

ARTICLES

Lack of Jury Diversity: A National Problem with Individual Consequences

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Chicago's federal district court, the Eastern Division of the Northern District of Illinois, encompasses racially diverse and multicultural Cook County in addition to other primarily white counties. In 2013, at the start of a high-profile criminal tax-evasion trial, the 50-member prospective jury pool called for jury selection failed to include a single African-American man. *See Annie Sweeney & Cynthia Dizikes, [The balancing act of jury selection](#), Chicago Tribune (Mar. 27, 2013)*. Although U.S. District Judge James Zagel suggested that this incident was a rarity, the same courthouse had summoned an entirely Caucasian jury pool no more than two months earlier for another black defendant's criminal trial. *Id.*

Turns out, this "rare" incident is not so rare after all. Tresa Baldas, [No-shows for jury duty hurt diversity of Michigan pools](#), Detroit Free Press (Apr. 13, 2012). On the contrary, it is indicative of a challenge that courts are confronting across the country. These jurisdictions are struggling to provide criminal defendants with jury candidates that could be reasonably described as the defendant's "peers." In other words, courts are striving to effectively and randomly select jury pools with a composition that reflects the racially diverse populations they serve. *Id.* Criminal defense attorneys are often presented with a jury that features a majority of white, upper-middle class individuals who are then responsible for judging the guilt or innocence of a defendant who does not share their same characteristics or background. Hong Tran, [Jury Diversity: Policy, legislative and legal arguments to address the lack of diversity in juries](#), Defense, May 2013, at 6. As one federal judge put it: "Unless you are totally blind, a judge cannot help but realize that when 100 people come into court for jury selection that there are one or two, or none, who are visible minorities." Baldas, *supra* (quoting U.S. District Judge Victoria Roberts).

Several causes have been identified as a source of this problem. A key factor associated with the underrepresentation of minorities is that jury questionnaires in many predominantly minority areas come back to the court as undeliverable or do not come back at all. *Id.* According to the Detroit U.S. District Court's Jury Department, "one-third of undeliverable jury questionnaires or ones never returned are in Detroit," a city with a significant minority population. Individuals with lower socioeconomic statuses tend to move more frequently, making them difficult to locate to deliver a juror summons. *See Task Force on Race and the Criminal Justice System, Preliminary Report of Race and Washington's Criminal Justice System*, at 29 (2012) ("African Americans, Native Americans and Latinos are more likely to be economically disadvantaged, have unstable employment, experience more family disruptions, and have more residential mobility."). Furthermore, the costs associated with answering a summons or being called for jury duty are prohibitive for those who cannot afford to miss a day of work. Alexander E. Preller, *Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 Colum. J.L. 1, 1–2 (Fall 2012) ("For many, [the] inadequate compensation [afforded to jurors] is simply inconvenient, but for those who are self-employed, hold multiple

part-time jobs, or are dependent on tips as part of their compensation, potential loss of income is critical and they do whatever they can to avoid [jury duty].”).

Notwithstanding the difficulties in empaneling a multiracial jury, criminal defendants are still given the right to be tried by an impartial jury of their peers. But given the difficulty in composing a diverse jury pool, it bears asking: Why does it matter? Why do we strive for jury diversity?

