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What Hurricane Katrina Taught Me About Fair Cross-Section Claims

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WHAT HURRICANE KATRINA TAUGHT ME ABOUT FAIR CROSS-SECTION CLAIMS
by ROBIN E. SCHULBERG

Abstract

Among the aftereffects of Hurricane Katrina was depressed representation of African Americans on federal jury venires. The Federal Public Defender for the Eastern District of Louisiana challenged the venires under the Sixth Amendment right to a jury drawn from a fair cross-section of the community. These challenges lost but what stood out in the litigation process was the paucity of authority in our favor. This article attributes the lack of success that has plagued fair cross-section claims to the tendency of lower courts to conflate them with equal protection claims. While equal protection claims require proof of discriminatory intent, fair cross-section claims do not. Nevertheless, the group-specific nature of the harm leads courts to view fair cross-section claims through an equal protection lens, and consequently, to require fault, if not invidious intent. This article contends that the disparate impact model for Title VII employment discrimination claims developed in *Griggs v. Duke Power Co.* would correct this error by shifting the focus from blameworthiness to results and by foreclosing “blame the juror” excuses for disproportionate representation.

On the Gulf Coast “Katrina” is shorthand for a plethora of problems that followed in the wake of the catastrophic hurricane. For federal criminal defendants in the Eastern District of Louisiana, one of those problems was the paler complexion of the post-Katrina juries. The Eastern District of Louisiana is composed of New Orleans and 12 surrounding parishes (counties). The African-American population was concentrated in the city, which, along with some smaller white parishes took the brunt of the storm. As a result, African-Americans were disproportionately displaced. More than half the voting age African-Americans in the Eastern District lived in flooded census blocks; for whites,

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1 Attorney, Federal Public Defender, Eastern District of Louisiana. I would like to thank Ann Woolhandler for her thoughtful comments on an earlier draft of this article. Any errors or inadequacies, of course, are solely my own.
2 U.S. Census Bureau, Census 2000 Summary File 1, GCT-P6: Race and Hispanic or Latino; see also Dr. Andrew A. Beveridge, *Disparities in the Jury System of the Eastern District of Louisiana, Pre- and Post-Katrina* (June 21, 2006), Figure 3, filed as Exhibit 2(a) to Motion to Quash Jury Venire and to Stay Proceedings, United States v. Caldwell, Crim. Action No. 06-023 (E.D. La.) (on file with author).
the corresponding figure was less than one-third. Disproportionate displacement had a predictable effect on the racial composition of jury venires. In a judicial district whose voting age population was 31.5 percent African-American before Katrina, federal venire panels in the first five months of post-Katrina trials averaged only 15.8 percent African-American.

We anticipated this problem in the office of the Federal Public Defender, where I work, and attempted to address it with constitutional challenges to the jury venires. In a series of cases, we moved to quash the venires on the ground that they would not be representative. We met with a solid wall of resistance. At first, the district judges said persons who evacuated outside the Eastern District were no longer part of the community, regardless of whether they intended to return. Although the judges relented on that point, they stood firm on another: the jury selection process was not to blame. If there were fewer African-Americans on jury venires than their percentage in the community, it was because of a natural disaster, not “systematic exclusion.” We used a tort analogy to counter this reasoning: a phenomenon could have multiple causes, both

3 Beveridge, supra note 1, Figure 2.
4 Beveridge, supra note 1, Table 1.
5 Dr. Andrew A. Beveridge, Disparities in the Jury System of the Eastern District of Louisiana, Pre-and Post-Katrina – Supplement 2 (June 27, 2006), Table 4, filed as Exhibit 2(c) to Motion to Quash Jury Venire, supra note 1. Since June 2006, the representation of African-Americans on criminal venires has improved to pre-Katrina levels. Notably, pre-Katrina levels approached substantial underrepresentation under the prevailing statistical test. Beveridge, supra note 1, Table 4. Katrina pushed the numbers over the edge.
7 We defined “community” post-Katrina as those who had returned plus those who intended to return. At the time of these motions, no one was removed from the voter registration lists unless the registrar was informed that they had registered elsewhere.
human and natural. Katrina might be responsible for displacing prospective jurors, but a jury selection system that made no effort to find them or to pay the costs of returning to the district to serve contributed to the problem. This argument, like our others, got nowhere.

One noteworthy aspect of this litigation was the paucity of authority in our favor. After the Supreme Court recognized the right to a jury drawn from a fair cross-section of the community during the 1970s, the overwhelming majority of claims failed. Partly this was because courts of appeals required a 10 percent disparity between the representation of the excluded group in the population and on the venires, a difficult burden to meet given that African-Americans average less than 13 percent of the population nationally.8 But where claimants satisfied the 10 percent threshold, they still lost because the courts refused to characterize the weaknesses in their jury selection system as “systematic exclusion.”

My experience with the Katrina fair cross-section claims persuades me that these claims lose because judges confuse them with equal protection claims. Equal protection claims require proof of purposeful discrimination. Fair cross-section claims do not. More fundamentally, the two claims protect different values. Whereas the Equal Protection Clause prohibits discrimination, the fair cross-section requirement of the Sixth Amendment defines the type of jury to which criminal defendants are entitled: a jury drawn from a representative pool.9 A jury selection system that persistently fails to produce representative venires is not necessarily racist in the sense of intentionally excluding prospective jurors because of their race. But it nevertheless is constitutionally

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inadequate because it denies criminal defendants the possibility of a representative jury. The distinction mirrors the difference between disparate treatment and disparate impact claims in Title VII employment discrimination law.

This article argues that disparate impact law has valuable lessons for fair cross-section jurisprudence. In Part I, I trace the development of the Sixth Amendment fair cross-section guarantee from its origin in equal protection law. In Part II, I show how the shadow of equal protection concepts influences fair cross-section decisions. In Part III, I discuss the lessons of disparate impact law, in the particular, the seminal case, Griggs v. Duke Power Co.,\(^1\) and explain how those lessons would correct mistakes in the fair cross-section jurisprudence.

I.

The Fair Cross-Section Requirement Emerges From Equal Protection Cases.

The fair cross-section requirement developed from equal protection jurisprudence. Challenges to the racial composition of juries originally were brought under the Equal Protection Clause of the Fourteenth Amendment by African-American defendants facing trial or convicted by all-white juries.\(^1\) From the start, the Supreme Court made clear that the right it was recognizing was a prohibition of purposeful discrimination,\(^2\) not the right to a jury of any particular composition.\(^3\) Intent, of course, is difficult to prove in cases of

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\(^11\) Strauder v. West Virginia, 100 U.S. 303 (1879); Virginia v. Rives, 100 U.S. 313 (1879); Neal v. Delaware, 103 U.S. 370 (1880); see also Peters v. Kiff, 407 U.S. 493, 500 n.9 (1972) (explaining origin of fair cross-section guarantee).
\(^12\) Strauder, 100 U.S. at 308; Rives, 100 U.S. at 322-23. Indeed, Strauder involved a state statute expressly limiting jury service to whites.
\(^13\) Rives, 100 U.S. at 323. This limitation has persisted. See, e.g., Akins v. Texas, 325 U.S. 398, 403 (1945) (criminal defendants “are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried.”).
discriminatory application of facially neutral laws. To enable the Civil War amendments to serve their intended function – to protect the former slaves – the Supreme Court allowed proof of intent by indirect means. The most common method was a statistical showing known as the “rule of exclusion.” The challenger would show that virtually no African-Americans had served on juries over an extended period of time. Refusing to engage in the “violent presumption” that no African-Americans were qualified to serve, the Court would find a prima facie case of intentional discrimination.

