STATISTICS ARE NOT EVERYTHING: AN IMPERFECT APPLICATION OF THE *DUREN* TEST IN *GARCIA-DORANTES V. WARREN*

Introduction

Not long before news broke of a computer error in the county's jury selection system, the defendant in *Garcia-Dorantes v. Warren* was convicted of assault and second-degree murder.[1] The glitch in the automated system had excluded nearly three-quarters of eligible residents in Michigan's Kent County by pulling potential jurors largely from suburban zip codes instead of from the urban areas where most non-white residents lived.[2] Consequently, on appeal, the defendant claimed a violation of the Sixth Amendment's right to an impartial jury,[3] but the Michigan Court of Appeals affirmed his conviction.[4] Next, he brought a petition for habeas relief in federal court,[5] which the district court granted after finding that minority representation in the defendant's jury venire was "not fair and reasonable."[6] The State appealed to the Sixth Circuit, which affirmed the decision.[7]

The right to a trial by jury was central to the founding of the United States, so the issues *Garcia-Dorantes* raises concerning the extent of a jury's representativeness go to the heart of the American legal system.[8] More specifically, this case attempts to resolve just how substantial a racial minority's underrepresentation on jury venires must be to violate the Sixth Amendment.[9] The Sixth Circuit decided the case within the well-established fair cross-section framework of *Duren v. Missouri*,[10] but its approach involving two particular statistical tests was one of several methods courts use to measure the extent of underrepresentation.[11] This lack of consensus on how to use statistics to evaluate fair cross-section challenges has major implications for both individual defendants and for how governments design their jury selection processes.[12] With ample evidence of racial minorities overrepresented in prisons[13] and underrepresented on juries,[14] these issues are more relevant than ever.

Recognizing the original purpose of and contemporary need for the Sixth Amendment, this Comment proposes a critique of the *Garcia-Dorantes* court's application of the *Duren* test. Part I introduces the historical background of the right to a jury trial and outlines how courts employ the *Duren* test to analyze fair cross-section challenges. Part II briefly describes the holding of the case and how it fits into Sixth Amendment jurisprudence. Part III argues that the Sixth Circuit adhered too closely to the traditional statistical approach to *Duren*'s second prong; that it should have put more emphasis on *Duren*'s third prong; and that, despite these problems, the *Duren* test still has value. Although it reached the right outcome, the Sixth Circuit's traditional use of *Duren* in *Garcia-Dorantes* was an ineffective application of this test.

I. Background

While the constitutional right to a jury trial has always been central to the American justice system,[15] the meaning of an "impartial" jury under the Sixth Amendment has never been static.[16] As the right to vote extended to African-American men,[17] women,[18] and eighteen- to twenty-year-old adults,[19] jury eligibility broadened accordingly.[20] Greater diversity—in theory—on juries and more inclusive conceptions of justice and citizenship that accompanied the civil rights movement prompted Congress to pass the Jury Selection and Service Act of 1968.[21] This law established the right, in federal court, to "juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."[22] Until this point, defendants used the Fourteenth Amendment's Equal Protection Clause to challenge jury composition, but this claim was limited to situations of intentional discrimination.[23]

Seven years later in *Taylor v. Louisiana*, the Supreme Court elevated the federal statutory right to a fair cross-section to a constitutional right by concluding it was essential to the Sixth Amendment's right to an impartial jury.[24] In *Taylor*, the Court explicitly recognized the value of

a diverse jury venire, which next raised the question of what exactly a fair cross-section is and when this right is violated.[25] It attempted to answer this question in *Duren v. Missouri*, which created the three-part test courts have used ever since to evaluate fair cross-section challenges[26]:

> In order to establish a prima facie violation of the fair cross-section requirement, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[27]

If the defendant has proven a prima facie violation, the prosecution then bears the burden of showing that a "significant state interest" justifies the lack of a fair cross-section.[28]

While there has been minimal debate about who constitutes a "distinctive group" under the first *Duren* prong,[29] the second prong's fair representation requirement has remained the most contested.[30] Because it is impractical for jury venires to perfectly match the population's demographics, courts have turned to a variety of statistical tests to determine what level of disparity between the jury venire and population is acceptable.[31] They typically start with the absolute disparity test, which is simply the percentage difference between the distinctive group's representation in the jury venire and in that jurisdiction's population.[32] Next, courts often turn to the comparative disparity test, which measures the decreased likelihood, compared to the general population, that individuals from the underrepresented group will be on a jury venire.[33]

