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An (Un)Fair Cross Section: How the Application of Duren Undermines the Jury

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NOTE

AN (UN)FAIR CROSS SECTION: HOW THE APPLICATION OF *DUREN* UNDERMINES THE JURY

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Introduction

The constitutional right to a jury is so entrenched that the Constitution mentions juries in four different sections: in Article III and in the Fifth, Sixth, and Seventh Amendments.[1] The framers of the Constitution viewed the jury as a powerful check on government.[2] Although the Constitution's "obsession" with juries[3] principally derives from a skepticism of government,[4] juries serve two additional functions. The jury is a tool of civic education by allowing citizens to participate in a fundamental aspect of democracy.[5] Additionally, the jury serves a legitimizing function by instilling public confidence in legal outcomes.[6] Acknowledging these various functions of the jury is critical to understanding the scope of the jury right and its incidental protections. When courts fail to recognize the functions that the jury serves, they risk misconstruing aspects of the right.[7] In this Note, I argue that courts have failed to account for the functions of the jury when applying one aspect of the right—the fair cross section guarantee.

The fair cross section guarantee derives from the Sixth Amendment's "impartial jury" requirement and recognizes that "the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community."[8] As a result, juries must be drawn from jury venires that represent a fair cross section of the community where the trial is heard.[9] To determine whether there is a violation of the fair cross section requirement, the Supreme Court developed a three-prong test in *Duren v. Missouri*.[10]

Unfortunately, the current application of the *Duren* test in lower courts undermines, rather than supports, the functions of the jury. In

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1 Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 Ohio St. L.J. 959, 964 (2010).

2 *See* Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 48 (2007) (describing how the early American jury system developed, in part, to provide a counterweight to English colonial rule by "allow[ing] the injection of local norms and values into legal disputes").

3 Larsen, *supra* note 1, at 964.

4 *See* Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 23 (1994) (noting that "[t]he Anti-Federalist case for preserving local juries grew directly from colonial experience in using juries to resist the Crown").

5 *See* Powers v. Ohio, 499 U.S. 400, 406 (1991) ("The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."); John Gastil et al., The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation 5 (2010) (writing that "the jury serves the juror, as a student of democracy").

6 *See* Vidmar & Hans, *supra* note 2, at 75 (suggesting that representative juries "offer[ ] more legitimacy for the resulting verdict").

7 *See infra* Part III.

8 Taylor v. Louisiana, 419 U.S. 522, 526–27 (1975).

9 *Id.* at 529–30.

10 439 U.S. 357, 364 (1979).

applying *Duren*, courts often require that defendants show not only a systematic failure to create jury venires representing a fair cross section of the community but also how the jury-selection procedure causes nonrepresentative jury venires.[11] Placing the burden on the defendant to prove how a specific jury-selection procedure is responsible for nonrepresentative jury venires is a high bar that often renders the fair cross section guarantee illusory.[12] This high bar leads courts to endorse jury-selection procedures that are inadequate for compiling representative jury venires, which, in turn, leads to persistent underrepresentation of distinctive groups.[13] As a result, defendants are denied the opportunity to have a jury drawn from a fair cross section of the community.[14] Potential jurors from certain groups within a community may be regularly overlooked for jury service.[15] And, over time, juries that are not representative of the community undermine the public's faith in legal outcomes.[16]

To remedy this situation, courts should rethink how they apply *Duren*. Rather than require that defendants prove how the jury-selection procedure causes nonrepresentative jury venires, courts should presume that jury-selection procedures are inadequate when distinctive groups are regularly excluded from jury venires. Indeed, such an approach is consistent with *Duren*.[17] Presuming that the jury-selection procedure is a cause of persistent underrepresentation will reduce the risk that inadequate procedures go unchallenged and ultimately lead to more representative jury venires.[18] As a result, defendants will be protected from prejudicial jury-selection practices; potential jurors from underrepresented groups will be more likely to have the opportunity to participate in a fundamental aspect of demo-

11 *See* Bates v. United States, 473 F. App'x 446, 451 (6th Cir. 2012) (rejecting a Sixth Amendment fair cross section challenge because "there is simply nothing in the record indicating that the racial disparity at issue was caused by the [district court's] jury selection procedures").

12 *See* Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism in Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954 ("[T]he law has constructed an extremely high bar to recognizing disparities in representation, and the law expects defendants to untangle highly complicated questions of causal explanation.").

13 *See id.* at 948–52 (outlining how a case that "capture[d] the causes of African-American underrepresentation in . . . jury pools" survived constitutional scrutiny).

14 *See id.* at 952 (noting that the difficulty in disaggregating purposeful versus inadvertent minority underrepresentation in jury-selection pools can lead to judicial support for suboptimal jury-selection procedures, ultimately resulting in minority underrepresentation).

15 *See, e.g.*, ABRAMSON, *supra* note 4, at 127–31 (arguing that drawing jurors by non-cross-sectional methods, such as voter lists, can lead to underrepresentation of certain minority groups, the young, and the poor).

16 *See* VIDMAR & HANS, *supra* note 2, at 75.

17 *See infra* Part II.F.

18 *See infra* Part IV.

cratic governance; and the public's faith in legal outcomes will be bolstered.

This Note proceeds in five Parts. Part I discusses the three major functions of the jury. Part II traces the rise of the fair cross section guarantee and explains the current Supreme Court approach to evaluating fair cross section challenges. It then explores how lower courts apply this approach and how this application is inconsistent with *Duren*. Part III discusses how the current application of *Duren* fails to support the three major functions of the jury. Part IV proposes a remedy: creating a presumption of causation when the defendant demonstrates a pattern of underrepresentation of distinctive groups on jury venires.

I
THE FUNCTIONS OF THE JURY

Although scholars have described the functions of the jury in different ways and from different perspectives,[19] the jury serves three major functions: (1) checking government power; (2) encouraging civic participation; and (3) providing legitimacy to the legal system.

A. Check on Government Power

Historically, in criminal cases, the jury has been understood as a critical check on the power of the government.[20] William Blackstone explained: "Our law has . . . wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown."[21] Early American juries were, perhaps, even more conscious of their role as a buffer between the state and the individual. According to Joan Larsen, colonial and founding-era juries "were prized for their ability to counterbalance and compete with legislative and judicial power."[22] Indeed, colonial juries had the authority to find both facts and law, which "led to the jury system playing a critical role in resisting English imperial rule."[23]

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19 *See generally* Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1333–90 (2012) (evaluating the civil jury as a political institution and noting four functions of the civil jury).

20 *See id.* at 1337 ("The clearest example of [juries providing a check on government power in criminal cases] is the jury's role . . . in checking the government's role as prosecutor."); *see also* PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 21 (1984) (noting that a fundamental purpose of the jury "has been to buttress or buffer official power").

21 Duncan v. Louisiana, 391 U.S. 145, 151–52 (1968) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *342, *349) (internal quotation marks omitted).

22 Larsen, *supra* note 1, at 968–69.

23 VIDMAR & HANS, *supra* note 2, at 51.

Similar to criminal juries, civil juries impede abusive government power.[24] The civil jury provided colonists with a degree of local democratic control over the law.[25] While this democratic lawmaking function is less obvious today, in many ways it still persists.[26] By injecting community standards into mixed questions of law and fact, particularly in tort law, civil juries continue to exercise a lawmaking function.[27] Furthermore, debates about jury nullification continue to highlight a belief in some quarters that juries should create law in special situations.[28]

Whether in the civil or criminal context, the jury's function as a check on government protects litigants. In the criminal context, the jury protects defendants. In 1879, the Supreme Court, for the first time, applied the Equal Protection Clause to overturn a conviction on the basis that the defendant was denied a jury of peers.[29] In the civil context, the jury does not necessarily protect the defendant or the plaintiff. Rather, the jury ensures that each litigant is afforded a trial that is free from excessive government influence and, specifically, free from the influence of biased judges.[30]

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24 *See* Solomon, *supra* note 19, at 1341 ("[T]he civil jury was recognized as a necessary safeguard . . . against the government . . . .").

25 *See id.* (noting how civil juries "protect[ed] citizens from oppressive laws").

26 *See* Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 33 (1994) ("[M]eaningful representation, accountable deliberation, and communication [are] necessary characteristics of socially just, collective decision-making."). *But see* Solomon, *supra* note 19, at 1342 ("If we do still need civil juries as checks on judges, it is not clear how exactly this check quite works.").

27 *See* Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337, 341 (2011) ("[T]here are numerous, prominent aspects of the contemporary torts scene that are influenced by, or simply the result of, the existence of the civil jury."); *see also* VIDMAR & HANS, *supra* note 2, at 277–79 (discussing how civil juries interpret the reasonable person standard differently for individuals and corporations).

