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An Unbroken Thread: African American Exclusion from Jury Service, Past and Present

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INTRODUCTION

The underrepresentation of African Americans in jury pools and on juries is a widespread phenomenon.[1] Although the U.S. Supreme Court recognized that criminal defendants have a constitutional right to a jury selected from a fair cross section of the community,[2] lower courts rarely enforce that right.[3] In response, some jurisdictions have taken preemptive remedial measures to increase jury-pool diversity, but such actions have been voluntary and limited in their impact.[4] Creating representative juries requires large-scale, transformational reform to standards of juror eligibility, fair cross-section jurisprudence, and policies governing juror summons. Moreover, to be effective, such reforms must account for the centuries-long history of exclusion of African Americans from juries.

Beginning with the nation's founding and continuing into the mid-20th century, the exclusion of African Americans from grand and petit juries was near absolute.[5] It took nearly 200 years after this nation's independence, and almost 100 years after the U.S. Supreme Court prohibited racial discrimination in jury selection,[6] for African Americans

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1. *See* Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 103 (2019) ("There is a significant amount of evidence, however, that jury pools do *not* reflect a fair cross-section of their communities, in that they underrepresent African-Americans and Latinos.").

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

3. *See* Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 797 (2011) ("[T]he overwhelming majority of fair, cross section claims have failed . . . ."); *see also* DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 304 (6th ed. 2008) (describing the Court's fair cross-section cases as "so worthwhile in the abstract but which are so woefully inadequate in practice").

4. *See, e.g.*, *Court to Hear Seven Cases: Racial Issue in Jury Selection*, ALEXANDRIA DAILY TOWN TALK, Dec. 11, 1965 at 8 ("Rapides Parish to change its jury selection procedures, drawing names from utility customer lists rather than registered voter rolls. The lawyers said the percentage of African Americans on the lists was not fairly representative of the African American population percentage in the judicial division.").

5. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 884 (1994) ("[T]he first African-Americans ever to serve on a jury in America were two who sat in Worcester, Massachusetts, in 1860.").

6. Strauder v. West Virginia, 100 U.S. 303 (1880).

to begin to serve on juries with regularity.[7] However, the current race-neutral policies and practices of summoning people for jury service tend to mimic the results of explicitly race-based practices from the past. Although existing scholarship discusses the history of jury service, the difficulties of litigating fair cross-section claims, and the impact of felony-conviction disenfranchisement on juror eligibility, few articles address the intersection of these issues from a racial justice lens and with an eye toward implementing race-conscious reforms of juror summoning policies, fair cross-section law, and standards of juror eligibility.

Most importantly, this Article explores the unbroken thread between the historical exclusion of Black people from juries and contemporary underrepresentation. Beyond identifying this historical link, the Article also recommends policy and legal solutions to increase jury-pool diversity. Part I will detail this nation's history of African American exclusion from jury service, which continued through the middle of the 20th century despite the passage of the Reconstruction Amendments and the Supreme Court's repeated prohibition on excluding jurors based on race. Part II will survey statutory and legal attempts to achieve racially representative juries through the passage of the Jury Selection and Jury Service Act and through fair cross-section jurisprudence. Part III will track contemporary policies that disenfranchise people with certain criminal convictions, resulting in the exclusion of Black people from juries. Finally, Part IV will recommend legal and policy solutions that would meaningfully increase the representation of Black people in jury pools.

I. AFRICAN AMERICAN EXCLUSION

The jury is a sacred and defining aspect of the American legal system.[8] In forming the new nation, the constitutional framers envisioned the jury

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7. *But see* Alschuler & Deiss, *supra* note 5, at 897 (lamenting that in 1994, "the history of efforts to secure an equal place in the jury box for Americans of African descent is not yet concluded").

8. *See* 1 JOHN DICKINSON, *The Declaration of Rights adopted by the Stamp Act Congress, October 19, 1765*, *in* THE WRITINGS OF JOHN DICKINSON: POLITICAL WRITINGS, 1764-1774 178, 185 (Paul Leicester Ford ed., Phila., Historical Society of Pennsylvania 1895) ("VII. That trials by jury are the inherent and invaluable right of every British Subject in these Colonies."); THE DECLARATION OF INDEPENDENCE, para. 20 (U.S. 1776) ("For depriving us in many cases, of the benefit of Trial by Jury."); *see also* Duncan v. Louisiana, 391 U.S. 145, 151 (1968) ("[B]y the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.").

as a powerful protection against arbitrary and unjust action.[9] From the beginning, the framers recognized jury service as a marker of citizenship, akin to voting.[10] In refusing to recognize Black people as citizens, the framers implicitly excluded them from jury service.[11] With few exceptions, Black people did not serve on juries until after the Reconstruction Amendments.[12]

A. De Jure Exclusion

Early American standards for jury service varied from state to state. Every state limited jury service to men,[13] and a few states explicitly conditioned jury service on being white.[14] States also patterned the requirements for jury service on voting, which many states limited to white

9. *See Duncan*, 391 U.S. at 156. ("The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1183 (1991) ("[T]he key role of the jury was to protect ordinary individuals against governmental overreaching.").

10. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 217–21 ("First, the Framers recognized the connection between jury service and other forms of political participation, especially voting. Second, this connection between jury service and voting as two components in a package of political rights runs through the reconstruction and voting discrimination amendments . . . .").

11. *See* Scott v. Sandford, 60 U.S. 393, 423 (1857) (concluding that the framers did not contemplate including Black people as citizens when drafting the Constitution).

12. *See* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 94 (1961) (reporting that the two African Americans who served on a Massachusetts jury in 1860 were "the first of such instances" in the state's history). Although some other Northern states did not explicitly limit jury service to white men, custom and prejudice prevented Black people in those states from serving. *See also* Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L. J. 415 (1986).

13. *See* Alschuler & Deiss, *supra* note 5, at 877.

14. *See* LITWACK, *supra* note 12, at 477 (noting that even when states did not prohibit Black people from serving on juries, such service was rare).

men.[15] For instance, South Carolina, Georgia, and Virginia limited voting rights, and thus jury service, to white men.[16] The statutory standards in state courts often defined the standards for the federal courts located in the those states.[17] In Tennessee, for example, the legislature specified: "Every *white* male citizen who is a freeholder, or householder, and twenty-one years of age, is legally qualified to act as a grand or petit juror . . . ."[18] Therefore, in both Tennessee state and federal courts, only white men could serve on juries. West Virginia had a similar statute: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors . . . ."[19]

During the brief period of Reconstruction, broad sweeping federal legislation extended citizenship with all its privileges and immunities to Black people, enabling them to serve on juries and to exercise the right to vote.[20] New Black civic participation resulted in the election of a wave of Black lawmakers, particularly in formerly slaveholding states.[21] However, Black exercise of citizenship was short-lived. The end of *de jure* exclusion of African American jurors coincided with a surge in anti-Black violence.[22] Following its formation in 1865,[23] the Ku Klux Klan and other

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15. *See, e.g.*, Act of Feb. 9, 1831, §1, 29 Ohio Laws 94, 94 (1831) (tying jury service to the right to vote).

