

# No Records, No Right: Discovery & the Fair Cross-Section Guarantee

Nina W. Chernoff\*

*ABSTRACT: Every criminal defendant has the right to a jury selected from a “fair cross-section” of the community—a pool of people reflecting the community’s racial and ethnic makeup. Yet there is substantial evidence that juries in state courts across the country do not reflect a fair cross-section of their communities, in violation of the Sixth Amendment and federal and state statutes. This Article exposes and analyzes one cause of racially unrepresentative juries: state courts’ failure to grant criminal defendants access to jury selection records.*

*Jury selection records are critical because fair cross-section violations are frequently hidden from view. For example, a computer error caused the federal jury selection system in Connecticut to read the “d” in Hartford to mean “deceased,” and accordingly failed to call anyone from Hartford for jury service. This hidden error eliminated 63 % of eligible African-Americans from the jury system and thereby produced a racially unrepresentative jury pool in violation of the fair cross-section guarantee. The flaw went undetected until a federal defendant obtained access to jury records under federal law. Yet under Connecticut law, a state defendant in that district would be prohibited from accessing the records that revealed the error. As a result of state laws like Connecticut’s, defendants are often denied access to the information they need to discover violations of the fair cross-section right.*

*This Article provides the first scholarship analyzing the role of access to records in constitutional and statutory fair cross-section doctrine. It reveals the way in which the celebrated constitutional and statutory right to an impartial jury*

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\* Associate Professor, City University of New York (CUNY) School of Law. I am grateful for the research assistance and thoughtful contributions of Joseph Schofield, Kelly M. Burnett, and Michael Wynn, and for the insights of Ruthann Robson and Mark Raymond Sylvester. I also benefited from the feedback of Erin Collins, Miriam Baer, and Anders Kaye at the A.B.A. Criminal Justice Section Faculty Workshop; Kim Thomas, Amber Baylor, Vida Johnson, and Richard Frankel at the New York University Law School Clinical Law Review Writers’ Workshop; Samantha Buckingham, Cortney Lollar, and Andrew Ferguson at the PDS in the Legal Academy Symposium; and the attendees of the James T. Gathii Faculty Workshop Series at Albany Law School and the CUNY Law scholarship workshop. I welcome all feedback and can be reached at [nina.chernoff@law.cuny.edu](mailto:nina.chernoff@law.cuny.edu).

*depends entirely on the ostensibly minor decision to grant or deny criminal defendants access to jury selection records.*

*This Article begins by illustrating why fair cross-section violations are both invisible and harmful, and describes how federal law has responded by guaranteeing federal defendants a right to discovery. It uses an original 50-state survey to reveal that, in contrast to the federal system, the majority of states keep the door to the fair cross-section right locked by denying defendants access to the discovery key. In fact, 39 of the 50 states fail to provide access to the one set of records that defendants must have in order to enforce the right. This Article analyzes and critiques state court doctrine that elevates administrative concerns over the fair cross-section right, and concludes by proposing solutions that could accommodate courts' concerns without jeopardizing the fair cross-section guarantee.*

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## I. INTRODUCTION

Every criminal defendant has the right to a jury selected from a “fair cross-section” of the community—a pool of people reflecting the community’s racial and ethnic makeup. Yet substantial evidence suggests that jury pools across the country often do *not* represent a fair cross-section of communities.<sup>1</sup> As a result, criminal defendants—who are disproportionately African-American and Latino—may routinely face juries that are disproportionately white.<sup>2</sup>

These disproportionately white juries are inconsistent with constitutional requirements for the proper operation of juries. They are inconsistent with social science data on the actual operation of juries. And racially underrepresentative juries are inconsistent with the laws of all 50 states that guarantee criminal defendants a jury selected from a fair cross-section of the community.

This Article exposes and analyzes one reason the problem of underrepresentative juries has gone unchecked: the failure of states to grant defendants access to discovery about the jury selection system. To understand why discovery is the key to unlocking the fair cross-section right, consider the following example of a fair cross-section violation in Connecticut.

Luis Osorio was facing criminal charges in the Hartford Division of the United States District Court for Connecticut.<sup>3</sup> Mr. Osorio suspected the jury pool underrepresented Hispanics and African-Americans. He alleged a violation of his Sixth Amendment right to a jury selected from a fair cross-section of the community.<sup>4</sup> To make out a fair cross-section claim a defendant must do three things: First, identify a “‘distinctive’ group” or groups in the community, such as African-Americans.<sup>5</sup> Second, demonstrate that the representation of this distinctive group in the jury pool “is not fair and reasonable in relation to” the group’s representation in the community.<sup>6</sup> For example, a defendant could compare census data showing African-Americans make up 50% of the community, with jury data showing African-Americans

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1. See *infra* Part II.

2. This Article uses the terms “Hispanic” and “Latino” interchangeably, because although many of the original sources discussed in this Article use the term “Hispanic,” that term has been criticized for being underinclusive and Eurocentric. See, e.g., Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context That Matters*, 82 WASH. L. REV. 897, 965 (2007) (“The term ‘Hispanic’ is representative of Latin America’s connections and history as it relates to Spain and Europe exclusively, and does not recognize the influence on Latin America and Latinos of the history and cultures of indigenous peoples and people of African descent.”).

3. *United States v. Osorio*, 801 F. Supp. 966, 968 (D. Conn. 1992).

4. *Id.*

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

6. *Id.*

make up only 30% of the jury pool. Third, demonstrate that the underrepresentation is “due to systematic exclusion.”<sup>7</sup> In other words, the underrepresentation is “inherent in the particular jury-selection process utilized.”<sup>8</sup>

In order to pursue and substantiate the second and third elements of his cross-section claim, Mr. Osorio requested and was granted access to discovery on the operation of the jury selection system.<sup>9</sup> That discovery revealed an egregious flaw in the jury selection system—one that eliminated almost two-thirds of potential African-American and Hispanic jurors.

The flaw was rooted in the fact that, as in many jurisdictions, Connecticut’s federal jury office uses computer programs to assemble and manage the lists of potential jurors.<sup>10</sup> The computer program filters through a large pool of Connecticut residents’ names, and randomly selects people from that pool to receive jury summonses.<sup>11</sup> Unbeknownst to the jury office, an inadvertent error caused the computer program to erroneously read the “d” in the capital city of Hartford to mean “deceased.”<sup>12</sup> The computer program accordingly never selected anyone from Hartford to receive a jury summons.<sup>13</sup> For nearly three years,<sup>14</sup> during which time the jury office sent out 4631 jury questionnaires, “[n]ot one questionnaire ha[d] been mailed to and thus returned from anyone residing in . . . Hartford.”<sup>15</sup> As a result, no one in Hartford was ever called for jury service. And African-American residents of Connecticut are primarily clustered in just a few towns and cities, one of which is Hartford.<sup>16</sup>

The computer program also failed to send jury summons to anyone in the neighboring city of New Britain, the second largest city in the jury

7. *Id.*

8. *Id.* at 364, 366. If the defendant satisfies the three prongs, he has established a fair cross-section violation unless the government can show that the aspect of jury system that caused the underrepresentation “manifestly and primarily” advances “a significant state interest.” *Id.* at 367.