28 *See* James Joseph Duane, *Jurors' Handbook: A Citizens Guide to Jury Duty*, FULLY INFORMED JURY ASSOCIATION (1996), http://www.fija.org/docs/JG_Jurors_Handbook.pdf ("That is the power of the jury at work; the power to decide the issues of law under which the defendant is charged, as well as the facts.").

29 Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (concluding "that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State").

30 *See* Haddon, *supra* note 26, at 90–91 (arguing "representativeness in participation can respond to the problem of unchecked power by the judge . . . by making better use of the social and intellectual processes by which individuals and groups engage in meaningful exchange of ideas, deliberate, and achieve consensus"). Moreover, the jury checks the power of the government by checking the power of majority groups within society who are presumably more powerful. *See* Rose & Abramson, *supra* note 12, at 962–63 ("A representative jury makes deliberation impartial, precisely by checking the biases of any one group, and by giving power to arguments that bridge the divides of demography in America and move diverse people to the same verdict."). Similarly, in *Ballew v. Georgia*, 435 U.S. 223 (1978), the Supreme Court held that a five-person jury violated the Sixth Amendment. The Court's reasoning was based on empirical studies demonstrating that the quality of deliberation decreased as the size of the jury decreased. *Id.* at 232–39. Thus, a jury too

B. Encouraging Civic Participation

A second function of the jury is to advance civic ideals and participation. In contrast to the jury's role as a check on government power, which protects litigants, the civic function of the jury protects potential jurors. Alexis de Tocqueville noted that jury service is "one of the most efficacious means for the education of the people which society can employ."[31] But it is not merely that jury service educates citizens; jury service is an avenue through which citizens partake in democracy. The right to serve on a jury may be viewed as akin to the right to vote.[32] Excluding certain groups from jury service undermines the bonds of those groups with other democratic institutions. As John Gastil et al. argue, "members of a democratic society need to connect not just with each other but also with the state in ways that are inspiring, empowering, educational, and habit forming."[33] Jury service is an important means to create that connection. Again, de Tocqueville recognized as much when he wrote:

> The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.[34]

The Supreme Court has also recognized the right of jurors to have the opportunity to serve. In *Powers v. Ohio*, the Court explained that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."[35]

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small to adequately deliberate denies a litigant of her right to a fair trial. *See id.* at 241–42. The argument made by Georgia as to why it used five-person juries in certain cases was that small juries saved the state money. *Id.* at 243–44. The Court rejected that reason as not strong enough to overcome the litigant's right to adequate deliberative capacity by the jury. *Id.* at 244. Therefore, the jury's function as a check on government power is not merely to buttress the government's nefarious policies but also to protect against more neutral policies that effectively deprive a litigant of her jury right. *Compare* Haddon, *supra* note 26, at 90–91 (addressing abuse of power by judges), *with* Rose & Abramson, *supra* note 12, at 962–63 (addressing possible majority bias within unrepresentative juries), *and Ballew*, 435 U.S. at 245 (ruling that reducing jury size to five members is a deprivation of litigants' right to fair trials).

31 GASTIL ET AL., *supra* note 5, at 5 (citing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 337 (Henry Reeve trans., Schocken Books 1974) (1835)).

32 *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 205 (1995) ("[T]he plain meaning of various constitutional provisions concerning the 'right to vote' literally applies to jurors.").

33 GASTIL ET AL., *supra* note 5, at 9.

34 Powers v. Ohio, 499 U.S. 400, 407 (1991) (quoting 1 DE TOCQUEVILLE, *supra* note 31, at 334–37).

35 *Id.* at 409.

C. Providing Legitimacy to the Legal System

A third function of the jury is to add legitimacy to the legal system. While the first two functions protect individuals (both litigants and potential jurors), the legitimacy function of the jury protects society at large by bolstering public confidence in legal outcomes.[36] Although there are certainly specific instances where a particular jury verdict is controversial,[37] opinion polls confirm that the American public has greater confidence in a jury's verdict than a judge's verdict.[38]

There are numerous ways in which a jury injects legitimacy into the legal system.[39] People may trust a jury's verdict more than a judge's verdict for a host of reasons. It may be that people trust verdicts rendered by lay jurors more than those rendered by legal professionals employed by the state (i.e., judges) because of a deep-seated distrust of government.[40] It may be that people prefer to have twelve individuals deliberate, rather than one judge decide.[41] Or it may be that juries accord with our notion of democracy.[42]

Regardless of the mechanism by which juries legitimize legal outcomes, perceptions of fairness in the legal system are correlated to perceptions that the jury is impartial. Leslie Ellis and Shari Diamond studied the effect of jury composition on perceptions of fairness in

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36 *See* Haddon, *supra* note 26, at 53 ("The jury has been said to forge public acceptance of court decisions by legitimizing them."). The jury might also inject legitimacy into the legal system by its "transitory nature." *Id.* This reasoning suggests that because a jury is not permanent, when it reaches an unpopular verdict, public ire is deflected away from the court and toward the jury. In other words, the jury can insulate the judge from making difficult decisions. *Id.*

37 *See* Frank Newport, *Blacks, Nonblacks Hold Sharply Different Views of Martin Case*, GALLUP (Apr. 5, 2012), http://www.gallup.com/poll/153776/blacks-nonblacks-hold-sharply-different-views-martin-case.aspx (highlighting the different perspectives of blacks and nonblacks on the jury verdict over George Zimmerman).

38 *58% Still Trust A Jury's Verdict More Than A Judge's*, RASMUSSEN REPORTS (Feb. 19, 2014), http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/february_2014/58_still_trust_a_jury_s_verdict_more_than_a_judge_s ("The latest Rasmussen Reports national telephone survey finds that 58% of American Adults trust a jury more to determine the guilt or innocence of someone accused of criminal behavior. Just 22% trust a judge more, while nearly as many (20%) are not sure.").

39 *See* Solomon, *supra* note 19, at 1353 ("[T]he most pervasive theme in justifying the civil jury is that it provides democratic legitimacy. How exactly this argument works, though, is often unclear . . . .").

40 Chief Justice William Howard Taft recognized this function of the jury when he wrote, "One of [the jury system's] greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." Balzac v. Porto Rico, 258 U.S. 298, 310 (1922).

41 *See* Haddon, *supra* note 26, at 53 ("[B]ecause the jury verdict is seen as the product of the group, and thus the legitimacy of the result is supported in a manner that might not be attainable if one person, the judge, decides.").

42 *See* Powers v. Ohio, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic element of the law . . . .").

verdicts. They found that guilty verdicts rendered by heterogeneous juries were more likely to be viewed as fair than guilty verdicts rendered by homogenous (i.e., all white) juries.[43] Accordingly, "cost[s] can arise if juries fail to reflect a fair cross-section of the community. Regardless of any direct effects on verdict, unrepresentative juries potentially threaten the public's faith in the legitimacy of the legal system and its outcomes."[44]

Judges have also noted the legitimacy functions of the jury. In *Ballard v. United States*, Justice Douglas indicated his concern about the effect of nonrepresentative juries when he said, "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."[45] Many have echoed Justice Douglas's words over the years.[46]

II
The Fair Cross Section Guarantee

The fair cross section right guarantees that jury venires will be representative of the community in which a case will be tried. It is a derivative of the constitutional command that the jury be "impar-

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43 Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1049 (2003); *see also* Albert W. Alschuler, *Racial Quotas and the Jury*, 44 Duke L.J. 704, 707 (1995) (noting the mistrust in communities where juries are regularly composed of all white jurors).

44 Ellis & Diamond, *supra* note 43, at 1038. The legitimizing function of a jury drawn from a representative cross section of the community was recognized long before *Smith v. Texas* started to open the door of the cross-sectional ideal by holding that "the Fourteenth Amendment prohibits . . . racial discrimination in the selection of grand juries." Smith v. Texas, 311 U.S. 128, 132 (1940). The early practice of utilizing mixed juries when adjudicating cases involving minority groups served a legitimizing function. Regarding the use of mixed juries by American colonists in cases with Native American litigants, Neil Vidmar and Valerie P. Hans state, "[T]he colonists had the insight that the mixed-jury verdict would be viewed as more legitimate by the Native American population." Vidmar & Hans, *supra* note 2, at 69–70.

45 329 U.S. 187, 195 (1946); *see also* McCray v. New York, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting) (quoting *Ballard* while noting that the effect of excluding minorities from the jury "goes beyond the individual defendant" and harms the legitimacy of the jury system, the law, the community, and the democratic ideal).

46 *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." (citing *Ballard*, 329 U.S. at 195)). Politicians have also relied on Justice Douglas's words. Senator Joseph Tyding, the chief architect of the Jury Selection and Service Act of 1968 (JSSA), opened the hearings that would eventually lead to the JSSA's enactment by citing *Ballard*. *See Federal Jury Selection: Hearing on S. 383, S. 384, S. 385, S.386, S.387, S. 989, and S. 1319 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 90th Cong. 1 (1967) (statement of Sen. Joseph D. Tydings, Chairman, Subcomm. on Improvements in Judicial Mach.).

tial."[47] As such, the fair cross section right promotes the functions of the jury: it protects litigants from government overreach; it serves a civic function by ensuring that potential jurors are not arbitrarily precluded from jury service; and it helps preserve the legitimacy of the jury and the legal system.