16. *See* CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860 15 (1960).

17. Honorable Arthur J. Stanley, Jr., *Federal Jury Selection and Service Before and After 1968*, 66 F.R.D. 375, 375 (1975).

18. *See* TENN. CODE § 4002 (1858) (emphasis added).

19. Strauder v. West Virginia, 100 U.S. 303, 305 (1880).

20. *See, e.g.*, Civil Rights Act of 1866, Ch. 31, 14 Stat. 27–30 (codified as amended at 42 U.S.C. §§ 1981–82 (1987)) (providing African Americans with equal rights under the law); Civil Rights Act of 1875, Ch. 114, 18 Stat. 335, 336 (codified as amended at 18 U.S.C. § 243 (2015)) (forbidding disqualification from jury service on the basis of race and criminalizing racial discrimination in jury selection at the hands of state and federal officials); *see also* Alschuler & Deiss, *supra* note 5, at 867 ("During Reconstruction, African-Americans in some jurisdictions regularly served on juries."). *But see id.* at 868 ("Some Southern jurisdictions, however, kept African-Americans from jury service even during Reconstruction.").

21. *See generally* PHILIP DRAY, CAPITAL MEN: THE EPIC STORY OF RECONSTRUCTION THROUGH THE LIVES OF THE FIRST BLACK CONGRESSMEN (2010).

22. *See* EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH 179 (1985).

23. *See* ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 3–5 (1971).

white supremacists waged a campaign of intimidation to ensure that Black citizens did not exercise their newly granted rights, including that of jury service.[24] Across the fractured nation, angry white mobs, in some cases backed by white government officials, attacked Black people and targeted Black churches, schools, and communities with violence and destruction.[25] Further, local white officials used their authority to minimize and in many instances block Black political gains.[26] The wave of violence and intimidation had the intended result: Black people stayed away from the

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24. *See generally* PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 109–13 (2002) (detailing Southern white resistance to recognizing Black rights, including voter fraud, physical violence, and instituting poll taxes and literacy tests).

25. *See, e.g.*, JAMES G. HOLLANDSWORTH JR., AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866 3, 12, 104–05 (2001) (describing the New Orleans massacre of 1866 in which over 200 Black Union war veterans were killed, including 40 delegates at the Constitutional Convention; in response, Mayor Monroe and other city officials were removed from office for their role in the massacre); Calvin Schermerhorn, *Civil-Rights Laws Don't Always Stop Racism*, ATLANTIC (May 8, 2016), https://www.theatlantic.com/politics/archive/2016/05/the-memphis-massacre-of-1866-and-black-voter-suppression-today/481737/ [https://perma.cc/A83Z-R74K] (detailing widespread violence in Memphis, led by local white officials and directed at Black residents and neighborhoods: "The [1866] Memphis Massacre shows that deadly violence and denials of citizens' rights can happen even when civil-rights laws are in place, particularly when those laws are defanged or unenforced"); Melinda M. Hennessey, *Political Terrorism in the Black Belt: The Eutaw Riot*, 33 ALA. REV. 35, 35–48 (1980) (describing events on October 25, 1870, when Klansmen attacked the crowd at a Republican rally with over 2,000 Black attendees in Eutaw, Greene County, Alabama); *The Riot of 1871*, MERIDIAN STAR (July 22, 2006) (describing anti-Black violence in Meridian, Mississippi in March 1871, resulting in the death of 30 Black people and the mayor being driven out of office); Mark M. Smith, *"All is Not Quiet in Our Hellish County": Facts, Fiction, Politics, and Race: The Ellenton Riot of 1876*, 95 S.C. HIST. MAG. 142 (Apr. 1994); Melinda M. Hennessey, *Racial Violence during Reconstruction: The 1876 Riots in Charleston and Cainhoy*, 86 S.C. HIST. MAG. 100 (Apr. 1985) (detailing a series of civil unrest and anti-Black violence in South Carolina in 1876, specifically, Hamburg, Charleston, Ellenton, Cainhoy, Edgefield, Mt. Pleasant, and Beaufort).

26. Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115, 2126 (1996) ("During the years of presidential Reconstruction, as southern legislatures enacted the black codes and as white sheriffs, judges, and justices of the peace used their authority to minimize the effects of emancipation, blacks learned that state and local officials offered them only a charade of justice.").

polls and disengaged from civic life, including from jury service.[27] The absence of Black people on juries meant that in the rare occurrence that the state filed criminal charges against anyone engaging in such violence, an all-white jury would acquit them.[28]

Amidst the violent resistance to Reconstruction, the U.S. Supreme Court had the opportunity to decide whether the recently enacted Fourteenth Amendment prevented a state from discriminating on the basis of race during jury selection.[29] When drafting the Fourteenth Amendment, "[f]orefront in the framers' minds was to provide redress to Black victims of crimes."[30] Prior to drafting the Amendment, members of the Joint Committee on Reconstruction heard testimony from lawyers, military leaders, and businessmen in the South who reported that Black victims of crime had little hope of redress in the courts,[31] in part because in most states they could neither testify against white people nor serve on juries.[32] Accordingly, the Court's principal concern was protecting the rights of Black defendants, not the rights of Black prospective jurors.

After an all-white jury in West Virginia convicted and sentenced Taylor Strauder, a formerly enslaved person, to death, Strauder appealed to the U.S. Supreme Court.[33] The question before the Court was whether West Virginia's laws limiting jury service to white men violated the

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27. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 78–79 (1990).

28. *See, e.g.*, DRAY, *supra* note 24, at 117–19 (describing limitations of state and federal government to indict and try individuals responsible for lynching Lake City, South Carolina's first Black Postmaster Frazier Baker, his wife, and infant child, "because any such jury would most likely be composed of some of the members of the lynch mob itself").

29. *See* Strauder v. West Virginia, 100 U.S. 303 (1880).

30. Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51.3 COLUM. HUM. RTS. L. REV. 985, 1003 (2020).

31. *See Report of the Joint Committee on Reconstruction, at the First Session, 39th Cong.*, Part III, 37 (Jan. 30, 1866) (responding to whether an aggrieved Black man would turn to the courts, Major General Clinton Fisk explained, "[T]he negro . . . would not dream of such a thing [because of] . . . fear of personal violence to himself, and because he would think it would be utterly futile . . . .").

32. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND AMERICAN LEGAL PROCESS – THE COLONIAL PERIOD 58 (1978); *see also* GEORGE MCDOWELL STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 44, 194 (1856) (explaining that an enslaved person could not testify against a white person, but could testify against another enslaved person).

33. *Strauder*, 100 U.S. at 305.

Fourteenth Amendment.[34] Answering in the affirmative, the Court explained that the framers intended the Fourteenth Amendment to protect African Americans, newly freed from enslavement, from unfriendly state action.[35] Thus, the Court held unconstitutional West Virginia's statute preventing African Americans from serving on juries.[36] The prohibition violated the rights of Black defendants to equal protection of the laws, which included a trial by jury and a judgment by one's peers.[37] Ultimately, the decision proved aspirational at best, as it did little to protect against the subsequent *de facto* exclusion of Black people from juries.[38]

B. De Facto Exclusion

Although juror-qualification laws after *Strauder* could no longer specify the race of prospective jurors, the revamped laws provided jury commissioners and clerks with broad discretion in selecting jurors with certain desired attributes. Across the country, states established vague standards of juror eligibility—honest and intelligent men, those of good moral character, and those who have not been convicted of an offense involving moral turpitude—that effectively excluded Black people from juries.[39] Although these laws did not explicitly mention race, the resulting all-white grand and petit juries from jurisdictions with substantial Black

34. *Id.*

35. *Id.* at 310 ("[The Fourteenth Amendment's] aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it.").

36. *Id.*

37. *See* Cong. Globe, 42d Cong., 2d Sess. 900 (Feb. 8, 1872) (Senator George Edmunds, Vermont: "Where would be the value of declaring that a colored man should have equal rights of trial by jury and equal rights of judgement by his peers, if you are to say that the jurors are to be composed of the Ku Klux Klan . . . ? You are to put him in the hands of his enemies for trial.").

38. *See* discussion *infra* Part I.B.

39. *See South Slow to Revamp Juries*, BIRMINGHAM NEWS, May 19, 1935, at 2 (Alabama: A jury commissioner determines the mental, physical and moral fitness of a juror; Georgia: The jury commissioners must select from the books of the tax receiver the most upright and intelligent men in the community; Louisiana: Must be qualified electors, citizens of the state between 21 and 60, and must be able to read and write and understand the constitution; North Carolina: Must be a property owner and all taxes of previous year must be paid and of good moral character; South Carolina: Each juror must be a qualified elector between the ages of 21 and 65, of good moral character. A qualified elector must be registered for general elections).

populations indicated race-based exclusion. Legal challenges to all-white juries in criminal trials proved futile given the high standard of proof required to show intentional discrimination based on race.[40]

What started as *de jure* exclusion based on race morphed into *de facto* exclusion with the same result. For example, Tennessee's jury service statute enabled court officials to subjectively assess the qualifications of jurors—beyond age and head-of-household status. Specifically, officials were to find "such persons . . . esteemed in their community for their integrity, fair character and sound judgment."[41] Following *Strauder*, a criminal defendant challenged a similarly worded law in Alabama, pointing out that Macon County, where an all-white grand jury indicted the defendant, was over 70% Black.[42] However, the state's high court demurred, holding that it was powerless to intervene when legislative authority enabled state officials to exercise discretion when empaneling juries. Rather, the court shifted responsibility to Alabama's voters: "If there was abuse, it would seem the redress was intended to be left to the removal of the faithless officers, or in legislative change."[43] However, except for the brief period of Reconstruction, Alabama's voters looked like Alabama's jury pools: all-white.[44]

De facto exclusion of Black people from juries continued well into the 20th century, even after the Court's 1935 decision prohibited the practice.[45] The decision resulted from Alabama's prosecution of nine Black teenagers, known as the Scottsboro Boys, whom a pair of white women falsely accused of rape.[46] The State convened all-white juries and swiftly convicted the nine, securing death sentences against all but the youngest.[47] In one of three decisions from the U.S. Supreme Court

40. *See, e.g.*, Eastling v. Arkansas, 62 S.W. 584 (Ark. 1901); Wilson v. Georgia, 69 Ga. 224 (1882); Smith v. Kentucky, 33 S.W. 825 (Ky. 1896); Louisiana v. Murray, 17 So. 832 (La. 1895); Cooper v. Maryland, 20 A. 986 (Md. 1885); Missouri v. Brown, 24 S.W. 1027 (Mo. 1894); Bullock v. New Jersey, 47 A. 62 (N.J. 1900); North Carolina v. Sloan, 2 S.E. 666 (N.C. 1887); South Carolina v. Brownfield, 39 S.E. 2 (S.C. 1901); Martin v. Texas, 72 S.W. 386 (Tex. 1903).

41. Part III, Title 4, Ch. 5, Art. 1, § 4765 (1884).

42. Green v. State, 73 Ala. 26, 30 (1882).

43. *Id.* at 41–42.

44. *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 166–67 (2019) (citing Giles v. Harris, 189 U.S. 475 (1903) (holding that the U.S. Supreme Court lacked authority to order Alabama to allow Black people to register to vote)).

45. *See* Norris v. Alabama, 294 U.S. 587 (1935).

46. *Id.* at 588.

47. *Id.*; *see also* Alan Binder, *Alabama Pardons 3 'Scottsboro Boys' After 80 Years*, N.Y. TIMES, Nov. 21, 2013, at A14.

resulting from the incident,[48] *Norris v. Alabama*, the Court reviewed testimony about the state's laws on juror qualification.[49] In accordance with *Strauder*, Alabama had long ago passed juror qualification laws identifying desired characteristics for juries, none of which mentioned race.[50] However, as with similarly worded laws passed throughout the South, Alabama's law allowed local officials to exercise discretion when empaneling jurors.[51] In explaining the absence of Black people on the grand jury in *Norris*, the jury commissioner testified:

> I do not know of any negro in Morgan County . . . who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness . . . and who can read English, and who has never been convicted of a crime involving moral turpitude.[52]

The Court disagreed, holding that the "long-continued, unvarying, and wholesale exclusion" of African Americans from juries violated the Fourteenth Amendment.[53] Despite the Court's strong language in *Norris*,

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48. Powell v. Alabama, 287 U.S. 45 (1932) (extending Sixth Amendment right to counsel to the states via the Due Process Clause of the Fourteenth Amendment); Patterson v. Alabama, 294 U.S. 600 (1935) (finding denial of due process where state excluded Black people from defendant's jury pool).

49. *Norris*, 294 U.S. at 590–96.

50. *See id.* at 590–91 ("The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.") (quoting ALA. CODE § 8603 (1923)).

