (West 2006 & Supp. 2011).

111. CONN. GEN. STAT. § 51-222a(a)–(c) (2005); D.C. CODE § 11-1905 (LexisNexis 2010); N.Y. JUD. CODE § 506 (McKinney 2003).

112. ARK. CODE ANN. § 16-32-103 (2006); MISS. CODE ANN. § 13-5-8 (West 2010); R.I. GEN. LAWS § 9-9-14.1 (1997).

113. FLA. STAT. ANN § 40.011 (West 2004); MICH. COMP. LAWS ANN. §§ 600.1304, .1310(1) (West 1996 & Supp. 2010); OKLA. STAT. tit. 38, § 18 (2010).

114. MASS. GEN. LAWS ANN. ch. 234, § 4 (West 2000).

115. *See* E-mail from David Williams, Attorney Advisor, U.S. Admin. Office for the U.S. Courts, to Andrew Stengel, Director, Nat'l Election Advocacy, Brennan Ctr. for Justice (Mar. 6, 2008, 12:00 EST) (on file with author) (noting the list is only accurate to the knowledge of David Williams at that time).

B. *Increasing the Renewal Frequency of the Master List to Improve Accuracy*

Creating a representative and inclusive master jury list is not the end of the task, however. List accuracy, with respect to the address records, is a third key objective of an optimal master jury list. It should go without saying that even a perfectly representative and inclusive master jury list is useless if the prospective jurors cannot be located to receive a jury summons. Nationally, an average of 12% of jury summonses are returned by the United States Postal Service marked "undeliverable," which is the single biggest factor contributing to decreased jury yields.[116] Some undeliverable summonses are due to inaccurate addresses, but the vast majority are simply out-of-date because the person has moved to a new residence.[117] Nationally, an estimated 12% of the nation's population moved to a new address each year.[118] Thus, even if a court could begin the year with a completely accurate master jury list, by the end of the year, one out of every eight records would be outdated. Frequent renewal of the master jury list is an essential task in contemporary jury system management. The ABA's *Principles for Juries and Jury Trials* recommended the lists be updated at least annually.[119] More tellingly, of the thirty-nine states that specify the maximum life of a master jury list, twenty-nine states—74%—mandate that courts renew the master jury list at least annually.[120] As an interim measure between master jury list

116. GREGORY E. MIZE, PAULA HANAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 21–22 (2007) [hereinafter MIZE] (averaging the national averages for one-step and two-step courts).

117. *See id.*

118. *See* U.S. CENSUS BUREAU, TABLE B07003, ACS 2005-2009, Geographic Mobility in the past Year by Sex for Current Residence in the United States. The migration rates in the early 1960s were not appreciably different than contemporary migration rates. U.S. CENSUS BUREAU, ANNUAL GEOGRAPHICAL MOBILITY RATES, BY TYPE OF MOVEMENT: 1947–2009 (2010), *available at* http://www.census.gov/population/socdemo/migration/tab-a-1.pdf (showing the percentage of people that have moved every year from 1947 to 2009). The most plausible justification for permitting courts to employ the same master jury list for up to four years was the time and labor involved in compiling the list at that time.

119. ABA PRINCIPLES, *supra* note 105, Principle 10(A)(1), at 10.

120. ALASKA STAT. § 09.20.050 (2010); ARK. CODE ANN. § 16-32-103 (2006); CAL. CIV. PROC. CODE §§ 197–98 (West 2006); COLO. REV. STAT. § 13-71-107 (2010); CONN. GEN. STAT. § 51-222(a) (2005 & Supp. 2010); FLA. STAT. ANN. § 40.011 (West

renewals, courts may update their address records using the Postal Service's National Change of Address (NCOA) database[121] to improve jury yields and minimize wasted printing and postage expenses associated with undeliverable mail.[122] "In almost every instance, the savings in printing and postage costs greatly exceed the cost of the NCOA update."[123] Even if it were not in the interest of courts to use this service to ensure the delivery of jury summons to their more mobile—and disproportionately minority—citizens in the community, it still would be more cost-effective in terms of jury operations.[124]

C. *Improving Jury Summons Response Through Effective Enforcement*

Of course, once the jury summons or qualification questionnaire has been delivered to the prospective juror, it is incumbent on that individual to either appear for jury service on the date summoned or provide a valid