Where courts diverge widely is in the weight they accord each test and the minimum thresholds that constitute a fair cross-section violation. Most courts seem to favor the absolute disparity test, and many tend to consider absolute disparities of less than ten percent insufficient

for a Sixth Amendment violation.[34] However, courts such as that in *United States v. Osorio* have found that "non-benign" factors can outweigh low disparity numbers, while others have explicitly avoided this approach.[35] Many courts also reject the comparative disparity test because it can be unhelpful when the distinctive group comprises a small portion of the overall population, despite other courts criticizing the absolute disparity test for the very same reason.[36] Complicating matters further, some courts rely on a variety of other statistical tests[37] and many also conflate equal protection and fair cross-section analysis when invoking the Fourteenth Amendment.[38] For example, in *People v. Bryant*, the Michigan Supreme Court employed the standard deviation and disparity-of-risk tests in addition to absolute and comparative disparity to conclude that the same flawed jury selection system in *Garcia-Dorantes* was constitutional.[39]

These wide-ranging approaches to *Duren*'s second prong stem largely from the Supreme Court's lack of specific guidance in its one case addressing this issue, *Berghuis v. Smith*.[40] At oral argument, Justice Sotomayor articulated the dilemma of fair cross-section jurisprudence when she said, "'I think there is a difference' between the 9% and 1% scenarios . . . but 'I just don't know statistically where' to draw the line."[41] Rather than defining this line, the Court declined to endorse a particular method for analyzing *Duren* or to prescribe a certain threshold of statistical significance for any test.[42] Stating, "Each test is imperfect," the Court reversed the Sixth Circuit's finding of a fair cross-section violation that had been based on the comparative disparity test.[43] Instead, it decided the case based on insufficient evidence proving systematic exclusion, ultimately leaving much discretion to the courts in fair cross-section cases.[44]

II. Case Description

In *Garcia-Dorantes v. Warren*, the Sixth Circuit exercised the discretion delegated to it by the Supreme Court in *Berghuis* to find a fair cross-section violation mainly by applying the

comparative disparity test.[45] This outcome created a split with the Michigan Supreme Court's *Bryant* decision, which had rejected a challenge to Kent County's jury selection system during the period of the computer error.[46] The Sixth Circuit did consider the absolute disparity test that other courts tend to prefer, but ultimately deemed it unhelpful here.[47] Finding these two tests sufficient, it explicitly declined to consider other methods or the "non-benign factors" approach.[48] It also went to great lengths to justify this outcome as consistent with *Berghuis*, where the Supreme Court had reversed this very same court's finding of a fair cross-section violation.[49]

The only question before the Court concerned sufficient underrepresentation under *Duren*'s second prong, as the parties did not dispute the first or third prongs.[50] Drawing on reports by expert statisticians to measure the extent of African-Americans' underrepresentation, the Court found an absolute disparity of 3.45% and comparative disparity of 42%.[51] Arguing that absolute disparity understates the underrepresentation when the distinctive group is small—as it was here—the Court relied more heavily on comparative disparity.[52] It concluded that a 42% comparative disparity exceeded what this Court and other circuits had considered sufficient to show underrepresentation, which was enough evidence to rule in the defendant's favor.[53]

III. Analysis

The Sixth Circuit reached the correct result in *Garcia-Dorantes*, but it should have applied a more effective version of the *Duren* test. First, like other courts, it accorded too much weight to statistical analysis. Second, it should have instead decided the case mostly on *Duren*'s third prong. Finally, despite these shortcomings, it was still justified in using *Duren*, which remains an imperfect but promising tool for reducing the pervasive problem of under-representative juries.

A. Reliance on the Absolute and Comparative Disparity Tests Is Misplaced

The *Garcia-Dorantes* court followed the traditional approach to *Duren*'s second prong by relying on statistical analysis to measure underrepresentation.[54] However, the seemingly arbitrary and contradictory nature of courts' use of these tests suggests that they should never play as significant a role as they did in the Sixth Circuit's decision.[55] Specifically, the most frequently invoked absolute and comparative disparity tests illustrate why courts should not consider statistical tests dispositive by themselves.[56] Despite the fact that courts heavily rely on it, the absolute disparity test makes it difficult to decide when the underrepresentation on jury venires is substantial enough to be unconstitutional.[57] For example, with just 4.8% of a county's population being African-American, adding just one more African-American to a jury venire where they were underrepresented would actually make them *overrepresented*.[58] This test was reasonable to use in *Duren* because the underrepresented group was so large,[59] but it provides little useful guidance with small minority populations.[60]