51. *South Slow to Revamp Juries*, *supra* note 39. ("There are no laws barring the Negro, as such, from jury service in Dixie, a survey showed. Negroes have served in some instances on Southern juries, but actually few have been given this right since [R]econstruction days. The Negro does not serve in juries, principally because, like many whites, in most instances he is unable to fill the qualifications of citizenship demanded for jury service, it was found.").

52. *Norris*, 294 U.S. at 598–99.

53. *Id.* at 597.

states were slow to allow Black people to serve on juries. For instance, Tennessee did not empanel a Black juror in Nashville until 1949,[54] and it took another 15 years for counties across the state to empanel Black jurors, who usually served only one at a time.[55]

In 1965, the U.S. Supreme Court again weighed in on a claim of racial discrimination in jury selection in *Swain v. Alabama*.[56] Swain, who had been sentenced to death for rape, challenged both the total exclusion of African Americans from his petit jury and the systemic underrepresentation of Black people on grand juries in the jurisdiction in which he was tried.[57] In responding to the first challenge, the Court held that the systematic exclusion of Black people based on their race via peremptory strikes, which allowed counsel to remove a juror for any non-discriminatory reason, violated the Fourteenth Amendment.[58] Nonetheless, the Court failed to find that the prosecutor in Swain's case relied on race in removing all the eligible Black jurors.[59] As for the second question, the Court declined to recognize a defendant's right to a proportional number of jurors of his same race.[60] The concept of a

54. *See Negro to Serve as Petit Juror*, NASHVILLE BANNER, Nov. 7, 1949, at 22 ("For the first time in Davison County a young Negro today sat in the Criminal Court jury assembly room and will serve as a petit juror . . . .").

55. *See 4 Women Decline Jury Service*, NASHVILLE BANNER, July 24, 1951, at 6 ("First Negro juror served in this county over a year ago."); *Negro Juror Serves in Fayette Murder Trial*, LEAF-CHRON., Oct. 30, 1951, at 13 ("Ben Murphey [is] . . . the first Negro to serve as a juror in a major case here since reconstruction days."); *1st Negro Jurors Serve in Marion: One on Grand Jury Another on Trial Panel at Court*, CHATTANOOGA DAILY TIMES, June 4, 1952, at 13; *First Negro Juror for Tenn. County*, MORRISTOWN GAZETTE MAIL, July 7, 1955, at 1; *Oscar Bailey is Acquitted*, SULLIVAN CNTY. NEWS, Nov. 20, 1958, at 1 ("According to courthouse observers, C.R. Green became the first Negro to serve on a Sullivan County jury . . . ."); *More Jurors Needed in Brownsville Trial*, KINGSPORT TIMES, Oct. 13, 1959, at 1 ("Two of those called—and excused—were Negroes, the first ever summoned for jury duty in predominantly Negro Haywood County."); *Memphis Names Negro to Jury*, TENNESSEAN, Jan. 22, 1963, at 17.

56. Swain v. Alabama, 380 U.S. 202 (1965).

57. *Id.* at 205 ("[W]hile Negro males over 21 constitute 26% of all males in the county in this age group, only 10 to 15% of the grand and petit jury panels drawn from the jury box since 1953 have been Negroes . . . . In this period of time, Negroes served on 80% of the grand juries selected, the number ranging from one to three. There were four or five Negroes on the grand jury panel of about 33 in this case, out of which two served on the grand jury which indicted petitioner.").

58. *Id.* at 223–24.

59. *Id.*

60. *Id.* at 208.

proportional jury, or one reflective of the defendant's community, was an emerging idea that had only begun to take root by the time of the Court's decision in *Swain*. Instead of the Fourteenth Amendment's Equal Protection Clause, the right to a fair cross section originated from the Sixth Amendment's guarantee of an impartial jury.

II. FIRST WAVE OF LEGAL AND STATUTORY SOLUTIONS

Case law recognizing a defendant's right to a jury selected from a fair cross section of the community began to develop in the 1940s and 1950s.[61] Unlike *Swain v. Alabama*, which considered the prosecution's conduct in striking jurors, the fair cross-section right focused on conduct further upstream—the system that local court officials used to summon people for jury service. Just as with earlier jury-selection jurisprudence, the right to a fair cross section was born out of the concern that a system excluding African Americans from jury service based on race "contravene[d] the very idea of a jury—'a body truly representative of the community.'"[62] In response to the growing number of challenges to jury composition, Congress enacted the Jury Selection and Service Act of 1968 (JSSA).[63] The legislation also addressed the lack of uniformity among federal judicial districts, many of which still depended on the selection and eligibility requirements of the state where the federal court sat.[64] In theory, the legal and statutory solutions upholding the fair cross-section right should have resulted in more representative juror pools. Instead, the process by which defendants could challenge the lack of representation on

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61. *See* Smith v. Texas, 311 U.S. 128 (1940); Thiel v. S. Pac. Co., 328 U.S. 217 (1946); Avery v. Georgia, 345 U.S. 559 (1953); Hernandez v. Texas, 347 U.S. 475 (1954).

62. Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970) (quoting *Smith*, 311 U.S. at 130).

63. Edward Ranzal, *Federal Jurors: Plan Under Way to Qualify Millions*, AUSTIN AM., May 16, 1968, at 5 ("Under the plan, which will broaden the base for selecting jurors . . . jurors will qualify on the basis of an 'objective' questionnaire and will no longer be hand chosen by a court clerk or jury commission, which can now, for instance, reject a prospective juror merely on his appearance.").

64. *Id.* ("The act will eliminate the so-called 'key-man' system, which is still in effect in about 30 states. Under this system, the person in charge of jury selection asks friends to suggest persons to serve as jurors—usually their social peers.").

a jury became riddled with ambiguity, and the standard proved difficult to meet.[65]

A. The Constitutional Right to a Fair Cross Section

Although not explicitly stated in the Sixth Amendment, the fair cross-section right derives from a defendant's right to an impartial jury.[66] In order for the jury to fulfill its foundational role of protecting against arbitrary power, the process of jury summoning must comport with democratic principles.[67] Although the fair cross-section right stems from the Sixth Amendment, the prohibition on racial discrimination in jury selection arises from the Fourteenth Amendment's Equal Protection Clause. Thus, the fair cross-section right and the right to a jury chosen without racial discrimination differ in substantial ways. Significantly, a defendant challenging racial discrimination in jury selection must show intentional discrimination, whereas a fair cross-section challenge requires only a prima facie showing that the system summoning jurors results in underrepresentation of a distinct group.[68]

The Court's fair cross-section jurisprudence culminated in 1979 with *Duren v. Missouri*, which established the standard by which defendants can mount a challenge.[69] To prevail on a Sixth Amendment fair cross-section claim, a defendant must show that (1) "'the group alleged to be excluded is a "distinctive" group in the community;'" (2) "'the representation of this group in venires . . . is not fair and reasonable in

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65. *See* Sanjay K. Chablani, *Re-Framing the 'Fair Cross-Section' Requirement*, 13 U. PA. J. CONST. L. 931, 948 (2011) ("[D]efendants have had little success in federal courts raising Sixth Amendment claims that the juries in their cases were selected from venires that did not reflect a 'fair cross-section' of the community. The same has been true for claims raised in state courts across the country. The limited efficacy of the 'fair cross-section' jurisprudence can be traced to its entanglement with the equal protection principles . . . .") (footnotes omitted).