A. The Rise of the Fair Cross Section Ideal

The concept that a jury should be drawn from a fair cross section of the community is a relatively recent development.[48] In its early forms, juries were certainly not representative bodies.[49] In the American colonies, juries may have been slightly more egalitarian than their English counterparts, but early American juries were a far cry from representing a fair cross section of the community.[50] Throughout the nineteenth century and the first half of the twentieth century, American juries continued to be all male, mostly white, and comprised of "respected" members of the community.[51]

The rise of a cross-sectional ideal began to take hold in the mid-twentieth century.[52] In 1940, the Supreme Court suggested that juries should be "representative of the community."[53] For the next two decades, judges and scholars debated the merits of representative juries. With the growing influence of the civil rights movement in the 1960s, the side favoring representative juries gained the upper hand. In 1966, the Fifth Circuit struck down a jury-selection procedure that included good character and intelligence qualification requirements, which had the effect of excluding a disproportionate number of African Americans from jury service in Georgia.[54] *United States v. Rabinowitz* highlighted gaps in the then-existing statutory scheme for selecting jurors in the federal courts. As a result, Congress intervened with the passage of the Jury Service and Selection Act of 1968 (JSSA).[55] With the enactment of the JSSA, Congress declared that

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47 *See* Taylor v. Louisiana, 419 U.S. 522, 526 (1975) ("Our inquiry is whether the presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions.").

48 ABRAMSON, *supra* note 4, at 99.

49 *See* VIDMAR & HANS, *supra* note 2, at 34 (describing the difficulty of "assembling an unbiased jury of peers" in early juries).

50 *Id.* at 66.

51 *Id.* at 66–67. An exception was the limited use of mixed juries, which placed members of minority groups on juries when a member of that group faced trial. The use of mixed juries served to legitimize verdicts, particularly when Native Americans were on trial. *Id.* at 70.

52 *See* ABRAMSON, *supra* note 4, at 99–100 (highlighting how the cross-sectional jury was further promulgated in the 1960s and 1970s).

53 Smith v. Texas, 311 U.S. 128, 130 (1940).

54 Rabinowitz v. United States, 366 F.2d 34, 44 (5th Cir. 1966).

55 28 U.S.C. §§ 1861–78 (2013).

"[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."[56]

In addition to the statutory fair cross section guarantee, courts have employed the Fourteenth Amendment's Equal Protection Clause to address discrimination in assembling jury venires.[57] But while equal protection is a powerful tool to combat intentional discrimination in drafting the jury venire, it is less effective in addressing situations where there is obvious underrepresentation of certain segments of the community on jury venires but no evidence of intentional exclusion on the part of state actors.[58]

In response to the inadequacy of the Equal Protection Clause to protect the impartiality of the potential jury, the Supreme Court breathed life into the Sixth Amendment in *Taylor v. Louisiana*[59] by making it a tool to address unintentional underrepresentation in jury venires. In 1975, the *Taylor* Court gave the cross-sectional ideal constitutional status when it declared, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[60] By acknowledging that the Sixth Amendment's impartial jury requirement required cross-sectional representation on jury venires, the Court opened the door to allow challenges to the composition of jury venires even where there is no evidence of intentional discrimination.

B. The Function of the Fair Cross Section Guarantee

As noted above, the jury serves three essential functions: (1) checking government power; (2) encouraging civic participation; and (3) providing legitimacy for legal outcomes.[61] The requirement that jury venires are drawn from a fair cross section of the community should promote these functions. Indeed, in *Taylor*, the Court was "convinced that the [fair cross section] requirement has solid foundation" because it promotes the three major functions of the jury: (1) "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against

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56 28 U.S.C. § 1861.

57 *See* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 151–52 (2012) ("African-Americans were recognized as part of the community for jury purposes only with the passage of the Fourteenth Amendment in 1868 . . . .").

58 *See id.* at 152–53 (explaining a possible root of the judicial confusion between the intentional and systematic exclusion standards).

59 419 U.S. 522 (1975).

60 *Id.* at 528.

61 *See supra* Part I.

the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge"; (2) to support "[c]ommunity participation in the administration of the criminal law"; and (3) to promote "public confidence in the fairness of the criminal justice system."[62]

In regard to serving as a check on government power, the fair cross section requirement prevents government officials from hand selecting jurors. Indeed, Congress passed the JSSA in response to dissatisfaction with the arbitrary and proprietary selection of jurors by court clerks.[63] To encourage civic participation, the fair cross section requirement ensures that no group is systematically excluded from the opportunity to serve on a jury and thus deprived of the civic benefits of jury service, regardless of whether the exclusion is intentional or unintentional.[64] Finally, in regard to legitimacy, drawing the jury venire from a fair cross section of the community reassures the public that the trial is not rigged against any particular defendant,[65] and it also makes it more likely that actual juries will be diverse.[66]

C. The *Duren* Test

Four years after *Taylor*, the Supreme Court developed a test for determining whether there is a fair cross section violation.[67] In *Duren v. Missouri*, the Court considered whether Missouri's practice of providing a procedure for women to opt out of jury service constituted systematic exclusion in violation of the fair cross section requirement of the Sixth Amendment.[68] The Court took note of the fact that women averaged less than fifteen percent of participants on jury venires in the forum county.[69] Such disproportionate representation,

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62 419 U.S. at 530.

63 The JSSA was, in part, a response to the Fifth Circuit's decision in *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966). Alexander E. Preller, *Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J.L. & SOC. PROBS. 1, 4 (2012).

64 *See supra* Part I.B (discussing how the jury system encourages civic participation); *see also* Duren v. Missouri, 439 U.S. 357, 368 n.26 (noting that systematic underrepresentation of any one group is evidence that the jury is not a fair cross section of the community).

65 *See Rabinowitz*, 366 F.2d at 59–60 (1966) ("Even more important is the fact that many citizens will have no direct contact with the administration of justice, but will judge its efficacy on how the judicial process functions . . . . '[T]here is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.' When the basic jury list was poisoned, the fruits of that list were also infected." (quoting Ballard v. United States, 329 U.S. 187, 195 (1946))).

66 ABRAMSON, *supra* note 4, at 101 (drawing the jury venire from a cross section ensures that the jury "represent[s] accurately the diversity of views held in a heterogeneous society such as the United States").

67 *See Duren*, 439 U.S. at 364.

68 *Id.* at 359–60.

69 *Id.* at 360, 365–66.

according to the Court, violated the fair cross section requirement.[70] In so holding, the *Duren* Court outlined a three-part test for fair cross section challenges:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (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 jury-selection process.[71]

Missouri's reasons for its jury-selection procedure were not irrelevant, according to the Supreme Court.[72] Although Missouri failed to offer a sufficient justification for its procedure,[73] the Court considered the potential justification that a state might want to ensure that jury service did not infringe upon the "preclusive domestic responsibilities of some women."[74] While the Court rejected that potential justification, it left the door open to allowing procedures that may inadequately compile a representative jury venire if the procedure is appropriately tailored to support an important state interest.[75]

After *Duren*, the fact that a distinctive group is unreasonably and systematically underrepresented on jury venires satisfies the defendant's prima facie case for a fair cross section violation.[76] The state can overcome a fair cross section challenge by demonstrating a compelling reason for exclusion and that its procedures are appropriately tailored to support the state interest.[77] In other words, once the defendant satisfies the three elements of the *Duren* test, the burden shifts to the state to justify its practice.[78]

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70 *Id.* at 360.

71 *Id.* at 364.

72 *See id.* at 368–69 ("[O]nce the defendant has made a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community, it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest.").

73 *Id.* at 369.

74 *Id.*

75 *Id.* at 370 ("[A] State may have an important interest in assuring that those members of the family responsible for the care of children are available to do so. An exemption appropriately tailored to this interest would . . . survive a fair-cross-section challenge.").

76 *See id.* at 364; *see also* Randolph v. California, 380 F.3d 1133, 1141 (9th Cir. 2004) (noting that, "[u]nder the test established by *Duren*," disproportionate exclusion of a distinctive group must be systematic to violate the Sixth Amendment trial by jury right).

77 *See Duren*, 439 U.S. at 370.

78 Rose & Abramson, *supra* note 12, at 916 ("If these three are proved, the burden shifts to the state to defend the practices." (citing *Duren*, 439 U.S. at 367–68)).

