The Jury's Still Out? Some Jurors Never Made It In: How Felon Disenfranchisement Has Made the Sixth Amendment Fair Cross Section an Impossibility

SARAH CLAXTON*

* Staff Member, Volume 52, and Managing Editor, Volume 53, *The University of Memphis Law Review*; Juris Doctor Candidate, University of Memphis Cecil C. Humphreys School of Law, 2023. Thank you to Professor David Romantz, who served as my faculty advisor on this project, for sharing instrumental insight and enthusiasm throughout the Note-writing process. Thank you to Emma Kent, Nina Szymaszek, Hallie Robison, Katelyn Jackson, and Paden Hemphill, for being thoughtful editors during the writing and editing processes that made this Note the best it could be. Thank you to the Volume 53 staff for editing, bluebooking, and offering valuable feedback. Thank you to Ryan, Dan, Yale, Carly, and all my friends and family for always making me laugh until I cry, letting me cry until I laugh, and supporting me unconditionally. Last, but never least, thank you to my mother, the Honorable Charmiane G. Claxton, who always believes in me, encourages me, and entertains my problems even when she's busy. I dedicate this Note to my brother John who has taught me the importance of passion in education and perseverance through life's challenges.

> 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.[1]

I. INTRODUCTION

The stain of Black juror exclusion is embedded in the framework of the American jury system. Taylor Strauder and Troy Terrell Henry—two Black men in post-Reconstruction era America, separated by 134 years—were tried for their alleged crimes before a jury of twelve white "peers."[2] Strauder's 1880 case became a landmark decision in the United States that endeavored to ensure that his position would not be replicated without an exacting analysis of the associated state discrimination and a firm grasp on the protections afforded by the U.S. Constitution. Henry's 2013 case became one of many in the 134-year gap that failed to deliver on *Strauder*'s aspirations.

1. Justice Marshall writing for the majority in *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

2. Based on the events of *Henry v. Virginia Department of Corrections*, No. 3:17CV03-HEH, 2018 WL 1037552 (E.D. Va. Feb. 23, 2018) and *Strauder v. West Virginia*, 100 U.S. 303 (1880).

Felon disenfranchisement, the practice of barring individuals who have been convicted of felony crimes from innate civil liberties such as voting, jury service, and holding public office, has created a seemingly undetected cycle of systematic discrimination in the American jury system. As more Black Americans are convicted of felonies, they are excluded from jury pools across the country, causing subsequent juries to be increasingly unrepresentative of local communities. When juries are unrepresentative of the surrounding community and are predominantly white, Black Americans on trial are more likely to be convicted, and the cycle continues.[3] This disenfranchisement began with the exclusion of Black jurors based on lack of citizenship, evolved through de jure and de facto discrimination, and culminated in the present system of felon exclusion statutes and their disparate impact on Black Americans. Because of felon disenfranchisement, Black Americans are significantly underrepresented in the jury pool, and thus on juries.[4]

Although the Supreme Court has held that the Sixth Amendment guarantees defendants the "constitutional right to a jury drawn from a fair cross section of the community,"[5] this right is difficult to enforce because accompanying legislation and case law is infected with the centuries-long history of Black juror exclusion. In *Duren v. Missouri*, the Supreme Court announced a three-pronged test that defendants must meet to establish a prima facie case for a "fair cross section" violation:

> (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

3. *See* Steve Hartsoe, *Study: All White Jury Pools Convict Black Defendants 16 Percent More Often than Whites*, DUKE TODAY (Apr. 17, 2012), https://today.duke.edu/2012/04/jurystudy ("In cases with no blacks in the jury pool, blacks were convicted 81 percent of the time, and whites were convicted 66 percent of the time. The estimated difference in conviction rates rises to 16 percent when the authors controlled for the age and gender of the jury and the year and county in which the trial took place.").

4. *See* Nina W. Chernoff, *Black to the Future: The State Action 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 . . . .").

5. Duren v. Missouri, 439 U.S. 357, 368 (1979).

> 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 jury-selection process.[6]

The holding in *Duren* protects those on trial from *unintentional*[7] racial discrimination in the jury selection process through Sixth Amendment fair cross section challenges;[8] however, facially neutral felon disenfranchisement statutes that disproportionately impact Black Americans have created a systematic workaround that is not contemplated in the established three-prong analysis. Tennessee's facially neutral disenfranchisement statute and its corresponding statistical effect on the jury pool represent the epitome of this systematic workaround. Nearly one in every four Black Tennesseans is unable to serve on a jury, despite the racially neutral language included in Tennessee's felon exclusion statute, as in many other states across the country. The continued enforcement of these inherently discriminatory felon exclusion statutes effectively eliminates the possibility of juries being composed of a fair cross section of the community. This vicious cycle, increasing the probability of whiter and whiter juries, is a violation of the Sixth Amendment and is aggravated as Black people are consistently convicted at a higher rate.[9]

6. *Id.* at 364. This three-prong test largely derived from the holding in *Taylor v. Louisiana*, which stated that "the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." 419 U.S. 522, 535–36 (1975).

7. This Note specifically emphasizes the lack of intent required to establish Sixth Amendment fair cross section claims because courts often reject these challenges, implicitly inserting an intent requirement. Moreover, as a consequence of Sixth Amendment fair cross section jurisprudence stemming from the Fourteenth Amendment, the principles of Equal Protection challenges, specifically *Batson* claims, are often intertwined, further contributing to courts minimizing the importance of unintentional discrimination resulting from the jury-selection system over time. *See infra* notes 52, 54, 94 and accompanying text.

8. *Duren*, 439 U.S. at 357.

9. *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.").

This Note analyzes the problem and proposes solutions that intersect the cycle of overlooked legislative discrimination. Section II lays out the history of Black juror discrimination, discusses the current remedy for those alleging a Sixth Amendment violation due to jury underrepresentation, and introduces felon exclusion from juries. Section III examines how these facially neutral felon disenfranchisement statutes, using Tennessee as a model, disproportionately distort the jury pool and violate defendants' Sixth Amendment guarantee, effectively accomplishing the same goals as the preceding facially discriminatory statutes. Section IV proposes a broader reading of prong three of the *Duren* test that will truly give teeth to the constitutional challenge and ensure the possibility of a fair cross section of the community under the Sixth Amendment by preventing legislative discrimination in this area. Finally, Section V concludes by referencing the main themes and solutions from the Note.

II. FROM DE JURE DISCRIMINATION TO DE FACTO DISCRIMINATION: BLACK JURORS HAVE NEVER BEEN PROTECTED

The concept of a trial by jury is rooted in the English common law and reaches as far back as King Henry II in the twelfth century and his "self-informing" jury.[10] Now, the jury is integral to the American legal system and acts as further protection—aside from the court—against prejudiced action.[11] Accordingly, jury service has stood as a

10. A.B.A. Div. for Pub. Educ., *Part 1: The History of Trial by Jury*, Dialogue on the American Jury: We the People in Action 1, 1 (2005), https://www.americanbar.org/content/dam/aba/administrative/public_education/resources/dialoguepart1.pdf ("Twelve 'free and lawful men' of the neighborhood were assembled to state, under oath, their knowledge of who was the true property owner or heir. These panels of twelve freemen established the basis from which the modern civil jury would grow.").

11. The process and significance of the trial by jury in America was not achieved without a fight. The British crown sought to deny American colonists their right to trial by jury, and that form of oppression became one of the many sparks that ignited the American Revolution. *See* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (characterizing the Tyranny of the British to include deprivation "of the benefit of Trial by Jury"); Duncan v. Louisiana, 391 U.S. 145, 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

symbol of American citizenship since the nation's founding.[12] This American right to a trial by jury is fully expressed in Article III of the United States Constitution and the Sixth and Seventh Amendments.[13] Although the Framers recognized the significance of jury service, especially as it related to voting,[14] this "inestimable safeguard" initially only extended to white Americans because Black people were not yet considered citizens.[15] Black Americans did not serve on juries until after the Reconstruction Amendments.[16]

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."); *Taylor*, 419 U.S. at 530 ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.").

12. *See* Maggie Koester, Note, *The Jury Is Still Out: How Kentucky's Felon Exclusion Statutes Violate* Batson *and the Sixth Amendment*, 31 GEO. MASON U. CIV. RTS. L.J. 289 (2021) ("In a democratic system, being a juror is one important, if not the most important, service a citizen can provide.").

13. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); U.S. CONST. amends. VI–VII.

14. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 217 (1995) ("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 . . . ."). Because of the close tie between voting and jury service rights, and their respective eligibility qualifications or exclusions, this Note will at times use statistics to support propositions interchangeably assuming that disqualification for voting rights likely implicates the status of jury service rights, and vice versa.

15. *See* Scott v. Sandford, 60 U.S. 393, 423 (1857) (concluding that Black people were not contemplated by the Framers when drafting the Constitution for its citizens); Green v. State, 73 Ala. 26, 39 (1882) ("[Blacks] were excluded, because they were not recognized as citizens, and only citizens could serve on juries.").

16. *See* U.S. CONST. amends. XIII–XV. The Reconstruction Amendments were drafted and ratified after the Civil War. They acted to abolish slavery and guarantee equal protection of the laws to the newly-freed Black Americans.