66. *Thiel*, 328 U.S. at 220 (citing *Smith*, 311 U.S. at 130) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.").

67. *See* Taylor v. Louisiana, 419 U.S. 522, 528–29 (1975).

68. *See generally* 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 (2012) (explaining that state and federal courts often incorrectly apply the equal protection guarantee when assessing fair cross-section claims).

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

relation to the number of such persons in the community;'" and (3) "'this underrepresentation is due to systematic exclusion of the group in the jury-selection process.'"[70] Although seemingly straightforward, the requirements in practice proved ambiguous and burdensome.

1. Distinctive Group

Given the history of exclusion, whereby courts categorically excluded African Americans and women from jury service, the fair cross-section jurisprudence uniformly recognizes race and gender as distinct groups.[71] However, the Court has not been as clear about other categories. A pre-*Duren* case, *Thiel v. Southern Pacific Co.*, recognized wage earners as a distinct group,[72] but federal courts have been hesitant to extend protection to other groups.[73] Although the Court has yet to define "distinctive group," it requires defendants mounting a fair cross-section challenge to link distinctiveness "to the purposes of the fair cross section requirement."[74] Said another way, the exclusion of the group in question must threaten the democratic principles of an impartial jury. Under this rationale, some state courts have gone beyond federal courts in finding that the exclusion of lesbians and gay men,[75] young people,[76] and public housing residents[77] violated defendants' fair cross-section right.

2. Relative Underrepresentation

To prove the second prong of the *Duren* test—underrepresentation—a defendant must measure the disparity of the distinctive group within the jury pool against the presence of the distinctive group within the community. There are two factors within the second prong that lack

70. Berghuis v. Smith, 559 U.S. 314, 319 (2010) (quoting *Duren*, 439 U.S. 357); *see also Taylor*, 419 U.S. 522 (acknowledging the Sixth Amendment guarantees criminal defendants a trial by an impartial jury drawn from a fair cross section of the community).

71. *Taylor*, 419 U.S. 522 (women); *Berghuis*, 559 U.S. at 320 (African Americans).

72. Thiel v. S. Pac. Co., 328 U.S. 217 (1946).

73. *See* Lockhart v. McCree, 476 U.S. 162, 174 (1986) (refusing to recognize a shared viewpoint as distinct for fair cross-section); Silagy v. Peters, 905 F.2d 986, 1010 (7th Cir. 1990) (declining to recognize age as a factor qualifying as a distinct for purposes of the fair cross-section requirement).

74. *Lockhart,* 476 U.S. at 174.

75. People v. Garcia, 92 Cal. Rptr. 2d 339, 347–48 (Ct. App. 2000).

76. State v. Cannon, 267 So. 3d 585 (La. 2019).

77. State v. Cage, 337 So. 1123 (La. 1976).

clarity: the preferred method of measuring the disparity[78] and the appropriate comparator in the community.[79] Regarding the first factor, lower courts have used four measurements to determine disparity: absolute disparity, comparative disparity, standard deviation analysis, and probability analysis.[80] The U.S. Supreme Court has not endorsed any single test.[81] This Article leaves the discussion of the benefits and drawbacks of each method to others.[82] Instead, this Article focuses on the second of these two factors, determining the appropriate comparator in the community.

Determining which group to measure in the community for statistical comparison with the number in the jury pool can dictate the viability of a fair cross-section claim. Some federal courts have clarified that the jury summons process does not guarantee a jury "drawn from a cross-section of the total population without the imposition of any qualifications."[83] This rationale implies that a defendant mounting such a challenge cannot simply rely on total population numbers of the distinct group in question. Yet another federal court explained: a "'truly representative cross-section'

78. Berghuis v. Smith, 559 U.S. 314, 329 (2010) ("The courts below . . . noted three methods employed . . . in lower federal court decisions . . . . Each test is imperfect.").

79. *See* United States v. Rioux, 97 F.3d 648, 657 (2d Cir. 2000) (rejecting the government's argument to consider smaller subset of qualified voters in community, instead "conclud[ing] that the appropriate measure in this case is the eighteen and older subset of the population, regardless of other qualifications for jury service").

80. *See* Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L. J. 1913, 1917–18 (1994) (referring to the four measures as absolute disparity, absolute impact, comparative disparity, and statistical significance).

81. *Berghuis*, 559 U.S. at 329–30 ("Even in the absence of AEDPA's constraint . . . we would have no cause to take sides today on the method or methods by which underrepresentation is appropriately measured.").

82. *See, e.g.*, Joanna Sobol, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community*," 69 S. CAL. L. REV. 155, 206–08 (1995) (discussing pitfalls and benefits of the absolute disparity test and statistical deviations); Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross Section Challenges*, 37 CHAMPION 14, 18 (2013) (describing multiple ways courts measure disparity).

83. United States v. Gordon-Nikkar, 518 F.2d 972, 975–76 (5th Cir. 1971) (quoting United States v. McVean, 436 F.2d 1120, 1122 (5th Cir. 1971)).

requirement encompasses only individuals qualified to serve as jurors."[84] Depending on the measure in the community, a challenger may undercount the very same population they are arguing is underrepresented in the jury pool. Defendants who measure the jury pool against those in the community who are eligible to vote, where jury service is tied to voter eligibility, exclude anyone ineligible to vote due to a felony conviction, which has a disproportionate impact on African Americans.[85] Thus, using the number of eligible voters in the community tends to undercount the number of Black people in the community.[86] However, the Ninth Circuit allows for a more expansive comparison—the group in the whole community, without qualification—to make the threshold prima facie showing.[87] The Northern District of Alabama came to a similar conclusion.[88]

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84. *Gordon-Nikkar*, 518 F.2d at 976; *see also* United States v. Torres-Hernandez, 447 F.3d 699, 701 (9th Cir. 2006) (holding that "to determine whether Hispanics are underrepresented to an unconstitutional degree in venires, a district court must rely on that evidence which most accurately reflects the judicial district's actual percentage of jury-eligible Hispanics" and "may not take into account Hispanics who are ineligible for jury service"); Ramseur v. Beyer, 983 F.3d 1215, 1231 (3d Cir. 1992) ("Absolute disparity . . . is defined as the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire.").