2004); HAW. REV. STAT. § 612-11 (1993 & Supp. 2007); 705 ILL. COMP. STAT. 305/1 (2007); KY. REV. STAT. ANN. § 29A.040 (LexisNexis 1998 & Supp. 2010); LA. CODE CRIM. PROC. ANN. art. 408.1 (2003); MASS. GEN. LAWS ch. 234A, §§ 15–16 (2000); MICH. COMP. LAWS ANN. § 600.1310 (West 1996 & Supp. 2010); MISS. CODE ANN. § 13-5-8 (West 2010); NEB. REV. STAT. ANN. § 25-1628 (LexisNexis 2004 & Supp. 2010); N.H. REV. STAT. ANN. § 500-A:2 (LexisNexis 2009); N.J. STAT. ANN. § 2B:20-2(b) (West 1994 & Supp. 2010); N.M. STAT. ANN. § 38-5-3 (1998); OHIO REV. CODE ANN. § 2313.06 (LexisNexis 2010); OKLA. STAT. tit. 38, § 18 (2010); OR. REV. STAT. ANN. § 10.215 (West 2003 & Supp. 2010); 42 PA. CONS. STAT. ANN. § 4521 (West 2004 & Supp. 2010); S.C. CODE ANN. § 14-7-130 (Supp. 2010); S.D. CODIFIED LAWS § 16-13-1 (2004); TEX. GOV'T CODE ANN. § 62.001(c) (West 2005); UTAH CODE ANN. § 78B-1-106 (LexisNexis 2002); VA. CODE ANN. § 8.01-345 (2007 & Supp. 2010); WASH. REV. CODE ANN. § 2.36.055 (West 2004 & Supp. 2010); WIS. STAT. ANN. § 756.04(3)–(5) (West 2001); WYO. STAT. ANN. § 1-11-106 (2009).

121. *See NCOALink Systems*, U.S. POSTAL SERV., http://www.usps.com/ncsc/addressservices/moveupdate/changeaddress.htm (last visited Apr. 25, 2011). The Postal Service maintains an NCOA database to forward mail after people move to a new address. The Postal Service also licenses private vendors to access the NCOA database to provide updated address records for individuals, families, and businesses that have moved—a service used extensively by commercial mail customers to minimize undeliverable rates. *See id.*

122. Paula Hannaford-Agor, *Jury News: "Neither Snow, nor Rain, not Heat, nor Gloom of Night Stays These Couriers from the Swift Completion of Their Appointed Rounds*," 25 CT. MANAGEMENT., no. 3, 2010, at 65, 66, *available at* http://www.ncsconline.org/D_Research/cjs/Jury%20News%2025-3.pdf ("Anecdotal reports from commercial jury vendors suggest that NCOA address verification returns 10% to 15% of records" from the master jury list with an updated or corrected address.).

123. *Id.* at 66–67.

124. *See id.*

reason he or she should be excused from service. Unfortunately, 6% of individuals summoned for jury service by two-step courts and 9% summoned for jury service by one-step courts do neither; they simply fail to respond to the summons or fail to appear for jury service altogether.[125] Traditionally, courts have characterized nonresponse and failure-to-appear (FTA) rates as factors beyond their control—at least for purposes of fair cross section challenges.[126] That assertion, however, is hard to reconcile with the fact that a jury summons is a court order that the court has inherent authority to enforce. Imagine, for example, a court claiming it lacked authority to enforce a child support order, domestic violence protection order, or civil judgment. All states have statutory or administrative provisions detailing the sanctions—both civil and criminal—for failing to respond to a valid jury summons.[127] Despite this, the reality is some courts simply do not find it worth the time and trouble to enforce jury summonses and no aggrieved party—a parent, domestic violence victim, or judgment creditor, for example—exists who can insist that they do so.[128]

Nevertheless, 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.[129] A

125. MIZE, *supra* note 116, at 22.

126. *See, e.g.*, People v. Currie, 104 Cal. Rptr. 2d 430, 437–39 (Ct. App. 2001) ("[T]he disparity in representation is attributable to the disproportionately high rate of failure to appear by those summoned for jury service . . . . The adoption of . . . measures, even if constitutionally permissible, would appear to be unavailing as a practical matter. . . .").

127. *See, e.g.*, CAL. CIV. PRO. CODE § 209 (West 2006 & Supp. 2010) ("Any prospective trial juror who has been summoned for service, and who fails to attend as directed or to respond to the court or jury commissioner and to be excused from attendance, may be attached and compelled to attend. Following an order to show cause hearing, the court may find the prospective juror in contempt of court, punishable by fine, incarceration, or both, as otherwise provided by law."); IOWA CODE § 607A.36 (2009) ("If a person fails to appear when notified to report or at a regularly scheduled meeting, without providing a sufficient cause, the court may issue an order requiring the person to appear and show cause why the person should not be punished for contempt, and unless the person provides a sufficient cause for the failure, the person may be punished for contempt.").

128. *See, e.g.*, CAL. CIV. PRO. CODE § 209 ("Following an order to show cause hearing, the court *may* find the prospective juror in contempt of court . . . ." (emphasis added)); IOWA CODE § 607A.36 ("If a person fails to appear . . . the person *may* be punished for contempt." (emphasis added)).

129. Summons enforcement is also endorsed by the ABA. *See* ABA PRINCIPLES, *supra* note 105, Principle 10(D)(2), at 12 ("Courts should adopt specific

1997 pilot program in Eau Claire, Wisconsin, for example, found increasingly aggressive steps to follow-up on nonresponders reduced the nonresponse rate from 11% on the first mailing to 5% after the second mailing, and to less than 1% after issuing Order to Show Cause notices and capias warrants.[130] The Los Angeles County Superior Court had equally impressive results from its Summons Sanction Program. The failure-to-appear rate for jury summonses on the first mailing was 41%, but follow-up efforts reduced the final nonresponse rate to 2.7%.[131] As part of a national study of jury operations, the NCSC obtained detailed information from more than 1,400 state courts about their jury operations from 2004 through 2006.[132] It found that 80% of state courts conducted some form of follow-up on nonresponders and FTA jurors.[133] More than half of those courts reported sending a second summons or second notice.[134] Courts that did so reported nonresponse and FTA rates 24% to 46% less than courts that reported no follow-up.[135] All of these studies provide concrete support for the American Judicature Society's findings concerning nonresponse. When the court takes steps to enforce its jury summons, it changes public perceptions about the likelihood of consequences for failure to appear.