9. *Osorio*, 801 F. Supp. at 971.

10. *Id.* at 970.

11. *Id.*

12. *United States v. Jackman*, 46 F.3d 1240, 1242–43 (2d Cir. 1995) (“At the time of the decision in *Osorio*, there was no explanation for the omission of Hartford and New Britain residents from the jury pool. Subsequently, 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.”).

13. *Osorio*, 801 F. Supp. at 972.

14. Matthew Kauffman, *Overhaul of Jury Selection Planned: Reform of Federal Jury Selection Backed by Judges*, HARTFORD COURANT (Nov. 25, 1992), [http://articles.courant.com/1992-11-25/news/0000109405\\_1\\_jury-pools-jury-system-grand-jury](http://articles.courant.com/1992-11-25/news/0000109405_1_jury-pools-jury-system-grand-jury).

15. *Osorio*, 801 F. Supp. at 972.

16. CONNECTICUT AFRICAN-AMERICAN DEMOGRAPHICS, AFRICAN AMERICAN AFFAIRS 2, [http://www.cga.ct.gov/aaac/pdfs/Demographic\\_Profile.pdf](http://www.cga.ct.gov/aaac/pdfs/Demographic_Profile.pdf) (documenting that in 1990, Hartford was the Connecticut town with the highest percentage of African-Americans in the state, at 38.8%) (last visited May 12, 2016).

district.<sup>17</sup> The New Britain citizens were left out of the jury pool because the source list of names from New Britain was accidentally misplaced and was never entered into the computer program.<sup>18</sup>

As a result of everyone in Hartford being “dead” and everyone in New Britain being “missing,” the jury pool for the district court in Connecticut became significantly whiter. Those two cities alone accounted for 63% of the voting-age African-American population and 68% of the voting-age Hispanic population in the jury district.<sup>19</sup>

It is indisputable that this accidental error violated criminal defendants’ right to a jury selected from a fair cross-section of the community. The critical point is that this violation *would never have been discovered* if Mr. Osorio had not been granted access to records of the jury selection system.<sup>20</sup> Indeed, the jury office had sent over 4000 jury questionnaires by the time Mr. Osorio filed his claim, and no one had noticed “[t]he complete absence of either city” from the jury pool.<sup>21</sup> The violation was only revealed by Mr. Osorio’s review of the jury office’s records.<sup>22</sup>

This Article exposes how the celebrated right to an impartial jury largely depends on the ostensibly minor decision to grant or deny discovery of jury records to criminal defendants. To be sure, there are a number of reasons why jury systems may underrepresent African-Americans and Latinos,<sup>23</sup> and improving access to discovery will not resolve them all. But only discovery can *reveal* them.

Part II of this Article explains why fair cross-section violations are constitutionally distinct, usually invisible, and always harmful. Part III discusses how federal law has responded by guaranteeing defendants a right to discovery. Part IV presents an original 50-state survey to reveal that—in contrast to the federal system—39 of 50 states fail to provide access to the records defendants need to enforce the fair cross-section right. Part V then examines why access to records is mandated by the fair cross-section purpose of state statutes and constitutions. Part VI critiques state court doctrine that elevates administrative concerns over the fair cross-section right, and the article concludes in Part VII with proposals that could accommodate courts’ concerns without jeopardizing the fair cross-section guarantee.

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17. *Osorio*, 801 F. Supp. at 972.

18. *Id.*

19. *Id.*

20. *See id.*

21. *Id.*

22. *United States v. Jackman*, 46 F.3d 1240, 1244 (2d Cir. 1995) (“*Osorio* alerted the clerk to the fact that the old Qualified Wheel seriously underrepresented residents of Hartford and New Britain and consequently underrepresented Blacks and Hispanics.”).

23. For example, the master list may underrepresent people of color if it is drawn from voter registration rolls in jurisdictions where African-Americans register to vote at a lower rate. *See, e.g.*, HIROSI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 18–21 (1993).

## II. THE CONTEXT: A UNIQUE PROTECTION, AN INVISIBLE VIOLATION, AND A REAL HARM

The problems with Connecticut's jury system illustrate three important points that in turn explain why in 39 states the fair cross-section right is almost impossible to enforce. First, the Sixth Amendment fair cross-section right guarantees a defendant a unique protection that is distinct from the right to equal protection. Second, a fair cross-section violation is usually completely invisible to the only person with standing to challenge it—the criminal defendant. Third, this unique and invisible constitutional violation causes real-world harm, jeopardizing one of the most critical safeguards of the criminal system as well as public confidence in the justice system.

### A. DISCRIMINATION IS THE DISTINCTION BETWEEN THE FAIR CROSS-SECTION AND EQUAL PROTECTION GUARANTEES

The litigation of the Connecticut computer error demonstrates why the distinction between a claimed violation of the fair cross-section right and a violation of equal protection is a difference that matters.

Mr. Osorio, the defendant who exposed the Hartford computer error, alleged that the jury system violated both his fair cross-section and equal protection rights.<sup>24</sup> The District Court did not reach the equal protection issue,<sup>25</sup> but if it had, it would have been forced to conclude that there was no equal protection violation because there was no discriminatory intent. The computer programming error was a mistake—and the jury office personnel were not even aware of it until the litigation began.<sup>26</sup> There was no evidence that the misplaced list of New Britain jurors was the product of anything more than human error. These kinds of mistakes cannot give rise to an equal protection claim.

Put simply, equal protection is concerned with *means*, whereas the Sixth Amendment is concerned with *ends*. The Fourteenth and Fifth Amendments guarantee a process that is free from discrimination, and without proof that the process was infected with discrimination, there is no equal protection claim. In contrast, the Sixth Amendment guarantees the defendant several outcomes, such as “a speedy and public trial,” the “assistance of counsel,” and “an impartial jury.”<sup>27</sup> You either have a speedy trial or you do not. You either have a defense attorney or you do not. And you either have an impartial jury—which the Supreme Court has interpreted to mean a jury selected from a fair cross-section<sup>28</sup>—or you do not. Under the Sixth Amendment, it does not

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24. *Osorio*, 801 F. Supp. at 968.

25. *Id.* at 980 n.14.

26. *See id.* at 968–73.

27. U.S. CONST. amend. VI.

28. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (“[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.”).

matter if the *reason* you do not have a speedy trial, a lawyer, or an impartial jury is malice or accident. The distinction between the two constitutional protections “[i]s important. An Equal Protection challenge concerns the process of selecting jurors, or the allegation that selection decisions were made with discriminatory intent. The Sixth Amendment, on the other hand, is concerned with impact . . . .”<sup>29</sup> As a result, ethical and unbiased people can still accidentally operate a jury selection system that violates the Sixth Amendment.