As the litigation grew more sophisticated, challengers quantified and compared the proportion of African-Americans in the adult population with their representation on juries and grand juries. The stark statistical disparity established a prima facie case. The theory was that the complete or near complete absence of African-American jurors for a generation or more could not have happened by chance. Denial of discriminatory intent by local officials and assertions of good faith received short shrift. Otherwise, the Supreme Court said, the Equal Protection Clause “would be but a vain and illusory requirement.” During the 1930s, ‘40s and ‘50s, the Court routinely overturned criminal

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15 Strauder, 100 U.S. at 306; Ex Parte Virginia, 100 U.S. 339, 344-45 (1879).
18 Hill v. Texas, 316 U.S. 316 U.S. 400, 405 (1942); Norris, 294 U.S. at 599; Neal, 103 U.S. at 397.
20 Eubanks, 356 U.S. at 587; Hernandez, 347 U.S. at 482; Hill, 316 U.S. at 404; Smith, 311 U.S. at 131.
21 Norris, 294 U.S. at 598.

At the same time, however, demands were growing for broader changes in jury selection that strained the limits of equal protection doctrine. Encouraged perhaps by the race discrimination cases, a movement developed to “democratize” juries. New York City, for example, empanelled “blue ribbon juries,” culled from the general pool through examination of questionnaires and personal interviews with jury officials.\footnote{Fay v. New York, 332 U.S. 261, 266-68 (1947); id. at 298 (Murphy, J., dissenting).} The result was a special pool composed mostly of jurors with professional, managerial or white collar occupations.\footnote{Id. at 298 (Murphy, J., dissenting).} Blue collar workers were not represented.\footnote{See James Oldham, The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges, 6 Wm. & Mary Bill Rts. J. 623, 628-48 (1998), for an account of practices in other states.} These special juries drew criticism as elitist and anti-democratic.\footnote{See, e.g., Fay, 332 U.S. at 299-300 (Murphy, J., dissenting) (jury officials have evolved a “standard . . . of an economic or social nature” to exclude persons); Glasser, 315 U.S. at 86 (officials charged with choosing jurors “must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community”); Abramson, We, the Jury at 99-100; Darryl K. Brown, The Means and Ends of Representative Juries, 1 Va. J. Soc. Pol’y & L. 445, 449 (1994); William V. Luneburg and Mark A. Nordenberg, Specially Qualified Juries and Expert Non-Jury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation, 67 Va. L. Rev. 887, 905 (1981); Note, Blue Ribbon Juries,” 47 Col. L. Rev. 463, 468 (1947) (state Judicial Council called for abolition of special juries starting in 1937).} Although their purported goal was to assure juror competence, critics charged that jury officials equated competence with socio-economic status so the special juries became bastions of class privilege. Some charged that special juries in criminal cases were especially prone to convict.\footnote{Note, 47 Col. L. Rev. at 468 (state Judicial Council contended blue ribbon jury “used as a convicting jury”).} In 1947, a challenge reached the Supreme Court. In\textit{ Fay v. New York}, a divided Court refused to
invalidate the use of blue ribbon juries in New York state courts, deferring to the state in
the absence of proof of intentional discrimination.\textsuperscript{28} \textit{Fay} demonstrated the limits of the
equal protection doctrine. Blue collar workers might be underrepresented in special
juries, but the imbalance did not offend the Equal Protection Clause if it was nothing
more than the by-product of a procedure intended to promote juror competence.

The movement for more inclusive juries flowed into other channels. In 1941, the
Judicial Conference of the United States Courts appointed a committee of federal district
judges, known as the Knox Committee after its chairman, to study the problem.\textsuperscript{29} The
committee’s report tried to have it both ways. “It is the sense of the Committee,” the
report said, “that jurors to serve in the district courts of the United States should be drawn
from every economic and social group of the community without regard to race, color, or
politics, and that those chosen to serve as jurors should possess as high a degree of
intelligence, morality, integrity, and common sense, as can be found by the persons
charged with the duty of making the selection.”\textsuperscript{30} The report prompted legislative
proposals to establish uniform qualifications for federal jurors.\textsuperscript{31}

Since the first Judiciary Act, federal courts had used the juror qualifications of the
state in which they sat.\textsuperscript{32} The legislation proposed in 1947 to change this practice did not
make it through Congress intact. The final bill contained uniform qualifications but it
allowed district courts to supplement those qualifications with state standards. It took
another ten years to make the change, a testament to the political strength of the

\begin{thebibliography}{9}

\bibitem{28}332 U.S. 261 (1947).
\bibitem{29}Luneburg and Nordenberg, 67 Va. L. Rev. at 909.
\bibitem{31}Rabinowitz \textit{v. United States}, 366 F.2d 34, 46 (5th Cir. 1966) (\textit{en banc}).
\bibitem{32}\textit{Id.} at 45.
\end{thebibliography}
opposition. The Civil Rights Act of 1957 established uniform qualifications that could not be supplemented. The qualifications were intended to broaden the juror base and to increase the number of African-Americans called for service. But the 1957 Act provided no guidelines for implementation so local officials continued to cull jurors for “quality” with requirements exceeding the statutory standards.

Ultimately, Congress established not only uniform objective qualifications for federal jurors, but also random selection of jury venires and guidelines for implementing the new system. The Jury Service and Selection Act of 1968 (“JSSA”) specified voter registration lists as the basic source of jurors, and established random methods for narrowing the lists. To assure implementation, the JSSA provided step-by-step instructions and directed judicial districts to develop “jury plans” for following them. Together these practices took much of the subjective judgment out of jury

33 Id. at 48-50.
34 Id. at 51.
36 28 U.S.C. § 1865. Jury officials “shall deem any person qualified” unless she fails to satisfy any of five enumerated criteria: (1) she is not a citizen, at least 18 years old, who has lived in the judicial district for one year; (2) she cannot read and write English sufficiently to fill out the juror questionnaire; (3) she cannot speak English; (4) she is incapable of serving due to mental or physical infirmity; or (5) she is charged with or has been convicted of a felony and her civil rights have not been restored. 28 U.S.C. § 1865(b).
38 28 U.S.C. § 1863(b)(2). Voter registration lists are to be supplemented with other lists as necessary to obtain a fair cross-section.
39 28 U.S.C. § 1863(b). Generally, the JSSA requires each judicial district to formulate a jury plan that provides for the random drawing of a master jury wheel from the source list at least once every four years. 28 U.S.C. § 1863(b)(4). Periodically the clerk draws names from the master wheel, again at random, and mails juror qualification forms to the persons selected. 28 U.S.C. § 1864. The clerk reviews the forms that are completed and returned and eliminates those persons who do not satisfy the statutory qualifications. Everyone else is placed on the qualified jury wheel. 28 U.S.C. §§ 1865, 1866. As needed, the clerk randomly draws persons from the qualified wheel to be summoned for service. 28 U.S.C. § 1866.
selection (except for the exercise of peremptory challenges at trial\textsuperscript{41}). When the Supreme Court extended the Sixth Amendment jury trial right to the states\textsuperscript{42} a few weeks after the JSSA passed, states turned to the JSSA as a model for their own selection procedures.\textsuperscript{43}

These political developments undermined the efficacy of the Equal Protection Clause as a source of constitutional constraints on jury selection. The crux of an equal protection violation is intentional discrimination. By establishing random selection procedures and objective qualifications, however, the JSSA eliminated the opportunities for discriminatory intent to be exercised. As became evident in the controversy over juror qualifications, objective selection processes could still result in underrepresentation of racial, economic and social groups. But the ability of courts to infer invidious intent from disproportionate results diminished as jury officials justified venire composition in terms that carried at least facial legitimacy.\textsuperscript{44} Moreover, the groups whose underrepresentation sparked challenges expanded beyond African-Americans. The Supreme Court was willing to give heightened equal protection scrutiny to other racial groups such as Hispanics. “Throughout our history,” the Court explained, “difference in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the law.”\textsuperscript{45} But it was not willing to extend the same equal protection scrutiny to underrepresentation of women and economic

\textsuperscript{41} Peremptory challenges remain an obstacle to diverse juries today. Equal protection guarantees have proven difficult to enforce and the Supreme Court refused to apply the fair cross-section requirement to peremptory challenges in \textit{Holland v. Illinois}, 493 U.S. 474 (1990).