85. *See* CHRISTOPHER UGGEN ET AL., SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 3 (2016) http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf [https://perma.cc/VR9Q-ANA5].

86. *See* United States v. Jefferson, No. 08–140, 2011 WL 161937, at *2 (E.D. La. Jan. 14, 2011) (explaining that percentage of registered voters is insufficient basis for comparison because "not all registered voters are also qualified to serve as jurors").

87. United States v. Rodriguez-Lara, 421 F.3d 932, 941 (9th Cir. 2005) ("The weight of Supreme Court and circuit authority teaches that, for purposes of the prima facie case, the proportion of the distinctive group in the jury pool is to be compared with the proportion of the group in the whole community.").

88. United States v. Carmichael, 467 F. Supp. 2d 1282, 1307 (N.D. Ala. 2006) ("[T]he community 'qualified for jury service' for the purposes of a fair cross-section challenge is not necessarily synonymous with the community registered to vote, and courts have regularly relied on census data, especially when refined to exclude certain categories of ineligible persons, to establish the benchmark community qualified for jury service.").

3. Systemic Exclusion

The crux of the third prong is that the defendant must point to the court's summoning *system* as the cause for the alleged underrepresentation *over time*. It is not enough for a defendant to point to the resulting lack of representation in only the defendant's jury pool. "[A] large discrepancy [that] occurred 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 utilized."[89] Per statutory guidance, most officials rely on voter registration lists as the source for jury pools.[90] In those instances, reviewing courts routinely decline to find that the system is responsible for any underrepresentation.[91] However, some appellate courts have indicated a willingness to question officials' reliance on voter registration lists if defendants can prove that such reliance regularly results in underrepresentation of a distinct group.[92] This willingness is particularly prevalent in jurisdictions where voter registration is the exclusive source for jury pools. Notably, the JSSA allows officials to supplement with "some other source or sources of names in addition to voter lists where necessary" to protect the fair cross-section right and to prevent discrimination in jury summons.[93]

After the defendant makes the requisite prima facie showing of a fair cross-section violation under *Duren*, the burden then shifts to the government. The government "must show that those aspects of the jury

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

90. *See* 28 U.S.C. § 1863(b)(2) (2018).

91. *See, e.g.*, Howell v. Superintendent Rockview SCI, 939 F.3d 260 (3d Cir. 2019) (declining to find systemic exclusion where jurisdiction relied on facially neutral jury source list from voter registration and department of transportation driving records); *see also* David M. Coriell, *An (Un)fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 479 (2015) (courts treat voter registration lists as "presumptively valid" sources for jury summons).

92. *See* United States v. Weaver, 267 F.3d 231, 244–45 (3d Cir. 2001) ("[I]f the use of voter registration lists over time did have the effect of sizably underrepresenting a particular class or group on the jury venire, then under some circumstances, this could constitute a violation of . . . the Sixth Amendment."); Bryant v. Wainwright, 686 F.2d 1373, 1378 n.4 (11th Cir. 1982) ("[I]f the use of voter registration lists as the origin for jury venires were to result in a sizeable underrepresentation of a particular class or group on the jury venires, then this could constitute a violation of a defendant's 'fair cross-section' rights under the Sixth Amendment.").

93. 28 U.S.C. § 1863(b)(2).

selection process that result in the disproportionate exclusion of a distinctive group manifestly advance an overriding, significant government interest."[94]

B. The Jury Selection and Service Act of 1968

Courts have interpreted the JSSA to coexist with defendants' constitutional right to a jury selected from a fair cross section of the community.[95] The Act essentially codified defendants' constitutional right.[96] State legislatures quickly followed suit, passing similar legislation regulating jury service in state trial courts.[97]

94. United States v. Ashley, 54 F.3d 311, 313 (7th Cir. 1995).

95. *See, e.g.*, United States v. Rodriguez, 924 F. Supp. 2d 1108 (C.D. Cal. 2013) (recognizing that the Sixth Amendment and the JSSA are coextensive and guarantee defendant's right to grand and petit juries drawn from a fair cross-section of the community); United States v. Shine, 571 F. Supp. 2d 589 (D. Vt. 2008) (using same three-prong test to determine violation of the fair cross-section right under the Sixth Amendment and the JSSA); United States v. Orange, 364 F. Supp. 2d 1288 (W.D. Okla. 2005) (evaluating defendant's JSSA claim using same standards as the constitutional claim under the Sixth Amendment), *aff'd*, 447 F.3d 792 (10th Cir. 2006).

96. In relevant part, the statute declares that "all litigants in Federal courts . . . 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." 28 U.S.C. § 1861 ("Declaration of Policy").

97. *See, e.g.*, State v. Ayer, 834 A.2d 277, 295 (N.H. 2003) ("The legislative policy underlying the [jury selection] statute is that all persons selected for jury service should be selected at random from a fair cross section of the population of the area served by the court."); N.Y. JUD. LAW § 500 (McKinney 2020) (New York state's fair cross section requirement); ME. REV. STAT. ANN. tit. 14, § 1201-A (West 2020) ("It is the policy of the state that all persons chosen for jury service be selected at random from the broadest feasible cross section of the population of the area served by the court . . . .").

III. GOOD MORAL CHARACTER IN THE MODERN AGE

Jury service has long been tied to voter eligibility.[98] Historically, the requirements for jury and voter eligibility were similar.[99] The JSSA further cemented the connection between voting and jury service when it required officials to source jury lists from the lists of registered voters.[100] However, the risk of juror underrepresentation increases where officials rely solely on voter registration as a source given the high number of individuals whose criminal convictions disenfranchised them. Forty-eight states restrict the voting rights of individuals with felony convictions.[101] Recent studies estimate that over six million Americans are ineligible to vote due to felony convictions.[102] Rates of disenfranchisement fall heaviest on the very populations of people who are routinely underrepresented on juries—African Americans and Latinxs—because rates of contact with the criminal legal system vary according to race.[103]

Losing the right to vote, and subsequently the right to serve on a jury due to a criminal conviction, is not a recent phenomenon. The first colonists imported disenfranchisement from Europe when they settled in North America.[104] A century later, the Fourteenth Amendment, extending

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98. *See, e.g.*, Williams v. Mississippi, 170 U.S. 213 (1898) (upholding statute directing officials to use voter registration lists in choosing qualified jurors); Cassell v. Texas, 339 U.S. 282, 285 (1950) (holding jurors must be qualified to vote); Neal v. Delaware, 103 U.S. 370, 389–90 (1880) (jurors selected from among those qualified to vote).