Indeed, as illustrated in the next Part, racial and ethnic disparities can result from a range of accidental or benign actions by the jury office. The resulting racial underrepresentation may violate the fair cross-section guarantee, but absent discrimination, there is no equal protection violation. As the Second Circuit observed in the context of the Connecticut jury litigation, “as often happens in overburdened courts (like other institutions), the failure” to fix errors in the system might result “simply from the unwarranted assumptions by all concerned” that the system is operating as it should.<sup>30</sup>

*B. A FAIR CROSS-SECTION VIOLATION IS INVISIBLE AND THUS LEAVES DEFENDANTS  
DEPENDENT ON THE GOVERNMENT*

1. An Invisible Violation

The second point illustrated by the exclusion of Connecticut jurors is that a violation of the fair cross-section right is essentially invisible. In this way it is different from any of the other Sixth Amendment rights. Imagine a defendant, say Mr. Osorio in Connecticut, enters the courtroom where he will be tried. Even if Mr. Osorio is not familiar with the Sixth Amendment, he will be able to tell if he is standing before the court without a lawyer, and he will know if he has languished in jail for a year before being tried. But Mr. Osorio will have no idea if his jury was *selected from* a fair cross-section of the community. The only thing he can see—the jury venire assembled in the courtroom for the voir dire process—is legally irrelevant.

This is because the Sixth Amendment and jury statutes guarantee a defendant a jury selected from a fair cross-section of the community, but not a jury that actually includes a fair cross-section of the community.<sup>31</sup>

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29. *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (emphasis omitted), *overruled on other grounds by In re United States*, 426 F.3d 1 (1st Cir. 2005); *see also infra* Part II.B.2. The scope of the two standards also differs: equal protection extends to would-be jurors who are denied the opportunity to serve on juries by discriminatory state actors, while the Sixth Amendment protects only criminal defendants.

30. *United States v. Jackman*, 46 F.3d 1240, 1245 (2d Cir. 1995).

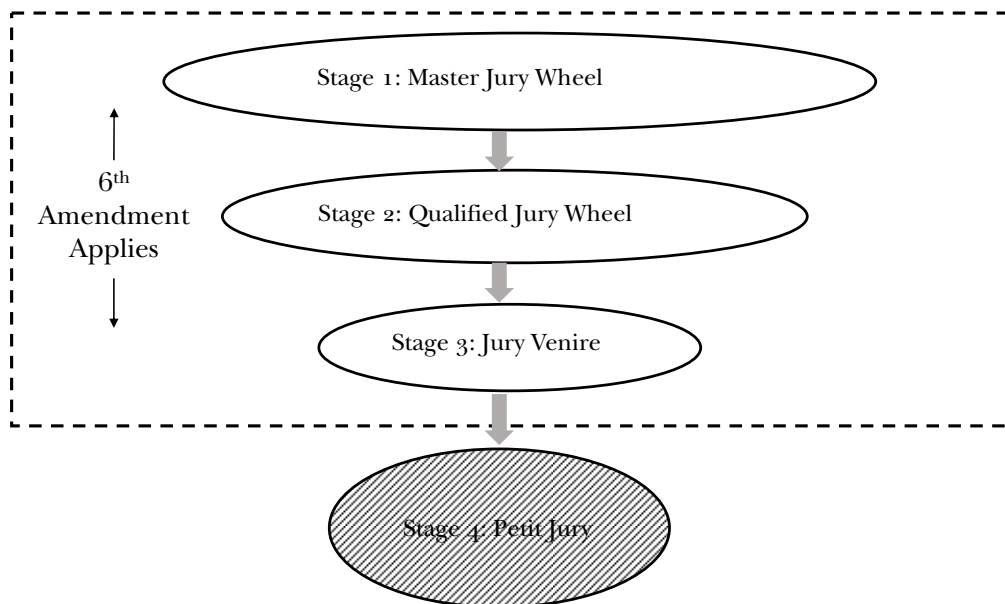
31. *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (“We have never invoked the fair-cross-section principle . . . to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.”).



Understanding this limitation requires a basic understanding of the four stages of the jury selection process, illustrated in Figure 1 below.

In the four stages of jury selection, the population of all the possible jurors in the community is winnowed down to a panel of 12 jurors.<sup>32</sup> The fair cross-section right—under either the Sixth Amendment or statute—applies only to the first three stages of that process.

Figure 1. The Stages of Jury Selection



**Stage 1: Creating a pool of potential jurors from all the possible jurors in the community:** At stage 1, the jurisdiction creates a pool of potential jurors by using a source list (or lists) of names. For example, if Connecticut uses the voter registration rolls as its source list, the potential jury pool is made up of residents of the Connecticut judicial district who are registered to vote. This initial potential jury pool is referred to as the “master jury wheel.”<sup>33</sup>

**Stage 2: Creating a list of qualified jurors from the master jury wheel:** At stage 2, the jurisdiction winnows down the jury pool identified at stage 1 to only those jurors who are qualified to serve. Qualifications for jury service vary slightly by jurisdiction, but typically jurors are required to be citizens, at least 18 years old, proficient in English, and without a felony conviction.<sup>34</sup> The

32. Although there is no constitutional requirement that a jury consists of 12 persons, *Williams v. Florida*, 399 U.S. 78, 86 (1970), 12 is the historical and typical number of jurors on a criminal jury (not including alternates).

33. Or “master list,” “jury wheel,” or “source list.”

34. *See, e.g.*, N.Y. JUD. LAW § 510 (McKinney 2003).

system first randomly selects a number of persons on the master jury wheel and then sends them a questionnaire, asking qualification questions to determine their eligibility.<sup>35</sup> This second, smaller pool is usually referred to as the “qualified jury wheel.”

**Stage 3: Creating a jury venire from the qualified jury wheel:** At stage 3, the jurisdiction summons members of the qualified jury wheel to the courthouse, where they become part of the “jury venire” if they have not been granted a deferral or are not excused on request.<sup>36</sup> The “jury venire” is the group of people at the courthouse who are available to serve as jurors on a given day.<sup>37</sup>

**Stage 4: Creating individual jury panels from the jury venire:** At stage 4, the court sends some members of the jury venire to various courtrooms where jury panels are selected through the voir dire process. Some of these people become members of a petit jury for an individual case. Others are excluded through the voir dire process or are never questioned during voir dire because the petit jury is filled before they are examined. Other members of the jury venire are never sent to a courtroom and are simply excused after showing up at the courthouse.

The fair cross-section right applies to the master jury wheel (stage 1), the qualified jury wheel (stage 2), and the jury venires from which petit juries are selected (stage 3), but not to the petit jury panels (stage 4).<sup>38</sup> In other words, it applies only to the invisible stages of jury selection that occur before Mr. Osorio sees the jury venire for his own trial. As the Supreme Court has explained, “[d]efendants are not entitled to a jury of any particular composition, . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”<sup>39</sup>

Because of the limitation on the cross-section right, the only thing Mr. Osorio can actually see is the one part of the jury selection process that is irrelevant to the Sixth Amendment analysis. And every stage of the process that is protected by the Sixth Amendment occurs behind the closed doors of the jury office, and often inside of a computer. Mr. Osorio might have seen an all-white jury that *suggested* there was a problem with the jury selection

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35. Sometimes this questionnaire also doubles as the summons to come to court on a specific day.

36. Again, in some jurisdictions stage 2 and stage 3 are combined when the jurisdiction sends out a combined questionnaire and summons.

37. *United States v. Savage*, Nos. 07-550-03, -04, -05, -06, 2013 WL 797417, at \*5 (E.D. Pa. March 5, 2013) (recognizing that a request for “venire panels . . . is a request for the list of jurors that appeared at the courthouse to attend juror orientation”).