\textsuperscript{42} \textit{Duncan v. Louisiana}, 391 U.S. 145 (1968).


\textsuperscript{44} \textit{Fay}, 332 U.S. at 277 (underrepresentation of manual laborers results from application of “legitimate standards of disqualification”); \textit{Thiel v. Southern Pacific Co.}, 328 U.S. 217, 222 (1946) (exclusion of day labors because they could not afford to miss work); \textit{Glasser v. United States}, 315 U.S. 60, 86 (1942) (motives behind tendencies to select elite jury panels “may be the best”); \textit{Rabinowitz}, 366 F.3d at 41 (jury commissioner expressing goal of “outstanding blue ribbon jury list”).
The substance of the doctrinal dilemma is perhaps best illustrated by the Court’s rejection of a common excuse offered by white Southern jury commissioners for underrepresentation of African-Americans on venires. The commissioners said they drew up lists of jurors from people they knew and they did not know any qualified African-Americans. The Supreme Court was not satisfied. Jury commissioners had a “constitutional duty,” the Court said, “not to pursue a course of conduct . . . which would operate to discriminate in the selection of jurors on racial grounds.” Discrimination “necessarily results” where qualified African-Americans are excluded from service because the jury commissioners did not “seek to learn” who they are. Hence, jury commissioners had “the duty” to try to find them. The source of this duty is not clear. It does not come from the Equal Protection Clause, which merely forbids intentional

46 Fay v. New York, 332 U.S. at 281-84.
47 Hoyt v. Florida, 368 U.S. 57, 68 (1961). Indeed, when challenges to the exclusion of women reached the Court in the 1940s, the conventional wisdom was that “inherent differences” between the sexes justified disparate treatment under the law. States could legislate a minimum wage for women only, West Coast Hotel v. Parrish, 300 U.S. 379 (1937), and prohibit them from working in certain occupations, Geosar	v. Cleary, 335 U.S. 464 (1948). In 1942, only 28 states permitted women to serve on juries, and 15 of those allowed them to opt-out of service. Fay v. New York, 332 U.S. 261, 289 (1947). In 1947 and again in 1961, the Court rejected equal protection challenges to these exemptions. Fay, 332 U.S. at 290; Hoyt, 368 U.S. at 62. As for economic classes, the Court was reluctant to give heightened equal protection scrutiny after its confrontation with Franklin D. Roosevelt over the invalidation of New Deal programs. Dandridge v. Williams, 397 U.S. 471, 484-85 (1970); Ferguson v. Skrupa, 372 U.S. 726, 730-33 (1963); Williamson v. Lee Optical of Okla., 348 U.S. 483, 488-89 (1955); see also Barry Friedman, The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics, 148 U. Pa. L. Rev. 971, 979 (2000).
49 Hill, 316 U.S. at 404 (emphasis added); see also Smith, 311 U.S. at 132.
50 Hill, 316 U.S. at 404; see also Smith, 311 U.S. at 132.
51 Cassell, 339 U.S. at 289 (plurality); id. at 298 (Clark, J., concurring).
discrimination but does not create a right to a jury pool of any particular composition.\footnote{Cassell, 339 U.S. at 292 (Frankfurter, J., concurring) (“If the record here showed no more than that the grand-jury commissioners consider the Negroes with whom they were acquainted – just as they considered white persons whom they knew – and had found them to be either unqualified for grand-jury service or qualified but unavailable, and did so not designedly to exclude Negroes, the State court’s validation of the local procedure would have to prevail.”).}

So it must come from somewhere else.\footnote{Nor did the duty arise from the need to remedy prior discrimination, which prompted the Supreme Court to order affirmative relief in the school desegregation cases. Paul Brest, \textit{Foreward: In Defense of the Antidiscrimination Principle}, 90 Harv. L. Rev. 1, 32-33 (1976) (discussing \textit{Green v. County School Bd.}, 391 U.S. 430 (1968), and \textit{Swann v. Charlotte-Mecklenburg Bd. of Education}, 402 U.S. 1 (1971)). The cases in which the Supreme Court spoke of the duty to find qualified African-American jurors did not involve prior findings of discrimination.}

The “somewhere else” was the right to a jury drawn from a fair cross-section of the community, which the Court ultimately read into the Sixth Amendment right to trial by an impartial jury. The idea came from the petitioner’s \textit{pro bono} lawyers in \textit{Smith v. Texas}\footnote{Robert C. Walters \textit{et al.}, \textit{Jury of Our Peers: An Unfulfilled Constitutional Promise}, 58 SMU L. Rev. 319, 319 (2005). One of the three lawyers was William A. Vinson, a founding partner of Vinson & Elkins, a prominent Houston-based firm.} and Justice Black included it in his 1942 opinion for the Court.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.\footnote{\textit{Smith v. Texas}, 311 U.S. 128, 130 (1940).}

Two years later in \textit{Glasser v. United States},\footnote{315 U.S. 60 (1942).} the Court used the “tradition” of a jury that is “truly representative of the community” to analyze a challenge to the limitation of female jurors to graduates of League of Women Voters “jury classes.”\footnote{See text, page _____.} Although it disposed of the case on other grounds, the Court disapproved of the procedure: “[T]he proper functioning of the jury system, and, indeed our democracy itself, requires that the jury be a body truly representative of the community, and not the organ of any special...
group or class.” Soon after, the Court relied on the new theory to reverse convictions where day laborers and women were not called to serve in federal court. Of note, the trio of cases involved facial classifications that were necessarily intentional but the intent (at least in two of the cases) was arguably benign. Limiting female jurors to those who had taken juror education classes promoted competence, while exclusion of day laborers removed the financial burden of service from those who could least afford it. The Court took the occasion to emphasize that good intentions were not a defense to this emerging claim. “Steps innocently taken,” the Court said, “may one by one lead to the irretrievable impairment of substantial liberties.”