A. History of Black Juror Exclusion

The exclusion of Black Americans from jury service has its racially discriminatory roots in the nation's founding. Despite the Supreme Court's 1880 decision in *Strauder v. West Virginia* that prohibited racial discrimination in jury selection, all-white juries were nearly universal up until the mid-20th century.[17] It wasn't until almost 100 years after *Strauder* that the Court recognized that criminal defendants have a constitutional right to a jury selected from a fair cross section of the community.[18]

1. De Jure Discrimination

Although early American jury service standards varied from state to state, the vast majority of states' juries were limited to men.[19] Jury diversity was further reduced as many states aligned the requirements for jury service with the established voting laws.[20] South Carolina, Georgia, and Virginia limited voting rights, and therefore jury service eligibility, to white men.[21] Some states had statutory requirements for jurors that explicitly excluded Blacks. For example, in Tennessee, the legislature specified that "[e]very *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."[22] Similarly, West Virginia's statute stated that "[a]ll *white* male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors."[23] During Reconstruction, sweeping federal legislation extended the privileges and immunities of citizenship to Black men, allowing them to serve on juries and ostensibly ending de jure discrimination.[24]

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

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

19. Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 56, 58 (2020).

20. *See* Vikram, *supra* note 14, at 217–21.

21. Hoag, *supra* note 19, at 58; *see* CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860 15 (1960).

22. TENN. CODE § 4002 (1858) (emphasis added).

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

24. *Compare* State v. Claiborne, 19 Tenn. 331, 341 (1838) ("[W]e feel satisfied that [free negroes] are not citizens in the sense of the Constitution; and therefore when coming among us are not entitled to all the 'privileges and immunities' of citizens of

But this newfound inclusion was short-lived due to the combination of anti-Black violence and discriminatory state action that perpetuated Black juror exclusion. During this period, there was a spike in anti-Black violence as a result of the extension of citizenship to Black Americans.[25] This was especially widespread with the advent of the Ku Klux Klan in 1865.[26] Angry white mobs, some backed by government officials and other political actors, violently attacked and targeted Black communities across the nation.[27] "The wave of violence

this State."), *with* U.S. CONST. amends. XIII–XV; Civil Rights Act of 1866, 14 Stat. 27–30 (codified as amended at 42 U.S.C. § 1981) (extending equal rights under the law to African Americans).

25. Hoag, *supra* note 19, at 59 (citing EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH 179 (1985)).

26. Hoag, *supra* note 19, at 59 (citing ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 3–5 (1971)).

27. *See, e.g.*, Mackenzie Lanum, *Memphis Riot, 1866*, BLACK PAST (Nov. 20, 2011), https://www.blackpast.org/african-american-history/memphis-riot-1866 ("The riot began [on May 1, 1866] when a white police officer attempted to arrest a black ex-soldier and an estimated fifty blacks showed up to stop the police from jailing him. . . . By the end of May 3, Memphis's black community had been devastated. Forty-six blacks had been killed. Two whites died in the conflict, one as the result of an accident and another, a policeman, because of a self-inflicted gunshot. There were five rapes and 285 people were injured. Over one hundred houses and buildings burned down as a result of the riot and the neglect of the firemen. No arrests were made."); Michael Stolp-Smith, *New Orleans Massacre (1866)*, BLACK PAST (Apr. 7, 2011), https://www.blackpast.org/african-american-history/new-orleans-massacre-1866 ("The New Orleans Massacre, also known as the New Orleans Race Riot, occurred on July 30, 1866. While the riot was typical of numerous racial conflicts during Reconstruction, this incident had special significance. It galvanized national opposition to the moderate Reconstruction policies of President Andrew Johnson and ushered in much more sweeping Congressional Reconstruction in 1867. . . . The riot's repercussions extended far beyond New Orleans. Northerners angry over the violence helped the Republican Party take control of the U.S. House of Representatives and the U.S. Senate in the Congressional elections of 1866. That Republican controlled Congress subsequently passed the Reconstruction Acts of 1867, a series of measures that called for Army occupation of ten former Confederate states and measures that ensured voting rights for African Americans."); Sheren Sanders, *The Clinton, Mississippi Riot (1875)*, BLACK PAST (Jan. 11, 2018), https://www.blackpast.org/african-american-history/clinton-mississippi-riot-1875 ("The Clinton Riot began on September 4, 1875, in the small town of Clinton, Mississippi at a Republican rally to introduce the party's candidates who were running for political office in the upcoming November elections. The immediate death toll included five blacks and three white men.

and intimidation had the intended result: Black people stayed away from the polls and disengaged from civic life, including from jury service."[28]

Because of the surge in anti-Black violence in response to the enactment of the Reconstruction Amendments and civil rights legislation, the Supreme Court ultimately had to resolve definitively whether the Fourteenth Amendment prohibited states from racial discrimination in jury selection. In *Strauder v. West Virginia* (1880), a formerly enslaved Black defendant was convicted by an all-white jury and sentenced to death.[29] He then appealed to the Supreme Court, arguing that West Virginia's statute limiting jury service only to white men violated the Fourteenth Amendment Equal Protection Clause.[30] The Court agreed with Strauder that the law expressly excluding Black jurors was unconstitutional and explained that the Framers' primary intent in enacting the Fourteenth Amendment was "to secure to a recently emancipated race . . . . [A]nd to strike down all possible legal discriminations against those who belong to [the emancipated race]."[31] Thus, West Virginia's juror prohibition denied Black defendants' rights to

Over the next several days, an estimated fifty blacks were killed in the massacre that followed."); Michael Stolp-Smith, *The Hamburg Massacre (1876)*, BLACK PAST (Apr. 7, 2011), https://www.blackpast.org/african-american-history/hamburg-massacre-1876 ("On July 8, 1876, the small town of Hamburg, South Carolina erupted in violence as the community's African American militia clashed with whites from the surrounding area. Hamburg was a small all-black community across the river from Augusta, Georgia. Like many African American communities in South Carolina, it was solidly Republican, and with the GOP in charge in Columbia, some of its men were members of the militia."); *see also* 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.").

28. Hoag, *supra* note 19, at 61 (citing 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)).

29. Strauder v. West Virginia, 100 U.S. 303, 304 (1880).

30. *Id.* at 304–05.

31. *Id.* at 304, 310; *see also* Batson v. Kentucky, 476 U.S. 79, 85 (1986) ("Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.").

equal protection of the laws—the trial by a jury composed of one's peers.[32]

Ultimately, the Court's decision in *Strauder* proved to be of little practical effect as subsequent de facto discrimination became a sustainable workaround to further Black juror exclusion. In fact, the *Strauder* decision provided the foundation for de facto discrimination by affirming that states "may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications."[33]

2. De Facto Discrimination

Following *Strauder*, facially neutral standards for juror eligibility effectively excluded Black people and preserved the racially-motivated roots of de jure discrimination.[34] In other words, "de jure

32. In *Strauder*, the Court was mainly concerned with protecting the rights of Black defendants on trial. *Strauder*, 100 U.S. at 305, 309 ("[E]very citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color . . . . The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment."). *But see* Virginia v. Rives, 100 U.S. 313 (1880) (upholding the decision of an all-white jury for a Black defendant because the Virginia juror qualifications statute does not refer to race and is, therefore, not a violation of the Fourteenth Amendment Equal Protection Clause). The holding in *Rives* severely limited the application of *Strauder*. The decisions in *Strauder* and *Rives* are textually consistent in that the West Virginia juror exclusion statute did explicitly prevent Black citizens from serving on a jury and the Virginia statute did not, so it was reasonable, on its surface, to conclude that West Virginia's statute was unconstitutional due to racial discrimination and Virginia's statute was not. That said, the strong racial prejudice and animosity that existed in communities when the Court handed down both decisions in 1880 makes it clear that the legislative and judicial conduct surrounding jury composition and exclusion, whether through express language or otherwise, did not abide by the spirit of the Reconstruction Amendments and civil rights legislation.

33. *Strauder*, 100 U.S. at 310.

34. *See, e.g.*, Neal v. Delaware, 103 U.S. 370, 401–02 (1880) (Field, J., dissenting) (justifying Black juror exclusion alleging that "the great body of black men . . . are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries."); Brief Amici Curiae of the Tennessee Conference of the NAACP and Napier-Looby Bar Association at 7, Abdur'Rahman v. Tennessee, No. M2019-01708-CCA-R3-PD (Feb. 21, 2020) [hereinafter Brief Amici Curiae].

discrimination in grand and petit jury selection gave way to de facto discrimination . . . so that race discrimination in jury selection was illegal in name but persisted in practice."[35] States across the country enacted vague and subjective standards for juror eligibility—requiring good moral character, honest and intelligent men, persons having educational qualifications—whose discriminatory application excluded Black citizens from juries.[36] These new laws provided the legislature and judiciary broad discretion in selecting jurors based on certain characteristics, allowing states to easily circumvent *Strauder*'s command.[37] For example, Tennessee allowed officials to intuitively assess these qualifications of potential jurors and ostensibly select "such persons . . . esteemed in their community for their integrity, fair character and sound judgment."[38]

Although the new juror requirements did not mention race, the results were no different from the race-based juror exclusion statutes—all-white juries in places where there were substantial Black populations and Black defendants on trial.[39] Legal challenges in these scenarios failed due to the high standard of proof required to establish intentional racial discrimination.[40] The discretion given to clerks charged with creating jury lists was practically limitless and left courts powerless when faced with constitutional challenges brought by defendants. This is exemplified in *Green v. State*, where a Black defendant in Alabama challenged a facially neutral juror requirement statute after his conviction by an all-white jury, arguing racially discriminatory

35. Brief Amici Curiae, *supra* note 34, at 7.

36. *See South Slow to Revamp Juries*, BIRMINGHAM NEWS, May 19, 1935, at 2 ("The South will comply with the mandate of the United States Supreme Court that the Negro must not be excluded from jury service, but it is proceeding slowly and warily about the process of revamping the workings of its judicial system . . . .").