D. *Duren*'s Systematic Exclusion Requirement

As noted above, the third prong of the *Duren* test requires "that . . . underrepresentation is due to systematic exclusion of the group in the jury-selection process."[79] What constitutes systematic exclusion of a distinctive group? On the facts of *Duren*, the Supreme Court held that Missouri's practice of allowing women to voluntarily opt out of jury service satisfied the meaning of systematic exclusion.[80] Such a practice was systematic because "[the] large discrepancy [in female representation on jury venires] occurred not just occasionally, but in every weekly venire for a period of nearly a year."[81] Thus, the practice "manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized."[82] In summary, the *Duren* Court did not need to engage in an extensive inquiry to determine that the jury-selection procedure led to systematic underrepresentation; it was apparent that the opt-out provision was the culprit. What *Duren* did not say was that a defendant needed to show with particularity how the jury-selection procedure caused the underrepresentation in order to make out a prima facie case for a fair cross section violation.[83]

E. Courts' Applications of Systematic Exclusion in the *Duren* Test

Despite the *Duren* Court not requiring defendants to show a specific mechanism of the underrepresentation, courts have strictly construed the third prong of the *Duren* test. For example, state courts of appeals have required that defendants demonstrate how a jury-selection procedure causes the systematic exclusion of distinctive groups from jury venires.[84] Unlike in *Duren*, where the Court assumed

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79 *Duren*, 439 U.S. at 364.

80 *Id.* at 366–67.

81 *Id.* at 366.

82 *Id.*

83 *See* Chernoff, *supra* note 57, at 162–63 (observing that "disparity over time can alone" prove something systemic caused the disparity and noting that the *Duren* Court ruled in Duren's favor even though he could not prove "with particularity" when "the systematic exclusion [of women] took place" in the selection process (internal quotation marks omitted)).

84 Although the Supreme Court did not need to reach the third prong of the *Duren* test in *Berghuis v. Smith*, 559 U.S. 314 (2010) (reviewing a Michigan Supreme Court decision that the Sixth Circuit believed was incorrect), Justice Ruth Bader Ginsburg addressed the systematic exclusion requirement. She noted that "[n]o 'clearly established' precedent of this Court supports Smith's claim that he can make out a prima facie case [for systematic exclusion] merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation." *Id.* at 332. As such, the Supreme Court seems to adopt an interpretation of *Duren* that requires the defendant to show that the underrepresentation is caused by the jury-selection system. *See also* Holland v. Illinois, 493 U.S. 474, 477 (1990) ("[O]ur cases hold that the Sixth Amendment entitles every

that Missouri's opt-out provision was responsible for the underrepresentation of women, some courts require that defendants affirmatively show how a jury-selection procedure contributes to the underrepresentation of a distinctive group.[85]

Moreover, federal courts of appeals have consistently said that a showing of persistent underrepresentation is insufficient to prove causation.[86] As the Ninth Circuit said, "[i]f underrepresentation by itself were sufficient to support a holding of unconstitutionality, the second and third prong of *Duren* would effectively collapse into one inquiry."[87] And the Sixth Circuit noted in a recent application of *Duren*, "[g]enerally speaking, a long-standing statistical disparity is not enough to establish systematic exclusion."[88] In *Bates v. United States*, the Sixth Circuit rejected a fair cross section challenge because it found "nothing in the record indicating that the racial disparity at issue [which the court conceded occurred consistently over time] was *caused* by the . . . jury selection procedures."[89] The problem is that requiring this showing of causation permits courts to reject fair cross section challenges even when the underrepresentation of a distinctive group is due to the jury-selection procedure.

There are three ways in which courts apply this stringent causation standard to the third prong of the *Duren* test. First, some courts require a showing of intent in order for a defendant to succeed in a fair cross section challenge.[90] Second, some courts reject fair cross section challenges on the grounds that excluded individuals from a

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defendant to object to a venire that is *not designed* to represent a fair cross section of the community . . . ." (emphasis added)).

85 *See* Rose & Abramson, *supra* note 12, at 951 (noting that a fair cross section challenge failed in *United States v. Green*, 389 F. Supp. 2d 29 (D. Mass. 2005), because the "defense evidence could not pinpoint how much of the underrepresentation of African Americans was due to these systematic flaws, as opposed to the more practical problems that do not stem from state action").

86 *See, e.g.*, United States v. Smith, 463 F. App'x 564, 571 (6th Cir. 2012) ("Defendant points to nothing in the selection process that allows an inference that any underrepresentation was *due* to the system itself." (emphasis added)); Rivas v. Thaler, 432 F. App'x 395, 403 (5th Cir. 2011) ("[The defendant] has not shown that any underrepresentation of Hispanics or persons 18 to 34 on his jury venire was *due* to their 'systematic exclusion in [the] jury-selection process.'" (emphasis added) (citation omitted)). Rose and Abramson argue that lower courts' rejections of fair cross section challenges in the face of evidence that distinctive groups are consistently underrepresented results from courts "conflating two distinct principles. One is the requirement that jurors be chosen in nondiscriminatory ways; the other is that jurors are to be chosen from a pool that is a representative or fair cross-section of the community." Rose & Abramson, *supra* note 12, at 914.

87 Randolph v. California, 380 F.3d 1133, 1141 (9th Cir. 2004).

88 Bates v. United States, 473 F. App'x 446, 450 (6th Cir. 2012).

89 *Id.* at 451 (emphasis added). The *Bates* court acknowledged that an extreme disparity that persisted over time may be considered a per se fair cross section violation. *Id.* at 450.

90 *See infra* Part II.E.1.

distinctive group self-select out of jury service.[91] Finally, some courts reject fair cross section challenges where a jury commission uses a presumptively valid list, such as voter-registration lists, despite evidence that the list is not representative of the community.[92] In all these cases, the jury-selection procedures contribute to underrepresentation. Courts, however, reject the fair cross section challenge because other factors may also contribute to underrepresentation. Thus, the defendant is not able to show exactly how the jury-selection procedure causes underrepresentation and, therefore, not able to satisfy a strict reading of the third prong of the *Duren* test.

1. *Intent*

The most egregious error that courts make in applying the *Duren* test is confusing the Sixth Amendment's fair cross section requirement with the Fourteenth Amendment's equal protection guarantee.[93] In *Duren*, the Supreme Court stated that satisfying the third prong of the test requires only that the exclusion is systematic or inherent to the procedures for forming the jury venire.[94] Thus, procedures that regularly lead to nonrepresentative jury venires violate the fair cross section guarantee regardless of whether or not the state intends to exclude distinctive groups.

Despite *Duren*, Nina Chernoff demonstrated that some courts of appeals' decisions require that the jury-selection practice intentionally discriminate against a distinctive group for a fair cross section challenge to succeed. Chernoff examined 167 federal courts of appeals cases that cited *Duren* from January 1, 2000, to July 30, 2011.[95] According to her review, of the 167 fair cross section challenges, 104 were denied because a court held that the defendant failed to satisfy the third prong of *Duren*.[96] And of those 104 cases, 43 were rejected because the defendant failed to allege or show that the exclusion was intentional or discriminatory.[97] For instance, the Ninth Circuit dis-

91 *See infra* Part II.E.2.

92 *See infra* Part II.E.3.

93 *See* Chernoff, *supra* note 57, at 192–94 (arguing that failing to differentiate between the two tests "threatens both the integrity of the law and public acceptance of judicial decisions").

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

95 Chernoff, *supra* note 57, at 166 n.122 (detailing the author's methodology and accounting for limitations).

96 *Id.* at 166 (reporting author's statistical findings).

97 *See id.* at 166–68, nn.128–37 (citing cases). Chernoff attributes this commingling of the Sixth Amendment fair cross section right and the Fourteenth Amendment equal protection guarantee to the historical development of the fair cross section right. *Id.* at 193. Prior to 1975, when the fair cross section right was established in *Taylor v. Louisiana*, courts dealt with fair cross section challenges as equal protection violations. *Id.* at 150. Thus, that legacy persists today in some courts and leads some judges to require purposeful discrimination in the Sixth Amendment context. *Id.* at 193–94.

missed a fair cross section challenge on the grounds that the defendant failed to make out "a prima facie case for *discrimination* . . . ."[98] In these cases, courts permit jury venires that are not representative of a fair cross section of the community, regardless of whether or not the jury procedure caused the underrepresentation. So long as the court finds that the jury commission was not intentionally discriminatory, there is no violation.

2. *Self-Exclusion*

For courts that correctly recognize that intent to exclude a distinctive group is not an element of the *Duren* test, many still reject fair cross section challenges when they find that the reason for a group's underrepresentation was because members of the group "self select" out of jury duty.[99] What is striking about this reasoning is that it directly contradicts *Duren*, which considered a provision allowing women to self-select out of jury service.[100] Courts that apply this reasoning distinguish *Duren* by noting that the opt-out provision in *Duren* was explicitly contemplated by the jury-selection procedure at issue. As the Tenth Circuit has said, "[d]iscrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*."[101] And in *United States v. Carter*, the Sixth Circuit rejected a fair cross section challenge despite evidence that there was a pattern of underrepresentation of African Americans on jury venires because, according to the court, "[t]he district court [was] under no obligation to compel no-shows."[102] Failure to show up for jury service, in the court's view, was the fault of the potential jurors for which the district should not be responsible.