D. *Altering Length of Service and Compensation of Jurors to Minimize Excusal Rates and Increase the Ability to Serve*

Of course, not all jurors who respond to a jury summons ultimately serve. Some individuals do not meet the minimum statutory requirements for jury service—United States citizenship, residency in the jurisdiction, aged eighteen or older, English fluency, and not subject to a legal disability,

uniform guidelines for enforcing a summons for jury service and for monitoring failures to respond to a summons. Courts should utilize appropriate sanctions in the cases of persons who fail to respond to a jury summons.").

130. Eau Claire County, WI Juror Qualification Questionnaire Enforcement Program (March–July 1997) (on file with author).

131. Los Angeles County, CA 2003 Summons Sanction Program (on file with author).

132. MIZE, *supra* note 116, at 2–3.

133. *See id.* at 24.

134. *Id.* (showing 52.0% of one-step courts and 51.9% of two-step courts send a second summons).

135. *Id.* at 24–25. Order to Show Cause proceedings and other more aggressive enforcement measures are considerably more time- and labor-intensive than second summons programs, which likely explains why courts are less likely to employ them. Due to their relative infrequency, these types of efforts had less effect on nonresponse and FTA rates overall. *Id.*

such as a felony conviction or mental incompetence.[136] Some of these qualifications can have a substantial impact on the demographic composition of the jury pool as compared to the total population. The baseline for assessing demographic representation in the jury pool, however, is the *jury-eligible* population rather than the total population.[137] Thus, the impact of qualification criteria has already been considered for the purpose of fair cross section analysis. Although the Court in *Duren* made it clear it would accord substantial deference to states in defining qualification and exemption policies, the deference was not unlimited.[138] If those policies systematically excluded distinctive groups from the jury pool, the state would have to show a compelling reason for the exclusion.[139]

Qualification criteria define who is eligible for jury service in the jurisdiction.[140] Exemption criteria, in contrast, are statutory provisions that grant certain categories of individuals the right to opt out of jury service, if desired.[141] Common exemption criteria include previous jury service, advanced age, occupational status—political officeholders, judicial officers, practicing lawyers, public safety officials, and healthcare professionals are frequent categories—and status as the sole caregiver for young children or incapacitated adults.[142] Nationally, an estimated 6% of summoned jurors are exempt from jury service.[143] Excusal provisions grant the trial court discretion to excuse prospective jurors, upon request, for financial or

136. *See, e.g.*, 28 U.S.C. § 1865(b) (2006).

137. *See* United States v. Artero, 121 F.3d 1256, 1261 (9th Cir. 1997) (citing United States v. Cannady, 54 F.3d 544, 548 (9th Cir. 1995)) (requiring defendant to use jury-eligible statistical evidence of Hispanics to allege underrepresentation of Hispanics on jury venire).

138. Duren v. Missouri, 439 U.S. 357, 367 (1979) (citing Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

139. *Id.* at 368 (citing *Taylor*, 419 U.S. at 533–35).

140. *See, e.g.*, IOWA CODE § 607A.4 (2009); N.J. STAT. ANN. § 2B:20-1 (West 1994 & Supp. 2010).

141. MUNSTERMAN, *supra* note 103, at 43–50 (discussing the ABA standards for exemption, excusal, and postponement).

142. *Id.* at 48.

143. MIZE, *supra* note 116, at 22 (finding 7.3% of summoned jurors in one-step courts and 5.1% of summoned jurors in two-step courts are exempted). Previous jury service is the most common category of exemption identified in state jury statutes (forty-seven states), followed by advanced age (twenty-seven states), political office holders (sixteen states), law enforcement officials (twelve states), judicial officers (nine states), healthcare professionals (seven states), sole caregivers (seven states), licensed attorneys (six states), and active military (five states). *Id.* at 15.

medical hardship or extreme inconvenience.[144] Persons who are disqualified are not included in the jury-eligible population. Persons who are qualified, but exempt or excused from jury service, are included. Thus, distortions in the demographic composition of the jury pool due to exemptions and excusals would be subject to review in fair cross section challenges.