While the Sixth Circuit was right not to rely on absolute disparity for this very reason, it incorrectly gave more weight to comparative disparity instead.[61] While the comparative disparity test does try to account for the issue of small population size by dividing the absolute disparity by the percentage of the group's share in the population, minor changes can lead to distorted results.[62] Even though it sounds incredibly high, a comparative disparity of 100% would be insignificant if, for example, that group's share of the total population was only 0.1%.[63] Because of these problems, the *Garcia-Dorantes* court should not have depended on comparative disparity to such an extent, even though it does capture more nuance than absolute disparity.[64] Instead, the Court should have viewed all of the statistical analysis provided by experts—that

went well beyond just absolute and comparative disparities—holistically, as informative sources of useful background material that are not alone dispositive.[65]

B. More Focus Should Be on *Duren*'s Systematic Exclusion Prong

While employing statistical tests on a case-by-case basis without bright-line thresholds may seem vague, such ambiguity would be more tolerable if the *Garcia-Dorantes* court had relied on the clarity of *Duren*'s third prong.[66] In fact, the Sixth Circuit would have reached the same result if it had decided that the systematic exclusion—which the parties agreed was present—was enough to find a fair cross-section violation, regardless of the numbers produced by statistical analysis.[67] Determining whether there has been systematic exclusion can be much more straightforward than evaluating whether underrepresentation is substantial enough to violate the Sixth Amendment.[68] Under *Osorio*, a court would simply decide if there were "non-benign" factors that caused the underrepresentation to *not* be a result of random chance.[69] A court can answer this question without turning to relatively arbitrary statistical analysis where, as in *Osorio*, the selection system plainly excluded a significant portion of the population from even being considered for jury duty.[70]

This approach would provide sufficient guidance to lead to more consistent outcomes, instead of the wide variety of results produced by using statistical tests.[71] Importantly, it would avoid the kind of split that occurred when the *Garcia-Dorantes* court reached the opposite holding as the Michigan Supreme Court in *Bryant*, even though both courts were evaluating the same incident of Kent County's flawed selection system.[72] Concluding that a 42% comparative disparity is high enough to be a violation, *Garcia-Dorantes* distinguished the case at hand from the very cases *Bryant* relied on when *Bryant* concluded that measure was insufficient, and vice

versa.[73] Both courts would have reached the outcome in *Garcia-Dorantes* if they had focused more on *Duren*'s third prong.[74]

This approach would not only be easier to apply and lead to greater consistency, it would also be more in line with the spirit of the Sixth Amendment.[75] If a cross-section is a "composite representation typifying the constituents of a thing in their relations,"[76] the defendants in *Garcia-Dorantes* and *Bryant* did not even have the *possibility* of a representative jury when hundreds of thousands of residents were excluded. In fact, because the computer glitch plainly excluded whole segments of the population—including most minority residents—there might still have been a Sixth Amendment violation even if the defendant's jury was fully representative.[77] Because of this constitutional requirement, the *Bryant* court construed *Duren* too strictly in its explicit rejection of the *Osorio* approach.[78] In concluding the computer error was constitutionally permissible, it essentially allowed—albeit indirectly and unintentionally—exactly what the Jury Service and Selection Act was passed to prevent: the government's arbitrary hand-selection of jurors.[79] Consequently, the Sixth Circuit would have furthered the aim of the fair cross-section requirement if it had decided *Garcia-Dorantes* mostly on *Duren*'s third prong.[80]

C. *Duren* Is Still Valuable Because of the Importance of the Right to an Impartial Jury

While the above analysis raises questions about the ultimate usefulness of the *Duren* test,[81] the Sixth Circuit was correct to apply it in *Garcia-Dorantes* and courts should not abandon it altogether. One argument against *Duren* is that equal protection doctrine sufficiently serves the purpose of the Sixth Amendment's right to an impartial jury.[82] However, *Duren* still fills an important void not covered by the Equal Protection Clause.[83] First, unlike under an equal protection challenge, defendants who bring a Sixth Amendment challenge do not have to be of the same race, sex, or other category as the allegedly underrepresented group.[84] This difference is

why, in *Duren* and *Taylor*, the male defendants had standing to claim a Sixth Amendment violation because of the lack of women on jury venires.[85] Maintaining this right is essential because less homogenous juries can benefit everyone, regardless of whether the defendant's race, for example, happens to be represented in his or her jury venire.[86] Second, there is no requirement under fair cross-section doctrine that exclusion result from *purposeful* discrimination, while there is under equal protection.[87] This distinction is critical, as it provides a remedy for defendants like Garcia-Dorantes, for whom the county's incompetence caused the same result as intentional discrimination would have: a non-representative jury venire.[88]