While the facts of *Duren* may be distinguishable, requiring an explicit procedure for citizens to opt out of jury service as a prerequisite for a fair cross section violation does not logically follow from the reasoning of *Duren*. The failure to enact procedures that encourage jury participation can also stand in the way of representative jury venires. The Fifth Circuit rejected a fair cross section challenge based on claims regarding the district's low pay for jury service and the district's lack of effort to compel potential jurors to respond to summonses because those practices did "not constitute the type of *affirmative* barrier to selection for jury service that is the hallmark of a Sixth Amendment

98 United States v. Hara, 237 F. App'x 263, 265 (9th Cir. 2007) (emphasis added).

99 Chernoff, *supra* note 57, at 178 (noting that "courts emphasize the 'private choices' of putative jurors to 'willfully exclude themselves' from the jury pool").

100 *See Duren*, 439 U.S. at 369–70 ("[E]xempting all women because of the preclusive domestic responsibilities of some women is insufficient justification for their disproportionate exclusion on jury venires.").

101 United States v. Orange, 447 F.3d 792, 800 (10th Cir. 2006).

102 483 F. App'x 70, 74 (6th Cir. 2012).

violation."[103] But while the potential juror may be partly to blame, it cannot be credibly argued that a jury-selection policy regarding pay or enforcement of summonses does not have an impact on the likelihood that certain groups, particularly the young and minorities, will show up for jury service.

3. *Presumptively Valid Lists*

Courts also reject fair cross section challenges when a state or district selects jurors by using a presumptively valid list, such as a voter-registration list, despite evidence that certain groups are underrepresented on such lists. Courts hold that jury commissions are not responsible for the fact that certain groups register to vote in lower proportion to their representation in the community.[104] The Eighth Circuit has held that in order to prove a fair cross section violation the defendant must show not only that a distinctive group has registered to vote in lower numbers than that group's proportion in the community but also that the group "faced obstacles to voting."[105] The Fifth and Tenth Circuits are of the opinion that the circuits are in "complete agreement that neither the [JSSA] nor the Constitution require that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population."[106] However, one cannot credibly argue that the use of an inadequate list does not cause underrepresentation of certain groups.[107]

F. Understanding the Third Prong of the *Duren* Test in Context

Rejecting fair cross section challenges because the defendant cannot show that the government intended to exclude certain groups, that potential jurors did not self-select out of jury service, or that the list used was not prejudicial, is inconsistent with the reasoning in *Duren*. In particular, *Duren* instructs that when distinctive groups are

103 Rivas v. Thaler, 432 F. App'x 395, 402–03 (5th Cir. 2011) (emphasis added).

104 *See, e.g.*, United States v. Watkins, 691 F.3d 841, 850–51 (6th Cir. 2012) (rejecting the argument that the exclusive use of voter-registration lists can violate the fair cross section right despite systemic underrepresentation of certain distinctive groups on voter-registration lists); United States v. Green, 435 F.3d 1265, 1272 (10th Cir. 2006) ("[P]ersons holding a driver's license but choosing not to vote simply do not comprise a distinct group."); United States v. Rodriguez-Lara, 421 F.3d 932, 945 (9th Cir. 2005) (rejecting defendant's attempt to "link[ ] sole reliance on voter-registration lists for jury selection to current systematic exclusion of Hispanics").

105 United States v. Rodriguez, 581 F.3d 775, 790 (8th Cir. 2009).

106 *Orange*, 447 F.3d at 800 (quoting United States v. Test, 550 F.2d 577, 586 n.8 (5th Cir. 1976) (citing cases)).

107 To argue otherwise would be nonsensical. A jury-selection procedure that utilizes lists that do not include an individual's name is a reason why that individual is not called for jury duty. Likewise, lists that omit large proportions of citizens of certain distinctive groups are a reason why that group is underrepresented on jury venires.

underrepresented on jury venires over a period of time, the jury-selection procedure is inherently flawed.[108] And when one examines the elements of the *Duren* test and considers the work that each prong of the test accomplishes, it is clear that the third prong does not require the strict reading that courts of appeals demand.

The *Duren* test's first prong—identifying a distinctive group—helps distinguish the characteristics that are relevant to constituting a jury venire that is representative of the community.[109] For example, courts have determined that some characteristics, like gender and race, deserve proportional representation on jury venires.[110] For other characteristics, such as sexual orientation, is it less clear whether jury venires must proportionally represent individuals sharing the characteristic.[111] And courts have rejected the idea that individuals sharing other characteristics, such as being a resident of public housing[112] or having a need to urinate frequently,[113] must be proportionately represented on jury venires. However imperfectly the first prong of the *Duren* test does its work, its purpose is to distinguish characteristics deserving of proportional representation on jury venires and those that do not.

The second prong of the *Duren* test distinguishes between acceptable and unacceptable levels of deviation for the representation of a distinctive group on a jury venire from their representation in the community.[114] Different courts have used different approaches to determine what is acceptable deviation.[115] For example, the Eleventh Circuit is steadfast in its use of the "absolute disparity" test and that there is no violation of the second prong of the *Duren* test unless the disparity exceeds ten percent.[116] The Supreme Court, in its most re-

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

109 *See id.* at 364.

110 *See, e.g.*, *id.* (gender); United States v. Wagner, 41 F.3d 663 (5th Cir. 1994) (per curiam) (race).

111 *See* Sneed v. Fla. Dep't of Corr., 496 F. App'x 20, 27 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 391 (2013), *and reh'g denied*, 134 S. Ct. 814 (2013) ("[T]he Supreme Court has never held that homosexuality is a protected class for purposes of analyzing discrimination in jury selection under *Batson*."). *But see* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 444 (9th Cir. 2014) (holding that peremptory challenges made on the basis of sexual orientation must be subjected to heightened scrutiny).

112 *See* United States v. González-Vélez, 466 F.3d 27, 39 (1st Cir. 2006) ("[T]here is no case law supporting the argument that public housing residents are a distinctive group.").

113 *See* United States v. Snarr, 704 F.3d 368, 385–86 (5th Cir. 2013) (noting that defendants "provide no supporting authority [and] provide no statistical data" to the claim that individuals who need to urinate frequently are a distinct class).

114 *See Duren*, 439 U.S. at 364.

115 *See* Berghuis v. Smith, 559 U.S. 314, 329 (2010) (identifying three methods employed in lower federal court decisions "to measure the representation of distinctive groups in jury pools": absolute disparity, comparative disparity, and standard deviation).

116 United States v. Carmichael, 560 F.3d 1270, 1280 (11th Cir. 2009) ("Under black letter Eleventh Circuit precedent, '[i]f the absolute disparity . . . is ten percent or less, the

cent fair cross section decision, refused to adopt or require one method over another.[117] Despite this ambiguity, the purpose of the various measurements for *Duren*'s second prong is to distinguish between significant and insignificant deviations from proportionality. The second prong relieves courts from the impossibility of having to compose jury pools that are exactly proportional to the community.[118]

The third prong of the *Duren* test—the systematic exclusion prong—distinguishes between situations where a particular jury venire is nonrepresentative and those situations where the jury venires in a district are continuously nonrepresentative of the community.[119] A defendant does not have a right to a particular jury,[120] nor does a defendant have the right to a particular jury venire.[121] Rather, the right is to a process that is fair—that is, one that is not predisposed to stacking the deck against the defendant.[122] As such, the third prong of the *Duren* test ensures that a particular nonrepresentative jury venire is not a statistical anomaly, but rather that there is a repeated pattern of exclusion of certain groups within a jurisdiction.

If there is a pattern of underrepresentation of certain groups on jury venires, it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation.[123] Indeed, the *Duren* Court concluded "that a large discrepancy occur[ing] not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process

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second element is not satisfied . . . .'" (alteration in original) (quoting United States v. Grisham, 63 F.3d 1074, 1078–79 (11th Cir. 1995))).

117 *See Berghuis*, 559 U.S. at 329–30 ("[W]e would have no cause to take sides today on the method or methods by which underrepresentation is appropriately measured.").

118 Indeed, a requirement of exact proportionality would be unworkable, particularly because courts and litigants do not always agree about the make-up of the community. *See, e.g.*, Mares v. Scribner, 389 F. App'x 738, 739-40 (9th Cir. 2010) (rejecting the argument that the use of 1990 census data was insufficient to measure community representation).

119 *See Duren*, 439 U.S. at 364.

120 *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." (internal citations omitted)).

121 *See, e.g.*, United States v. Alix, 86 F.3d 429, 434 n.3 (5th Cir. 1996) ("We note that a defendant cannot establish a prima facie violation of the fair-cross-section requirement by relying solely on the composition of the jury panel at his own trial.").