Exemption classifications collectively have little relationship to either socioeconomic or minority status,[145] so the impact of exemptions is rarely cited in fair cross section cases. However, excusing jurors due to hardship, especially for financial reasons, can dramatically affect the demographic composition of the jury pool. There are, however, steps courts can take to minimize excusal rates and facilitate the ability of jurors to serve, particularly with respect to the length of the term of service and the amount of compensation provided to offset out-of-pocket expenses. The ABA's *Principles for Juries and Jury Trials* addresses both of these.[146] Principle 2(C) specifies "the time required of persons called for jury service should be the shortest consistent with the needs of justice"—ideally no more than one day or one trial.[147] Principle 2(F)(1) specifies jurors "should receive a reasonable fee that will, at a minimum, defray routine expenses such as travel, parking, meals and child-care."[148] "Courts should be encouraged to increase the amount of the fee for persons serving on lengthy trials."[149] The NCSC's *State-of-the-States Survey of Jury Improvement Efforts* found both of these measures had a substantial impact on court excusal policies.[150] Courts employing a one-day or one-trial term of service, for example, had an average excusal rate of 6%, while the excusal rate in courts with longer terms of service was 8.9%.[151] Similarly, courts with high juror compensation policies had an average excusal rate of 6.6%, while courts with lower compensation policies averaged 8.9%.[152] Implementing optimal policies simultaneously resulted

144. MUNSTERMAN, *supra* note 103, at 48.
145. *See supra* note 143 and accompanying text.
146. ABA PRINCIPLES, *supra* note 105, at 4, 5.
147. *Id.* at 4.
148. *Id.* at 5.
149. *Id.*
150. *See* MIZE, *supra* note 116, at 23–24.
151. *Id.*
152. *Id.* Higher compensation rates were defined as more than the average juror fee of $22 per day for flat-fee courts and $32 per day for graduated-fee courts, and lower compensation rates were defined as less than the average juror fee. *Id.*

in excusal rates that were less than half of those employing less effective policies, 4.1% and 9.3%, respectively.[153]

IV. A NEGLIGENCE THEORY OF JURY SYSTEM MANAGEMENT

As discussed in the previous section, trial courts have substantial ability to minimize the impact of nonsystematic exclusion through routine jury system management. They can update the master jury lists at least annually and employ NCOA updates to reduce the impact of undeliverable summonses. They can enforce the jury summons through effective follow-up programs to reduce the impact of nonresponse rates. In addition, they can minimize the term of service and increase juror compensation to facilitate the ability of jurors to serve if summoned. These efforts not only help secure a jury pool that reflects a fair cross section of the community, but they also improve the efficiency of jury operations through increased jury yield and enhanced public perceptions about the jury system.

Well-respected national organizations such as the ABA and the NCSC endorse these efforts as basic practices that all courts should employ.[154] Commercial jury automation software long ago developed the capability to support these functions.[155] As a practical matter, the vast majority of courts already routinely employ some or all of these practices.[156] In essence, courts have developed functional standards over time to define the minimum requirements for effective jury operations in much the same way that other organizations, industries, and government agencies have developed standards to protect the safety and well-being of consumers, employees, and others affected by their respective operations. It is long overdue that fair cross section jurisprudence acknowledge the existence of these standards by holding courts accountable when their failure to operate the jury system in a reasonably effective manner results in substantial underrepresentation of distinctive groups in the jury pool.

Centuries of caselaw provide exhaustive commentary on the elements of negligence at common law. It is not necessary to recount it in detail

153. *Id.* at 24.

154. *See* ABA PRINCIPLES, *supra* note 105, at 10–17.

155. *See Jury+ Next Generation,* Jury Systems, Incorporated, http://www.jurysystems.com/products_next_gen.html (last visited May 3, 2011); *Agile Jury,* ACS, A Xerox Company, http://www.acs-inc.com/ov_agilejury.aspx (last visited May 3, 2011); Courthouse Technologies, http://www.courthouse-technologies.com /Home.asp (last visited May 3, 2011); Judicial Systems, Incorporated, http://www.judicialsystems.com/ (last visited May 3, 2011).

156. MIZE, *supra* note 116, at 9–10.

here, but it is helpful to briefly list the four elements that must be proven for a plaintiff or claimant to prevail in a negligence action: (1) the defendant had a duty to comport himself or herself in a way that protects others from foreseeable harm, (2) the defendant breached that duty of care, (3) the breach of duty caused the plaintiff or claimant's injury, and (4) the plaintiff or claimant's loss can be compensated.[157] In some situations, the minimum standard of care is defined by statute or regulation such that failure to comply is per se negligence.[158] At common law, the duty of care was that observed by the hypothetical "reasonably prudent person," which traditionally was determined by a jury.[159] In contemporary jury operations, the analogous standard of care may be found either in positive law, such as statutes or administrative rules, and industry standards, such as those promulgated by the ABA and the NCSC, or inferred from the routine practices the vast majority of courts now employ.

An articulation of what this duty consists of might go like this: Courts have a duty to operate their jury systems in a manner that secures an adequate number of prospective jurors to empanel trial juries,[160] ensures that the jury pool reflects a fair cross section of the community,[161] expends court resources in a reasonably efficient manner,[162] and treats jurors with appropriate dignity and respect.[163] The duty is owed not only to the

157. *See generally* PROSSER AND KEETON ON TORTS § 5:30 (Robert E. Keeton ed., 5th ed. 1984).

158. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (1965) ("An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.").

159. *See id.* § 8(b) cmt. b ("When, in light of all the facts related to the actor's conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.").