The 1940s cases, however, did not constitutionalize the fair cross-section requirement. The cases were tried in federal court so the Court relied on its supervisory powers. The result was different in cases originating in state courts, where the Court deferred to the states. Hence, underrepresentation of blue collar workers and women in New York state courts survived, as did Florida’s requirement that women pre-register for jury service if they wished to be called. In 1968, however, the Court extended the Sixth Amendment right to a jury trial in criminal cases to the states. The next time the opt-in procedure came before the Court, it had the tools to address the matter in

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61 The Court’s decision to give heightened equal protection scrutiny to “benign” intentions would not develop until the “reverse” discrimination cases of the 1980s and 1990s. See Adarand Constructors v. Pena, 515 U.S. 200 (1995); City of Richmond v. Croson, 488 U.S. 469 (1989).
62 Glasser, 315 U.S. at 86; see also Thiel, 328 U.S. at 224-25.
65 Duncan v. Louisiana, 391 U.S. 145 (1968). The states, however, were not required to have 12-person jurors, so long as the jury was large enough to promote group deliberation, and “to provide a fair possibility of obtaining a representative cross-section of the community.” Williams v. Florida, 399 U.S. 78, 100 (1970); see also Ballew v. Georgia, 435 U.S. 223, 236-37 (1978) (representation of minority groups compromised by five-member juries).
constitutional terms. In *Taylor v. Louisiana*, the Court held that a state statute allowing women to be called for jury service only if they pre-registered violated the fair cross-section requirement of the Sixth Amendment.66

*Taylor* based the fair cross-section requirement on the jury’s traditional function “in guarding against arbitrary power.”67 By bringing to bear the “commonsense judgment of the community,” the jury served as “a hedge” against prosecutorial overreaching and judicial indifference.68 “This prophylactic vehicle is not provided,” the Court said, “if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool.”69 The Court also acknowledged the democratic ideal70 emphasized by the New Deal Court of the 1940s, concerned with “class distinctions”71 and the specter of the jury as an “organ of [a] special group.”72 Finally, the *Taylor* Court cited Justice Frankfurter on the need for the jury to have a “broad representative character . . . as assurance of a diffused impartiality.”73 A later five-justice majority would base the fair cross-section requirement on the impartiality requirement alone, reasoning that it prevents the government from “stacking the deck” with pro-prosecution groups.74 But as commentators point out, the same Court has refused to attribute distinctive views to distinctive groups in its decisions prohibiting

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67 *Id.* at 530.
68 *Id.*
69 *Id.*
70 *Id.* (“Community participation in the administration of the criminal law . . . is . . . consistent with our democratic heritage. . . . Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.”).
73 419 U.S. at 530, quoting *Thiel*, 328 U.S. at 227 (Frankfurter, J. dissenting). The Court also cited legitimacy and sharing responsibility for criminal convictions among diverse groups as additional reasons to constitutionalize the fair cross-section requirement. These considerations seem more like results of recognizing the right than constitutional foundations.
race- and gender-based peremptory challenges. Justice Frankfurter’s concept of “a diffused impartiality” seems more defensible. As Martha Minow explains, people bring different perspectives to a jury based on their different experiences. When multiple perspectives are present, the collective deliberation process yields a better decision that would otherwise emerge. In other words, “fair representation and impartiality converge.”

II. The Equal Protection Paradigm Persists

The Supreme Court laid out the elements of a fair cross-section claim in Duren v. Missouri. To make a prima facie case, the proponent had to show (1) a distinctive group (2) which was underrepresented on jury venires (3) “due to systematic exclusion of the group in the jury selection process.” If the proponent succeeded, the burden shifted to the governmental actor to prove the exclusion feature of the jury selection process primarily advanced a significant government interest. Notably absent from the list of elements was purposeful discrimination. While discriminatory intent is an essential

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76 Martha Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality in Judges and Jurors, 33 Wm. & Mary L. Rev. 1201-1205-206 (1992).
77 Id. at 1206.
78 Id. at 1209.
80 Id. at 364.
81 Id. at 367-68.
82 See United States v. Weaver, 267 F.3d 231, 237 (3rd Cir. 2001); United States v. Spriggs, 102 F.3d 1245, 1254 (D.C. Cir. 1997); United States v. Esquivel, 88 F.3d 722, 725 (9th Cir. 1996); United States v. Biaggi, 909 F.2d 662, 678 (2nd Cir. 1990); United States v. Perez-Hernandez, 672 F.2d 1380, 1384 n.5 (11th Cir. 1982); United States v. Maskeny, 609 F.2d 183, 190 (5th Cir. 1980); United States v. Green, 389 F. Supp. 2d 29, 51 (D. Mass. 2005), mandamus granted on other grounds, 426 F.3d 1 (1st Cir. 2005); see also United
element of an equal protection claim, the Court explained, “[I]n contrast, in Sixth Amendment fair cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant’s interest in a jury chosen from a fair community cross-section.”83 On its facts, Duren concerned a state statute in which women were called for jury service but could claim an automatic exemption. It was up to the individual woman to disqualify herself. Discriminatory intent on the part of jury officials or the state therefore played no role in the resultant underrepresentation. Nevertheless, the Court invalidated the statute because it systematically resulted in jury venires with disproportionately few women.84

Instead of discriminatory intent, a party raising a fair cross-section claim must prove a causal connection between the underrepresentation and the jury selection process.85 The underrepresentation must be “due to”86 the operation of the selection system, not happenstance.87 In Duren, the petitioner met that requirement by “his undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year.”88 That showing, according to the Court, “manifestly indicates that the cause of the underrepresentation was systematic – that is, inherent in the particular jury-selection process utilized.”89 The Court, however,

83 Duren, 439 U.S. at 368 n.26.
84 Id. at 365-66.
85 Randolph v. California, 380 F.3d 1133, 1141 (9th Cir. 2004); United States v. Ramnath, No. 97-1202, 131 F.3d 132, 1997 WL 738584 (2nd Cir. Nov. 21, 1997) (unpublished); Ramseur v. Beyer, 983 F.2d 1215, 1231 (3rd Cir. 1992) (en banc); Davis v. Warden, 867 F.2d 1003, 1014 (7th Cir. 1989); Machetti v. Linahan, 679 F.2d 236, 241-42 (11th Cir. 1982).
86 Duren, 439 U.S. at 364.
88 439 U.S. at 366.
89 Id. at 366.
took its analysis further. It identified the stages of the jury selection process at which discrepancies appeared and tied them to the opportunities for women to opt-out. Women could exercise the automatic exemption when they completed a juror questionnaire or when they subsequently received a summons to appear. At both stages, the number of women in the pool fell dramatically. “The resulting disproportionate and consistent exclusion of women,” the Court concluded, “was quite obviously due to the system by which juries were selected.”

Despite the distinctions drawn in Duren, the lower courts continue to struggle with the distinction between an equal protection and a fair cross-section claim. Some panels have explicitly injected discriminatory intent into a fair cross-section prima facie case. More commonly, the confusion is evident in the way courts handle the second and third Duren elements. To find substantial underrepresentation, the second element, courts require, explicitly or de facto, at least 10 percent absolute disparity. The statistic

\[90\] Id. at 367.

91 In United States v. Footracer, 189 F.3d 1058 (9th Cir. 1999), for example, a divided panel said “systematic exclusion” meant disparate treatment, not disparate impact. Id. at 1061-62. “Disparate treatment” is shorthand for an indirect evidence case of purposeful discrimination proof that similarly qualified persons of different races are treated differently raises an inference of discriminatory intent. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Cooper v. Southern Co., 390 F.3d 695, 723 (11th Cir. 2004), cert. denied, 126 S. Ct. 478 (2005), disapproved on other grounds, Ash v. Tyson Foods, ___ U.S. ___, 126 S. Ct. 1195 (2006); Williams v. Waste Management of Ill., 361 F.3d 1021, 1034 (7th Cir. 2004). The Footracer dissent chided the majority: “it is not disparate treatment but the disproportion itself that is the hallmark of a Sixth Amendment violation.” 189 F.3d at 1068, 1069. The panel opinion was subsequently withdrawn, 252 F.3d 1059 (9th Cir. 2001), and the case was decided by unpublished opinion on a different ground. No. 97-19528, 16 F. App’x 595 (9th Cir. 2001). See also United States v. Contreras, 108 F.3d 1255, 1268 (10th Cir. 1997) (fair cross-section claim based on excusal of jurors before voir dire rejected for lack of evidence that “any of the jurors were excused because of their ethnicity”); United States v. Cecil, 836 F.2d 1265, 1269 (8th Cir. 1982) (fair cross-section guarantee prohibits “deliberate exclusion”).