99. *See, e.g.*, *Ex parte* Virginia, 100 U.S. 339, 349 (1879) (Field, J., dissenting) ("[A]ll male citizens between the ages of twenty-one and sixty, who are entitled to vote and hold office under the Constitution and laws of the State, are liable, with certain exceptions not material to be here mentioned, to serve as jurors.").

100. *See* U.S.C. § 1863(b)(2).

101. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 595–99 (2013) (detailing the statutes and policies in forty-eight states curtailing the right to vote based on criminal convictions and noting Colorado and Maine as the only two states without policies excluding jurors based on criminal convictions).

102. UGGEN ET AL., *supra* note 85.

103. See J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 43 (2009) ("African Americans and Latinos face significantly greater likelihood of being arrested, convicted, and incarcerated than whites.").

104. Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WISC. L. REV. 1045, 1061 (2002) ("English colonists in North America transplanted much of the mother

the equal protection of the laws to African Americans, carved out a criminal exception enabling officials to use disenfranchisement in a racially discriminatory way.[105] Thus, states could continue to exclude Black people from exercising basic rights of citizenship. For instance, post-Reconstruction Kansas required that "[e]very juror must be a man of good moral character. If ever convicted of a felony he is ineligible."[106] Officials used disenfranchisement stemming from contact with the criminal legal system to perpetuate African American exclusion from juries. Many jury eligibility statutes contained only the phrase "good moral character," neglecting to explicitly mention a criminal conviction, so as to maintain all-white or virtually all-white juries. In Texas, a defendant challenged a county's jury summoning process that routinely empaneled all-white grand and petit juries.[107] He argued:

> that there was in the county as many colored citizens of sound judgment, approved integrity, fair character, and fully qualified for jury duty, as white, and stated as grounds for the motion that "the county commissioners, in selecting the lists of names for jury duty for and during the present year, discriminated against all colored men of African descent . . . ."[108]

Given the disproportionately high rate of felony convictions among African Americans[109] and the policies that disenfranchise those with convictions, Black people continue to be regularly underrepresented in jury pools.[110] Court officials still utilize many of the same race-neutral

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country's common law regarding the civil disabilities of convicts, and supplemented it with statutes regarding suffrage.").

105. *See* Jennifer Rae Taylor, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 GONZ. L. REV. 365, 369 (2012) (citing U.S. CONST. amend. XIV, § 2).

106. *Tells of Growth: Jury Canvass Reveals Some Interesting Facts*, KANSAS CITY J., July 4, 1887.

107. Tarrance v. Florida, 188 U.S. 519 (1903).

108. *Id.* at 520.

109. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 97–114 (2012) (describing racial disparities in criminal charging and convictions due to racially discriminatory policies).

110. *See generally Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUST. INITIATIVE 14–16 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/9M8C-UYU2] (detailing continuing legacy of illegal racial

policies and practices that officials used to exclude Black jurors in the 19th and early 20th centuries with the same result.[111] For African Americans, the rate of disenfranchisement from a criminal conviction is four times greater than that of non-African Americans, with "[o]ne in 13 African Americans of voting age . . . disenfranchised."[112] Although some jurisdictions allow for vote restoration for individuals with felony convictions, the process is often expensive and arduous.[113] Moreover, even if individuals with criminal convictions make it into a jury pool, prosecuting attorneys often remove them—either via a peremptory strike or for cause—due to their contact with the criminal legal system.[114] There is an accepted assumption that contact with the criminal legal system results in juror bias for the defendant. Such an assumption exacerbates jury underrepresentation.

IV. REMEDIES

The democratic principles supporting the very existence of jury trials beg for innovative remedies to help facilitate more racially representative juries. At a minimum, trial courts must supplement jury source lists, courts must broaden their interpretation of the fair cross-section standard, and states should both ease the path to re-enfranchisement and eliminate felony conviction disenfranchisement. Anything short of these remedies fails to address the longstanding and persistent problem of juries lacking meaningful racial diversity. After studying racial discrimination in jury selection and racial underrepresentation in juries, the Equal Justice Initiative found that "often, the only opportunity for racial minorities to

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discrimination in jury selection and underrepresentation of Black people on criminal juries).

111. *See* Rebecca Santana, *Mississippi Felons Push Court to Restore Voting Rights*, U.S. NEWS & WORLD REP. (Dec. 3, 2019), https://www.usnews.com/news/us/articles/2019-12-03/mississippi-case-pushes-to-restore-felons-voting-rights [https://perma.cc/U7NT-NRML] ("The plaintiffs . . . argue that the restoration process violates the constitution's Equal Protection Clause because when it was adopted in 1890 it was intended to keep African Americans from voting and still disproportionately affects black people.").

112. UGGEN ET AL., *supra* note 85, at 3.

113. *Id.* at 13 ("[I]t is clear that the vast majority of such individuals in . . . states [that allow citizens to restore their voting rights] remain disenfranchised. Indeed, some states have significantly curtailed restoration efforts since 2010, including Iowa and Florida.").

114. Roberts, *supra* note 101, at 599–602 (describing peremptory challenges and challenges for cause as two ways Black prospective jurors are removed on the basis of criminal convictions).

influence decision-making in America's criminal justice system is to serve on a jury."[115] Thus, the "[e]xclusion of qualified citizens of color from jury service amounts, then, to the near-complete absence of minority perspective, influence, and power in the criminal justice system."[116] Further, a multi-pronged approach is necessary to right the past wrongs that explicitly targeted African Americans for exclusion from juries, the remnants of which persist today.

A. Jury Source Lists

To ensure representation on juries, jurisdictions must supplement their jury summons list with other sources, such as the department of motor vehicles, unemployment benefits, utility or public-benefits records, and tax rolls. Federal and state statutes allow for such supplementation.

Some localities, including New York, have adopted these measures; their success is still under review.[117] In 2010, then New York Governor David Paterson signed into law the Jury Pool Fair Representation Act.[118] The law allowed for the collection of annual demographic data on jurors to enable the government to track the problem and assess remedial tactics.[119] Most importantly, the law expanded the source lists of prospective jurors to include payers of income and property taxes; students receiving financial aid; senior citizens subject to rent increase exemptions; recipients of workers compensation; individuals receiving family and individual assistance; public housing residents; and people subscribing to certain utility services, such as gas, electric, telephone, and cable.[120]

However, recommended changes to the source lists must include follow through. Unlike New York's efforts, Tennessee merely recommended action but failed to implement the recommendations. In

115. *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, *supra* note 110, at 14.

116. *Id.* at 43.