Critics who advocate abandoning *Duren* point to its significant inherent flaws.[89] A major policy concern is that fair cross-section challenges breed litigation, causing enormous burdens on courts.[90] For example, the *Garcia-Dorantes* court's ruling for the defendant raises the probability that anyone convicted by a jury selected while the system was faulty should receive a new trial.[91] Another problem in *Duren* jurisprudence is that courts have mainly focused on race and sex in evaluating underrepresentation.[92] Although the Jury Selection and Service Act prohibits discrimination based on these traditional classes,[93] a more inclusive conception of "fair cross-section of the community" would consider additional categories, such as age or profession.[94]

These concerns illustrate that *Duren* is problematic, but the right to an impartial jury is vital enough to warrant its continued use. While implications of a successful fair cross-section challenge such as that in *Garcia-Dorantes* are indeed onerous on judicial systems, these burdens are minimal compared to the consequences of violating this constitutional right.[95] There is ample evidence that all-white juries carry biases that can deprive non-white defendants of an impartial jury.[96] If an "impartial jury" mandates as little bias as possible,[97] then ensuring jury venires represent the diversity of the community greatly increases the possibility that the resulting jury

panel will constitute a fair cross-section.[98] As for the argument that *Duren* should define diversity beyond race and sex, this approach could be impractical to apply and ignores the effort required to address the particular history of discrimination against women and minorities.[99]

The systematic exclusion in *Garcia-Dorantes* is especially problematic because it compounds obstacles that already make it difficult to attain representative juries: minorities' lower rates in jury pools,[100] lower response rates to summonses,[101] and greater likelihood prosecutors will strike minority jurors using peremptory challenges.[102] Because this pervasive underrepresentation can have such grave consequences on minority defendants, applying *Duren* is still a better alternative than relying solely on equal protection.[103] Its three prongs also provide a useful conceptual framework to approach fair cross-section claims, even if some adjustment is necessary.[104] Ultimately, *Garcia-Dorantes* was justified in employing *Duren*, but a modified form could more successfully protect the fundamental constitutional right to an impartial jury.

Conclusion

Asked to determine whether the exclusion of thousands of Kent County residents from jury service consideration amounted to unconstitutional underrepresentation, the Sixth Circuit in *Garcia-Dorantes* took a traditional approach. Even though it relied heavily on a less-favored statistical test, it still followed the established application of *Duren* that emphasizes decisive statistical analysis at the second prong. In doing so, it only further added to the unhelpful variation of *Duren*'s application. Despite its flaws, *Duren* is still a useful framework for protecting the constitutional right to an impartial jury. However, applying it with less emphasis on statistical analysis of underrepresentation and more on systematic exclusion could ensure greater consistency across jurisdictions and adherence to the ideals of the Sixth Amendment.

[1] Garcia-Dorantes v. Warren, 801 F.3d 584 (6th Cir. 2015).

[2] *Id.* at 590 (citing *Ambrose v. Booker*, 684 F.3d 638, 640–41 (6th Cir. 2012)). *See also Teacher Discovers Computer Glitch in Jury System,* ASSOCIATED PRESS, Oct. 21, 2002.

[3] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial *by an impartial jury* . . . ." (emphasis added)).

[4] *Garcia-Dorantes*, 801 F.3d at 587.

[5] Having exhausted his remedies in the state court system, the defendant could challenge his conviction in federal court under 28 U.S.C. §§ 2241 and 2254 because he claimed his imprisonment violated the Constitution.

[6] *Garcia-Dorantes*, 801 F.3d at 595. *See Venire*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A panel of persons selected for jury duty and from among whom the jurors are to be chosen.").

[7] *Garcia-Dorantes*, 801 F.3d at 588.

[8] *Cf.* THE FEDERALIST NO. 83 (Alexander Hamilton) (stating both supporters and opponents of a constitutional convention agree on a jury trial's value, which is the "very palladium of free government"). *See generally* Jim Neal, Founding Member, Neal & Harwell, Judge Edward R. Finch Law Day Awards Speech (Apr. 29, 2005) (tracing the history of the right to a jury trial). Even older historical sources propose the right to a jury. Blackstone famously called the jury the "glory of the English law," *id.*, and the Magna Carta stated no man can go to prison "except by the lawful judgement of his peers or by the law of the land," MAGNA CARTA 389 (J.C. Holt ed., Cambridge Univ. Press 3d. ed. 2015) (1215).

[9] *Garcia-Dorantes*, 801 F.3d at 600.

[10] Duren v. Missouri, 439 U.S. 357 (1979).

[11] *See Garcia-Dorantes*, 801 F.3d at 603–04.