37. *See, e.g.*, Green v. State, 73 Ala. 26 (1882).

38. TENN. CODE § 4765 (1884); TENN. CODE § 9992 (1932). When these facially neutral statutes were enacted, it was unlikely that any state officials or judicial commissioners and clerks would consider recently freed Black citizens "esteemed in their community."

39. Hoag, *supra* note 19, at 62–63.

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); Missouri v. Brown, 24 S.W. 1027 (Mo. 1894); South Carolina v. Brownfield, 39 S.E. 2 (S.C. 1901); Martin v. Texas, 72 S.W. 386 (Tex. 1903).

application.[41] Although the Alabama county was over seventy percent Black, the probate judge, sheriff, and clerk refused "to place on the list, or in the box from which juries were to be drawn, the names of persons of African blood."[42] The Supreme Court of Alabama minimized this suspicious scenario by merely relying on the combined testimony that "no person was excluded from the jury box, or from the jury, on account of his race, color or previous slavery."[43] Thus, the court held that it could not justify reversal given the legislative authority vested in state officials to exercise discretion when empaneling juries pursuant to facially neutral juror-eligibility statutes.[44]

This form of de facto discrimination by states and its supposed limits in the 20th century was marked by *Norris v. Alabama*, a landmark 1935 Supreme Court case. *Norris*, notably accompanied by *Powell v. Alabama* and *Patterson v. Alabama*, stands at the forefront of an Alabama incident in which nine Black teenagers, known as the Scottsboro Boys, were falsely accused of rape by two white women and later convicted by an all-white jury.[45] In *Norris*, the Supreme Court confronted the constitutionality of Alabama's facially neutral juror standards statute, which in practice permitted the county to engage in "long-continued systematic, and arbitrary exclusion of qualified negro citizens from service on juries," despite textually complying with

41. *Green*, 73 Ala. at 30.

42. *Id.* at 29–30.

43. *Id.* at 30.

44. *Id.* at 42 ("A discretion thus confided by legislative authority to officers of the State or county, to be exercised according to their opinion or judgment, can not, on principle, become a judicial question.").

45. Norris v. Alabama, 294 U.S. 587 (1935); Powell v. Alabama, 287 U.S. 45 (1932); Patterson v. Alabama, 294 U.S. 600 (1935). The case of the Scottsboro Boys was taken up twice by the U.S. Supreme Court. After the teenagers were not afforded consistent and reliable counsel despite court order, the Court held that Alabama had denied the boys effective assistance of counsel and thus deprived them of due process as required by the Fourteenth Amendment. *Powell*, 287 U.S. at 45. Still, Alabama persisted in retrying most of the boys, again with all-white juries. That then brought about the second appeal to the Supreme Court, which is discussed in this Note, over the Scottsboro Boys' Fourteenth Amendment right to equal protection of the laws by empaneling a jury from which all Black people had not been systematically excluded. Despite the decision in *Norris* and its relevance to Black juror exclusion, "all the Scottsboro boys went free, but not until they had served, in aggregate, more than 100 years in jail for a crime they almost surely did not commit." EDWARD P. LAZARUS, CLOSED CHAMBERS 81 (1998).

Strauder.[46] Citing *Neal v. Delaware*, the Court stated that "although the state statute defining the qualifications of jurors may be fair on its face, the [Fourteenth Amendment] affords protection against action of the state through its administrative officers in effecting the prohibited discrimination."[47] Yet the Court noted that jury commissioners and clerks were given wide discretion when acting under the new juror eligibility laws as shown in Alabama. The jury commissioner in *Norris* stated when explaining the lack of Black people on the jury:

> I do not know of any negro in Morgan County over twenty-one and under sixty-five 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 which would render him unfit to discharge the duties of a juror, and who can read English, and who

46. *See Norris*, 294 U.S. at 588, 590–91 (quoting ALA. CODE § 8603 (1923)).

> 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.

47. *Norris*, 294 U.S. at 589; *see* Neal v. Delaware, 103 U.S. 370, 397 (1880) ("It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States.").

> has never been convicted of a crime involving moral turpitude.[48]

In response to this testimony and additional "abundant evidence that there were a large number of negroes in the county who were qualified for jury service," the Court determined that there was "no justification consistent with the constitutional mandate" and held that systematic exclusion of Blacks via discriminatory application of the jury standards statute violated the Fourteenth Amendment.[49]

Even still, states were slow to allow Black people to serve on juries. "[I]n the wake of the U.S. Supreme Court's decision in *Norris v. Alabama*, Tennessee's then Attorney General explained that the state's juror selection statutes did not discriminate based on race and thus, need not change in response to the Court's holding."[50] Yet Tennessee did not empanel a Black juror until 1949, fourteen years after the landmark decision.[51] Following *Norris*, jury discrimination cases and constitutional challenges began to move toward purposeful exclusion of Black people using peremptory strikes, a device that allows counsel from both parties to remove a juror for any nondiscriminatory reason.[52] Parties may cloak their discriminatory intent for removing

48. *Norris*, 294 U.S. at 598–99. This painfully honest testimony is the heart of de facto Black juror discrimination.

49. *Id.* at 591–99.

50. Brief Amici Curiae, *supra* note 34, at 12 (citing *No Law Change Necessary Here for Negro Juror: General Beeler Declares No Discrimination Is Found in Tennessee Statutes*, NASHVILLE BANNER, Apr. 9, 1935, at 6). Nevertheless, Black jurors continued to be excluded.

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

52. *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965) (holding that systematic exclusion via peremptory strikes of Black people from juries based on their race violated the Fourteenth Amendment); Batson v. Kentucky, 476 U.S. 79 (1986) (enumerating a three-prong test defendants must establish to prove the State's purposeful or deliberate exclusion on the account of race through peremptory challenges: (1) the defendant is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race; and (3) the prosecutor used that practice to remove certain members on account of their race). The Court in *Batson* reaffirmed *Strauder*'s overarching principle, "that [a] State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded [via peremptory strikes]"; however, it

Black jurors from the pool with an ambiguous, but sufficient, nondiscriminatory cause to achieve purposeful exclusion. Further, the Court at this time declined to recognize a defendant's right to a proportional number of jurors of his same race.[53] The concept of a proportional jury, or one representative of the defendant's community, was a newly emerging idea. It coincided with the divergence between the Fourteenth Amendment's Equal Protection challenges and the right to a jury taken from a fair cross section of the community, originating in the Sixth Amendment's guarantee of an impartial jury.[54]

B. Constitutional Right to a Fair Cross Section Under Duren

The country's fair cross section jurisprudence, built on the U.S. Constitution's Sixth Amendment, was inconsistent until *Duren v. Missouri*. The Sixth Amendment guarantees the right of criminal defendants to "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[55] The phrase "impartial jury of the State" has been interpreted to require that a jury be selected from "a representative cross section of the community."[56] Unlike *Swain v. Alabama* and *Batson v. Kentucky*,[57] where

rejected the high evidentiary burden on the defendant, marking it as "inconsistent with equal protection standards." 476 U.S. at 79–80.

53. *Swain*, 380 U.S. at 208.

54. The lasting influence of *Batson* has reshaped the American criminal justice system and defendants' jury discrimination claims, but its current principles largely differ from the focus of this Note. The basis of the Court's holding in *Batson* sought to identify intentional discrimination, chiefly on the part of prosecutors, while Sixth Amendment fair cross section challenges disregard the intent behind jury underrepresentation to concentrate on disparate impact from systematic problems. The history and development of the Sixth Amendment fair cross section challenge is rooted in Fourteenth Amendment jurisprudence, as seen through this Note so far, but has now evolved into its own area of law accompanied by unique challenges. Thus, the rest of this Note will analyze the Sixth Amendment fair cross section portion of jury discrimination law rather than continuing the progression of Fourteenth Amendment Equal Protection jury discrimination claims stemming from *Batson*.

55. U.S. CONST. amend. VI.

56. Taylor v. Louisiana, 419 U.S. 522, 528 (1975). Congress later codified this "fair cross section" language as a requirement of juries. Jury Selection and Service Act of 1968 (JSSA), Pub. L. No. 90-274, § 101, 82 Stat. 53, 54 (codified at 28 U.S.C. § 1861 (2006)).