38. *See* *Lockhart v. McCree*, 476 U.S. 162, 174 (1985) (“The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn.” (quoting *Pope v. United States*, 372 F.2d 710, 725 (8th Cir. 1967))).

39. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1974).

system,<sup>40</sup> but that observation is legally irrelevant.<sup>41</sup> Importantly, Mr. Osorio could not look at his jury and “see” the legally relevant fact that the computer program in the jury office was reading the “d” in Hartford as “deceased,” nor could he “see” the legally relevant omission of the list of potential New Britain jurors.

Consider the following similar examples—while not all ultimately led to successful fair cross-section claims, they all demonstrate how the racial diversity of jury pools can be unintentionally undermined in stages of the selection process that are invisible to defendants.

**Using alphabetical order in Indiana:** African-Americans in Allen County, Indiana were underrepresented in the jury pool because of an “Accident of the Alphabet.”<sup>42</sup> The computer program used to select jurors in Allen County was programmed to work through an alphabetical list of townships, selecting persons from each successive township to be summoned for jury duty.<sup>43</sup> It was also programmed to stop pulling names from the pool when it reached 10,000 names.<sup>44</sup> Year after year, the program identified the requisite 10,000 potential jurors before reaching the end of the alphabetical list of townships.<sup>45</sup> Residents of Wayne Township, at the end of the computer’s list, were thus dramatically underrepresented in the jury pool.<sup>46</sup> This made a difference because 75% of African-Americans in Allen County lived in Wayne Township.<sup>47</sup> As a result, “African-Americans as a group had roughly *half the chance of being included on a jury panel* than a truly random system would have produced.”<sup>48</sup>

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40. *Ambrose v. Booker*, 684 F.3d 638, 646 (6th Cir. 2012) (“It may be true that a venire panel’s composition may put a petitioner on notice of a procedural irregularity in some instances, for example in areas where the minority population is so high that the probability of an all-white panel is minuscule.”). Lawyers who routinely practice in the same jurisdiction often notice the underrepresentation of distinctive groups in the jury pool, but again, this observation is alone legally insufficient. *See, e.g.*, Matthew Kauffman, *Race Mix of Jury at Issue*, HARTFORD COURANT, (Oct. 30, 1995), [http://articles.courant.com/1995-10-30/news/9510300014\\_1\\_jury-duty-jury-pools-representative-jury](http://articles.courant.com/1995-10-30/news/9510300014_1_jury-duty-jury-pools-representative-jury) (“[M]any defense attorneys in Hartford . . . say they are puzzled by the dearth of minorities and city residents among jury pools.”).

41. *See Ambrose*, 684 F.3d at 645 (recognizing that criminal defendants “could not have known that minorities were underrepresented in the *jury pool* by looking at the *venire panel*”).

42. *Azania v. State*, 778 N.E.2d 1253, 1258 (Ind. 2002); *see also Presley v. State*, 9 So. 3d 442, 443 (Miss. Ct. App. 2009) (Venire that “did not contain any potential jurors whose surnames began with the letters [T through Z] . . . resulted from . . . [a] system” where a computer selected the requisite number of jurors from an alphabetical list “midway through the letter ‘S.’”).

43. *Azania*, 778 N.E.2d at 1257.

44. *Id.*

45. *Id.* at 1259.

46. *Id.*

47. *Id.*

48. *Id.* at 1260 (emphasis added).

**Allocating jurors in Michigan:** African-Americans in Kalamazoo, Michigan were underrepresented in the jury pool because of the manner in which the jury office allocated jurors to different courts.<sup>49</sup>

Kalamazoo residents were first allocated to circuit courts and then the remaining names were sent to district courts.<sup>50</sup> Because their names were sent first to district courts, “few residents of the City of Kalamazoo . . . were available for allocation to the circuit court venires.”<sup>51</sup> This made a difference “because the largest population of African-Americans eligible for jury service resided in the City of Kalamazoo,” and their exclusion “from the circuit court venires resulted in approximately *seventy-five percent of the African-American adults eligible for jury service being excluded from service in the circuit court.*”<sup>52</sup>

**Dividing the district in Illinois:** African-Americans in Cook County, Illinois were underrepresented in the jury pool because of the manner in which the jury office split up the district for administrative purposes.<sup>53</sup>

Illinois law permitted jury offices in large judicial circuits to divide up the circuit for the purpose of summoning jurors.<sup>54</sup> The jury office in Cook County did so, essentially splitting the county in a Northern and Southern half, drawing the line where it would leave roughly half the population in each division.<sup>55</sup> Jurors in the Northern half of the circuit were sent to one court; jurors in the Southern half to another court.<sup>56</sup> But “only 25.4% of the county’s black registered voters live in the northern half of the county, while 75.4% live in the southern half.”<sup>57</sup> As a result, a jury “venire that was randomly drawn from the northern half of Cook County would be expected to contain only *half as many black venirepersons* as a venire drawn from Cook County as a whole.”<sup>58</sup>

**Eliminating duplicates in California:** Hispanics in a California county were underrepresented in the jury pool because of the manner in which the jury office eliminated duplicate names.<sup>59</sup>

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49. *People v. Hubbard*, 552 N.W.2d 493, 504 (Mich. Ct. App. 1996), *overruled on other grounds by* *People v. Bryant*, 822 N.W.2d 124 (Mich. 2012) and *People v. Harris*, 845 N.W.2d 477 (Mich. 2014).

50. *Hubbard*, 552 N.W. 2d at 500 (The court appears to have inadvertently switched the words “district” and “circuit” in the first sentence on page 500, but the following three sentences establish that residents were sent first to circuit courts.).

51. *Id.* (“Consequently, residents of . . . Kalamazoo were being significantly underrepresented in the circuit court venires.”).

52. *Id.* (emphasis added).

53. *People v. Peebles*, 616 N.E.2d 294, 305 (Ill. 1993).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 306.

58. *Peebles*, 616 N.E.2d at 306 (emphasis added) (citing but not adopting testimony of defense expert).

59. *People v. Ramirez*, 139 P.3d 64, 94–95 (Cal. 2006).

The jury office ran a computer program to eliminate duplicate names after merging multiple source lists of potential jurors.<sup>60</sup> This ensured that, for example, someone who was listed on the voter registration list and the list of licensed drivers would not be listed twice in the jury pool. The program identified duplicates “by comparing the full last name and the first four letters of the first name.”<sup>61</sup> But “[b]ecause many members of the Hispanic community share common surnames and first names,” there was an increased chance that “Hispanics might be erroneously deleted.”<sup>62</sup> Indeed, there was evidence that although Hispanics made up roughly 26% of the community, they were only 19% of the jury pool.<sup>63</sup> But when an improved approach to removing duplicate names was introduced, it “resulted in an increase from 19 to 26 percent” of Hispanic representation in the jury pool.<sup>64</sup>

**Using telephones in Montana:** Native Americans in Cascade County, Montana were underrepresented in the jury pool because the jury office used the telephone to summon prospective jurors.<sup>65</sup>

Summoning jurors by phone led to the disparity because, while only 5% of “Anglo American” households in the county were without phone service, 29% of Native American households lacked a phone.<sup>66</sup> As a result of the telephone notification process, in a “200-juror panel randomly drawn, over *one-third* (70) of the prospective jurors were excluded from possible jury service.”<sup>67</sup>

**Saving money on software in Michigan:** African-Americans in Kent County, Michigan, were underrepresented in the jury pool because a computer error caused fewer jury summons to be sent to African-American districts.<sup>68</sup>

“[I]n an effort to save money spent on software fees,” the jury office in Kent County “switched . . . from using a vendor’s software for summoning jurors to software developed by its information technology department.”<sup>69</sup> But “the new [in-house] computer program had an erroneous setting,” and instead of selecting potential jurors from the pool of 456,435 names, it selected jurors from a subset of 118,169 of those names.<sup>70</sup> “Because the 118,169 individuals selected came disproportionately from certain zip codes,

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60. *Id.* at 94.