160. *See generally* MUNSTERMAN, *supra* note 103, at 44–52 (providing detailed instructions on calculating jury yield to estimate the number of jury summons needed to be mailed to secure a sufficient number of qualified jurors for jury selection purposes).

161. *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (requiring a "representative cross section of the community"); *see also* BJA MANUAL, *supra* note 105, Standard 3.2, at 107 ("Jury lists are representative of the jurisdiction from which they are drawn.").

162. *See, e.g.*, BJA MANUAL, *supra* note 105, Standard 4.2 cmt., at 173 ("Trial courts must use available resources wisely to address multiple and conflicting demands.").

163. *See id.* Standard 5.2 cmt., at 224 ("Standard 5.2 requires a trial court to instill in the public trust and confidence that basic court functions are conducted in

litigants that choose trial by jury as the method of resolving their cases, but also to the general public as both taxpayers and prospective jurors.[164] Specific practices to accomplish these goals are either mandated by the legislature, endorsed by well-respected industry groups, or practiced routinely by a majority of courts.[165] These include annual renewal and adequate maintenance of a broadly inclusive, representative, and accurate master jury list; effective follow-up programs for persons who fail to respond to a jury summons; and juror excusal and compensation policies that facilitate jurors' ability to serve if summoned.[166]

Courts that fail to employ these practices breach their duty to the litigants before them and to the general public. Although courts have no authority or inherent ability to address the types of socioeconomic factors that often cause minority underrepresentation in the jury pool, practicing effective jury system management has proven to greatly mitigate the impact of these factors.[167] Ineffective jury system management, in contrast, can result in substantial underrepresentation of distinctive groups in the jury pool, which violates defendants' Sixth Amendment right to an impartial jury and citizens' Equal Protection right to participate in the jury system, and undermines public trust and confidence in the justice system. Although the socioeconomic factors that contribute to minority underrepresentation in the jury pool do not systematically exclude distinctive groups, the failure of courts to mitigate the underrepresentation through effective jury system practices is itself a form of systematic exclusion.

Litigants alleging a violation of the fair cross section requirement would still have to demonstrate that the underrepresentation was the result of the court's failure to practice effective jury system management.[168] This would almost always require expert testimony concerning the precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and a plausible explanation of how the operation of the jury system resulted in their exclusion. Mere speculation about the possible causes of

accordance with the standards in the areas of Expedition and Timeliness and Equality, Fairness, and Integrity.").

164. *Id.* Standard 4.2 cmt., at 173.

165. *See supra* notes 107–15 and accompanying text.

166. *See supra* Part III.

167. *See supra* notes 150–53 and accompanying text.

168. Duren v. Missouri, 439 U.S. 357, 364 (1979) ("[T]his underrepresentation is due to systematic exclusion of the group in the jury-selection process.").

underrepresentation will not substitute for a credible showing of evidence supporting those allegations.[169]

At common law, the remedy for an injury caused by negligence was a monetary award sufficient to make the plaintiff whole. The harm from a violation of a defendant's right to a jury selected from a jury pool that reflects a fair cross section of the community is an unfair trial, which would seem impossible to quantify in monetary terms. This Article does not propose violations of the fair cross section requirement become eligible for compensation as a constitutional tort, such as § 1983.[170] Rather, it contends the traditional remedy available under the Sixth Amendment—a new trial in which the deficiencies of the jury system have been rectified—continues to be the appropriate remedy.

How would the application of this proposed negligent-jury-management theory comport with the Sixth Amendment's historical deference to state rulemaking, presumably including policies concerning jury operations? Would this now make trial courts the functional guarantors of a perfectly representative jury pool? Neither the Constitution nor principles of common law negligence go that far. The caveat expressed by the Supreme Court in *Duren* was:

> States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community. However . . . "the right to a proper jury cannot be overcome on merely rational grounds." Rather, it requires that a significant state interest be manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group.[171]

169. *See, e.g.*, Diggs v. United States, 906 A.2d 290, 298 (D.C. Cir. 2006) (denying defendants' Sixth Amendment claim because they failed to present evidence African-Americans were excluded from jury panels on Mondays); Commonwealth v. Estes, 851 A.2d 933, 936 (Pa. Super. Ct. 2004) (denying the defendant's Sixth Amendment claim because he merely showed underrepresentation and "offered no evidence of a calculated discriminatory practice").

170. 42 U.S.C. 1983 (2006). Section 1983 was enacted specifically to provide a remedy to private citizens deprived of their constitutional rights through the intentional or negligent acts of government agencies. Ironically, judicial officers are generally immune from Section 1983, so the protections of the statute are unavailable for defendants alleging a violation of their right to a jury selected from a fair cross section of the community.