57. *See supra* notes 52, 54 and accompanying text; *infra* note 94.

prosecutorial discrimination was at issue invoking the Fourteenth Amendment's Equal Protection Clause, "the fair cross-section right [of the Sixth Amendment] focused on conduct further upstream—the system that local court officials used to summon people for jury service."[58] "[T]he 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.'"[59] In the 1940s and 1950s, courts began recognizing the right to a jury composed of a fair cross section of the community under the Sixth Amendment.[60]

Despite court-led legal solutions and legislation enacted to substantiate jury composition challenges,[61] exactly how defendants could succeed on these challenges was ambiguous and difficult to prove.[62] In 1979, the *Duren* Court established a constitutional test that allowed

58. Hoag, *supra* note 19, at 66.

59. Hoag, *supra* note 19, at 66 (quoting Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970)); *see* David M. Coriell, *An (Un)fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 472–73 (2015) (quoting *Taylor*, 419 U.S. at 530) ("[The fair cross section requirement] promotes the three major functions of the jury: (1) 'to guard against the exercise of arbitrary power— to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge'; (2) to support '[c]ommunity participation in the administration of the criminal law'; and (3) to promote 'public confidence in the fairness of the criminal justice system.'").

60. *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).

61. Jury Selection and Service Act of 1968 (JSSA), Pub. L. No. 90-274, § 101, 82 Stat. 53, 54 (codified at 28 U.S.C. § 1861 (2006)). "Courts have interpreted the JSSA to coexist with defendants' constitutional right to a jury selected from a fair cross section of the community. . . . State legislatures quickly followed suit, passing similar legislation regulating jury service in state trial courts." Hoag, *supra* note 19, at 72.

62. *See* Sanjay K. Chhablani, *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 . . . .").

defendants to bring this Sixth Amendment claim.[63] To prevail on a Sixth Amendment fair cross section challenge, a defendant must prove:

> (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 jury-selection process.[64]

In *Duren*, the Court faced the question of "whether an automatic exemption from jury service offered to women was unconstitutional given that it reduced the percentage of women from 46 percent of the community to 15 percent of the pool from which the defendant's jury was selected."[65] The Court stated that once a defendant has established a prima facie violation of the fair cross section requirement by proving each prong in the test, then the burden shifts to the State to justify "this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest."[66] The state can support a significant state interest "by demonstrating a compelling reason for exclusion and that its procedures are appropriately tailored to support [that] interest."[67]

1. Distinctive Group

The Court in *Duren* did not specifically detail certain requirements or factors to identify a "distinctive group" for the purposes of a

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

64. *Id.* at 364. This three-prong test largely derived from the holding in *Taylor v. Louisiana*, which states that "the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." *Taylor*, 419 U.S. at 535–36.

65. Paula Hannaford-Agor & Nicole L. Waters, *Safe Harbors from Fair-Cross-Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool*, 8 J. EMPIRICAL LEGAL STUD. 762, 764 (2011); *Duren*, 439 U.S. at 365–66.

66. *Duren*, 439 U.S. at 368.

67. Coriell, *supra* note 59, at 474. This seems to be a definition of strict scrutiny which is generally difficult to meet.

fair cross section challenge[68] but merely stated that women as a group are "without doubt" sufficient to establish the first prong.[69] In general, these "distinctive groups" are isolated and defined by immutable characteristics[70]—particularly race, gender, ethnicity, and nationality—and are applied to jury discrimination challenges under both the Sixth and Fourteenth Amendments.[71] In other words, "[a] 'distinctive' group for fair cross section purposes often encompasses groups that see themselves as distinct from other groups, are seen by others as a distinct group, and hold values not necessarily held by other groups."[72] Thus, courts have consistently recognized African Americans[73] and women[74]

68. *See* Hoag, *supra* note 19, at 68 (quoting Lockhart v. McCree, 476 U.S. 162, 174 (1986)) ("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.'"). Professor Hoag has interpreted this to mean that "the exclusion of the group in question must threaten the democratic principles of an impartial jury." *Id.* at 68. Using these two sources together, the idea of the "distinctive group" seems to harken back to the principle that originally lays the foundation for a jury—protection—and further throughout history—equal protection, a concept that was not even contemplated during the early beginnings of juries. Distinctive groups face greater difficulty protecting themselves in the democratic and judicial processes, likely because of the history of discrimination that continues to discreetly permeate our society. Other times, for some distinctive groups, sheer numbers could be the adversary of protection.

69. *Duren*, 439 U.S. at 364.

70. The terms "cognizable group" and "distinctive group" are often used interchangeably in jury discrimination jurisprudence. "Cognizable group" is generally associated with Equal Protection claims. *See, e.g.*, People v. Motton, 704 P.2d 176, 181 (Cal. 1985) ("That Blacks generally comprise a *cognizable group* is settled.") (emphasis added); *Duren*, 439 U.S. at 364 (stating in the first prong of the three-prong test for fair cross section challenges that alleged excluded group must be a *distinctive group*) (emphasis added).

71. In Fourteenth Amendment Equal Protection claims, discrimination against most cognizable groups, specifically race, ethnicity and nationality, is analyzed using strict scrutiny. Strict scrutiny requires narrowly tailored action or legislation that serves a compelling government interest to justify the disparate treatment.

72. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Clams Must Be Expanded*, 59 DRAKE L. REV. 761, 766 (2011).

73. Berghuis v. Smith, 559 U.S. 314, 320 (2010).

74. Taylor v. Louisiana, 419 U.S. 522, 531 (explaining that women "are sufficiently *numerous* and *distinct* from men" so that "if they are systemically eliminated

as distinct groups for the purpose of this constitutional challenge.[75] Some courts have even gone past the well-established distinctive groups[76] to include the LGBT community,[77] young people,[78] Jews in New York City,[79] the Amish in Ohio,[80] and "The Farm," a religious commune in Tennessee.[81]

2. Relative Underrepresentation

The second prong under *Duren* is that the representation of the certain distinctive group in the jury pool from which jurors are drawn is not "fair and reasonable in relation to the number of such persons in the community."[82] This requires the challenger to measure the disparity of the distinctive group within the community compared to the jury venire.[83] In *Duren*, this was established by the defendant's "statistical presentation" that "in the relevant community slightly over half of the adults are women . . . [and therefore] jury venires containing approximately 15% women are [not] 'reasonably representative' of this community."[84]

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from jury panels, the Sixth Amendment fair-cross-section requirement cannot be satisfied.") (emphasis added).

75. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 175 (1986) ("Our prior jury-representativeness cases . . . have involved such groups as blacks, women, and Mexican-Americans . . . . [E]xclusion . . . on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an 'appearance of unfairness.'").

76. *See* Hernandez v. Texas, 347 U.S. 475, 478 (1954) ("Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection.").

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

78. *See* State v. Cannon, 267 So. 3d 585 (La. 2019).

79. United States v. Gelb, 881 F.2d 1155, 1161 (2d Cir. 1989).

80. State v. Fulton, 566 N.E.2d 1195, 1201 (Ohio 1991).

81. State v. Nelson, 603 S.W.2d 158, 163 (Tenn. Crim. App. 1980).

82. Duren v. Missouri, 439 U.S. 357, 364 (1979).

83. *Id.* at 364–65 ("Initially, the defendant must demonstrate the percentage of the community made up of the group alleged to be underrepresented, for this is the conceptual benchmark for the Sixth Amendment fair-cross-section requirement.").

84. *Id.* at 365–66 ("Such a gross discrepancy between the percentage of women in jury venires and the percentage of women in the community requires the conclusion

Interpreting and applying this prong have raised several questions for courts. First, what is the preferred method of measuring the disparity?[85] Second, what is the appropriate definition of "community" to establish a comparator to the jury pool?[86] Both discrepancies have proven to be dispositive for defendants' prima facie showing.[87] As for the preferred method of measuring disparity, the Supreme Court has not endorsed any single test, stating that each of them is imperfect.[88] This Note leaves the in-depth discussion about the benefits and detriments of each test to other articles[89] because the main focus is the appropriate definition of community and who it includes for determining the measure of disparity.[90]

"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."[91] Courts are split between

that women were not fairly represented in the source from which petit juries were drawn in Jackson County.").

85. *See* Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913, 1917–18 (1994) (stating that some of these measures include "absolute disparity," "absolute impact," "comparative disparity," and "statistical significance").

86. Some courts define community as only including those that are *qualified* for jury service, which for this Note most notably excludes felons, while others prefer to look at the total population in the relevant area.

87. Hannaford-Agor, *supra* note 72, at 763 ("As a practical matter, the amount of underrepresentation must be substantial, and few defendants are able to satisfy this second prong."). The proof of underrepresentation is complicated more when the proper comparator to the community at large is unclear and potentially unfair based on the exclusion of the specific distinctive group being challenged. *See* Hoag, *supra* note 19, at 69.

88. Berghuis v. Smith, 559 U.S. 314, 329–30 (2010) ("Each test is imperfect. . . . [W]e would have no cause to take sides today on the method or methods by which underrepresentation is appropriately measured.").