122 *See Taylor*, 419 U.S. at 538.

123 *See, e.g.*, *Duren*, 439 U.S. at 367 ("The resulting disproportionate and consistent exclusion of women from the jury wheel . . . was quite obviously due to the *system* by which juries were selected.").

utilized."[124] Moreover, when a distinctive group is underrepresented on the jury for a considerable period of time, it is very likely that the jury-selection procedure does, in some way, cause the underrepresentation. While a jury-selection procedure may not be the sole reasons for the underrepresentation of a group, it certainly plays a role.[125]

G. Summary of the *Duren* Test's Application

In summary, in applying the *Duren* test, courts of appeals adhere to a strict reading of the third prong of the test. Courts require that defendants demonstrate that the jury-selection procedure causes underrepresentation of a distinctive group on jury venires.[126] When there are other potential factors, such as when citizens do not respond to summonses or fail to register to vote, courts reject fair cross section challenges because the defendant is unable to draw a clear causal link between the jury-selection procedure and the underrepresentation.[127] *Duren* says nothing, however, about requiring the defendant to demonstrate the mechanism by which the jury-selection procedure leads to underrepresentation.[128] This should be apparent when con-

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124 *Id.* at 366; *see also* Bates v. United States, 473 F. App'x 446, 450 (6th Cir. 2012) (conceding that "an extreme underrepresentation may be enough to establish a *per se* systematic exclusion"); United States v. Test, 550 F.2d 577, 586 (10th Cir. 1976) ("[P]roof that a cognizable group had been *totally* excluded from jury service over a substantial period of time or had received only 'token representation' has been held sufficient to raise an *inference* of discrimination and systematic exclusion.").

125 *See* Rose & Abramson, *supra* note 12, at 952 ("It may be that too high a burden . . . imposed on a defense to require it to untangle the various factors that lead a jury plan consistently over a number of years to fairly recruit minority jurors. It should be enough to establish, as the data in *Green* did, the cumulative effect of these factors in diluting minority representation." (citing United States v. Green, 389 F. Supp. 2d 29 (D. Mass. 2005))).

126 *See, e.g.*, United States v. Hernandez-Estrada, 749 F.3d 1154, 1166 (9th Cir. 2014) (requiring evidence that underrepresentation of African Americans and Hispanics in the jury pool "is due to the system employed by the [district court]"); United States v. Weaver, 267 F.3d 231, 237 (3d Cir. 2001) (requiring the defendant to "demonstrate . . . the underrepresentation [of African Americans and Hispanics] is caused by the 'systematic exclusion of the group in the jury selection process'" (citation omitted)); United States v. Cecil, 836 F.2d 1431, 1446 (4th Cir. 1988) (noting that the defendant must show that the procedure of using voter-registration lists systematically or intentionally excludes); United States v. Lynch, 792 F.2d 269, 271 (1st Cir. 1986) (finding that underrepresentation of young adults in a grand jury requires "evidence of actual discriminatory or exclusionary practices" in order to violate the Sixth Amendment); Machetti v. Linahan, 679 F.2d 236, 241 (11th Cir. 1982) (requiring the underrepresentation of women to be established through "their systematic exclusion in [the state's] jury selection procedure").

127 *See, e.g.*, Ford v. Seabold, 841 F.2d 677, 685 (6th Cir. 1988) ("[B]ecause the underrepresentation . . . was not a result of systematic exclusion, Ford's petit jury challenge fails."); Atwell v. Blackburn, 800 F.2d 502, 506 (5th Cir. 1986) ("Because Atwell has not established that the failure to serve jury duty summonses . . . caused residents . . . to be underrepresented on his grand jury venire, we find that his claim . . . must fail.").

128 *See Duren*, 439 U.S. at 366–67.

sidering the work that each prong of the test accomplishes. In particular, the purpose of the third prong of the *Duren* test is to ensure that a particular nonrepresentative venire is not an anomaly, but rather that the underrepresentation of a distinctive group is persistent.[129]

Therefore, it should be enough for the defendant raising a fair cross section challenge to demonstrate that there is a pattern of unreasonable underrepresentation of distinctive groups.[130] Requiring a defendant to show exactly how that jury-selection process contributes to the systematic underrepresentation adds an additional hurdle for defendants making fair cross section challenges.[131] As a result, fair cross section challenges are doomed to fail, and do fail, in nearly every instance.[132]

III
How the Application of the *Duren* Test Undermines the Functions of the Jury

The functions of the jury are undermined by the fact that defendants regularly lose fair cross section challenges despite demonstrating that there is a pattern of a distinctive group being underrepresented in jury venires.[133] In these cases, courts essentially endorse jury-selection procedures that fail to live up to the cross-sectional ideal. This, in turn, undermines the ability of the fair cross section guarantee to support the jury in (1) checking government power, (2) encouraging civic participation, and (3) bolstering the legitimacy of legal outcomes.

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129 *See* Berghuis v. Smith, 559 U.S. 314, 330 (2010) (describing the "issue ultimately dispositive in *Duren*" as the extent to which underrepresentation was due to systematic exclusion).

130 *See* Rose & Abramson, *supra* note 12, at 952 ("It should be enough to establish . . . the cumulative effect of [various] factors in diluting minority representation.").

131 *Id.* at 954 ("[T]he presence of a complicated mix [of factors] leads to the legal conclusion that courts need do little or nothing.").

132 *See* Chernoff, *supra* note 57, at 145 ("When defendants claim that their jury was selected in violation of the Sixth Amendment fair cross-section right . . . their claims are usually denied."); Rose & Abramson, *supra* note 12, at 952 ("It may be that too high a burden is being imposed on a defense to require it to untangle the various factors that lead a jury plan consistently over a number of years to fairly recruit minority jurors.").

133 *See, e.g.*, Bates v. United States, 473 F. App'x 446, 450–51 (6th Cir. 2012) (rejecting a fair cross section challenge despite "statistical evidence indicat[ing] that African-Americans have been consistently underrepresented in . . . jury venires"); Rivas v. Thaler, 432 F. App'x 395, 402–03 (5th Cir. 2011) (rejecting a fair cross section challenge despite the fact that the percentage of Hispanics and young adults who appeared for jury service "[were] significantly less than the percentage of such individuals" in the community).

A. Check on Government Power

As noted earlier, no defendant is entitled to a particular jury or a particular jury venire.[134] Rather, defendants are entitled to a fair process.[135] A defendant may find himself with an all-white jury, drawn from an all-white jury venire,[136] but that alone does not rise to the level of a fair cross section violation. To satisfy *Duren*, the defendant must, at a minimum, show that there is a long-standing pattern of underrepresentation of distinctive groups on jury venires.[137] While this may lead to the perception that an individual defendant receives no protection from the fair cross section guarantee, the fair cross section guarantee does protect defendants from arbitrary abuses of government power.[138] The Sixth Amendment ensures that the jury venire is not intentionally or unintentionally stacked against the defendant.[139] The Sixth Amendment, working in conjunction with the Fourteenth Amendment, gives a defendant a fair shot at an impartial jury.[140]

Unfortunately, the courts' application of *Duren* undercuts this function of the jury. By requiring that defendants show how the jury-selection procedure causes underrepresentation, the government can employ inadequate jury-selection procedures that prejudice certain defendants. Mary Rose and Jeffrey Abramson recount how the District of Massachusetts' jury-selection procedures in *United States v. Green*[141] contributed to the prosecutors' decision to bring charges in federal court.[142] In that case, bringing the case in the federal court greatly decreased the percentage of African Americans eligible for the jury pool.[143] As a result, "[i]n the years immediately preceding the *Green* indictments, the proportion of African Americans in the availa-

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134 *See supra* notes 120–21 and accompanying text.

135 *See supra* note 122 and accompanying text.

136 *See* United States v. Tripp, 370 F. App'x 753, 759–60 (8th Cir. 2010) (rejecting defendant's fair cross section claim that was based on "the district court . . . denying his motion to strike the all-white jury venire and . . . violat[ing] his constitutional right to a fair trial").

137 *See* Duren v. Missouri, 439 U.S. 357, 366–67 (1979) (establishing that petitioner met systematic exclusion requirement through "[h]is undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year"); Rose & Abramson, *supra* note 12, at 939 ("But the Sixth Amendment does not require a defendant to prove an official intent to discriminate; it is sufficient to show that an otherwise neutral jury plan works in practice over a number of years to the disadvantage of minorities.").

138 *See* Chernoff, *supra* note 57, at 186 (noting that the right to have a fair cross section of the community represented at the jury venire "belongs . . . to the defendant").

139 *See* Rose & Abramson, *supra* note 12, at 939.

140 *See Duren*, 439 U.S. at 359.

141 389 F. Supp. 2d 29 (D. Mass. 2005).

142 *See* Rose & Abramson, *supra* note 12, at 946–47.