\[92\] United States v. Shinault, 147 F.3d 1266, 1273 (10th Cir. 1998); United States v. McAnderson, 914 F.2d 934, 941 (7th Cir. 1990); United States v. Tuttle, 729 F.2d 1325, 1327 (11th Cir. 1984); United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981); United States v. Maskeny, 609 F.2d 183, 190 (5th Cir. 1980); see
comes from *Swain v. Alabama*, an equal protection case, where the Supreme Court stated that underrepresentation by 10 percent or less did not raise an inference of purposeful discrimination.93 Courts transpose the Swain figure into fair cross-section cases.94 Commentators have criticized the use of Swain’s absolute disparity test (the difference between the percentage of a group in the community and the percentage of that group in the jury pool95) as a poor measure of significance,96 while the 10 percent figure forecloses fair cross-section claims regarding exclusion of groups comprising a small part of the population.97 More fundamentally, the transposition is unsound as a matter of doctrine. Statistics serve a different function in equal protection claims; they are circumstantial evidence of discriminatory intent.98 Indeed, as in Swain, the statistics often are the only evidence of discriminatory intent. Where the statistical disparity is stark, the likelihood of it occurring by chance is sufficiently small to raise an inference of invidious intent.99 Fair cross-section claims, however, do not require proof of invidious intent so statistics

also *United States v. Royal*, 174 F.3d 1, 7 (1st Cir. 1999) (adopting absolute disparity test but not specifying threshold); *United States v. Rioux*, 97 F.3d 648, 655-56 (2nd Cir. 1996) (same).

93 380 U.S. 202, 208-209 (1965) (“We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10 percent.”).

94 E.g., *McAnderson*, 914 F.2d at 941; *Clifford*, 640 F.2d at 155; *Maskeny*, 609 F.2d at 190.

95 *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005).


97 *Green*, 389 F. Supp. 2d at 52 (“Put simply, if each and every African-American in the Eastern Division [of the District of Massachusetts] were excluded from jury service, the absolute disparity would be ‘only’ 6.96 percent – and within the range cited approvingly [by the First Circuit].”); see also *United States v. Shinault*, 147 F.3d 1266, 1273 (10th Cir. 1998); *United States v. Rogers*, 73 F.3d 774, 776-77 (8th Cir. 1996) (calling unsuccessfully for *en banc* reconsideration); *United States v. Jackman*, 46 F.3d 1240, 1247 (2nd Cir. 1995).


play a different role. The disparity itself constitutes the constitutional violation if it is (a) substantial and (b) results from the jury selection system. A large and persistent disparity may raise the requisite causal inference. But there is no need for such a large disparity if there is other evidence tying the disparity to a particular feature of the selection process. Indeed, in the employment discrimination context, the Supreme Court has refused to adopt a rigid numerical threshold for disparate impact claims. Many lower courts fail to recognize this distinction. Instead, by adopting the 10 percent absolute disparity threshold in Swain, they require a statistical showing sufficient by itself to raise an inference that the disparity did not occur by chance, regardless of whether there is other evidence of a causal connection.

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100 One of the few courts to recognize this was the Third Circuit, sitting en banc in Ramseur v. Beyer, 983 F.2d 1215 (3rd Cir. 1992). "In making our Sixth Amendment analysis," the court said, "we sue standards that are somewhat different than those under the ‘substantial underrepresentation’ requirement of the equal protection analysis." Id. at 1234. The court asked whether the underrepresentation raised an inference of intentional discrimination in analyzing the defendant’s equal protection claim. By contrast, its fair cross-section analysis “examine[d] whether [the] group’s representation on jury lists is ‘unfair’ such that the proper functioning of the jury system is threatened.” Id. at 1234. In both instances, the court found a 14.1 percent absolute disparity insufficient.

101 Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979); United States v. Footracer, 189 F.3d 1058, 1068 (9th Cir. 1999) (Pregerson, J., dissenting), majority opinion withdrawn and replaced by unpublished memorandum, 252 F.3d 1059 (9th Cir. 2001).

102 United States v. Weaver, 267 F.3d 231, 244 (3rd Cir. 2001); United States v. Rioux, 97 F.3d 648, 658 (2nd Cir. 1996); see also Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994-95 (1988) (Title VII disparate impact claim).

103 Watson, 487 U.S. at 994-95 n.3 (plurality). At issue in Watson was whether a subjective selection process could be challenged under a disparate impact model. The Court held it could. In so doing, a plurality discussed the use of statistical evidence to prove causation. “Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation.” Id. at 994-95. Expanding on this point in a footnote, the plurality criticized the Equal Employment Opportunity Commission’s attempt to quantify “sufficiently substantial” with a guideline requiring that the disadvantaged group be selected at a rate less than four-fifths of the rate at which the group with the highest rate is selected. Id. at 995 n.3. “At least at this stage of the law’s development, we believe that . . . a case-by-case approach properly reflects our recognition that statistics ‘come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances.” Id., quoting Teamsters v. United States, 431 U.S. 324, 340 (1977). This section of the Watson opinion was part of a broader discussion of evidentiary burdens and liberal members of the Court refused to join it for reasons unrelated to the desirability of a rigid numerical threshold. Id. at 1000-1012 (Blackmun, J., dissenting).
The tendency to conflate equal protection and fair cross-section claims is also evident in the way lower courts treat the third *Duren* element, systematic exclusion, as a fault rather than a causation element. 104 In its earlier equal protection decisions, the Supreme Court often used the phrase “systematically excluded because of race.” 105 “Because of race” was shorthand for discriminatory intent. In *Duren*, the Court continued to use “systematic exclusion” but without “because of race.” Nevertheless, the term “exclusion” has suggested to lower courts an element of fault, if not deliberateness, on the part of court officials. 106 As a result, jury selection systems using a broad-based source of names and random selection have been virtually immune from challenge, even if African-Americans were persistently underrepresented on venires.

The problem is evident in the multitude of challenges to sole reliance on voter registration lists as the source of names. African-Americans tend to register to vote in numbers below their share of the adult population. 107 Using voter registration lists as the sole source of jurors builds this disproportion into the jury selection system. 108 Nevertheless, most courts hold that the resultant underrepresentation is not due to systematic exclusion. 109 They assert that persons who do not register to vote are not

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108 *Green*, 389 F. Supp. 2d at 43.

excluded from jury service but rather exclude themselves. Systematic exclusion occurs only if African-Americans are discouraged from registering to vote.110 This line of reasoning reflects an equal protection paradigm. It overlooks the disparate impact of using voter registration lists as the sole source of jury pools111 and builds a requirement of intentional discrimination, albeit in the voter registration system, into fair cross-section claims.112

Courts which insulate sole reliance on voter registration lists from Sixth Amendment challenge sometimes cite the Jury Selection and Service Act (“JSSA”) as authority.113 The JSSA established voter registration lists as the primary source of juror names to replace subjective sources such as the “key man” system, where jury officials asked well-connected individuals to compile lists of people they knew.114 To be sure, Congress saw the use of voter registration lists as a way to assure juror competence.115 But it also recognized that voter registration lists would have to be supplemented if they

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*Sates v. Rodriguez-Lara*, 421 F.3d 932, 945 (9th Cir. 2005) (rejecting challenge to sole reliance on voter registration lists for lack of evidence of impact); *United Sates v. Weaver*, 2667 F.3d 231, 244-45 (3rd Cir. 2001) (Sixth Amendment violation might occur if use of voter registration lists over time had the effect of sizably underrepresenting a particular group; *United States v. Ruiz-Castro*, 92 F.3d 1519 (10th Cir. 1996) (same) overruled on other grounds, *United States v. Flowers*, 464 F.3d 1127, 130 n.1 (10th Cir. 2006); *Bryant v. Wainwright*, 686 F.2d 1373 (11th Cir. 1982) (same). A divided California Supreme Court held sole reliance on voter registration lists unconstitutional in *People v. Harris*, 679 P.2d 433, 446 (Cal. 1984) (plurality), but the court subsequently reversed itself. *People v. Sanders*, 797 P.2d 561, 570-72 (Cal. 1990). *Sanchez*, 156 F.3d at 879 (no systematic exclusion absent proof that “certain racial or ethnic groups face obstacles in the voter registration process”); *Schanbarger*, 77 F.3d at 1424 (no Sixth Amendment violation “absent positive evidence that some groups have been hindered in attempting to vote”); *Cecil*, 836 F.2d at 1448 (“people who choose not to register would be excluded”).