[12] *Cf.* Andria Simmons, *State Expands Jury Duty Pool*, ATL. J.-CONST. (July 2, 2012, 6:09 AM), http://www.ajc.com/news/local/state-expands-jury-duty-pool/iy78gVxXv6pE6jD1rPRvoL (describing Georgia's expansion of its jury selection system to be more inclusive).

[13] *Cf. Finding a Jury of Your Peers Actually Is Pretty Complicated*, NAT'L PUB. RADIO (Dec. 27, 2014, 10:55 AM) ("All of the defendants are African-American.").

[14] *E.g.*, Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, CHAMPION, Dec., 2013, at 14.

[15] The right to an impartial jury also applies to military courts. CRIMINAL LAW DEP'T., JAG'S LEGAL CTR. AND SCH., U.S. ARMY, PRACTICING MILITARY JUSTICE *27-1 (2013). Notably, two important human rights treaties do not include the right to a jury trial. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 5–6, Nov. 4, 1950, 2889 U.N.T.S. 222; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 10 (Dec. 10, 1948).

[16] *See, e.g.*, Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 7–9, Berghuis v. Smith, 559 U.S. 314 (2010) (No. 08-1402) (describing how, in early America, juries consisted only of men handpicked by judges); Speech by Jim Neal, *supra* note 8.

[17] U.S. CONST. amend. XV.

[18] U.S. CONST. amend. XIX.

[19] U.S. CONST. amend. XXVI.

[20] *See, e.g.*, 1922 MINN. ATT'Y GEN. BIENNIAL REP., 437; Att'y Gen. Wis., Opinion Letter, 138–41 (Mar. 8, 1972); *see also* ADMIN. OFFICE OF THE U.S. COURTS, JUROR QUALIFICATIONS, http://www.uscourts.gov/services-forms/jury-service/juror-qualifications.

[21] Jury Selection and Service Act of 1968, Pub. L. No. 90–274, 82 Stat. 53 (codified at 28 U.S.C. §§ 1861–74 (1968)). *See* Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 943 (2016); Richard M. Re, Note, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1603 (2007) ("This reformist measure was designed to ensure not only that jurors were chosen from a wide sample of the population, but also that the same antidiscrimination protections that benefited black voters would also benefit black jurors.").

[22] Jury Selection and Service Act § 1861.

[23] *See* U.S. CONST. amend. XV; David M. Coriell, Note, *An (Un)fair Cross Section: How the Application of Duren Undermines the Jury*, 100 CORNELL L. REV. 463, 472 (2015).

[24] Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (finding a system unconstitutional where women were ten percent of venires but half of the jury-eligible population). States now also had to guarantee a fair cross-section. *See, e.g.*, MINN. STAT. ANN., MINN. R. CRIM. PRO. 26.02 (West).

[25] *Taylor*, 419 U.S. at 530–32 ("[A] flavor, a distinct quality is lost if either sex is excluded." (quoting Ballard v. United States, 329 U.S. 187, 193–94 (1946))). *Contra id.* at 542 (Rehnquist, J., dissenting) (arguing the majority's "flavor" quote "smacks more of mysticism than of law).

[26] Duren v. Missouri, 439 U.S. 357 (1979).

[27] *Id*. at 364.

[28] *Id.* at 368. Importantly, the Supreme Court has made clear that this fair cross-section guarantee applies only to jury venires and does not extend to the resulting jury panels themselves. *See* Linda Greenhouse, *Supreme Court Roundup: Justices, 5–4, Say an Impartial Jury Needn't Be a Cross-Section*, N.Y. TIMES, Jan. 23, 1990, at A19.

[29] *See* Chernoff & Kadane, *supra* note 14, at 17 ("[C]ourts have been reluctant to define groups other than African-Americans, Latinos, and women as distinctive . . . ."). *But see* Re, *supra* note 21, at 1595 ("Lower courts have plausibly concluded that Jews, the Amish, Puerto Ricans, homosexuals, and Native Americans are distinctive groups . . . .").

[30] *See* Re, *supra* note 21, at 1595.

[31] *See, e.g.*, Ferguson, *supra* note 21, at 948.

[32] *See, e.g.*, People v. Omar, 281 Ill. App. 3d 407, 415 (1996); State v. Griffin, 846 N.W.2d 93, 101 (Minn. Ct. App. 2014).

[33] *E.g.*, People v. Smith, 463 Mich. 199, 218 (2000). It "is calculated by dividing the absolute disparity by the population figure for a population group." *Id.*

[34] *See, e.g.*, *Omar*, 281 Ill. App. 3d at 415–16 (finding 8.6% disparity insufficient); State v. Holland, 976 A.2d 227, 236–37 (Me. 2009) (holding that 0.7% disparity is insufficient to show underrepresentation); *cf. Smith*, 463 Mich. at 217 (stating "absolute disparities less than 11.5%" are permissible (citing *Ramseur v. Beyer*, 983 F.2d 1215, 1231 (C.A.3, 1992))).