61. *Id.*

62. *Id.*

63. *Id.* The government produced evidence of a smaller disparity. *Id.*

64. *Ramirez*, 139 P.3d at 94.

65. *State v. LaMere*, 2 P.3d 204, 207 (Mont. 2000); *see also* *United States v. Nakai*, 413 F.3d 1019, 1022 (9th Cir. 2005) (noting that nearly half of jurors whom clerk failed to reach by telephone were Native American).

66. *LaMere*, 2 P.3d at 207.

67. *Id.* at 221 (emphasis added).

68. *People v. Bryant*, 822 N.W.2d 124, 128–29 (Mich. 2012).

69. *Id.* at 129.

70. *Id.* at 129–30.

jury questionnaires were disproportionately sent to those zip codes.”<sup>71</sup> This made a difference because it “resulted in . . . disproportionately fewer questionnaires going to zip codes with larger African-American populations.”<sup>72</sup> Ultimately, this “unintentional computer glitch” was responsible for “*systematic underrepresentation of African-Americans in the jury pools*” of that county.<sup>73</sup>

The representation of African-Americans and Latinos in jury pools has similarly been diminished in other jurisdictions by programming errors or malfunctions that eliminate towns or zip codes from the jury pool,<sup>74</sup> or otherwise accidentally eliminate eligible jurors.<sup>75</sup> In addition, the racial makeup of jury pools can be affected by benign efforts to send jurors to courthouses closer to their homes<sup>76</sup> or grant their deferral requests,<sup>77</sup> or the numeric

71. *Id.* at 130.

72. *Id.*

73. *Ambrose v. Booker*, 684 F.3d 638, 640 (6th Cir. 2012) (emphasis added).

74. *See, e.g., Griffin v. State*, 695 N.E.2d 1010, 1013–14 (Ind. Ct. App. 1998) (A “computer error excluded a large portion of a township from the county jury pool,” and that township “contained the largest percentage of the county’s African-American population.”); *State v. Cross*, 887 S.W.2d 789, 791 (Mo. Ct. App. 1994) (“Two zip codes were inadvertently excluded . . .”).

75. For example, a computer program error in Washington, D.C., discussed in more detail at Part V.A, erroneously eliminated from the jury pool anyone with a misdemeanor conviction although such persons are eligible for jury service. *United States v. Powell*, 136 Daily Wash. L. Rptr. 2149, 2154 (D.C. Super. Ct. 2008); *see also* ALASKA SUPREME COURT, 2007 STATUS REPORT OF THE ALASKA SUPREME COURT FAIRNESS AND ACCESS IMPLEMENTATION COMMITTEE 20 (2007), <http://courts.alaska.gov/appellate/docs/fairaccess2007.pdf> (A task force review “revealed that many villages had been excluded [from the jury pool] by mistake or because they had always been excluded even though there were no longer good grounds for the exclusion.”). In one jurisdiction, a computer error resulted in a jury summons being sent to a dog. Snejana Farberov, *Justice’s Gone to the Dogs! IV the German Shepard Called for Jury Duty Because of a Computer Glitch*, DAILY MAIL (April 15, 2014, 9:31 PM), <http://www.dailymail.co.uk/news/article-2605364/Justices-gone-dog-IV-German-shepard-summoned-jury-duty-computer-glitch.html>. When questioned about the dog’s pending jury service, the responsible official pointed out the truism that “jury duty notices are generated by a computer, which is not immune to errors.” *Id.*

76. *See, e.g., Alvarado v. State*, 486 P.2d 891, 900 (Ala. 1971) (Because “the system of jury selection employed . . . restricted eligibility for jury service to residents of the area within a 15-mile radius of [the courthouse], virtually all residents of Native villages were excluded from the jury panel.”); *Spencer v. State*, 545 So. 2d 1352, 1353–54 (Fla. 1989) (The division of the jury district, which was designed to “reduce substantial travel time for jurors and alleviate unnecessary expense to the state[.] . . . removed from the jury pool for the [district] a significant concentration of the black population of [the] County, specifically 17% of that population.”); *People v. Henderson*, 490 N.Y.S.2d 94, 96–97 (Buffalo City Ct. 1985) (The decision not to require jurors to travel to regional courts resulted in “Blacks [being] called [as jurors] 61% less frequently” than if jurors were sent to all courts in the county.); Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT’L BLACK L.J. 238, 256–58 (1994) (A Los Angeles’ rule providing that jurors would be able to serve at a courthouse within 20 miles of their home meant that up to “70.9% of Black registered voters have been left out of these outlying districts.”); *see also People v. Jenkins*, 997 P.2d 1044, 1100 (Cal. 2000) (describing effects of Los Angeles’ 20 mile rule).

77. *See, e.g., United States v. Clay*, 159 F. Supp. 2d 1357, 1362–64, 1369 (M.D. Ala. 2001) (“[T]here is uncontroverted evidence that the . . . disparity between the percentage of African-

increment used to randomly select jurors from the jury pool.<sup>78</sup> These and other examples demonstrate that mundane administrative decisions can produce racially underrepresentative jury pools—and that these decisions or errors are invisible to defendants.

This point was underscored by the Sixth Circuit when evaluating a defendant’s ability to “see” the computer error in Kent County, Michigan:

The glitch was a mistyped parameter in the software, buried in a mountain of computer code, that was only discovered after a broad statistical analysis led to an extensive internal investigation. . . . The difficulty of detecting this problem is underscored by the fact that the glitch persisted for nearly two years without detection by defendants, judges, or Kent County officials.<sup>79</sup>

As a result, the court held that “[t]his is not the type of error that would be reasonably discoverable by a defendant at jury selection.”<sup>80</sup>

## 2. Defendants Are Dependent on the Government

There is only one entity with access to information about whether the initial, invisible stages of the jury selection process are infected with these types of errors: the court, which is represented by the government.<sup>81</sup> A defendant like Mr. Osorio is therefore dependent on the government for information about whether the government is violating his rights.

The extent to which criminal defendants depend on the government for information about a violation of their fair cross-section right is illustrated by

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Americans on [the defendant’s] venire and in the divisional wheels” was the result of administrative decision to grant all deferral requests and group the deferred jurors together for later jury selection, when deferral requests were disproportionately made by whites.); *People v. Jackson*, 920 P.2d 1254, 1267 (Cal. 1996) (“[U]nderselection of [various groups including] Hispanics” was caused by “inconsistent methods for excusing prospective jurors, duplications and dated information used in forming the jury pool, and lack of follow-up with those persons not responding to the jury summons.” (footnote omitted)).