171. *Duren*, 439 U.S. at 367–68 (quoting Taylor v. Louisiana, 419 U.S. 522, 534,

The Court then explained Missouri's exemption policy permitting *all* women to "opt out" of jury service to safeguard the important role by *some* women in home and family life was insufficient justification for their disproportionate exclusion on jury venires.[172] Certainly, the fundamental qualification criteria employed by most state and federal courts would withstand a fair cross section claim, even though some of these qualifications often alter the demographic composition of the jury pool in substantial ways. Citizenship and English fluency qualifications, for example, often systematically exclude substantial numbers of Hispanics and Asians from the jury pool.[173] United States citizenship serves as a presumptive indication that the juror is sufficiently informed about the role and responsibilities of jurors through primary education or acculturation to serve competently if selected as a juror without substantial in-court training.[174]

The English fluency requirement is even more pragmatic. Without exception in the United States, court proceedings are held in English, and the formal trial record is recorded in English. Thus, the English fluency requirement is simply the requirement jurors be able to understand the trial proceedings and deliberate effectively with fellow jurors.[175] Foreign language interpreters are often present to translate for non-English-speaking litigants or witnesses, but the cost of providing interpreters for all potential languages and dialects spoken by prospective jurors would likely be prohibitively expensive.[176]

538 (1975)).

172. *Id.* at 369–70.

173. NCSC PRIMER, *supra* note 16, at 3; *see* United States v. Torres-Hernandez, 447 F.3d 699, 705 n.9 (9th Cir. 2006) (noting the jury-eligible Hispanic population).

174. Paula Hannaford-Agor & G. Thomas Munsterman, *Ethical Reciprocity: The Obligations of Citizens and Courts to Promote Participation in Jury Service*, *in* JURY ETHICS: JUROR CONDUCT AND JURY DYNAMICS 21, 24–25 (John Kleinig & James P. Levine eds., 2006).

175. *See, e.g.*, FREQUENTLY ASKED QUESTIONS ABOUT JUROR SERVICE IN NEW JERSEY 4, *available at* http://www.judiciary.state.nj.us/juryreporting/juryfqa.pdf ("You are required to be able to read and understand English. . . . If you speak English at work, you will most likely qualify as a juror.").

176. Pursuant to a provision of the New Mexico Constitution prohibiting the disenfranchisement of persons from the right to vote *and the right to serve on a jury* on the basis of inability to speak English, the New Mexico courts provide foreign language interpreters to non-English-speaking jurors. N.M. CONST. art. 7, § 3. It is the only state that does so. In other states, the issue of foreign language interpreters for persons of "limited English proficiency" (LEP) has become a topic of great concern among state

On the other hand, the proposition that substandard or negligent jury system management is a prerogative of trial courts deserving substantial deference is implausible, at best, if not outright laughable. At a minimum, courts that suffer from substantial underrepresentation of distinctive groups in the jury pool should be required to demonstrate they are making reasonable, good faith efforts to address the causes of underrepresentation, regardless of whether those causes are systematic or nonsystematic in nature or even whether those efforts are wholly successful. This brings us to the limits of common law negligence.

In the context of contemporary jury management, most courts operate their jury systems in reasonably responsible ways. The days of intentional discrimination against minorities in the jury pool are long gone and instances of actual, if inadvertent, systematic exclusion are extremely rare.[177] The fact remains, however, that many courts continue to struggle with substantial underrepresentation of minorities in the jury pool due to nonsystematic—mostly socioeconomic—factors. If a court has already taken all of the reasonably effective steps to address minority underrepresentation, what more would the Sixth Amendment require if the proposed negligence theory were grafted onto the fair cross section requirement? Some proposals have called for stratified sampling based on race or geography, for example, to compensate for minority

court policymakers. In August 2009, Assistant Attorney General Thomas Perez of the United States Department of Justice (DOJ) sent a letter to all state supreme court chief justices and state court administrators interpreting DOJ regulations and guidelines regarding state court obligations to provide assistance to persons with limited English proficiency. GREGORY E. MIZE, PROVIDING INTERPRETORS FOR "LEP" PERSONS (2011) (on file with author) (explaining the Perez letter's intent). The Perez letter told courts receiving federal grants they must provide interpretive services to all LEP litigants including relevant nonparties regardless of the solvency of a party. *Id.* Thus, state courts are asked to secure and pay for interpretive services in cases involving both the wealthy and nonwealthy, without the ability to recoup costs from those able to pay for them. *Id.*

177. To be more precise, intentional discrimination in the procedures employed to summon and qualify jurors for service is long gone. There is still widespread belief—and substantial evidence to support that belief—that peremptory challenges are routinely exercised with discriminatory intent. *See, e.g.*, Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 156 (1989) (citing Batson v. Kentucky, 476 U.S. 79 (1986)); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 831 (1997) (citing Swain v. Alabama, 380 U.S. 202 (1965)); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 449 (1996) (citing *Batson*, 476 U.S. at 90–93).

underrepresentation.[178] Others have urged courts to track down and require service from all qualified nonresponding jurors or to increase juror fees to fully compensate jurors for lost income.[179] While many of these are creative and well-intentioned strategies to address the ongoing challenge of minority underrepresentation, courts are not required to adopt these solutions to avoid civil liability under common law negligence or a constitutional violation under the Sixth Amendment.