[35] *Compare* United States v. Osorio, 801 F. Supp. 966, 978 (D. Conn. 1992) (deciding that exclusion of entire towns in venires outweighed the 4% disparities), *with* People v. Bryant, 822 N.W.2d 124, 146 (Mich. 2012) (overruling precedent that adhered to *Osorio*'s reasoning).

[36] *Compare Omar*, 281 Ill. App. 3d at 415, *with Bryant*, 822 N.W.2d at 139.

[37] Examples of other tests courts have applied are standard deviation, disparity-of-risk, and absolute impact analysis. *See, e.g.*, *Osorio*, 801 F. Supp. at 977; *Bryant*, 822 N.W.2d at 138–45.

[38] *Cf.* Chernoff & Kadane, *supra* note 14, at 15 (explaining that a violation of the Equal Protection Clause is a "completely independent claim [with] . . . a different standard").

[39] *Bryant*, 822 N.W.2d at 138–45.

[40] Berghuis v. Smith, 559 U.S. 314 (2010).

[41] *See* Richard M. Re, Commentary, *Jury Poker: A Statistical Analysis of the Fair Cross-Section Requirement*, 8 OHIO ST. J. CRIM. L. 533, 534 (2011).

[42] *Berghuis*, 559 U.S. at 329.

[43] *Id.* at 326, 329–31.

[44] *Id.* at 330–32.

[45] Garcia-Dorantes v. Warren, 801 F.3d 584, 600–02 (6th Cir. 2015).

[46] People v. Bryant, 822 N.W.2d 124, 126 (Mich. 2012).

[47] *Garcia-Dorantes*, 801 F.3d at 601–02.

[48] *Id.* at 603–04.

[49] *Id.* at 601 (stating that Supreme Court precedent does not mandate a particular result because the Court has never required a certain test or statistical threshold for *Duren*'s second prong).

[50] *Id.* (finding prongs one and three undisputed because the allegedly underrepresented group was African-American and the exclusion, lasting almost a full year, was "systematic").

[51] *Id.* at 600.

[52] *Id.* at 601–02.

[53] *Id.* at 601–03.

[54] *Id.* at 600–03.

[55] *Cf.* Duren v. Missouri, 439 U.S. 357, 375 (1979) (Rehnquist, J., dissenting) (calling statistical analysis to measure underrepresentation "simply playing a constitutional numbers game").

[56] *See* Re, *supra* note 21, at 1596.

[57] *See, e.g.*, Re, *supra* note 41, at 545.

[58] State v. Griffin, 846 N.W.2d 93, 101 (Minn. Ct. App. 2014).

[59] With women comprising just over the half of the population and only 15% of jury venires, the absolute disparity in *Duren* was about 40%. *Duren*, 439 U.S. at 365–67.

[60] *But see* People v. Omar, 281 Ill. App. 3d 407, 415 (1996); State v. Holland, 976 A.2d 227, 237 (Me. 2009).

[61] *See* Garcia-Dorantes v. Warren, 801 F.3d 584, 602 (6th Cir. 2015).

[62] *See, e.g.*, *Omar*, 281 Ill. App. 3d at 415; People v. Smith, 463 Mich. 199, 219 (2000); Chernoff & Kadane, *supra* note 14, at 18. *But see* Edward P. Schwartz, *Supreme Court Absolutely Unclear on Constitutionality of Absolute Disparity Test*, JURY BOX BLOG (Jan. 26, 2010, 4:06 PM), http://juryboxblog.blogspot.com/2010/01/supreme-court-absolutely-unclear-on.html.

[63] *See* Re, *supra* note 41, at 546; *see also Omar*, 281 Ill. App. 3d at 415.

[64] *Cf.* Re, *supra* note 21, at 1597 ("[Comparative disparity] captures the common intuition that underrepresentation is more objectionable when a large fraction of a given group is excluded.").

[65] *See, e.g.*, People v. Bryant, 822 N.W.2d 124, 139 (Mich. 2012); *Smith*, 463 Mich. at 228–29; State v. Griffin, 846 N.W.2d 93, 102 (Minn. Ct. App. 2014).

[66] *See* Re, *supra* note 21, at 1598.

[67] *Cf. Berghuis*, 559 U.S. at 330 (phrasing the question as, "to the extent underrepresentation existed, was it due to 'systematic exclusion?'").