78. See, e.g., *Washington v. People*, 186 P.3d 594, 597–98 (Colo. 2008) (An effort “[t]o reduce the likelihood that some prospective jurors in the jury wheel will be selected for jury duty more often than others” by assigning jurors a rank based on times of service had the inadvertent result of underrepresenting African-Americans and Hispanics.); *State v. Long*, 499 A.2d 264, 269 (N.J. Super. Ct. Law Div. 1985) (“The sorting of the master [jury] list by utilization of the fifth letter alphabetization system . . . results in a homogeneity that tends to skew the panel against a true cross section of the community.”); *State v. Hester*, 324 S.W.3d 1, 44 (Tenn. 2010) (Changes to “the increment used to draw names from the driver’s license list . . . have a significant effect on the drawing of names from the list. . . . [A]ssuming that [the county’s] Hispanic population generally is at the end of the list because Hispanics disproportionately have higher driver’s license numbers . . . decreasing the increment will have a tendency to increase the possibility that Hispanics will not be considered for jury service.”).

79. *Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012). “The problem came to light in 2002, when a local high school teacher, Wayne Bentley, completed a study of minority representation on Kent County juries.” *Id.* at 641.

80. *Id.* at 645.

81. *Gause v. United States*, 6 A.3d 1247, 1249 (D.C. 2010) (en banc).

the different outcomes in a pair of claims made in the same court in Washington, D.C. One defendant, Mr. Larry Gause, suspected that the jury pool in D.C. was underrepresenting African-Americans and asked the trial court for access to the jury selection records to investigate.<sup>82</sup> The trial court denied his request, and the trial proceeded—with the implicit assumption that Mr. Gause’s right to a jury selected from a fair cross-section was protected.<sup>83</sup> Around the same time, a second defendant, Mr. Odell Powell, had the same concerns about the same jury pool and made the same request.<sup>84</sup> Mr. Powell’s trial judge, in contrast, granted the motion and ordered the government attorneys to disclose the court’s jury selection records.<sup>85</sup>

Mr. Powell’s discovery request revealed a host of problems—invisible without discovery—that had the power to disproportionately exclude African-Americans. For example, a computer programming error was excluding all potential jurors with misdemeanor convictions, even though those people were legally eligible for jury service.<sup>86</sup> The program was also *permanently* excluding potential jurors who were only *temporarily* ineligible. Thus, any potential juror who had a pending criminal charge at the time he filled out the juror questionnaire was never called for jury service again, even when the charge had been dismissed or resolved.<sup>87</sup> Another programming error permanently disqualified any potential juror with a felony conviction, even though the ban on jury service only applies for ten years after conviction. Eligible jurors with “expired” felony convictions were therefore never called for jury service again.<sup>88</sup> There was every indication that no one, not even the jury administrators, knew these errors existed until Mr. Powell discovered them.<sup>89</sup> Each of these problems was similarly affecting Mr. Gause’s jury pool—but they were invisible to him because Mr. Gause’s requests for discovery had been denied.<sup>90</sup>

Discovery makes the difference, as these parallel D.C. claims demonstrate. For without the government’s information about jury selection, defendants’ fair cross-section challenges are destined to fail. Courts routinely reject fair cross-section claims that are based on a defendant’s “speculation” or “guesswork” about the jury process.<sup>91</sup> Defendants not only need the

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82. *Id.*

83. *Id.* at 1250.

84. *United States v. Powell*, 136 Daily Wash. L. Rptr. 2149, 2150 (D.C. Super. Ct. 2008). Both Mr. Gause and Mr. Powell were represented by attorneys in the Public Defender Service for the District of Columbia. *Gause v. United States*, 959 A.2d 671, 687 (D.C. 2008).

85. *Powell*, 136 Daily Wash. L. Rptr. at 2150.

86. *Id.* at 1254.

87. *Id.*

88. *Id.*

89. *See id.* at 2150–54.

90. *Gause v. United States*, 6 A.3d 1247, 1250 (D.C. 2010) (en banc). The trial judge’s failure to grant discovery was eventually reversed. *See infra* Part V.A.

91. *State v. Tremblay*, No. P1 97-1816AB, 2003 WL 23018762, at \*5–6 (R.I. Mar. 19, 2003)



government's data about the race of potential jurors, they need sufficient access to the operation of the system to understand the *source* of the disparity, as courts require defendants "to offer more than just speculation or surmise as to the reason for the alleged impermissible exclusion."<sup>92</sup> As one court explained—faced with a defendant who "submitted no competent evidence of underrepresentation or of systematic exclusion" where "[n]o exhibits were appended to the motion" and "no data was provided concerning past . . . jury panels"—"[t]he absence of such evidence is fatal to any attempt to establish a constitutional violation."<sup>93</sup>

Moreover, courts hold that only the jury system's *own* data is sufficiently reliable. For example, a defendant in Illinois seeking to establish a fair cross-section violation presented data compiled by the jury supervisor for the district.<sup>94</sup> The jury supervisor testified that "he recorded the racial composition of venirees based on his observations" at the courthouse over a ten-month period.<sup>95</sup> The Supreme Court of Illinois concluded that the data was properly excluded because the supervisor "did not testify that he observed *every* venire at the courthouse" and the supervisor "identified the race of venirepersons based on his personal observations, without any degree of scientific certainty."<sup>96</sup> Surveys conducted by public defender offices and testimony by outside experts have likewise been deemed inadequate.<sup>97</sup>

In sum, because fair cross-section violations are usually invisible, defendants seeking to mount a successful fair cross-section challenge must have access to the jury system's own data about the racial make-up of the jury pool and the operation of the selection system. The absence of such data, or an attempt to produce substitute data from other sources, is "fatal" to any attempt to establish a cross-section violation.

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(Defendants "cannot discharge their burden of demonstrating systematic exclusion merely by offering statistical evidence and perceived percentages of the alleged disparity." They need adequate statistics "together with at least a reliable indication as to *when* and *why* the alleged systematic exclusion occurred."); *see also* *People v. Burgener*, 62 P.3d 1, 21 (Cal. 2003) ("Speculation as to the source of the disparity is insufficient to show systematic exclusion."); *Goins v. Commonwealth*, No. 2008-SC-000718-MR, 2009 WL 3165539, at \*1 (Ky. Oct. 1, 2009) ("A showing of underrepresentation must be predicated on more than mere guesswork. Such a showing requires competent proof (usually statistical in nature).").

92. *Tremblay*, 2003 WL 23018762, at \*6.

93. *Goins*, 2009 WL 3165539, at \*2.

94. *People v. Peeples*, 616 N.E.2d 294, 307-08 (Ill. 1993).

95. *Id.*

96. *Id.* at 308.