143 *See id.* at 947–48 (noting that the percentage of available African American jurors in the Eastern Division of the Federal District of Massachusetts was much less than the county where the crime occurred).

ble jury pools averaged . . . less than half the expected representation indicated through U.S. Census data."[144]

Despite the obvious connection between the lists and the persistent underrepresentation of African Americans on jury venires, the district court rejected the fair cross section challenge because other factors could have also contributed to the underrepresentation.[145] According to Rose and Abramson, "the problem was that defense evidence could not pinpoint how much of the underrepresentation of African Americans was due to these systematic flaws, as opposed to the more practical problems that do not stem from state action."[146] As a result of this high burden of proof, the government is not held accountable for implementing jury-selection procedures that lead to the systematic exclusion of distinctive groups from jury venires which can prejudice certain defendants.

B. Undermining Civic Participation

More directly, the courts of appeals' application of the *Duren* test undermines the civic function of the jury. As Justice Anthony Kennedy noted, "[j]ury service preserves the democratic element of the law" and "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law."[147] By allowing continuous underrepresentation to go unchallenged, states and districts exclude members of certain groups from experiencing this democratic opportunity.[148]

If jury service is viewed as an opportunity for civic education,[149] then assuming that members of certain groups "self select" off the jury

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144 *Id.* at 947.

145 *See Green*, 389 F. Supp. 2d at 63 ("[Defendants] had to prove not merely that inaccurate lists contribute to a degree to the underrepresentation of minorities, but the precise degree to which they are responsible, i.e., that inaccurate lists (as opposed to transience or personal choice) are the main culprit. That burden is far, far, too high . . . .").

146 Rose & Abramson, *supra* note 12, at 951. Professor Abramson advised the court during the case and "recommended that the judge find no Sixth Amendment violation because of ambiguous data regarding the 'systematic exclusion' prong of the *Duren* test." *Id.* at 949. There were at least three sources of underrepresentation: (1) "the disproportionate undercounting of this group in the initial city and town census lists"; (2) "the return by the post office of some summonses as undeliverable"; and (3) "the failure of some persons to respond to jury summonses that were not marked undeliverable by the post office." *Id.* at 950. The defense was unable to show how each factor contributed to the overall disparity and was thus not able to satisfy the heightened causal requirement applied by the First Circuit. *Id.* at 950–51.

147 Powers v. Ohio, 499 U.S. 400, 407 (1991) (Harlan , J., dissenting) (quoting Duncan v. Louisiana, 391 U.S. 145, 187 (1968) (internal quotation marks omitted)).

148 *See, e.g.*, *Green*, 389 F. Supp. 2d at 79–80 (concluding that the court could not continue to "cast a blind eye to real problems with the representation of African-Americans on [its] juries").

149 *See* GASTIL ET AL., *supra* note 5, at 5 (noting that jurors were thought as "student[s] of democracy").

because they fail to participate in other civic activities denies this education to those most in need of it. For instance, if members of certain groups are systematically underrepresented because they register to vote in lower numbers, excusing those nonvoters from jury service perpetuates the cycle of underrepresentation on voting lists. This, in turn, leads to continued underrepresentation on jury venires.

Likewise, potential jurors are often excused because they are difficult to reach.[150] These "hard-to-reach" citizens are therefore deprived of the opportunity to exercise the rights and duties of citizenship. Although a state or district is entitled to exclude certain potential jurors for legitimate reasons, it is the government's burden to justify that the State's interest outweighs the individual defendant's right.[151] It may be the case that the difficulty of summonsing hard-to-reach citizens implicates a legitimate state interest. Courts, however, do not require the government to argue its interest when rejecting fair cross section claims based on the government's failure to inform citizens about jury service.[152]

For example, in *United States v. Nakai*, the Ninth Circuit dismissed a fair cross section claim where Native Americans were systematically excluded from jury venires. The defendant argued that Native Americans were systematically excluded from jury venires because the jury commission contacted potential jurors by phone to follow up on the summonses, but phones were scarce on the reservation. As a result, Native Americans were less likely to be informed about the details of their summonses.[153] Rather than require the government to demonstrate that it was a legitimate state interest not to make a greater effort to contact Native Americans, the court placed the burden on the defendant to prove that the scarcity of phones on the reservation was the cause of the underrepresentation of Native Americans on jury venires.[154] As a result, the jury-selection procedure was upheld despite the fact that many Native Americans were not informed about

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150 *See* Rose & Abramson, *supra* note 12, at 951 ("[N]o court before the *Green* decision had ever found factors such as undeliverable mail or nonresponse to constitute the kind of 'systematic' exclusions of members of a cognizable group that triggers a constitutional violation.").

151 *See* Duren v. Missouri, 439 U.S. 357, 368 (1979) ("[I]t is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest."); *see also* Taylor v. Louisiana, 419 U.S. 522, 534 (1975) ("The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare.").

152 *See, e.g.*, United States v. Nakai, 413 F.3d 1019, 1022 (9th Cir. 2005) (placing the burden of proof on the defendant).

153 *Id.*

154 *See id.*

the details of their jury service and, therefore, did not show for jury service.[155]

C. Undermining Legitimacy

The argument that the fair cross section requirement serves the legitimacy function of the jury derives from the original fair cross section case, *Taylor v. Louisiana*. In *Taylor*, Justice Byron White noted "[c]ommunity participation in the administration of the criminal law . . . is . . . critical to public confidence in the fairness of the criminal justice system."[156] When the fair cross section guarantee is understood as serving the jury's legitimacy function, requiring that defendants prove how a particular jury-selection procedure is the cause of a pattern of unreasonable underrepresentation of a distinctive group is inconsistent with the purpose of the requirement. Regardless of how or why certain groups are underrepresented on jury venires, the public's confidence in the efficacy of legal outcomes is diminished when certain distinctive groups are consistently omitted from jury service.[157]

As noted earlier, courts of appeals reject fair cross section challenges despite evidence that a distinctive group is repeatedly underrepresented on jury venires.[158] While the *Duren* Court stated that certain affirmative state interests may absolve the state from constituting a representative jury venire,[159] courts requiring that defendants show how the jury-selection procedure caused underrepresentation reject valid fair cross section challenges without ever considering the state's purpose for the jury-selection procedure. So long as a jury commission does not engage in a specific jury-selection procedure that can be easily linked to the underrepresentation of a distinctive group, nonrepresentative jury venires can continue without challenge.[160]

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155 *Id.*

156 *Taylor*, 419 U.S. at 530.

157 *See* Ellis & Diamond, *supra* note 43, at 1049 (describing a study that found the public is more likely to perceive a negative outcome for the defendant unfair when the jury lacks racial diversity).

158 *See supra* Part II.E.

159 *See* Duren v. Missouri, 439 U.S. 357, 367–68 (1979) (noting that the State has the burden to show that a fair cross section is incompatible with a significant state interest).

160 *See, e.g.*, Bates v. United States, 473 F. App'x 446, 450 (6th Cir. 2012) (dismissing fair cross section challenge despite statistical evidence of African Americans' persistent underrepresentation on jury venires); Rivas v. Thaler, 432 F. App'x 395, 402–03 (5th Cir. 2011) (rejecting fair cross section challenge even if the defendant were to have shown "Hispanics [and] persons 18 to 34" were underrepresented on the jury venires); United States v. Rodriguez, 581 F.3d 775, 790 (8th Cir. 2009) (rejecting a fair cross section challenge where jury lists were based on voter-registration lists but African American and Hispanics in North Dakota registered in lower proportion than whites in North Dakota); United States v. Clarke, 562 F.3d 1158, 1163 (11th Cir. 2009) (rejecting a fair cross section

When jury venires consistently underrepresent certain groups, the juries that are ultimately drawn will likewise be less representative of the community. To be sure, the composition of the jury venire is not the only factor that determines the ultimate composition of a particular jury, but it is an important factor.[161] If certain groups are always underrepresented (or not represented) on jury venires, it stands to reason that members of those groups will be less likely to serve on juries and, ultimately, juries will be less diverse. And as Leslie Ellis and Shari Diamond demonstrate, public perception of fairness is negatively correlated with less representative juries.[162]

Moreover, the mere perception that certain groups are unlikely to be called for jury duty also undermines faith in the judicial system. The Fifth Circuit understood this idea when deciding *Rabinowitz v. United States*, a seminal case prompting the passage of the JSSA.[163] Judge Richard Rives noted that such procedures undermine public confidence in the courts because "many citizens will have no direct contact with the administration of justice, but will judge its efficacy on how the judicial process functions."[164] Those unfairly excluded from jury service will hold negative opinions of the judicial process, and, similarly, those who recognize the unfairness in the selection of jurors will also hold the judicial system in lower esteem.