110 *E.g.*, *Garcia*, 991 F.3d at 492 (“mere fact that one identifiable group of individuals votes in a lower proportion than the rest of the population does not make a jury selection system illegal or unconstitutional”), *quoting United States v. Clifford*, 640 F.2d 150, 156 (8th Cir. 1981).

111 *Ruiz-Castro*, 92 F.3d at 1527 (equal opportunity to register to vote “might be a defense to an equal protection challenge to the right to vote, but the issue before us is not that issue”).

112 *E.g.*, *Polk v. Hunt*, 1996 WL 47110, at *2; Cecil*, 836 F.2d at 1445.

113 H.R. Rep. No. 90-1076 (1968), reprinted as 1968 U.S.C.C.A.N. 1792, 1794 & 1794 n.1; see also *Barbier v. Ponte*, 772 F.2d 982, 990 (1st Cir. 1985) (describing the opportunities for purposeful discrimination in the key man system), reversed on other grounds on rehearing en banc, 772 F.2d at 996.

resulted in underrepresentation of a distinct group in jury pools\textsuperscript{116} and it so provided in the JSSA.\textsuperscript{117} It is true that Congress observed that persons could avail themselves of the opportunity to serve on a jury by registering to vote,\textsuperscript{118} as at least one court noted in rejecting a fair cross-section claim.\textsuperscript{119} But the JSSA had two purposes: to assure litigants a representative source of juries \textit{and} to assure “all qualified citizens . . . the opportunity to be considered for jury service.”\textsuperscript{120} The opportunity to register to vote is relevant to the second purpose. The Sixth Amendment, however, focuses on the first purpose: a criminal defendant’s entitlement to a jury drawn from a fair cross-section of the community.\textsuperscript{121} To fulfill that purpose, the Supreme Court put the onus on judicial officers to find ways to include persons who do not register to vote.

The same mistaken line of reasoning is evident in another aspect of jury selection that has drawn challenges: failure to update addresses. The JSSA requires that a new master jury wheel be drawn at least every four years.\textsuperscript{122} In the interim, addresses usually are not updated unless a prospective juror informs the jury administrator that he or she has moved. African-Americans, however, have a higher mobility rate than whites, apparently associated with a higher rate of poverty and a lower rate of home

\begin{thebibliography}{99}
\bibitem{117} 28 U.S.C. § 1863(b)(2).
\bibitem{119} \textit{United States v. Cecil}, 836 F.2d 1431, 1445 (4th Cir. 1988) (\textit{en banc}).
\bibitem{121} Admittedly, the Court in \textit{Taylor} cited “sharing in the administration of justice [as] a phase of civic responsibility” as one function of the fair cross-section requirement. \textit{Taylor v. Louisiana}, 419 U.S. 522, 531 (1975). The focus, however, was on the responsibility to share the burden of the administration of justice, not the right to do so. Indeed, the \textit{Taylor} Court was quoting from Justice Frankfurter’s dissent in a case invalidating an automatic exemption for day laborers from service on the ground that they could least afford to miss work. \textit{See Thiel v. Southern Pacific Co.}, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).
\bibitem{122} 28 U.S.C. § 1863(b)(4).
\end{thebibliography}
ownership. Therefore, the failure to update addresses will disproportionately impact the rate at which African-Americans will receive jury mailings. A prospective juror who does not receive a juror questionnaire or a summons to appear will not respond, and failure to respond eliminates that person from the next step of the selection process. This was a particularly big problem in post-Katrina venires in the Eastern District of Louisiana. In September and October, 2005, one or two months after the storm, the Clerk of Court’s office mailed out 14,000 juror questionnaires. In addition, it mailed summonses to appear to qualified jurors during the fall and winter. The Clerk generally used pre-Katrina addresses for these mailings. Even as lists of evacuee addresses became available, the Clerk failed to incorporate them into the data base. As a result, many questionnaires and summonses went to flooded, and therefore vacant, addresses. To complicate matters, the New Orleans post office was closed until March, 2006. Upon reopening, it returned 3,500 undelivered questionnaires and summonses to the Clerk’s office on a single day. Since African-Americans disproportionately lived in flooded areas, they would have been disproportionately represented among the intended

123 The Census Bureau estimates that 19.4 percent of African-Americans, 20.0 percent of Hispanics, and 14.5 percent of whites moved during 2005. U.S. Census Bureau, 2005 American Community Survey, Table S0701: Geographic Mobility by Selected Characteristics, available at www.census.gov. The same data set shows that homeowners are less likely to move than renters, and people with higher income are less likely to move than poorer persons. Home ownership rates are higher among whites than African-Americans or Hispanics; conversely, the poverty rate among whites is far lower. U.S. Census Bureau, Census 2000 Demographic Profile Highlights (Summary Files 2 and 4); see also United States v. Green, 389 F. Supp. 2d 29, 49 (D. Mass. 2005) (accepting government’s representation of higher levels of transience among poorer population), mandamus granted on other grounds, 426 F.3d 1 (1st Cir. 2005).
124 The Federal Emergency Management Agency had lists of evacuee addresses, which it disclosed pursuant to court order to the Louisiana Secretary of State for purposes of the April, 2006, mayoral election in New Orleans. The Postal Service also had change-of-address lists, and after the April election, the Louisiana Secretary of State posted a list of addresses of absentee voters on its website.
125 Transcript of Discovery Hearing (May 18, 2006), pp. 24-27, United States v. Torres, Crim. Action No. 06-018 (E.D. La.) (on file with author).
recipients of those 3,500 undeliverables. Nevertheless, the district court refused to order the Clerk to use evacuee address lists. The problem was not the jury selection system, the court said, but rather evacuees who failed to file change-of-address cards with the post office. “With citizenship comes responsibility,” the court said.