At common law, persons have a duty to act in a way that prevents reasonably foreseeable harm to others—not, however, a duty to prevent all harm.[180] Nor are they required to take steps beyond that of a reasonably prudent person to prevent harm.[181] By the same logic, courts would not be constitutionally required to take all possible steps to address nonsystematic exclusion of distinctive groups. Some steps might prove to be exorbitantly expensive or only marginally effective. Other steps have simply not yet proven effective. Either justification—extraordinary expense or unproven effectiveness—would be sufficiently compelling; the failure to take those steps would not violate the fair cross section requirement.[182]

It is possible that future improvements in jury system management will address minority underrepresentation as or more effectively than the techniques described in this Article. Some noteworthy proposals are already being tested around the country. For example, a small handful of courts have implemented various forms of stratified sampling to address minority underrepresentation. The Third Judicial Circuit Court of Michigan supplements its master jury list with additional records from the City of Detroit to compensate for its disproportionately high nonresponse rates.[183] Since 1989, the State of Georgia has required its courts to summon

178. *See* Domitrovich, *supra* note 100, at 95 (citing G. Thomas Munsterman & Janice T. Munsterman, *The Search for Jury Representativeness*, 2 JUST. SYS. J. 59, 74 (1986)).

179. *Id.* at 95–96 (citations omitted).

180. *See supra* note 159 and accompanying text.

181. *See supra* note 159 and accompanying text.

182. Indeed, this may have been the unspoken basis for the Court's original distinction between systematic and nonsystematic exclusion. In 1968, when the federal Jury Selection and Service Act was enacted, the voter registration list was widely believed to be the most representative list available. S. REP. NO. 90-891, at 16 (1967). Few courts had access to sophisticated automation that would merge multiple lists, and doing so manually would be an extraordinary chore—certainly not one a court could undertake on an annual basis.

183. HANNAFORD-AGOR & MUNSTERMAN, *supra* note 48, at 4–5.

individuals for jury service in proportion to their gender, race, and age.[184] Federal district courts for the Eastern District of Massachusetts and the District of Kansas have implemented procedures to replace undeliverable juror qualification questionnaires and nonresponses with a randomly selected record from the same zip code.[185] These types of remedies, however, are highly controversial because by definition they violate an essential principle of random selection: all persons have an equal probability of being selected for jury service, which courts have come to regard as a touchstone of procedural legitimacy for the jury system.[186] It would indeed take an enormously compelling justification to overcome the presumption that random selection is the preferred method of jury selection. Moreover, these remedies lack the proven track record of the remedies previously discussed.[187] No formal evaluation of the federal court experiments has been reported to date, so their effectiveness is unknown.[188] The NCSC study of the Third Judicial Circuit Court found the

184. GA. UNIFIED APP. R. CT. II(E). The language of the rule refers exclusively to grand jury service, but the state trial courts in Georgia uniformly employ the same summoning and qualification procedures for both grand and petit jury service.

185. MASS. GEN. LAWS ANN. ch. 234A, § 11 (West 2000); U.S. DIST. CT. R. D. KAN. 38.1(g)(2). In theory, it is not clear such remedies would be effective in more diverse jurisdictions in which distinctive groups are geographically better distributed. In fact, by attempting to address minority underrepresentation directly, rather than addressing the underlying causes of the underrepresentation, oversampling might actually further skew the demographic composition of the jury pool due to the higher probability a replacement jury summons or juror qualification questionnaire would be mailed to a nonminority person.

186. The ABA's *Principles for Juries and Jury Trials* recognizes such efforts as legitimate, provided they are implemented to address underrepresentation of distinctive groups and are formally enacted by appropriate authority by the court. *See generally* ABA PRINCIPLES, *supra* note 105, Principles 10–11, at 10–17 (discussing suggested methods for achieving a representative, fair, and impartial jury). The NCSC also recognizes the potential of such efforts but cautions they should only be implemented if traditional methods of improving minority representation have failed to yield satisfactory results. *See generally* HANNAFORD-AGOR & MUNSTERMAN, *supra* note 48, at 25–33 (providing eight different recommendations separated into three stages for achieving a fair cross section).

187. *See supra* Part III (discussing studies on particular methods of jury selection).

188. The effectiveness of these methods of stratified selection are predicated on a highly segregated jurisdiction in which the vast majority of distinctive group members are concentrated within discrete geographic boundaries. The impact of these methods would necessarily be less effective in more integrated communities in which distinctive group members are dispersed throughout the jurisdiction.

supplementation of one-hundred thousand names from the City of Detroit overcompensated for both the disproportionately low representation on the source list and the effects of the suppression files.[189] Reports regarding the Superior Court of Fulton County, Georgia, also suggest the approach has not been fully successful.[190]

There are also practical limits on the usefulness of extremely aggressive enforcement programs, which become increasingly time- and labor-intensive to administer and result in increasingly lower returns on investment in terms of qualified jurors.[191] Like the proverbial tail wagging the dog, at some point the court risks having jury summons enforcement efforts eclipse the legitimate goals of effective jury system management.[192] It is certainly not practical to track down every last nonrespondent, and increasingly Draconian enforcement efforts may be counterproductive because they may undermine public support for the jury system.[193]

Similar concerns attend extreme efforts to overcome the financial hardship associated with jury service that prevents many individuals from being able to serve. Although courts rarely acknowledge it explicitly, most recognize the jury system is heavily subsidized by the in-kind contributions of jurors, their employers, and their communities.[194] Only a small portion of the actual costs of the jury system are incurred by the courts for administrative expenses, juror fees, and mileage reimbursement.[195] Lost income—or alternatively, lost wages paid by employers who compensate

189. HANNAFORD-AGOR & MUNSTERMAN, *supra* note 48, at 15–16.

190. *Nichols' Attorneys Say Jury Selection Flawed in Fulton County*, ACCESSNORTHGA.COM (May 16, 2006), *available at* http://www.accessnorthga.com/detail.php?n=123855&c=2.