97. *See, e.g., People v. Broadnax*, 532 N.E.2d 936, 942-43 (Ill. App. Ct. 1988) (concluding that defendant's evidence of disparity "is not methodologically valid or adequate" where defendant submitted "testimony of the staff members of the public defender's office and the affidavits of the three private attorneys"); *Commonwealth v. Smith*, 694 A.2d 1086, 1094-96 (Pa. 1997) (rejecting fair cross-section claim where defendant "relies upon an informal survey conducted by the Public Defender's Office" and "an expert in jury selection or composition" that the "survey results show that the average number of African-Americans in the jury pool in [the] County is well below the percentage of African-Americans in the population of [the] County at large").

C. A FAIR CROSS-SECTION VIOLATION CAUSES REAL HARM

The third point illustrated by the Connecticut jury litigation is that invisible fair cross-section violations have real and injurious consequences. The Connecticut errors eliminated almost two-thirds of African-Americans and Hispanics from the jury pool.<sup>98</sup> A significant amount of social science research has concluded that the underrepresentation of those groups undermines the very purpose of the jury, as that purpose has been articulated by the Supreme Court.

1. The Purpose of the Jury Is to Reflect Community's Judgment

The primary purpose of the Sixth Amendment right to an impartial jury is to protect criminal defendants "from oppression by the Government."<sup>99</sup> The jury protects the defendant from the mistakes, malice, or apathy of government actors (prosecutors, judges, and police) by reserving the ultimate question of guilt or innocence to "a body of [the defendant's] peers."<sup>100</sup> Therefore, "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."<sup>101</sup> The jury cannot play its "prophylactic" role "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."<sup>102</sup>

The Framers' focus on a jury of "peers or equals"<sup>103</sup> has evolved into the modern requirement that a jury be selected "from a fair cross section of the community."<sup>104</sup> This evolution reflects changes in our country's sense of who counts as a part of our community.<sup>105</sup> The founders were adamant about interposing the community's commonsense judgment, but their definition of community was largely limited to white, male, property owners.<sup>106</sup> Now our definition of peers has evolved to include persons of any race, ethnicity, or

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98. See *supra* note 17 and accompanying text.

99. *Duncan v. Louisiana*, 391 U.S. 145, 155 n.23 (1968) (quoting *Singer v. United States*, 380 U.S. 24, 31 (1965)); see also *Powers v. Ohio*, 499 U.S. 400, 411 (1991) ("The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors."); 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.").

100. *Williams v. Florida*, 399 U.S. 78, 87 (1970).

101. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

102. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

103. *Id.* at 537 n.19.

104. *Id.* at 537.

105. *Id.* ("Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place.").

106. See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 2 (1994) (noting that no African-American served on a jury until 1860, and no woman served until 1898).

gender who meets the eligibility requirements for jury service.<sup>107</sup> In light of these developments, the Supreme Court has accordingly concluded that the impartial jury required by the Framers “necessarily contemplates an impartial jury drawn from a cross-section of the community.”<sup>108</sup> So although the Court did not begin using the term “cross-section of the community” until 1942,<sup>109</sup> it did so in the context of describing “the established tradition . . . that the jury be a body truly representative of the community.”<sup>110</sup> The fair cross-section standard is thus a relatively new way of conceiving of a very old right.<sup>111</sup>

Indeed, a historian would be hard-pressed to exaggerate the criminal jury trial’s importance to the founders of our country or the framers of the Constitution. The First Congress of the American Colonies identified the jury trial as an essential right;<sup>112</sup> the Declaration of Independence described the denial of jury trials as part of the justification for revolution;<sup>113</sup> and the Framers not only wrote the criminal jury trial right directly into the Constitution,<sup>114</sup> but went on to ensure that it was guaranteed in the Sixth

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107. See *Taylor*, 419 U.S. at 533; *Strauder*, 100 U.S. at 310. The popular reference to a “jury of one’s peers” likely has its root in the Magna Carta, which states that “[n]o freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land.” *Featured Documents*, NAT’L ARCHIVES & RECORDS ADMIN., [http://www.archives.gov/exhibits/featured\\_documents/magna\\_carta](http://www.archives.gov/exhibits/featured_documents/magna_carta) (last visited May 12, 2016).

108. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). As the Supreme Court explained in *Holland v. Illinois*, the fair cross-section requirement is “not explicit in [the] text” of the Sixth Amendment, “but is derived from the traditional understanding of how an ‘impartial jury’ is assembled. That traditional understanding includes a representative venire, so that the jury will be . . . ‘drawn from a fair cross section of the community.’” *Holland v. Illinois*, 493 U.S. 474, 480 (1990) (emphasis in original) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975)).

109. *Glasser v. United States*, 315 U.S. 60, 86 (1942).

110. *Smith v. Texas*, 311 U.S. 128, 130 (1940); see ABRAMSON, *supra* note 106, at 29–30 (noting that at the time of the Constitution’s drafting, the supporters of the localized jury “were not perfect populists, [but] . . . they saw in the jury an embodiment of local people representing local values”).

111. JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTING PANELS* 9 (1977) (“The jury’s legitimacy has always rested in its capacity to express fairly the community’s conscience; what has changed over the centuries is *how* a jury best expresses the community’s conscience.”).

112. The criminal jury trial had been in place in England for several centuries before the British colonists arrived in America, and “[t]hose who emigrated to this country from England brought with them this great privilege ‘as their birthright and inheritance.’” *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (quoting *Thompson v. Utah*, 170 U.S. 343, 349–50 (1898)). Accordingly, when the First Congress of the American Colonies sought to identify “the most essential rights and liberties of the colonists,” it resolved “that trial by jury is the inherent and invaluable right of every British subject in these colonies.” *Duncan*, 391 U.S. at 152 (quoting *SOURCES OF OUR LIBERTIES* 270 (Richard L. Perry, ed. 1959)).

113. The Declaration of Independence lists the injuries that justified revolt, including the charge that the King of England “depriv[ed] us in many cases, of the benefits of Trial by Jury.” THE DECLARATION OF INDEPENDENCE (U.S. 1776).

114. Article III provides that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” U.S. CONST. art. III, § 2, cl. 3.

Amendment.<sup>115</sup> As the Supreme Court concluded, even a “skeletal history” of the right makes it clear that “trial by jury in criminal cases is fundamental to the American scheme of justice.”<sup>116</sup>

The fundamental role of the criminal jury right is also reflected in the history of states’ constitutions. As the Supreme Court has observed, “[t]he constitutions adopted by the original States guaranteed jury trial . . . [and] the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.”<sup>117</sup> Many state constitutions use the Sixth Amendment’s “impartial jury” language and have similarly interpreted it to entitle defendants to a jury selected from a “fair-cross-section” of the community.<sup>118</sup>

Finally, the fair-cross-section right is enshrined in a federal statute—the Jury Selection and Service Act—and extends to all litigants in civil or criminal cases, as discussed in more detail in Part III. All 50 states, as discussed in Part IV, have enacted statutes or have interpreted their state laws to guarantee criminal defendants the right to be tried by a jury selected from a fair cross-section of the community.