[68] *See* Re, *supra* note 21, at 1601 ("[A] jurisdiction's failure to send out jury questionnaires or summonses is paradigmatic systematic exclusion . . . .").

[69] *See* United States v. Osorio, 801 F. Supp. 966, 979 (D. Conn. 1992).

[70] *Accord Smith*, 463 Mich. at 204; *Bryant*, 822 N.W.2d at 153 (Cavanagh, J., dissenting). *See* Garcia-Dorantes v. Warren, 801 F.3d 584, 590 (6th Cir. 2015) (citing *Ambrose v. Booker*, 684 F.3d 638, 640-41 (6th Cir. 2012)); *id.* at 976; CTR. FOR JURY STUDIES, NAT'L CTR. FOR STATE

COURTS, STATE JURY MANAGER'S TOOLBOX: A PRIMER ON FAIR CROSS SECTION JURISPRUDENCE 6 (2010), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/A%20Primer%20on %20Fair%20Cross%20Section.ashx.

[71] However, the usefulness of such an approach might be limited to cases like *Garcia-Dorantes*, where there was a consequential flaw in the selection system. *Compare Garcia-Dorantes*, 801 F.3d at 590, *with* State v. Griffin, 846 N.W.2d 93, 97 (2014).

[72] *Compare Garcia-Dorantes*, 801 F.3d at 588, *with Bryant*, 822 N.W.2d at 126.

[73] *Compare*, *Garcia-Dorantes*, 801 F.3d at 603 (arguing the Third Circuit's holding of 73% as insufficient is distinguishable because here, the absolute disparity is higher), *with Bryant*, 822 N.W.2d at 141 (citing the Third Circuit as one of several circuits that considered comparative disparities above 50% permissible).

[74] *See Bryant*, 822 N.W.2d at 153 (Cavanagh, J., dissenting).

[75] *Cf.* Sanjay K. Chhablani, *Re-Framing the 'Fair Cross-Section' Requirement*, 13 U. PA. J. CONST. L. 931, 944 (2011). ("The [*Taylor*] Court found that the purposes of the jury were lost by a process that failed to comport with the cross-section requirement . . . .")

[76] *Cross Section*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cross%20section.

[77] *See* United States v. Osorio, 801 F. Supp. 966, 976 (D. Conn. 1992); *see also* R. v. Kokopenace, [2015] 2 S.C.R. 398, ¶ 2 (Can.) ("[R]epresentativeness focuses on the process used to compile the jury roll, not its ultimate composition."); Re, *supra* note 21, at 1582.

[78] *See Bryant*, 822 N.W.2d at 146.

[79] *See* Coriell, *supra* note 23, at 473; Re, *supra* note 21, at 1587.

[80] *See Bryant*, 822 N.W.2d at 153 (Cavanagh, J., dissenting).

[81] *See* Coriell, *supra* note 23, at 465 (arguing that *Duren* puts too much burden on the defendants); *see generally* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner, Berghuis v. Smith, 559 U.S. 314 (2010) (No. 08-1402) (advocating for not only abandoning *Duren* but also overruling *Taylor*).

[82] *Cf.* Duren v. Missouri, 439 U.S. 357, 370–71, 378 (1979) (Rehnquist, J., dissenting) ("I do not believe that the Fourteenth Amendment was intended or should be interpreted to produce such a quixotic result.").

[83] *Contra, e.g.*, Berghuis v. Smith, 559 U.S. 314, 334 (2010) (Thomas, J., dissenting).

[84] *See* Brief *Amicus Curiae*, *supra* note 81, at 17–18.

[85] *See generally Duren*, 439 U.S. 357; Taylor v. Louisiana, 419 U.S. 522 (1975).

[86] *Cf.* Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273, 274 (1996) ("[U]nderrepresentation on juries means that minority citizens receive less exposure to the educational experience of jury service, fuels the decline of public trust in jury fairness, and raises the risk that some jury decisions may be mis- or under-informed, lacking the breadth of experience that diverse panels can provide.").

[87] *See Duren*, 439 U.S. at 371 (Rehnquist, J., dissenting); State v. Holland, 976 A.2d 227, 240 (Me. 2009); Chhablani, *supra* note 75, at 944–45; Coriell, *supra* note 23, at 472.

[88] *See* Re, *supra* note 21, at 1590 ("[T]hreats to minority venire representation are not bigotry or prejudice but administrative neglect, bureaucratic strain, and political indifference.").

[89] *See, e.g.*, Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 19–32, Berghuis v. Smith, 559 U.S. 314 (2010) (No. 08-1402).