While this attitude may seem harsh, it stems from the same misunderstanding shared by other courts of the nature of the right at issue. Under routine circumstances, courts deny fair cross-section claims based on failure to update addresses on the ground that addresses become stale due to “outside factors, such as demographic changes.” The resultant underrepresentation, they say, is not due to the jury selection system itself. This position is logically fallacious where the failure to update addresses results in substantial underrepresentation. As in voter registration cases, however, courts read a “fault” or “blameworthiness” requirement into “systematic exclusion.” Just as people who do not register to vote are at “fault” for their exclusion from jury service, so too are people who move and fail to inform jury officials of their new address. The jury

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126 Dr. Andrew A. Beveridge, Disparities in the Jury System of the Eastern District of Louisiana, Pre-and Post-Katrina (June 21, 2006) at 9 and tables 6,7, filed as Exhibit 2(a) to Motion to Quash Jury Venire and to Stay Proceedings, United States v. Caldwell, Crim. Action No. 06-023 (E.D. La.) (on file with author).
127 Transcript of Motion Hearing (July 6, 2006), at 33, United States v. Caldwell, Crim. Action No. 06-023 (E.D. La.) (on file with author). Ironically, in a March, 2006 interview with The Third Branch, the jury administrator spoke of delays in re-routing mail to those who had filed change-of-address cards. “Before the main post office in New Orleans re-opened a few weeks,” she said, “the mail was being re-routed through Baton Rouge, Houston, returned to Baton Rouge, then on to St. Rouse, Louisiana, and it created enormous delays. Of all the issues we’ve had, the greatest challenge has been who is actually getting their mail.” Calling for Jurors Post-Katrina, The Third Branch (Mar. 2006), at 7.
128 See supra note 123.
129 United States v. Orange, 447 F.3d 792, 800 (10th Cir. 2006) (failure to update addresses is not systematic exclusion); United States v. Royal, 174 F.3d 1 (1st Cir. 1999) (fail-up to non-responses is desirable, though not required by the JSSA); United States v. Rioux, 97 F.3d 648, 658 (2nd Cir. 1996) (inability to serve juror questionnaires is due to outside forces, not the jury selection system); United States v. Craft, No. 97-5898, 1998 WL 702348, at *3 (6th Cir. Sept. 4, 1998) (unpublished) (underrepresentation is not due to jury selection system but rather to voting patterns, demographic trends and cultural differences).
130 Rioux, 97 F.3d at 658; Craft, 1998 WL 702348, at *3.
selection system is blameless because it complied with JSSA procedures and there was no intent to exclude.

This analysis fails to recognize that the fair cross-section guarantee is concerned with results, not fault or blameworthiness. It entitles defendants to a jury drawn from a representative pool. Therefore, courts cannot use jury selection methods that have been shown to persistently produce an unrepresentative pool. In this sense, a Duren claim is a species of strict liability; a jury selection method causing substantial underrepresentation is invalid, regardless of “fault,” unless the party defending the system shows that it primarily promotes a significant government interest. At the least, the fair cross-section requirement imposes a duty on jury officials to adopt procedures to remedy underrepresentation. Just as the excuse “I did not know any African-Americans” did not suffice to insulate jury selection procedures before Duren, so too the refusal to

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131 In an exceedingly thoughtful opinion, U.S. District Judge Nancy Gertner addresses this issue in United States v. Green, 389 F. Supp. 2d 29, 60-63 (D. Mass. 2005), mandamus granted on other grounds, 426 F.3d 1 (1st Cir. 2005). Underrepresentation of African-Americans prompted Massachusetts to seek a JSSA amendment allowing it to use locally compiled resident lists as the source of juror names instead of voter registration lists. Id. at 36, 42-43. The amendment passed but poorer localities neglected their statutory duty to update the resident lists annually. Id. at 36, 49. The defendants in Green blamed the failure to update the lists for the continuing underrepresentation of African-Americans in the jury system and showed a correlation between the areas with heavy African-American concentrations and the areas with low rates of response to juror questionnaires. Id. at 48-49. They could not, however, break-out the proportion of non-responses due to failure to update the resident lists and the proportion due to non-compliance by a recipient. Judge Gertner characterized the use of stale addresses as “an operational deficiency” of the jury selection system. Id. at 56. “In this context, if the goal is a fully representative jury,” she wrote, “it should be enough that [the operational deficiency] played a part in diminishing African-American representation” to establish systematic exclusion. “[A] more exact test would be well nigh impossible for defendants to meet.” Id. at 57. Nevertheless, Judge Gertner predicted that the First Circuit would not agree with her position, “given the rigors of [its] approach on other fronts,” and ruled against the defendants on their constitutional claim.” Id. She granted relief, however, on the JSSA claim but was reversed by the First Circuit, which said the standards for a JSSA claim were no less rigorous than those for a constitutional claim. United States v. Green, 426 F.3d 1, 8 (1st Cir. 2005).


133 Duren, 439 U.S. at 368-69.

134 See text at pages ____.
change procedures that have been shown to result in underrepresentation is constitutionally inadequate today.

III.

Lessons from Disparate Impact Doctrine

Fair cross-section claims fail to remedy systematic underrepresentation of racial minorities on jury venires because courts treat them as equal protection claims "lite." Courts confuse, in the terminology of Professor Paul Brest, the anti-discrimination principle with race-specific harm.135 The anti-discrimination principle, embodied in the Equal Protection Clause, prohibits classifications and decisions that treat people differently because of their race. It flows from a central tenet of classical liberalism: the belief that people are moral136 and political137 equals.138 A race-specific harm, by contrast, does not necessarily offend the anti-discrimination principle. It occurs when a practice disproportionately impacts members of a racial group. The practice, which may be facially race-neutral, is illegal only where the racially disparate impact offends a value protected by the Constitution or imposes a social cost prohibited by statute.139 Brest posits the fair cross-section guarantee as an example.140 The value protected is the right to an impartial jury that can interpose "the commonsense judgment of the community" against the government, both prosecutor and judge, so as "to guard against the exercise of

136 Brest, supra at 7-8; Ian Shapiro, The Evolution of Rights in Liberal Theory 87-88 (1986).
137 Kenneth L. Karst, Foreward: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 4 (1977); Shapiro, supra at 205-206.
138 Ronald Dworkin, Taking Rights Seriously 227 (1977) (distinguishing between equal treatment and treating people as equals).
139 Brest, supra at 45; see also Owen M. Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 235, 246 (1971) (distinguishing between equal treatment and equal achievement, and citing furtherance of other societal objectives as an ethical justification for a legal goal of equal achievement).
140 Brest, supra at 45.
arbitrary power.”\textsuperscript{141} But “[t]his prophylactic vehicle is not provided if the jury pool is
made up of only special segments of the populace or if large, distinctive groups are
excluded from the pool.”\textsuperscript{142} Hence, a Sixth Amendment violation takes the form of the
systematic exclusion of a distinctive group. The group-based nature of the violation in
both fair cross-section and equal protection cases leads courts to conflate the claims.

History makes clear, however, that the Supreme Court was fully aware that it was
not creating an equal protection claim in \textit{Taylor} and \textit{Duren}. In 1971, four years before
\textit{Taylor}, the Supreme Court recognized disparate impact claims under Title VII of the
Civil Rights Act of 1964. In \textit{Griggs v. Duke Power Co.},\textsuperscript{143} the Court held that Title VII
went beyond the anti-discrimination principle to remedy the depressed position of racial
minorities in the job market. Congress intended Title VII not only to “achieve equality of
employment opportunities,” the Court said, but also to “remove barriers that have
operated in the past to favor an identifiable group of white employees over other
employees. Under the Act, practices, procedures, or tests neutral on their face, and even
neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo
of prior discriminatory employment practices.”\textsuperscript{144} One of the main practices challenged
in \textit{Griggs} was the use of standardized intelligence tests to qualify applicants for
previously white departments. The test disproportionately excluded African-Americans
from the jobs. The Court observed that African-American performance on such tests was

\textsuperscript{141} \textit{Taylor v. Louisiana}, 419 U.S. 522, 530 (1975); see text at page ____
\textsuperscript{142} \textit{Id.}; see also Tanya E. Coke, Note, \textit{Lady Justice May Be Blind, But Is She a Soul Sister? Race-
Neutrality and the Ideal of Representative Juries}, 69 N.Y.U.L. Rev. 327, 353-57 (1994). In \textit{Holland v. Illinois}, a five-Justice majority based the fair cross-section right in the requirement of an impartial jury, noting that the Sixth Amendment said nothing about a representative jury.
\textsuperscript{143} 401 U.S. 424 (1971).
\textsuperscript{144} \textit{Id.} at 429-30.
depressed due to receipt of “inferior education in segregated schools,” and held that employers must compensate when fashioning job qualifications.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has – to resort again to the fable – provided that the vessel in which the milk is proffered be one all seekers can use.