89. *See, e.g.*, Hannaford-Agor, *supra* note 72, at 766–69; Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, 37 CHAMPION 14, 18 (2013).

90. This concept is weaved into the Analysis in Section III, which only focuses on the third prong. But determining the appropriate definition of the community, and importantly, whether that includes those that have been legislatively excluded in great amounts, is a crucial aspect in the calculation of underrepresentation and is dispositive to defendants' claims in jurisdictions where this disproportionate exclusion is especially extreme.

91. Hoag, *supra* note 19, at 69.

defining the community used as a comparison tool in fair cross section challenges as one without the imposition of various qualifications[92] and one that "encompasses only individuals qualified to serve as jurors."[93] Depending on how the court defines the applicable characteristics of the community, the defendant may be disadvantaged in his showing that the underrepresentation in the jury pool is sufficient disparity for the constitutional challenge. For instance, if the community is limited to those who are eligible to vote and juror eligibility is linked to voter registration status, this could exclude those with a felony conviction, a group which is disproportionately Black.[94] Thus, defendants would be forced to make a statistical comparison to a version of the relevant community that is significantly different from the whole community, an undertaking that may render the defendant's fair cross section challenge insurmountable in some jurisdictions.

3. Systematic Exclusion

Finally, it is necessary for the defendant to show that the underrepresentation of the alleged distinctive group, generally and on his venire, was due to their systematic exclusion in the jury-selection process.[95] The Court defined systematic as "inherent in the particular jury-selection process."[96] Systematic exclusion need not be intentional to satisfy this third prong but may simply be an inherent result of the jury selection process.[97] In *Duren*, allowing only women to voluntarily opt

92. 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 facia 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.").

93. United States v. Gordon-Nikkar, 518 F.2d 972, 976 (5th Cir. 1975); *see also Berghuis*, 559 U.S. at 315.

94. *See* Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENTENCING PROJECT (Oct. 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016.

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

96. *Id.* at 366.

97. *Id.* at 366–67; Prince v. Parke, 907 F. Supp. 1243, 1246 (N.D. Ind. 1995) (distinguishing the systematic exclusion prong from an equal protection claim "where the defendant must prove purposeful discrimination").

out of jury service constituted systematic exclusion.[98] Such a practice was considered systematic because "[the] large discrepancy [in representation of women on jury venires] occurred not just occasionally, but in every weekly venire for a period of nearly a year."[99] Further, the Court mentioned that "[t]he first sign of a systematic discrepancy is at . . . the construction of the jury wheel."[100] Thus, "[t]he resulting disproportionate and consistent exclusion of women . . . was quite obviously due to the *system* by which juries were selected."[101] Apart from this, the Court did not engage in an extensive analysis on the extent to which a procedure is "inherent in the particular jury-selection process," leaving the application of this prong ambiguous and subject to misinterpretation for future courts.[102]

C. Modern Black Juror Exclusion Through Felon Disenfranchisement

While the idea of excluding felons from jury service is not new,[103] the effect of this exclusion is having an increasingly significant impact as the number of felons climbs.[104] A 2016 study shows that

98. *Duren*, 439 U.S. at 366–67.

99. *Id.* at 366.

100. *Id.*

101. *Id.* at 367.

102. *Id.* at 366.

103. *See* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 100 (2003) ("For grand juries, felon exclusion dates back to the Assize of Clarendon in 1166 and, in more specific form, to a 1410 statute of Henry IV."). Many statutes previously mentioned in this Note that date back to the 1800s and 1900s include provisions that exclude those with felony convictions, or those that have been convicted of a crime involving moral turpitude.

104. *Id.* at 168 ("While felon exclusion is an old tradition, the enormity of its effects is a very recent development, resulting from tougher sentencing and the War on Drugs."). Not only are there more felons, but there are more crimes:

> Today, the federal criminal code reaches an unimaginably broad range of conduct. The number of criminal offenses in the U.S. Code increased from 3,000 in the early 1980s to 4,000 by 2000 and more than 4,450 by 2008. There are countless more criminal laws and regulations at the state and local levels.

Overcriminalization, THE HERITAGE FOUND., https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization.

over six million Americans are disenfranchised and ineligible to vote or serve on a jury because of their felony convictions.[105] Currently, forty-eight states restrict jury service rights to individuals without felony convictions.[106] According to a 2016 study, only two states in the U.S. have minor or no restrictions on felony disenfranchisement;[107] fourteen states limit the restriction of rights to the term of prison only;[108] four states limit the restriction term to prison and parole;[109]

105. Uggen, et al., *supra* note 94, at 3.

106. *See* ALA. CODE §§ 12-16-60(a)(4), 15-22-36(c); ALASKA STAT. §§ 09.20.020, 15.05.030(a), 33.30.241; ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. §§ 13-904(A)(3), 13-906, 13-908, 13-912; ARK. CODE ANN. § 16-31-102(a)(4); CAL. CIV. PROC. § 203(a)(9)–(10); CAL. PENAL CODE § 893(b)(3); COLO. REV. STAT. § 13-71-105(g)(3); CONN. GEN. STAT. § 51-217(a)(2); DEL. CODE ANN. tit. 10, § 4509(b)(6); D.C. CODE. § 11-1906(b)(2)(B); FLA. STAT. § 40.013(1); GA. CODE ANN. § 15-12-40; HAW. REV. STAT. § 612-4(b)(2); IDAHO CODE ANN. § 18-310(1); IND. CODE § 33-28-5-18; IOWA R. CIV. P. 1.915(6)(a); IOWA R. CRIM. P. 2.18(5)(a); KAN. STAT. ANN. §§ 21-6613(b), 43-158(c); KY. REV. STAT. ANN. § 29A.080(2)(e); LA. CODE CRIM. PROC. ANN. art. 401(A)(5); MD. CODE ANN., Courts and Judicial Proceedings § 8-103(b)(4), (c); MASS. GEN. LAWS ch. 234A, § 4(7); MICH. COMP. LAWS § 600.1307a(1)(e); MINN. CONST. art. VII, § 1; MINN. STAT. § 609.165, subd. 1; MISS. CODE ANN. §§ 13-5-1, 1-3-19; MO. REV. STAT. §§ 561.026(3), 494.425(4); MONT. CODE ANN. §§ 3-15-303(2), 46-18-801(2); NEB. REV. STAT. § 29-112; NEV. CONST. art. 2, § 1; NEV. REV. STAT. §§ 176A.850, 213.155(2)(d), 213.157(2)(d); N.H. REV. STAT. ANN. § 500-A:7-a(V); N.J. STAT. ANN. § 2B:20-1(e); N.M. STAT. ANN. § 38-5-1; N.Y. JUD. LAW § 510(3); N.C. CONST. art. VI, §8; N.C. GEN. STAT. §§ 9-3, 13-1; N.D. CENT. CODE §§ 12.1-33-01, 12.1-33-03(1); OHIO REV. CODE § 2967.16(C)(1); 38 OKLA. STAT. ANN. § 28(C)(5); OR. REV. STAT. §§ 137.281(1), 137.281(3); 42 PA. CONS. STAT. § 4502(a)(3); R.I. GEN. LAWS § 9-9-1.1(c); S.C. CODE ANN. §§ 14-7-810(1), 24-21-920; S.D. CODIFIED LAWS §§ 16-13-10, 23A-27-35; TENN. CODE ANN. § 22-1-102; TEX. CODE CRIM. PROC. ANN. § 48.05(A); UTAH CODE ANN. § 78B-1-105(2); VT. STAT. ANN. tit. 12, § 64; VA. CONST. art. II, § 1, art. V, § 12; VA. CODE ANN. § 8.01-338 (2); WASH. REV. CODE §§ 2.36.070(5), 9.94A.637(5), 9.94A.885(2); W. VA. CONST. art. 7, § 11; W. VA. CODE 52-1-8(b)(5)–(6); WIS. STAT § 756.02; WYO. STAT. ANN. §§ 6-10-106(a), 1-11-102, 7-13-105(a).

107. Maine and Vermont. Uggen, et al., *supra* note 94, at 4.

108. Hawaii, Illinois, Indiana, Massachusetts, Maryland, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. Uggen, et al., *supra* note 94, at 4.

109. California, Colorado, Connecticut, and New York. Uggen, et al., *supra* note 94, at 4.

eighteen states limit the term to prison, parole, and probation;[110] and twelve states, including Tennessee, have the strictest level of disenfranchisement by restricting the rights of felons during prison, parole, probation, and post-sentence.[111] The nation's exponential increase in felony convictions and consequently felon disenfranchisement in the modern era is a reality that many legal and analytical experts, and even courts and litigants, have identified.[112] Its ever-growing existence, whether intentional, accidental, or an unknown in between, has created an undeniable effect on the legal system, noticeably in the composition of jury pools.[113]

The disproportionate impact felon exclusion has on minority groups, particularly Black Americans, is staggering and hard to overlook.[114]

> According to the 2000 Decennial Census, white persons compromised 75.1 percent of the total population, while blacks comprised 12.3 percent . . . . [T]he U.S. Department of Justice, Bureau of Justice Statistics, estimates that 1.4 percent of whites, 8.9 percent of [B]lacks . . . have been incarcerated in a state or federal prison as of 2001 as the result of a previous felony conviction. This would serve as a disqualification for jury service in most U.S. jurisdictions.[115]

By 2010, approximately thirty-six percent of those with felony convictions, nearly seven million people, were Black despite the fact

110. Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Washington, West Virginia, and Wisconsin. Uggen, et al., *supra* note 94, at 4.

111. Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming. Uggen, et al., *supra* note 94, at 4.

112. *See* Kalt, *supra* note 103, at 168–69.

113. *See* Kalt, *supra* note 103, at 169.

114. *See* Smyth, Jr., *supra* note 9, at 43 ("African Americans and Latinos face significantly greater likelihood of being arrested, convicted, and incarcerated than whites."); Kalt, *supra* note 103, at 113 ("Reducing the representation of black men on juries by thirty percent without dissent is difficult to imagine, but felon exclusion does just that.").

115. Hannaford-Agor & Waters, *supra* note 65, at 775, 777.

that Black people only comprised of thirteen percent of the nation's population.[116] "[O]ne in four black children born in 1990 had a parent imprisoned by age 14; only one in 25 white children were similarly situated."[117] This undeniable correlation reveals the use of disenfranchisement "to perpetuate African American exclusion from juries."[118] Even in jurisdictions where the restoration of rights is allowed, it is usually expensive and unnecessarily complicated, causing low rates of restoration.[119] And States are not always required to inform felons of the opportunity to restore their civil rights.[120] Ultimately, however, even if people with felony convictions can make it into the jury pool, they will likely be removed for their involvement with the criminal justice system.[121]

III. ANALYSIS

Although the Supreme Court created a test for fair cross section violations in *Duren*, it has been misinterpreted by courts over time and rendered a useless cause of action for defendants. Further, certain states that still enforce post-sentence felon disenfranchisement, such as Tennessee, have allowed the racially disproportionate incarceration of Black Americans to generate a distorted jury pool that cannot be fairly said to represent the community. Working in sync, these two patterns

116. Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records*, PRISON POL'Y INITIATIVE (Feb. 18, 2021) https://www.prisonpolicy.org/reports/juryexclusion.html.

117. Smyth, Jr., *supra* note 9, at 43.

118. Hoag, *supra* note 19, at 74.

119. Uggen, et al., *supra* note 94, at 13 ("Even accounting for these restorations, it is clear that the vast majority of such individuals in these states remain disenfranchised.").

120. *See, e.g.*, The Honorable Gina Higgins, Panelist at Memphis Bar Association Bench Bar Conference: Restoration of Full Rights of Citizenship (Sept. 30, 2021) (detailing how Tennessee is not required to inform felons of the right restoration process or that it even exists).

121. Hoag, *supra* note 19, at 75. The discussion of whether individuals with a felony conviction are suitable for jury service is outside the scope of this Note but is still an important topic that many other authors have contemplated. *See, e.g.*, Kalt, *supra* note 103; JAMES BINNALL, TWENTY MILLION ANGRY MEN (2021) (detailing the reasons for including felons in our jury system).

have fashioned an undetected constitutional infringement for those on trial before a jury.

A. Courts Are Misinterpreting and Misapplying Duren*'s Third Prong*

The inaccurate application of *Duren*'s third prong has destroyed defendants' Sixth Amendment challenges because the standard embedded in case law over time is not designed to provide relief for the classes of individuals it is intended to protect. Following *Duren*, courts have strictly construed this prong, rendering it nearly impossible for defendants to prove systematic exclusion.[122] The primary focuses for these courts are a literal definition of "system" and a tangible causal link between the jury-selection process and the systematic exclusion.[123] Most of the recent examples that courts have held to constitute systematic exclusion are seen on two extremes of the systematic exclusion continuum: fault of the automation and technology used in the jury pool composition process[124] or intentional and deliberate exclusion on the part of jury commissioners by deviating from presumptively valid jury pool lists.[125] Neither of these two poles, however, precisely obeys the intent behind the command of *Duren*.

Pure mechanical error is underinclusive of the definition of systematic exclusion. Generally, courts applying this interpretation of systematic exclusion only allow random mechanical error to evidence that the underrepresentation resulted from the jury selection process.[126] For example, in *United States v. Osorio*, the jury selection system was

122. *See* Hannaford-Agor, *supra* note 72, at 763 ("With few exceptions, the cases that have survived the second hurdle of *Duren*'s second prong ultimately fail because the underrepresentation was not the result of 'systematic exclusion.'"); United States v. Rioux, 97 F.3d 648, 658 (2d Cir. 1996) ("[I]f we assume for the sake of argument that Rioux has established an unfair underrepresentation, he is impaled on the third prong of the *Duren* test . . . [because the statistics to prove systematic exclusion] would have to be of an overwhelmingly convincing nature.").

123. Coriell, *supra* note 59, at 475–76.

124. *See, e.g.*, United States v. Jackman, 46 F.3d 1240, 1242–43 (2d Cir. 1995) (citing United States v. Osorio, 801 F. Supp. 966 (D. Conn. 1992)).

125. *See, e.g.*, State v. Nelson, 603 S.W.2d 158, 165–67 (Tenn. Crim. App. 1980).

126. United States v. Jackson, No. 2:15-CR-00138-JRG, 2016 WL 7766122, at *6 (E.D. Tenn. Dec. 19, 2016), report and recommendation adopted, No. 2:15-CR-138, 2017 WL 160953 (E.D. Tenn. Jan. 13, 2017).

unintentionally programmed to read the eighth letter of the juror's city of residence as the individual's living status.[127] As a result, "it was discovered that no jury questionnaires were sent to Hartford residents because a computer programming error had caused the letter 'd' in 'Hartford' to communicate to the computer that all potential jurors from Hartford were deceased and thus unavailable for jury service."[128] At the time of this case, Hartford was one of the cities in Connecticut with the largest Black and Hispanic populations.[129] Thus, the court held that this computational mistake was "inherent in the jury selection process" and constituted a sufficient showing of systematic exclusion to establish the third prong, thereby proving a Sixth Amendment fair cross section violation.[130]

In contrast, proof of deliberate or intentional exclusion is over-inclusive of the definition of systematic exclusion. On their face, courts appear to understand that this constitutional challenge does not require proof of intent;[131] however, their holdings and reasoning often suggest otherwise.[132] This narrow application of *Duren*'s third prong largely stems from Fourteenth Amendment Equal Protection principles contaminating Sixth Amendment fair cross section jurisprudence. In fact, the *Duren* Court itself demonstrated the trouble separating the two for the sake of an accurate and fair analysis of fair cross section challenges, though Justice White expressly highlighted the fact that "equal protection challenges to jury selection and composition are not entirely analogous to the case at hand."[133] Still, in *Hayer v. University of Medicine*, the Third Circuit unambiguously injected equal protection when

127. *Osorio*, 801 F. Supp. at 972–73.

128. *Jackman*, 46 F.3d at 1242–43.

129. *Id.* at 1242.

130. *Osorio*, 801 F. Supp. at 980.

131. *Jackman*, 46 F.3d at 1246 ("The defendant need not prove discriminatory intent on the part of those constructing or administering the jury selection process.").

132. *See, e.g.*, United States v. Jackson, No. 2:15-CR-00138-JRG, 2016 WL 7766122, at *6 n.9 (E.D. Tenn. Dec. 19, 2016) ("Jackson has not presented any evidence of intentional exclusion . . . ."); Omotosho v. Giant Eagle, Inc., 997 F. Supp. 2d 792, 803 (N.D. Ohio 2014) ("After *Duren* and *Taylor*, circuit courts . . . have stated that a group is not systematically excluded if prospective jurors are gathered without *active* discrimination.") (emphasis in original) (internal citations and quotation marks omitted); State v. Nelson, 603 S.W.2d 158, 166 (Tenn. Crim. App. 1980) ("There can be no doubt that the exclusion in this case was purposeful.").

133. Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

reciting the plaintiff's Sixth Amendment fair cross section claim: "Plaintiff's . . . argument . . . is that the jury selection process violated her right to equal protection because the jury did not represent a fair cross-section of the community."[134] Further, the court then instructed that "[t]o prevail on this claim, plaintiff must show that the underrepresentation resulted from '*purposeful discrimination*' by demonstrating [the three *Duren* prongs]."[135] The Third Circuit is not the only jurisdiction to conflate these two doctrines:[136]

> Indeed, the mistake of denying Sixth Amendment claims for the failure to satisfy the Fourteenth Amendment requirement of intentional and discriminatory exclusion has been made by the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, by federal district courts, and by state courts in Alabama, Arkansas, California, Georgia, Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Washington, and Wisconsin.[137]

Though the foundation of this Sixth Amendment challenge is born from the Fourteenth Amendment, the modern integrity of the fair cross section violation demands that the principles underlying Equal Protection jurisprudence be completely detached. "The most egregious error that courts make in applying the *Duren* test is confusing the Sixth Amendment's fair cross section requirement with the Fourteenth Amendment's equal protection guarantee."[138]

In the 2012 case *Bates v. United States*, the Sixth Circuit confirmed this effectively insurmountable hurdle created by the equal protection contamination in stating that "[g]enerally speaking, [even] a long-standing statistical disparity is not enough to establish systematic

134. Hayer v. Univ. of Med., 490 F. App'x 436, 439 (3d Cir. 2012).

135. *Id.* (emphasis added).