IV
A Better Approach: Presuming Causation

A better approach for resolving fair cross section challenges would be for courts to presume that the jury-selection procedures cause underrepresentation when a defendant shows that there is a pattern of underrepresentation of distinctive groups on jury venires.[165] Courts should no longer require that defendants demonstrate how the jury-selection procedure caused the underrepresentation of a distinctive group. Instead, if there is a long-standing history of under-

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claim despite the fact that African Americans made up just under eight percent of the jury venires but represented twenty-one percent of the population).

161 For example, peremptory challenges are another factor that cause specific juries to underrepresent certain distinctive groups. *See* Ellis & Diamond, *supra* note 43, at 1036–37.

162 *Id.* at 1049.

163 *See supra* note 65 and accompanying text.

164 Rabinowitz v. United States, 366 F.2d 34, 59 (5th Cir. 1966).

165 Such a burden-shifting approach was put forth by a defendant, and rejected by the Seventh Circuit, in *United States v. Neighbors*, 590 F.3d 485, 491–92 (7th Cir. 2009). In that case, the defendant argued that the use of "voter registration lists[, which] generally under-represent minorities in the community," combined with the lack of African Americans on the jury venire, should create a presumption that the jury-selection procedure caused the underrepresentation. The defendant argued that the same burden shift that occurs in *Batson* cases should apply to *Duren* cases. *Id.* at 491–92. However, the Seventh Circuit responded: "We have consistently held that the defendant bears the burden of showing that the under-representation is due to systematic exclusion." *Id.* at 492.

representation, then it should be the government's burden to implement a jury-selection procedure that will lead to more representative jury venires or to demonstrate that implementing such procedures is inconsistent with another important state interest.[166]

Such an approach makes sense because in most situations the jury-selection procedure is at least partly to blame for underrepresentation. To use the words of *Duren*, the underrepresentation of a distinctive group is "due to their systematic exclusion in the jury-selection process."[167] For example, it is a false argument that a state's lack of effort to contact potential jurors by mail does not cause, in some way, the underrepresentation of certain groups who have a greater propensity to move. While the state may have a legitimate interest in not undertaking more aggressive efforts to recruit potential jurors, it should be the state's burden to argue its interest. Hard-to-reach citizens' right to serve as jurors should be presumed valid, rather than presumed to be inadequate to overcome the state's interest.

Under the current judicial approach, jurisdictions are willing to look the other way when there are multiple causes of underrepresentation.[168] Although some jurisdictions do take seriously the need to ensure representation on jury venires despite the lack of judicial encouragement,[169] a presumption of causation would require jury commissions to update inadequate jury-selection procedures. Take, for instance, the exclusive use of voter-registration lists. While it is true that some individuals do not register to vote despite facing no barriers to doing so,[170] it is not right to say that the exclusive use of a

166 It would not be the case that the government would be forced to prove that the jury-selection procedure was not responsible for the underrepresentation. If there is long-standing underrepresentation of distinctive groups on the jury venire, then it would be the government's burden to implement jury-selection procedures that are capable of compiling a representative jury venire. The government, however, can argue that the task of compiling a representative jury venire conflicts with other important state interests.

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

168 *See* Rose & Abramson, *supra* note 12, at 952–54. However, voluntary improvements in some chastened districts do not solve the problem. Creating a presumption that the jury procedure caused the underrepresentation when the defendant shows a pattern that distinctive groups are consistently left out of jury venires would force jury commissions to work harder to live up to the cross-sectional ideal.

169 In some cases where the government prevailed in a fair cross section challenge, districts have amended their procedures to ensure better representation. *See, e.g.*, Berghuis v. Smith, 559 U.S. 314, 322 (2010) (noting that the district reversed its jury-selection procedure at issue after the defendant was convicted); Rose & Abramson, *supra* note 12, at 953 (noting that after *Green* "[i]t is now the district's procedure to do a second mailing, targeted by zip code, for every summons returned by the post office as undeliverable").

170 *Cf.* Rose & Abramson, *supra* note 12, at 915 n.22 (noting comments by the chair of the committee of federal judges who drafted an early version of the JSSA stating that the use of voter-registration lists would eliminate from jury pools "those individuals not interested enough in their government to vote" (citation omitted)).

voter-registration list in compiling the jury venire does not cause the omission of the nonvoter from jury duty. Under a framework that presumes a fair cross section violation when there is a pattern of underrepresentation, if voting-registration lists are inadequate to secure a fair cross section of the community in jury venires, then the jury commission would be forced to supplement voter-registration lists with other lists that provide for greater representation.[171]

By creating this presumption, the functions of the jury—checking government power, promoting civic engagement, and providing legitimacy to legal outcomes—would be supported, rather than undermined, by the fair cross section guarantee. The power of government would be checked because there would be less room for courts to hide behind causal ambiguity to perpetuate nonrepresentative jury venires.[172] Civic engagement would be enhanced by opening jury service to those who "self select" out of other forms of democratic participation, and, perhaps, encouraging those citizens to engage in other aspects of civic life.[173] And legitimacy would be bolstered by ensuring that the jury venire is not a contributor to unrepresentative juries, while also instilling confidence in the public by requiring the government to present a legitimate state interest to justify the exclusion of any group on jury venires.[174]

CONCLUSION

The jury serves a number of functions. It is a check on government power. It promotes civic participation. And it legitimizes legal outcomes. As an important aspect of the right to an impartial jury, the Sixth Amendment's fair cross section guarantee should promote these functions.[175] Despite the purpose of the fair cross section guarantee, the right is undermined by the application of the *Duren* test in lower courts. In applying the third prong of the *Duren* test, some courts require defendants to demonstrate exactly how the jury-selection procedure is causally related to a pattern of under-

171 In fact, the JSSA seems to require as much. While the JSSA suggests voter-registration lists as a source for jury-selection lists, the statute also instructs that "[t]he plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured" by the JSSA. 28 U.S.C. § 1863(b)(2) (2012). Yet, despite the JSSA, "[t]he circuit courts are in complete agreement that . . . neither the Act nor the Constitution require that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population." United States v. Odeneal, 517 F.3d 406, 412 (6th Cir. 2008) (citation and internal quotation marks omitted).

172 *Cf. supra* Part III.A.

173 *Cf. supra* Part III.B.

174 *Cf. supra* Part III.C.

175 *See* Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975) (explaining the functions of the jury and the need to promote its "solid foundation").

representation.[176] The problem is that there may be multiple causes of underrepresentation.[177] As a result, fair cross section challenges are nearly always rejected, at least at the court of appeals level.[178] Indeed, even where there is evidence that distinctive groups are omitted from jury venires, the courts uphold the selection procedures and sanction nonrepresentative juries.[179] This stringent application of the third prong of the *Duren* test undermines each of the three jury functions by sanctioning jury venires that are inherently underrepresentative of certain groups. The courts of appeals' application of *Duren* allows the government to continue to implement inadequate jury-selection procedures, deprives certain citizens the opportunity to serve on juries, and may undermine public faith in legal outcomes.

A better approach is for courts to create a presumption that a pattern of underrepresentation of distinctive groups on jury venires is due to the jury-selection procedures. Such a presumption is consistent with *Duren*'s three-part framework. The first prong of the *Duren* test defines the distinctive group. The second prong defines the acceptable deviation between the proportion that group represents in the community and the proportion it represents on jury venires. The third prong helps the court determine whether the particular instance of underrepresentation is part of a pattern or is merely an anomaly. There is no need for courts to require that defendants show how jury-selection procedures lead to systematic exclusion of distinctive groups from jury venires. Rather, it should be enough for the defendant to show that a systematic exclusion of a distinctive group occurs because it will likely be the case that the jury-selection procedure is, at least, partially causally related to the underrepresentation. The government remains free to argue that the jury-selection procedure is not related to the underrepresentation or that the reason for the underrepresentation is related to a legitimate state interest.

The current practice of requiring the defendant to show how the jury-selection procedure causes nonrepresentative jury venires ensures that fair cross section challenges are doomed to fail in almost every instance, thus undermining the functions of the fair cross section

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176 *See, e.g.*, Bates v. United States, 473 F. App'x 446, 451 (6th Cir. 2012) (rejecting a Sixth Amendment fair cross section challenge because "there is simply nothing in the record indicating that the racial disparity at issue was caused by the [district court's] jury selection procedures").

177 *See* Rose & Abramson, *supra* note 12, at 952 (noting numerous causes of misrepresentation, including "undeliverable mail, out-of-date addresses, and a failure to do anything about high levels of nonresponse").

178 *See* Chernoff, *supra* note 57, at 145 ("When defendants claim that their jury was selected in violation of the Sixth Amendment fair cross-section right, . . . their claims are usually denied.").

179 *See id.* at 145–47 ("[E]ven while denying defendants' claims, [some courts] have admitted to being disturbed by the evidence of racial disparities in jury systems.").

right and, more generally, the jury. By removing the burden from defendants to prove causation, the fair cross section guarantee will actually promote the functions of the jury and ensure that the ideal of the fair cross section guarantee is more fully realized.