As an initial point, there is an issue of “optics”: a heterogeneous jury not only confirms that the system is fair and impartial for the defendant, Tran, *supra*, at 6 (citing Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definitions of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761 (Spring 2011)), but also assures the public at large. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy*, 78 (3) Chi.-Kent L. Rev. 1033, 1033 (2003). As former federal judge for the Northern District of Illinois David Coar opined, “You want, especially at the outset, [for] this thing to not only be fair but look fair. This court system depends on people believing that you get a fair shake.” Sweeney & Dizikes, *supra* note 1. Conversely, a racially homogenous jury pool can have a harmful impact on the public’s perception of the justice system. Sonia Chopra, [Preserving Jury Diversity by Preventing Illegal Peremptory Challenges: How to Make a Batson/Wheeler Motion at Trial \(and Why You Should\)](#), The Trial Lawyer, Summer 2014, at 20 (citing Samuel Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 (4) J. Personality & Soc. Pschol. 597 (2006)) (noting that “jury verdicts are perceived as more fair by outsiders when they are rendered by diverse versus homogenous juries”). Indeed, a jury pool’s makeup can raise serious questions concerning this nation’s overall dedication to racial equality. Are all-white juries a cause or a symptom of systemic racism, oppression, and discrimination? Either way, a system in which non-diverse juries are almost uniformly deciding the fate of minority criminal defendants is inherently contrary to our society’s professed dedication to achieving and maintaining equality.

In addition, minority presence on a jury allows the group to understand and appreciate the different life experiences that different racial identities have with the criminal justice system. Tran, *supra*, at 6 (citing Edward S. Adams, *Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U.L.Rev. 703, 709 (June 1998)). This leads the jury as a whole to perform their fact-finding tasks more effectively by helping eliminate or lessen individual biases or prejudices. *Id.* In turn, trials are more likely to be considered fair and impartial. *Id.* (citing Paula Hannaford-Agor, *Systemic Negligence in Jury Operations: Why The Definitions of Systemic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761 (Spring 2011)). Studies have shown that “diverse juries had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements.” Chopra, *supra*. People of different races—akin to people with varied economic statuses, social hierarchies, sexual orientations, or national origins—consider and evaluate the same information in different ways and often arrive at

different conclusions. Tran, *supra*, at 6. Of course, “[d]iverse viewpoints are more important to a jury’s performance than diverse skin color, but promoting diversity of race and ethnicity provides a more workable means of ensuring diverse viewpoints than attempting to probe viewpoints directly through questionnaires, voir dire examinations, and the like.” Albert W. Alschuler, *Racial Quotas and the Jury*, 44 Duke L.J. 704, 722 (1995).

Indeed, the lack of jury diversity has tangible implications beyond the larger societal problems that are indicated by a non-diverse jury pool. For example, consider the case of a black defendant who may wish to have at least one black juror in order to ensure that he is judged by a group that understands the nuances and implications associated with his background. Imagine that this defendant is presented with a jury pool comprised entirely of white, upper-middle class individuals along with a single black prospective juror. Now consider that the one black juror, while sharing the defendant’s racial background, lacks other traits that may be beneficial for the defense (e.g., a family member in the police force, an association with someone who was a victim of the crime charged against the defendant, etc.). On the one hand, the defense may choose to retain the minority juror despite these other issues. On the other, the defense could dismiss the juror and proceed with an all-white jury that lacks the necessary insight into the defendant’s identity, which risks allowing the remaining juror’s biases to go unchecked.

In this hypothetical, the defendant and defense counsel are forced to weigh the values of a shared racial identity against other characteristics that are desirable in a juror. Do you keep a juror who may sympathize and identify with the defendant because of a shared identity trait? Or do you risk empaneling a jury that lacks the ability to fully understand that defendant’s background and unique circumstances but may have different valuable characteristics? This balance is only being struck because there are no other prospective jurors who share the defendant’s racial background. The value of a juror’s race—an inherently troubling topic that calls into question other issues of discrimination and bias—is placed directly in the spotlight solely because of that juror’s otherness in comparison to his or her fellow jurors. By failing to provide other minority jurors, the court forces defendants and jurors to focus on what separates them from the group despite the justice system’s continued guarantees of equality and impartiality. Notwithstanding, this is a dilemma that stacks the deck even further against the defendant and jeopardizes his right to a jury of peers who can sympathize or identify with him as a nuanced individual.