Employment qualifications with a disparate impact were permissible only if the employer could show business necessity. “[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”

Although Griggs cites the undesirability of freezing “prior discriminatory employment practices” as justification for prohibiting employment practices with a discriminatory impact, prior intentional discrimination by the employer was not an element of a disparate impact claim. To the contrary, by invalidating a practice whose disparate impact was due to a factor beyond the employer’s control – inferior education – the Court made clear that disparate impact claims went beyond a remedy for prior intentional discrimination.

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145 Id. at 430.
147 401 U.S. at 432.
148 In the run-up to Griggs, commentators and lower courts relied on this rationale to justify relief from practices with discriminatory effect. See Parham v. Southwestern Bell, 433 F.2d 421, 427 (8th Cir. 1970); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 994 (5th Cir. 1969); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 516-18 (E.D. Va. 1968); see also George Cooper and Richard B. Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969); Blumrosen, 71 Mich. L. Rev. at 75-78. The Supreme Court subsequently overruled Local 189 and Quarles insofar as they invalidated seniority systems protected by section 703(h) of Title VII. International Brotherhood of Teamsters v. United States, 431 U.S. 342, 348-55 (1977).
Lower courts seized on \textit{Griggs} to recognize disparate impact claims under the Equal Protection Clause,\textsuperscript{151} even as the Supreme Court, wrestling with the problem of how to determine a legislative body’s intent, waffled.\textsuperscript{152} In 1976, the Supreme Court drew the line. In \textit{Washington v. Davis}, the Court held that the anti-discrimination principle embodied in the Fourteenth Amendment prohibited intentional discrimination only.\textsuperscript{153} In 1980, the year after it decided \textit{Duren}, the Court extended the discriminatory intent requirement to section 2 of the Voting Rights Act and the Fifteenth Amendment in \textit{City of Mobile v. Bolden}.\textsuperscript{154} So when the Court said in \textit{Duren} that “systematic disproportion itself demonstrates an infringement of the defendant’s interest in a jury chosen form a fair community cross-section,” in contrast to equal protection claims requiring proof of discriminatory purpose,\textsuperscript{155} the Court must have been aware that it was following the \textit{Griggs} model.

Claiming the \textit{Griggs} legacy could make two key differences for fair cross-section claims. First, it would shift the paradigm within which courts evaluate the claim. The anti-discrimination principle is a negative right. The Equal Protection Clause prohibits intentional discrimination but does not assure equal outcomes. Hence, judges thinking in equal protection terms look for wrongdoing. Confident that the jury selection process was insulated from intentional discrimination and that court personnel acted in good faith, the judge will discount low African-American representation as a social rather than legal problem. From a judge’s perspective, an accusation of a group-based violation of

\textsuperscript{151} Brest, \textit{supra} note 131, 90 Harv. L. Rev. at 24.
\textsuperscript{153} 426 U.S. 229 (1976).
\textsuperscript{155} 439 U.S. at 368 n.26.
the Constitution seems like a charge of racism. Planting fair cross-section claims in the *Griggs* paradigm would shift the perspective. The *Griggs* disparate impact model would put the focus on results: venires, like workforces, are supposed to be diverse. The issue would change from whether court personnel had done something wrong to whether the selection system produced the desired outcome. A pattern of undesirable results would raise concern about whether the problem was systematic.

Second, claiming the *Griggs* legacy would foreclose “blame the juror” excuses. Duke Power Co., the employer in *Griggs*, could not avoid liability by blaming deficient educational achievement for the poor showing of African-Americans on its standardized test. Rather, the Supreme Court held that the employer had to take “the posture and condition” of prospective employees into account when fashioning job qualifications. Those qualifications that disproportionately excluded African-Americans *prima facie* violated Title VII. Similarly in the fair cross-section context, courts must take “the posture and condition” of prospective jurors into account when fashioning a selection system. Selection systems that disproportionately exclude distinctive groups *prima facie* violate the Sixth Amendment. Blaming people for not registering to vote does not insulate sole reliance on voter registration lists as the source of jurors where African-American voter registration is low. Courts must take account of the disparate registration figures and supplement the source lists accordingly. Blaming prospective jurors for not reporting changes of address does not justify refusal to update addresses where African-Americans tend to move more frequently than whites or, as with Katrina, were disproportionately forced to evacuate. Courts must devise methods of contacting persons on the master jury wheel who change their residence.
It may well be that disparities in “the posture and condition” of members of distinctive groups can be traced to a history of purposeful societal discrimination, as in *Griggs*. Certainly, that was the case with Katrina, as film footage of the Superdome and Convention Center in New Orleans made clear. Arguably, it also is the case with depressed participation in the political system\textsuperscript{156} and with residential transience. Indeed, a history of societal discrimination may be what makes the group “distinctive.” But tracing disparities in a group’s “posture and condition” to historical discrimination is not necessary to a fair cross-section claim. The value protected by the Sixth Amendment is not a prospective juror’s right to an equal opportunity to serve; that right is protected elsewhere.\textsuperscript{157} The value protected by the Sixth Amendment is a criminal defendant’s right not to be deprived of his liberty except by an impartial jury of his peers.\textsuperscript{158} Hence, it does not matter why an aspect of the jury selection process filters out the group. What matters is that the group is systematically filtered out. Understanding the fair cross-section guarantee as a disparate impact claim would make this clear.

**CONCLUSION**

African-American representation on federal jury venires in New Orleans is better than it was in the first six months of post-Katrina trials so we have suspended our challenges. The conflation of equal protection and fair cross-section claims, however, remains a problem. This country has one of the highest incarceration rates in the

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\textsuperscript{157} The equal opportunity to serve on a jury is protected by the Equal Protection Clause and the JSSA. See 28 U.S.C. § 1861; *Peters v. Kiff*, 407 U.S. 493, 499 (1972) (citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), an equal protection case); see also note 117.

\textsuperscript{158} *Holland v. Illinois*, 493 U.S. 474, 481 (1990) (fair cross-section claim protects a defendant from the State stacking the deck against him); *Taylor v. Louisiana*, 419 U.S. 692, 701 (1975); *Peters v. Kiff*, 407 U.S. 493, 500 (1972) (singling out the injury to defendants who are denied possibility of a jury reflecting a representative cross-section as the concern underlying a Sixth Amendment claim).
world.\textsuperscript{159} A disproportionate number of those incarcerated are racial minorities, in particular, African-Americans.\textsuperscript{160} Convictions of African-American defendants by all-white juries drawn from venires with low African-American representation undermines the legitimacy of the criminal justice system in the eyes of those it incarcerates and their families.\textsuperscript{161} It also stokes racial tensions.\textsuperscript{162}

The fair cross-section right developed because the Equal Protection Clause could not adequately address what the Court and society perceived as an injustice. For lower courts to view fair cross-section claims through an equal protection lens sabotages the project that the Court undertook from \textit{Smith v. Texas} through \textit{Duren v. Missouri}. This is something the Court can fix without fear of interfering with the political branches of government. It should take the first opportunity to do so.


\textsuperscript{160} Harrison and Beck at 8-9 and Table 11.

\textsuperscript{161} \textit{United States v. Rogers}, 73 F.3d 774, 775 (8th Cir. 1996), citing \textit{Taylor v. Louisiana}, 419 U.S. 522, 530 (1975).

\textsuperscript{162} Coke, 69 N.Y.U.L. Rev. at 360-64.