[90] *See, e.g.*, *Duren*, 439 U.S. at 376–77 (Rehnquist, J., dissenting); *id.* at 25.

[91] *See* Brief *Amicus Curiae*, *supra* note 89, at 25; King & Munsterman, *supra* note 86, at 274.

[92] *See, e.g.*, Chhablani, note 75, at 947–48.

[93] Jury Selection and Service Act of 1968, Pub. L. No. 90–274, § 1862, 82 Stat. 53 (codified at 28 U.S.C. §§ 1861–74 (1968)).

[94] *See* Ferguson, *supra* note 21, at 982.

[95] *Contra* Brief *Amicus Curiae*, of the Criminal Justice Legal Foundation in Support of Petitioner at 25, Berghuis v. Smith, 559 U.S. 314 (2010) (No. 08-1402).

[96] *See, e.g.*, Vivian Ho, *For SF's Black Defendants, It's Hard to Find Jury of Peers*, S.F. CHRON. (Mar. 4, 2017, 5:07 PM), http://www.sfchronicle.com/crime/article/For-SF-s-black-defendants-it-s-hard-to-find-10977625.php (pointing to a study showing all-white juries convicted African-American defendants at a rate of 81% and white defendants at 66%. Having at least one African-American on the jury nearly closed this gap entirely). *But see* R. v. Kokopenace, [2015] 2 S.C.R. 398, ¶ 52 ("[T]here is no empirical data to support the proposition that jurors of the same race as the accused are necessary to evaluate the evidence in a fair and impartial manner . . . .").

[97] *See Jury*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "impartial jury" as "A jury that has no opinion about the case at the start of the trial").

[98] *Cf.* Ferguson, *supra* note 21, at 981–82 ("Numerous studies show that diverse juries are better fact finders because different viewpoints and perspectives provide for deeper and longer deliberation."); Brandt Williams, *Race Colors Jury Selection for Alleged Jamar Clark Protest Shooter*, MPR NEWS (Jan. 13, 2017), https://www.mprnews.org/story/2017/01/13/jamar-clark-protest-alleged-shooter-scarsella-trial (quoting a defense attorney who says that when choosing jurors, it is crucial to strike those with "strong opinions").

[99] *But cf.* Chhablani, *supra* note 75, at 947–48 (describing the unfairness and absurdity of other categories of people not being "distinct" enough to warrant the Sixth Amendment's protection).

[100] *See* Re, *supra* note 21, at 1603 (explaining that sourcing jurors from voting registration lists "plainly underrepresent[s] cognizable groups, including African-Americans"); Ho, *supra* note 96. This problem is so widespread because so many jurisdictions use voter registration lists to select jurors. *See* STEPHEN KNACK, DETERRING VOTER REGISTRATION THROUGH JUROR SOURCE PRACTICES: EVIDENCE FROM THE 1991 NES PILOT STUDY 1 (1992). For solutions to minorities' low representation on jury selection lists, see King & Munsterman, *supra* note 86; William Caprathe et al., *Assessing and Achieving Jury Pool Representatives*, JUDGES' J., Spring 2016, at 20; and *How You Were Chosen*, MULTNOMAH CTY. CIRCUIT COURT, http://www.courts.oregon.gov/Multnomah/General_Info/Jury_Service/pages/how_you_were_chosen.aspx.

[101] *See, e.g.*, Ferguson, *supra* note 20, at 957 ("Courts have identified a clear correlation between poverty and jury response rates, which in certain communities directly correlates with race."); *c.f.* Mona Chalabi, *What Are the Chances of Serving on a Jury?*, DEAR MONA: FIVE THIRTY EIGHT (June 5, 2015, 10:18 AM), https://fivethirtyeight.com/features/what-are-the-chances-of-serving-on-a- jury/ (noting that, for example, of the 32 million people summoned annually for state court jury duty, only 8 million actually report for jury duty). For a sample of jury summons information, see U.S. DIST. CT., DIST. OF CONN., SAMPLE SUMMONS FOR JURY SERVICE.

[102] *See, e.g.*, Adam Liptak, *Supreme Court Finds Racial Bias in Jury Selection for Death Penalty Case*, N.Y. TIMES, May 23, 2016, https://www.nytimes.com/2016/05/24/us/supreme-court-black-jurors-death-penalty-georgia.html?_r=0 ("Studies . . . found that prosecutors use peremptory challenges two or three times more often to strike black potential jurors than to strike others.").

[103] *Contra* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 19–20, Berghuis v. Smith, 559 U.S. 314 (2010) (No. 08-1402).

[104] *See* Duren v. Missouri, 439 U.S. 357, 364 (1979). *Contra id.*