Given the significant benefits to empaneling a multiracial jury pool, denial of such diversity may give rise to other issues. An all-white jury may ultimately deny a minority defendant the right to be tried by a panel of his or her peers and, as a result, run afoul constitutional guarantees. Legal challenges are chiefly based on the Sixth Amendment’s guarantee of an “impartial jury” that has been drawn from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 535–37 (1975). When a defendant challenges the composition of his or her jury panel under this paradigm, the alleged violation is analyzed using the *Duren* test. *Duren v. Missouri*, 439 U.S. 357 (1979). This test was reaffirmed in *Berghuis v. Smith*, 559 U.S. 314 (2010). The *prima facie* factors that establish a violation are

- the group alleged to be excluded is a “distinctive” group in the community;
- 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
- the underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 364.

A group is typically considered “distinctive” if it is based on race, gender, or ethnicity. Otherwise, courts have considered the following: “(1) that the group be defined and limited by some clearly identifiable factor . . . , (2) that a common thread or basic similarity in attitude, ideas, or experience run through the group, and (3) that there be a community of interest among the members of the group, such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.” *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985).

If the excluded group qualifies as “distinctive,” a court must then determine the pool of available and qualified prospective jurors. *Duren*, 439 U.S. at 364–66. To do this, the court will look to the state’s laws on the subject. States may generally be permitted to establish the requisite qualifications for prospective jurors, *Berghuis*, 559 U.S. at 333. (i.e., U.S. citizens, eighteen years old or older, resident of the county in which summoned, proficient in English, etc.). See e.g., RCW 2.36.070. From there, statistical evidence must be presented establishing that the distinctive group is underrepresented in the overall potential juror group. *Duren*, 439 U.S. at 364–66. The Supreme Court, in *Berghuis v. Smith*, noted that at least three different methods have been used for this element—absolute disparity, comparative disparity, and standard deviation—but further clarified that no statistical test is ideal. *Berghuis*, 559 U.S. at 329.

The final requirement under *Duren* requires that the underrepresentation be a product of the system used to select prospective jurors for service. *Duren*, 439 U.S. at 367 (1979). *Duren*, for example, found that that the court’s practice of granting automatic exemptions to otherwise qualified female jurors constituted systematic exclusion that violated the Sixth Amendment. *Id.* If a defendant is able to present sufficient evidence to show that his or her right to an impartial jury was violated, then the State must demonstrate a compelling justification for the alleged exclusion. *Id.* at 368. Unfortunately, the legal challenges concerning the lack of jury diversity have mostly been unsuccessful. For example, in Detroit, several defendants have challenged the jury selection process—none successfully. Baldas, *supra*. And Detroit is not alone: The lack of jury diversity is a national concern. *Id.* (quoting Greg Hurley, a member of the Virginia-based Center for Jury Studies and an analyst with the National Center for State Courts). Accordingly, federal courts around the country are taking steps to address the problem. Courts and lawmakers alike have implemented various solutions, which range from highly individualized responses to broad-reaching campaigns.

Some courts and judges have chosen to address the problem on a case-by-case or person-by-person basis. For instance, Eastern District of Michigan Judge David Lawson ordered several individuals to appear in his court and explain their failure to appear for jury duty. *Id.* Judge Lawson, however, did not stop there; he indicated that their continued absence would result in arrest, jail time, or a monetary fine. *Id.* Similarly, Judge Denise Page Hood, also of the Eastern District of Michigan, has taken an educational approach and required jury-dodgers to appear in her courtroom and observe the jury selection process in its entirety. *Id.* It seems that many courts agree that the sanction, or even the threat of sanction, effectively increases juror turnout.

Tran, *supra*, at 8. Moreover, judges have been able to take corrective action even when the initial jury gathering process fails to provide a sufficiently diverse group. For example, when presented with a predominantly Caucasian group of prospective jurors, Northern District of Illinois Judge Milton Shadur simply adjourned the trial for a couple of days until an adequately multiracial jury could be summoned. Sweeney & Dizikes, *supra*. In these instances, judges were able to take the steps they felt were appropriate to provide a defendant with an acceptable jury pool. At the same time, these ad hoc measures can only go so far and may be entirely unavailable if no minorities ever appear for jury duty. Moreover, these actions were taken at the discretion of the individual judge and may be unavailable, overlooked, or disregarded in other courtrooms.