136. 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, 167–70 (2012).

137. *Id.*

138. Coriell, *supra* note 59, at 477.

exclusion."[139] But this sentiment contradicts the Court's language in *Duren*: "[I]n Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section."[140] The *Duren* Court itself certified that its petitioner "manifestly indicate[d] that the cause of the underrepresentation was systematic" by the "undisputed demonstration that a large discrepancy occurred *not just occasionally* but in every weekly venire for a period of nearly a year."[141] This must certainly obviate the Sixth Circuit's claim that long-standing statistical disparity cannot establish systematic exclusion.

Finally, nearly all jurisdictions use voter registration lists as the primary source for creating jury pools,[142] which curtails courts' willingness to evaluate the extent of the jury-selection process and wrongly hinders a defendant's attempt to establish *Duren*'s prong three in his fair cross section challenge.[143] "Courts also reject fair cross section challenges when a state or district selects jurors by using a presumptively valid list, such as a voter-registration list, despite evidence that certain groups are underrepresented on such lists."[144] Because these lists are viewed as presumptively valid, "reviewing courts routinely decline to find that the system is responsible for any underrepresentation"

139. Bates v. United States, 473 F. App'x 446, 450 (6th Cir. 2012); *see also* United States v. Jackson, No. 2:15-CR-00138-JRG, 2016 WL 7766122, at *6 (E.D. Tenn. Dec. 19, 2016), report and recommendation adopted, No. 2:15-CR-138, 2017 WL 160953 (E.D. Tenn. Jan. 13, 2017) ("Underrepresentation alone is not sufficient to sustain a Sixth Amendment challenge to the selection process.").

140. Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

141. *Id.* at 366 (emphasis added).

142. United States v. Odeneal, 517 F.3d 406, 412 (6th Cir. 2008) ("Voter registration lists are the presumptive statutory source for potential jurors."); Omotosho v. Giant Eagle, Inc., 997 F. Supp. 2d 792, 805 (N.D. Ohio 2014) (quoting United States v. Cecil, 836 F.2d 1431, 1446 (4th Cir. 1988)) ("The use of voter registration lists has been consistently upheld against both statutory and constitutional challenge, unless the voter list in question had been compiled in a discriminatory manner.").

143. *See, e.g.*, Howell v. Superintendent Rockview SCI, 939 F.3d 260, 269 (3d Cir. 2019) (concluding "that the selection process was facially neutral because the pool of jurors . . . was composed of names from both the voter registration and Department of Motor Vehicles lists, and, therefore, did not preference any particular age, gender, or race").

144. Coriell, *supra* note 59, at 479.

and thus ensure that defendants face an uphill battle in proving systematic exclusion.[145]

B. Post-Sentence Felon Exclusion Statutes Disproportionately Affect Black Americans and Make the Fair Cross Section an Impossibility—Tennessee as a Case Study

The damage from courts misinterpreting and misapplying *Duren*'s third prong is compounded by the impact that felon exclusion statutes have on our society, particularly disenfranchisement statutes that are enforced post-sentence like Tennessee. Currently, persons convicted of a felony in Tennessee are disqualified from jury service permanently unless the right is restored by governor pardon or through the judicial restoration procedure.[146] In comparison to other states, Tennessee "ranks 49th in the nation in disenfranchisement rates."[147] Moreover, Tennessee is not required to inform individuals with felony convictions about the restoration of rights procedure, or even that the process exists.[148] Because of this, only 11,581 felons' rights were restored between 1990 and 2015 when 323,354 Tennesseans completed their sentences by 2016.[149] That is approximately a 3.6 percent restoration rate in twenty-five years. Because of how difficult and uncommon it is for Tennessee felons to have their right to serve on a jury restored, the jury pool is constantly distorted, limiting the ability to select from a "fair cross section of the community."

145. Hoag, *supra* note 19, at 71.

146. TENN. CODE ANN. §§ 22-1-102, 40-29-101–106. Once full incarceration (sentence, parole, probation) is complete, a person may petition to have their full rights of citizenship restored. This petition includes a statement of reasons the petitioner should have his rights restored, certified records and documents that prove the petitioner is eligible for and merits having full citizenship restored, and additional proof as required by the Court. The Hon. Gina Higgins, Panelist at Memphis Bar Association Bench Bar Conference: Restoration of Full Rights of Citizenship (Sept. 30, 2021).

147. Carolyn Krause, *Can Tennesseans with Felony Convictions Get Their Voting Rights Restored More Easily?*, TENNESSEAN (Dec. 29, 2021), https://www.oakridger.com/story/news/2021/12/30/can-tennesseans-felony-convictions-get-voting-rights-restored/8909816002.

148. The Hon. Gina Higgins, *supra* note 146.

149. Think Tennessee, *State of Our State: Rights Restoration* (2020), https://thinktennessee.org/wp-content/uploads/2020/11/state-of-our-state-policy-brief_-rights-restoration_final-updated.pdf.

The jury pool in Tennessee is further distorted because the exclusion of felons from participating in jury service disproportionately affects Black Tennesseans.[150] Since 1978, the Black incarceration rate in Tennessee has increased 136%.[151] In 2017, Black people made up forty-two percent of the prison population but only eighteen percent of the overall state population, revealing that Black Tennesseans were incarcerated at 3.1 times the rate of white people.[152] As of 2020, more than twenty percent of Tennessee's Black adults were disenfranchised,[153] one of the only four states in the U.S. to bear this disturbing statistic.[154] Higher conviction rates among Black Tennesseans, in comparison to their white counterparts, who subsequently lose their right to serve on a jury create a vicious cycle: the more felony convictions of Black Tennesseans, the fewer Black Tennesseans included in jury pools, the whiter juries get, and the more felony convictions of Black Tennesseans there are.[155]

If a defendant were to bring a fair cross section challenge to the status of the jury pool in Tennessee, the *Duren* three-prong test would prove unworkable. Demonstrating systemic exclusion would be

150. *Incarceration Trends in Tennessee*, VERA INST. OF JUSTICE (Dec. 2019) [hereinafter *Incarceration Trends*], https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-tennessee.pdf.

151. *Incarceration Trends*, *supra* note 150.

152. *Id.*

153. Kimberlee Kruesi, *Report: More Than 1 in 5 Black Tennesseans Disenfranchised*, TENNESSEAN (Oct. 16, 2020), https://www.tennessean.com/story/news/politics/2020/10/16/felon-voter-disenfranchisement-8-tennesseans-cant-vote/3655189001; Mariah Timms, *Tennessee Does Not Have to Change Felony Voting Rights Laws to Match Other States, Judge Rules*, TENNESSEAN (Oct. 26, 2020), https://www.tennessean.com/story/news/politics/2020/10/26/tennessee-does-not-have-change-felony-voting-rights-laws/6007355002 ("More than 20% of Tennessee's Black adults cannot vote due to a felony conviction, while an estimated 8% of the state's overall adult population is disenfranchised . . . .").

154. Uggen, et al., *supra* note 94. In 1980, only less than two percent of the Black population in Tennessee was disenfranchised.

155. *See* Steve Hartsoe, *Study: All White Jury Pools Convict Black Defendants 16 Percent More Often Than Whites*, DUKE TODAY (Apr. 17, 2012), https://today.duke.edu/2012/04/jurystudy ("In cases with no blacks in the jury pool, blacks were convicted 81 percent of the time, and whites were convicted 66 percent of the time. The estimated difference in conviction rates rises to 16 percent when the authors controlled for the age and gender of the jury and the year and county in which the trial took place.").

arguably impossible due to legislative discrimination through felon disenfranchisement. Tennessee courts fall into the large group of state courts across the country that misinterpret the language set out in *Duren*. In *State v. Taylor*, the Tennessee Court of Criminal Appeals stated that "[i]n order to establish a *prima facie* case of purposeful discrimination, the defendant must show [proof of the *Duren* factors.]"[156] Because Tennessee is one of the few states that still implement post-sentence felon exclusion statutes, the implications of this grave misinterpretation are greater and highly detrimental to defendants bringing a Sixth Amendment fair cross section claim in the state.

This limited reading of *Duren*'s third prong fails to encompass the plain meaning of "systematic exclusion" that the Court provided. The *Duren* Court itself stated that "the first sign of a systematic discrepancy is at . . . the construction of the jury wheel."[157] Further, the Court later specified that "aspects of the jury-selection process, *such as exemption criteria* [and juror qualifications], that result in the disproportionate exclusion of a distinctive group" must be justified by a significant state interest.[158] Thus, the Court expressly illustrated an aspect of the jury-selection process to include exemption criteria, or relevant qualifications for jurors, which inescapably includes felon exclusion statutes.

