

## A Jury of One's Peers

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Summer is here and everyone is feeling excited about fair cross-section claims. Or at least I am after hearing an enlightening presentation about them, described below.

**Source and importance of the fair cross-section right.** The right to be judged by a fair and impartial jury of one's peers is a bedrock principle of the American criminal justice system, grounded in the Sixth Amendment to the United States Constitution and article I, sections 24 and 26 of the North Carolina Constitution. In [Section 6.2A](#) of our manual, *Raising Issues of Race in North Carolina Criminal Cases*, we discuss reasons that it is important to have juries that reflect the composition of the communities from which they are drawn. For example:

- Citizens may not be denied the right to serve on juries, which is guaranteed by the federal and state constitutions.
- Jury pools and juries that underrepresent racial and ethnic minorities may create a perception of unfairness, eroding trust and confidence in the legal system.
- Studies have shown that the racial composition of juries may affect jury deliberations and influence case outcomes.
- Jury verdicts should reflect the voice of the community, which may act as a check on government overreaching.
- Participation in the jury formation process leads to civic engagement, education about the court system, and interaction across social groups.

This quote beautifully describes a more intangible but equally important benefit of having a representative jury:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

*Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

**Concerns about underrepresentation of minorities in jury pools.** Courts have found that minorities, primarily African Americans and Latinos, are often underrepresented in jury pools. *See, e.g.*, Nebraska Minority and Justice Task Force, Final Report 17 (2003) (noting that “many researchers have found that this is ‘the rule’ rather than the exception”). Court actors from various parts of North Carolina have shared concerns that jury pools from which trial jurors are selected do not appear to reflect their communities in terms of racial and ethnic composition. For example, defense attorneys have said to me, “I got to the courthouse, ready to pick a jury. I looked out at the pool and thought, ‘This group doesn’t look anything like \_\_\_\_ County!’” Leaders in judicial district 15B, made up of Orange and Chatham Counties, have undertaken a study of its jury pools to determine in a systematic fashion how well jury pools reflect the demographic composition of the counties’ jury-eligible population. The report, authored by colleagues at the

School of Government, will be available in August and may serve as a useful model for other districts.

**Fair cross-section challenges few and far between.** In spite of concerns about representative jury pools and juries, fair cross-section claims are rarely litigated. This may be at least in part because defense attorneys stopped raising such challenges after state legislatures modified jury formation statutes with the intent of creating more representative jury lists. North Carolina followed the trend of many other states that added lists of registered drivers to voter registration lists because drivers' lists may be more representative of racial minorities than voter registration lists alone. But researchers studying other jurisdictions that use "motor/voter" lists have found that underrepresentation persists in spite of the addition of drivers' lists. See, e.g., Ronald Randall et al., *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 Just. Sys. J. 71 (2008).

**Elements of a fair cross-section claim.** Fair cross-section challenges may be the most promising avenue of relief for defendants challenging racial disparities in jury formation because, in contrast to equal protection claims, defendants raising fair cross-section challenges don't have to prove discrimination. In case you aren't familiar with these claims, I will briefly set out the elements. In *Duren v. Missouri*, 439 U.S. 357 (1979), the United States Supreme Court set out the three steps for establishing a fair-cross section violation. To make out a prima facie challenge, a defendant must show: (1) the group alleged to be excluded is a 'distinctive' group in the community, which includes race, ethnicity, and gender, but not age; (2) the group is not fairly represented when compared to the number of such people in the community; and (3) the underrepresentation is due to systematic exclusion or inherent in the jury selection process that was used. See *Duren*; *State v. Williams*, 355 N.C. 501 (2002). We provide guidance on the showing that is required for each step in [Section 6.3](#) of *Raising Issues of Race*.

**Demystifying the fair cross-section right.** Last week, I had the opportunity to hear [Nina Chernoff](#), a Professor at CUNY School of Law, speak on some misconceptions about fair cross-section challenges. She was an incredibly engaging scholar, and I recommend her to any group seeking clarification of these issues. In particular, she described how numerous courts around the country, including North Carolina courts in some opinions, have confused the requirements of the Sixth and Fourteenth Amendments and mistakenly imposed a requirement on fair cross-section claimants that they show purposeful and discriminatory exclusion. See [Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Imposing Equal Protection Standards](#), 64 Hastings L.J. 141 (2012). Professor Chernoff has authored a helpful guide for people considering a fair cross-section claim, [The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges](#), with Dr. Joseph B. Kadane, *The Champion*, Dec. 2013, at 14. Examples of pointers include:

- Defendants raising fair cross-section claims do not have to be members of the distinctive group allegedly excluded.
- A defendant who is considering a fair cross-section claim may obtain information about the jury selection system through discovery.
- There is no perfect test for measuring underrepresentation; courts should consider the results of tests including absolute disparity, comparative disparity, and standard deviation. See *Berghuis v. Smith*, 559 U.S. 314, 329 (2010).
- There is no set percentage of underrepresentation required to satisfy the second prong of the *Duren*. See [The 16 Things Every Defense Attorney Should Know](#) at 19 (noting that defense attorneys should resist adoption of a 10% absolute disparity threshold because (1) the U.S. Supreme Court declined to adopt it; (2) it would leave groups comprising less than 10% of the community without a remedy for underrepresentation; and (3) it has been mistakenly imported from the equal protection context.
- Fair cross-section violations can be based on inadvertent rather than intentional conduct.
- Computer systems used in jury operations may inadvertently be the source of systematic exclusion.
- Recurring underrepresentation over time tends to reflect systematic exclusion.

Not only does Chernoff's presentation make you excited about the prospect of representative jury pools, she includes some fun cat memes. See, e.g.,