To ensure consistent minority attendance, a broader, policy-based approach may be necessary. Some courts and lawmakers have extended the scope of their efforts by altering laws and jury-selection methods. Permitting non-English speakers to sit on juries may increase the presence of minorities. Tran, *supra*, at 8–9. While eliminating the language requirement may not necessarily impact racial diversity, such a policy shift will certainly increase the presence of varied identities, nationalities, ethnicities, and other valuable characteristics. Also, some courts have changed their random-selection process to reach a broader groups of individuals with jury summonses.

Sweeney & Dizikes, *supra* (referencing statement from Paula Hannaford-Agor, an expert on jury system management with the National Center for State Courts). Typically, courts send juror questionnaires to individuals who were pulled from voter registration lists. *Id.* Census data, however, suggests that “registered voters tend to be older, white and more affluent than the general population.” *Id.* To bring greater racial and ethnic balance to the list of potential jurors, some jurisdictions have begun drawing from other lists with a greater proportion of minorities, such as driver license and state ID databases. *Id.* See also Tran, *supra*, at 8. Still, there remain countless other possible remedies, such as redesigning the jury questionnaire, requiring that questionnaires be completed and returned, and using stratified sampling techniques, John P. Bueker, *Jury Source Lists: Does Supplementation Really Work?*, 82 Cornell L. Rev. 390, 423–30 (Jan. 1997). However, each court must determine what solution is most effective for their jurisdiction.

Despite the efficacy of methods that are specifically intended to increase juror diversity, it may be necessary to first overcome the general population’s opposition to serving on a jury. It comes as no surprise that Americans typically hold negative attitudes when it comes to jury duty.

Alexander E. Preller, *Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 Colum. J.L. 1, 1–2 (Fall 2012) (“People hate getting jury

duty.”). If potential jurors, regardless of identity, resist jury service, then there is yet another barrier to achieving multiracial, heterogeneous jury panels. As a result, ensuring jury diversity may require a holistic approach that makes jury duty more desirable to everyone and then focuses additional efforts that target minority populations. Some courts have already suggested or undertaken this type of multifaceted approach. Increasing juror pay or providing additional incentives, for example, can serve a dual role by increasing general juror turnout and encouraging individuals from lower socioeconomic backgrounds to appear by decreasing the opportunity costs associated with jury service. Tran, *supra*, at 8 (noting that the Washington State Jury Commission, created by the Board of Judicial Administration in 1999, gave the “highest priority to increasing juror fees” which will “address the current inequity in juror compensation” and “enable[e] a broader segment of the population to serve”) (*citing* Washington Jury Commission, *Report to the Board of Judicial Administration, Executive Summary* (July 2000) http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf). Likewise, community outreach, including publicity campaigns, communications with businesses and employers, and educational efforts geared toward new citizens and minorities may promote jury service for the general population as well as for diverse communities. *Id.*

While there appear to be significant barriers to remedying the lack of multiracial and diverse jury pools, the alternative (i.e., allowing the issue to go unaddressed) is unacceptable. As previously noted, diversity is not simply an idealistic goal but has true utility in ensuring the justice system’s integrity and reliability. Presently, our nation’s courts seem to depend on an approach where each individual court system conceives a plan to increase diversity and subsequently evaluates the outcome. If one method is unsuccessful, they return to the drawing board. Essentially, these courts must rely on trial and error. To further complicate the issue, while one arrangement may work for one location, that same system may not be as effective in another part of the country. Therefore, it is imperative for courts to continue trying different methods to increase juror turnout and, in turn, juror diversity. The costs and potential benefits are too great to allow the continued absence of minority jurors to go unchecked.

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