117. *See* Ariel Atlas, Comment, *Don't Forget About the Jury: Advice for Civil Litigators and Criminal Prosecutors on Differences in State and Federal Courts in New York*, 2015 CORNELL L. LIBR. PRIZE FOR EXEMPLARY STUDENT RES. PAPER, 1, 19, *available at* https://scholarship.law.cornell.edu/cllsrp/10 [https://perma.cc/64NV-DAMG] (noting that three rounds of juror demographic data had been collected and analyzed, enabling litigants to use the information in potential challenges to jury pool representation).

118. *Id.*

119. *Id.*

120. The Jury Pool Fair Representation Act, N.Y. JUD. LAW § 506(a) (McKinney 2019).

2000, the Tennessee Supreme Court appointed the Racial and Ethnic Fairness Commission, which examined enhancing fairness in Tennessee's legal system and issued a report of its findings.[121] The report looked specifically at underrepresentation in juries and recommended that the state supplement the standard list sources—driver's licenses, property tax rolls, and voting lists—to include individuals from "school enrollment, public housing residents, and utility customers" in an effort to "adequately represent minority demographics."[122] These recommendations have yet to go into effect.

B. Focusing on Prong Three of Duren

As argued above, the *Duren* standard is riddled with ambiguity and is thus ripe for judicial reassessment. In dicta, several federal court opinions contemplate a challenge to the singular source of jury pools—the voter registration lists.[123] For instance, the Third Circuit in *United States v. Weaver* mused that "if the use of voter registration lists over time did have the effect of sizeably underrepresenting a particular class or group on the jury venire, then under some circumstances, 'this could constitute a violation of a defendant's "fair cross-section" rights under the [S]ixth [A]mendment.'"[124] Uniformly, these decisions decline to recognize a violation of the defendants' fair cross-section right because the defendant failed to show, under prong three, that the jury summoning system caused underrepresentation. These decisions all invite defendants to show that the jury summoning system that resulted in underrepresentation, namely, the voter registration list, is discriminatory.[125]

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121. TENNESSEE SUPREME COURT, IMPLEMENTING FAIRNESS: THE REPORT OF THE COMMITTEE TO IMPLEMENT THE RECOMMENDATIONS OF THE RACIAL AND ETHNIC FAIRNESS COMMISSION AND THE GENDER FAIRNESS COMMISSION (2000), http://www.tsc.state.tn.us/sites/default/files/docs/report_of_committee_to_implement_racia_ethnic__gender_fairness.pdf [https://perma.cc/PE2W-2RL2].

122. *Id.* at 21–22.

123. *See* United States v. Afflerbach, 754 F.2d 866, 870 (10th Cir. 1985) ("Appellants can prevail only if they show that the district's reliance on registration lists systematically excluded a distinct, cognizable class of persons from jury service.").

124. *See* United States v. Weaver, 267 F.3d 231, 244–45 (3d Cir. 2001).

125. *See, e.g.*, Bryant v. Wainwright, 686 F.2d 1373, 1378 n.4 ("[I]f the use of voter registration lists as the origin for jury venires were to result in a sizeable underrepresentation of a particular class or group on the jury venires, then this could constitute a violation of a defendant's 'fair cross-section' rights under the Sixth Amendment.").

Given the recent wave of voting rights lawsuits challenging voter registration procedures,[126] discriminatory voter purging procedures,[127] and the discriminatory impact of disenfranchisement on African Americans and Latinxs,[128] the climate is ideal to challenge voter registration policies within the context of a fair cross-section right. Instead of reinventing the wheel, criminal defendants can borrow data and legal analysis from voting rights litigation. Most voting rights litigation occurs in federal court and contains detailed analyses of state voting systems at a local level spanning multiple election cycles. This is exactly the information that would be most useful to state and federal criminal defendants who must show that the jury summons process, over time, has produced an underrepresentation of a distinct group.

C. Clear Path to Re-Enfranchisement: Eliminate Felony Conviction Disenfranchisement

Although each of the abovementioned remedies is necessary to increase representation in juries, dismantling voter disenfranchisement would have the most significant and immediate impact on increasing the number of African Americans summoned for jury service. Every state and federal jurisdiction relies on voter registration, either primarily or in part, to summon juries. With over 7% of voting age African Americans disenfranchised, enabling people with felony convictions to vote and thus qualify for jury service would increase the number of Black potential jurors. In some states, such as Florida, Virginia, and Tennessee, over 20% of Black people of voting age are disenfranchised; in Kentucky, over 25%.[129] States and the federal government can cease disenfranchising individuals with felony convictions. Maine and Vermont remain the only two states that allow incarcerated people to vote.[130] Beginning in 1997, more than 20 states, including New Mexico, Rhode Island, and Virginia, expanded voter eligibility for individuals with felony convictions.[131] In

126. *See, e.g.*, *Voting Rights Act Project*, *Work & Resources*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-reform/voting-rights-act [https://perma.cc/H9VF-3ET4] (listing pending voting rights cases).

127. *See, e.g.*, Ohio A. Philip Randolph Inst. v. LaRose, 761 Fed. Appx. 506 (6th Cir. 2019) (lawsuit challenging Ohio's method of purging its voter rolls).

128. UGGEN ET AL., *supra* note 85, at 3, 10.

129. *Id.* at 16.

130. *Id.* at 4.

131. NAZGOL GHANDNOOSH, SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 25 (2015),

2007, Maryland ended its lifetime voting ban for people who had been subject to it post-sentence. More recently, in 2016, the state ended the practice of banning voting for people on probation and parole.[132]

CONCLUSION

The jury is a uniquely American feature of the criminal legal system. However, in practice it exists as an aspirational concept given the lack of racially representative juries and the relatively low percentage of cases involving jury trials. To be clear, the low rate of jury trials does not excuse the lack of racial diversity in trials, particularly because virtually all capital prosecutions involve juries. Beyond changing the standard of review and legislation regulating eligibility, actors in the courtroom during jury selection, specifically judges and prosecutors, can provide additional remedies. Instead of removing jurors with certain criminal convictions, such as for drugs, gun possession, and tax evasion, if such individuals can remain impartial, then prosecutors can keep them on juries. Moreover, district attorneys can utilize their discretion to decline to prosecute certain crimes, like low-level drug offenses, thus decreasing the number of people with convictions. Judges can also prohibit counsel from inquiring about arrest records in voir dire and from investigating prospective jurors' records, both of which prosecutors do to remove jurors, whether with a peremptory strike or a challenge for cause. A defendant's right to an impartial jury and a juror's right to serve are sacred rights that this country neglected to uphold for millions of African Americans. There are concrete measures our criminal legal system can take now to end that legacy of racial discrimination.

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https://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf [https://perma.cc/93JX-G855].

132. *Id.*