Action that removes individuals from the "jury wheel" logically must contribute to its construction and therefore be considered inherent in the jury-selection process.[159] Juror exclusion and juror inclusion cannot be considered independently of one another because both impact the "construction of the jury wheel." When juror exclusion, namely felon exclusion, is accounted for as inherent in the jury-selection process, it allows defendants to establish that post sentence felon

156. State v. Taylor, No. 02C01-9501-CR-00029, 1996 WL 580997, at *18–19 (Tenn. Crim. App. Oct. 10, 1996).

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

158. *Id.* at 367–68 (emphasis added). The addition of "juror qualifications" is taken from the Court's reference to *Taylor* which asserts that "States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions," effectively placing these in the same category. *Id.* at 367 (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

159. Juror exclusion must be accounted for with the same significance as juror inclusion in ultimately determining the composition of the jury through the jury-*selection* process.

disenfranchisement in several states is a form of legislative discrimination that has systematically excluded Black people from jury pools to the extent of a Sixth Amendment fair cross section violation.

In fact, these statutes are conceivably *per se* systematic, especially considering *Duren* as a foundation. The Third Circuit noted, in its discussion of systematic exclusion, that "in *Duren* . . . the system that caused the underrepresentation—a state statute—was readily apparent."[160] Accordingly, a felon exclusion statute—a state statute—that results in a noticeable disproportion is also readily apparent as built into the system that constructs the jury pool. The Third Circuit continues in its analysis by adding a stipulation not contemplated by the Court in *Duren* and not evenhandedly applied by courts across the country. The Third Circuit erroneously stated, like its many sister courts, that "[a] selection process that is facially neutral is unlikely to demonstrate systematic exclusion."[161] But this assertion is not founded in *Duren* itself nor the accepted posture for systematic exclusion and is inconsistent with the reasoning of the *Duren* Court.[162]

Duren makes no mention of facially neutral processes having a lower likelihood of demonstrating systematic exclusion but instead focuses on the resulting disproportion, the crux of the third prong.[163] Consider again the facts of *Osorio*, where a technological anomaly caused two major cities, that held considerable minority populations, to be discounted in the jury pool construction process.[164] There, the error in the selection process lacked discriminatory intent and was facially neutral with regard to Blacks, the distinctive group in question.[165] Yet it was still "inherent in the jury selection process" and fell within the purview of the fair cross section protections. In the same manner that the mechanical error in *Osorio* unintentionally created a jury pool

160. Howell v. Superintendent Rockview SCI, 939 F.3d 260, 269 (3d Cir. 2019).

161. *Id.*

162. *See, e.g.*, United States v. Jackman, 46 F.3d 1240, 1241–42 (2d Cir. 1995) (citing United States v. Osorio, 801 F. Supp. 966 (D. Conn. 1992) (concluding that a technological error in constructing the jury pool constituted systematic exclusion when it affected predominantly Black and Hispanic communities)).

163. Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979) ("[S]ystematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section.").

164. *Jackman*, 46 F.3d at 1242.

165. *Id.*

that disproportionately excluded Black citizens, the mere fact that post-sentence felon exclusion statutes have directly created a distorted representation of the community over time is sufficient to establish *Duren*'s third prong. This inconsistency is rooted in Equal Protection principles contaminating Sixth Amendment fair cross section jurisprudence, a seemingly unbreakable habit for so many courts. Moreover, rather than performing a critical analysis of the *Duren* test and how current disenfranchisement statistics may affect its application, courts strictly adhere to an interpretation designed for failure.

IV. RECONSIDERING *DUREN* TO ACHIEVE RACIALLY REPRESENTATIVE JURIES

Justice and the integrity of the Sixth Amendment demand solutions that will bring about racially representative juries. Professor Hoag's proposal,[166] that the third prong of the *Duren* test must be expanded to allow defendants to show the racially disproportionate impact of the construction of voter registration lists as part of the jury-selection process to prove underrepresentation as a result of systematic exclusion, is appropriate and ripe for consideration. But interpretation of *Duren*'s third prong must be further broadened to account for the effect of felon exclusion legislation in the jury-selection process.[167]

166. Hoag, *supra* note 19, at 75–79. Professor Hoag suggested that "[a]t 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 reenfranchisement and eliminate felony conviction disenfranchisement." *Id.* at 75. In response to the analysis of Tennessee specifically, Tennessee's strict post sentence felon exclusion statutes should be altered to incorporate the restoration of rights procedure into the incarceration process so that felons have full citizenship again upon completion of their sentence. Because the restoration of rights is not automatic or mandatory, the jury pool isn't being replenished at any appreciable rate. Automatic restoration will begin to replenish the jury pool and ensure the possibility of a fair cross section of the community under the Sixth Amendment by preventing legislative discrimination in this area. While commentators may fear this solution over prejudice and discomfort, the majority of states now reject post-sentence felon disenfranchisement. Moreover, the idea that felons are not capable of serving as diligent jurors is divorced from several statistical realities.

167. The second prong of the *Duren* is also noticeably problematic in that the Supreme Court has yet to endorse a test for proving underrepresentation. A consistent test and standard applied across the country is the most rational solution to this issue. However, courts analyzing the sufficiency of evidence under prong two when

This proper interpretation of the third prong closely aligns with the language and spirit of *Duren*, protects Sixth Amendment fair cross section jurisprudence from infection of Equal Protection principles, and rebuilds the constitutional challenge so that it is accessible and better designed to provide relief to defendants.

Judicial interpretation for prong three of the *Duren* test must be broadened to include legislative action that changes the composition of jury pools—specifically post-sentence felon disenfranchisement statutes. As mentioned above, courts generally only recognize voter registration lists as the source for jury pools, holding them as presumptively valid based on their widespread and long-standing use in the jury-selection process. Additionally, the most accepted proof that underrepresentation was due to a systematic exclusion is evidence of mechanical error on behalf of the machines that produce the jury pool lists or proof of intentional exclusion. This misguided application of *Duren*'s third prong has perpetuated the falsehood that intentional exclusion should be required or even considered at all.

But this Note's proposed solution illuminates that proving intentional discrimination in this Sixth Amendment challenge is unnecessary and inappropriate. A defendant bringing a fair cross section challenge in Tennessee informs this solution. Now, a defendant in Tennessee is not able to argue that legislation, which has removed more than twenty percent of the Black population from jury pools in Tennessee, has caused systematic exclusion of Black Tennesseans. When courts expand their reading of the third prong to include legislation that directly alters the composition of the jury pool, it invites that defendant to present statistics that prove the jury summoning system caused underrepresentation. If this type of legislation is considered in the three-prong analysis, the Sixth Amendment fair cross section challenge actually becomes viable, and juries move towards becoming more representative.

evaluating a defendant's fair cross section challenge seem to be tainted by the values from *Duren* itself. Although women are a distinctive group under fair cross section challenges, they are not, and were not in *Duren*, a minority, making it inherently easier to prove underrepresentation based on statistical values. Yet the majority of these Sixth Amendment challenges are now rooted in discrimination against minorities. Thus, the standard for establishing the second prong of the fair cross section claim using minorities as a distinctive group should be lowered to account for the heightened difficulty proving underrepresentation.

Contemplating the effect of felon exclusion statutes on the jury pool in the third prong of the fair cross section analysis also respects the *Duren* Court's concerns. The Court stressed "that the constitutional guarantee to a jury drawn from a fair cross section of the community requires that States exercise proper caution in exempting broad categories of persons from jury service."[168] Further, current legislation fails to abide by *Duren*'s requirement that jury lists and panels must be representative of the community considering the prescribed qualifications and reasonable exemptions. Although the *Duren* Court stated that "States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions," this was given the caveat that the jury lists or panels must still be fairly representative of the community.[169] Thus, while the prohibition of felons from jury service is constitutional on its face, its application has caused the continual exclusion of Black people over time, a result that may not be justified "on merely rational grounds."[170] To continue to allow such drastic exclusion of Blacks from jury pools through felon disenfranchisement, the State must prove "that a significant state interest be manifestly and primarily advanced by . . . exemption criteria," a standard comparable to strict scrutiny.[171] By expanding the interpretation of the third prong of *Duren* to include the legislation that alters the construction of jury pools, the core principles of the fair cross section guarantee are assured.

V. CONCLUSION

The stain of Black juror exclusion has persisted over time, culminating in the present with prospective Black jurors' principal impediment: felon disenfranchisement and exclusion statutes. Across the country, jurisdictions are disproportionately distorting their jury pools as Black Americans are incarcerated and disenfranchised in increasingly higher numbers. The Sixth Amendment challenge aimed at guaranteeing that jury pools consist of a fair cross section of the community does not recognize the impact of this legislative discrimination and thus cannot provide its designed protection, particularly in states like Tennessee where one in four Black citizens cannot serve on a jury. The

168. *Duren*, 439 U.S. at 370.

169. *Id.* at 367 (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

170. *Id.* (quoting *Taylor*, 419 U.S. at 534).

171. State v. Nelson, 603 S.W.2d 158, 166 (Tenn. Crim. App. 1980).

path to racially representative juries starts with the language of the test for the fair cross section challenge in *Duren*. Courts met with these claims must expand their reading of the third prong and interpret the composition of the jury-selection process to include legislation that morphs the construction of jury pools—felon exclusion statutes—to fairly identify if there is disproportionate exclusion of a distinctive group.