191. Typically, the jury yield after the first follow-up notice is similar to the jury yield for the original mailing, but respondents to subsequent follow-up efforts tend to be disqualified at higher rates. NCSC PRIMER, *supra* note 16, at 1.

192. To control costs, many courts employ Order to Show Cause hearings and other aggressive enforcement efforts on a sporadic basis or on only a small proportion of nonrespondents. *Id.* at 2–3.

193. *See* TRACY L. SMEDLEY, BEYOND FAILURE TO APPEAR NOTICES: A REEXAMINATION OF JUROR ATTITUDES IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AND AN EXAMINATION OF OTHER TECHNIQUES TO ADDRESS FAILURE TO APPEAR PATTERNS 58 (2008), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/juries&CISOPTR=172.

194. *See* PAULA HANNAFORD-AGOR, SAVING MONEY FOR EVERYONE: THE CURRENT ECONOMIC CRISIS IS AN OPPORTUNITY TO GET SERIOUS ABOUT IMPROVING JUROR UTILIZATION, *in* FUTURE TRENDS IN STATE COURTS 50, 52 (Carol R. Flango et al. eds., 2009).

195. *See id.* at 50–52.

employees while on jury service—averages $100 per day, and a conservative estimate of lost productivity by employed jurors is $675 per day.[196] These are just the easily quantifiable costs of the jury system, which exclude nonincome compensation paid by employers and lost opportunity costs for unemployed jurors.[197] If courts were required to fully compensate jurors and their employers for lost income and lost productivity to enable low-income and minority jurors to serve, the cost of jury trials would increase from $25 to $50 per juror per day to as much as $800 to $1000 per juror per day.[198] Such costs are often not considered by policymakers, but would significantly burden courts' budgets.[199]

V. CONCLUSION

For more than forty years, the overwhelming majority of fair, cross section claims have failed either because minority underrepresentation was not sufficient to violate constitutional norms or the underrepresentation was caused by nonsystematic, often socioeconomic, factors.[200] In contemporary jury operations, however, actual instances of systematic exclusion are extremely rare.[201] Most instances of minority underrepresentation are due to intransigent socioeconomic factors that traditionally have been exempted from enforcement under the fair cross section requirement for the simple reason that courts cannot preemptively

196. *Id.* at 52.

197. Nonincome employee compensation includes fringe benefits such as insurance and pension contributions, unemployment compensation, and sick leave and vacation accruals. Lost opportunity costs are not easily quantifiable in monetary terms but generally include childcare, volunteer activities, education, recreation, and other activities jurors would have undertaken but for their obligation to report for jury service. *Id.*

198. *Id.*

199. Consider the potential cost of empaneling a jury for a three-day trial. If the court summoned forty-five jurors to report for service, the cost of jury selection alone is estimated at $36,000 to $45,000. *See id.* The cost for twelve empaneled trial jurors and two alternates would add $11,200 to $14,000 per day to the cost of the trial. *See id.* Now consider incurring these costs for each of the estimated 154,000 jury trials that take place each year in the United States. MIZE, *supra* note 116, at 7 (estimating 148,558 state court jury trials and 5,463 federal court jury trials took place in 2006). The total could exceed $8.8 billion per year more than the entire federal judiciary budget allocation in 2009 and the state judiciary budgets of all fifty states and the District of Columbia.

200. *See supra* Part I.

201. *See supra* note 60 and accompanying text.

solve the underlying socioeconomic conditions themselves.[202] In spite of the lack of a constitutional mandate, forty years of good faith efforts to improve minority representation in the jury pool have produced a number of effective practices that greatly mitigate the impact of these socioeconomic factors.[203] Most trial courts are now mandated to employ these practices by their respective legislatures or have adopted them as routine practices because they are efficient, cost-effective, and are regarded as minimally acceptable standards for contemporary jury system management.[204] Nevertheless, some courts have declined to adopt these practices, which tends to exacerbate the challenge of securing a jury pool that reflects a fair cross section of the community, on the grounds they are not constitutionally required to do so.[205] In essence, maintaining the distinction between systematic and nonsystematic exclusion in fair cross section jurisprudence effectively immunizes trial courts from taking reasonable steps to address the most common causes of minority underrepresentation. It is long past time the fair cross section requirement recognize ineffective jury system management that contributes to minority underrepresentation is itself a form of systematic exclusion the Sixth Amendment can no longer tolerate.

202. *See supra* Part II.D.1.
203. *See supra* Part III.
204. *See supra* Part III.
205. *See supra* Part II.D.2.