As the drafters of the federal and state constitutions and statutes recognized, and as the Supreme Court has consistently reinforced, a jury’s commonsense judgment acts as an “inestimable safeguard,”<sup>119</sup> interposing community members between the defendant and unworthy prosecutions. But a jury can come to such a commonsense judgment only “as long as it consists of a group of laymen representative of a cross section of the community.”<sup>120</sup>

## 2. Racially Unrepresentative Juries Fail to Reflect a Community’s Judgment

The Supreme Court’s fair cross-section mandate is based on the recognition that jurors’ deliberations are substantively enriched by the diverse perspectives of people with different life experiences. The absence of any distinctive group “deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented,” for “the effect is to remove from the jury room qualities of human nature and varieties

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115. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .” (emphasis added)); see also Amar, *supra* note 99, at 1183 (“Guaranteed in no less than three amendments, juries were at the heart of the Bill of Rights. The Fifth safeguarded the role of the grand jury; the Sixth, the criminal petit jury; and the Seventh, the civil jury.”). As Professor Amar has observed: “If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury.” *Id.* at 1190.

116. *Duncan*, 391 U.S. at 149, 153; see also Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1115–33 (2014).

117. *Duncan*, 391 U.S. at 153; see also Amar, *supra* note 99, at 1183 (“[T]he only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases.”).

118. See, e.g., *State v. Fredericks*, 507 N.W.2d 61, 64–65 (N.D. 1993) (“[W]e . . . read the Sixth Amendment’s impartiality and fair-cross-section requirements into our state constitution.”).

119. *Duncan*, 391 U.S. at 156.

120. *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972).

of human experience, the range of which is unknown and perhaps unknowable.”<sup>121</sup> This is particularly important because jurors do not simply decide the existence of objective facts, they make subjective judgments that depend on discretion, morality, determinations of credibility, and life experiences.<sup>122</sup>

For example, a jury might be called on to evaluate whether a defendant is guilty of Assault on a Police Officer based on the officer’s testimony that the defendant resisted being handcuffed.<sup>123</sup> A representative jury’s evaluation of the officer’s testimony can involve what jury scholar Jeffrey Abramson calls a “conversation informed by diversity,” where the conduct of the officer and the defendant can be “studied from competing angles and different perspectives until the jury achieves the impartiality” that the Sixth Amendment demands.<sup>124</sup> After all, jurors do not simply cast individual votes and go home; they have a conversation that cumulates in consensus. So although “demographics matter as to where jurors start,” the deliberation process requires jurors to listen to others’ perceptions of the same evidence.<sup>125</sup> The inclusion of these different perspectives “add[s] to the thoroughness and accuracy of deliberation.”<sup>126</sup>

This relationship between diverse juries and the quality of deliberation was substantiated in “a rare empirical test of the prediction that information exchange during deliberation differs depending on the composition of a jury.”<sup>127</sup> The “[a]nalysis of . . . deliberations indicated that the racial composition of the jury influenced the content and scope of the discussions.”<sup>128</sup>

Specifically, “[c]ompared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial (e.g., physical evidence that was not presented, witnesses who did not testify).”<sup>129</sup> The study showed that “[r]acially mixed juries were also more likely to discuss racial issues such as racial

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

122. See Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133, 140 (1996) (“To the extent that jury questions are subjective, representative panels make for better decision-makers. Objective questions do not require diversity; a homogeneous, unrepresentative panel can answer an objective question correctly. Where subjective answers are required, however, diversity is essential. Only a representative jury can accurately anticipate what society itself would deem to be just were all of its members privy to trial information.” (footnotes omitted)); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 997–98 (1998).

123. See *Coghill v. United States*, 982 A.2d 802, 808 (D.C. 2009).

124. Jeffrey Abramson, *Two Ideals of Jury Deliberation*, U. CHI. LEGAL F. 125, 131 (1998).

125. *Id.* at 133.

126. ABRAMSON, *supra* note 106, at 11.

127. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1027–28 (2003).

128. *Id.* at 1028.

129. *Id.*

profiling during deliberations, and more often than not, Whites on these heterogeneous juries were the jurors who raised these issues.”<sup>130</sup> A representative jury is thus an “impartial” jury, not because the different prejudices of individual jurors cancel one another out,<sup>131</sup> but because the jury “is greater than the sum of its respective parts.”<sup>132</sup> It is the process of deliberation rather than the presence of diversity that produces a verdict scrubbed clean of partiality and biases.<sup>133</sup>

African-American and Latino underrepresentation, in particular, diminishes the quality of deliberation about issues frequently relevant in criminal trials. Whites and people of color, as a general rule, have different life experiences based in part on race. And, as explained earlier, the fair cross-section analysis is concerned only with the “general rule,” as it applies only to the aggregate representation of groups in jury pools—not to the representation of individuals on specific juries.

Some of those aggregate differences include that black people are more likely than white people to have been victimized by crime.<sup>134</sup> African-Americans and Latinos also tend to have different experiences in the criminal justice system; even controlling for other factors, they are more likely to be stopped by police,<sup>135</sup> more likely to be searched,<sup>136</sup> more likely to be

130. *Id.*

131. The Supreme Court originally appeared to credit this conception of the jury in some cases, see, e.g., *Ballew v. Georgia*, 435 U.S. 223, 233 (1978), but this conception of the jury as a representative, rather than deliberative body has been subsequently explicitly rejected by the Supreme Court in *Lockhart v. McCree*, 476 U.S. 162, 177–78 (1986).

132. *State v. LaMere*, 2 P.3d 204, 212 (Mont. 2000) (recognizing that “diversity begets impartiality”).

133. ABRAMSON, *supra* note 106, at xi (“Representative juries are better able to ‘mix it up’ during deliberation, the preconceptions of some calling into doubt the predisposition of others.”).

134. NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 10 (2014), [http://sentencingproject.org/doc/publications/rd\\_Race\\_and\\_Punishment.pdf](http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf) [hereinafter “RACE AND PUNISHMENT”] (“In 2008, African Americans were 78% more likely than whites to experience household burglary, 133% more likely to experience motor vehicle theft, and experienced other types of theft at about the same rate.” (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES (2010))); *id.* (“Hispanics were 46% more likely than non-Hispanics to be victims of property crimes.” (citing BUREAU OF JUSTICE STATISTICS, *supra*)); *id.* (“In 2012, blacks were 66% more likely than whites to be victims of sexual assault, robbery, aggravated assault, and simple assault.” (citing JENNIFER TRUMAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION, 2012 (2013))); *id.* (“Hispanics were 37% more likely than whites to experience these crimes.” (citing JENNIFER TRUMAN ET AL., *supra*)).

135. *Id.* at 28 (“In 2011, blacks were 30% more likely than whites and Hispanics to report a recent traffic stop, though this disparity has faded in some recent years.”) (citing LYNN LANGSTON & MATTHEW DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 3 (2013)); CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 7 (2011).

136. RACE AND PUNISHMENT, *supra* note 134, at 28 (“Once pulled over, blacks and Hispanics were three times as likely as whites to be searched (6% and 7% versus 2%).”) (citing LANGSTON & DUROSE, *supra* note 135, at 9).

arrested,<sup>137</sup> more likely to be charged with a serious offense,<sup>138</sup> more likely to be detained pending trial,<sup>139</sup> more likely to be convicted,<sup>140</sup> more likely to be incarcerated,<sup>141</sup> and more likely to receive a severe sentence.<sup>142</sup> African-

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137. NAZGOL GHANDNOOSH, *THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM* 11 (2015) [hereinafter “BLACK LIVES MATTER”] (“A recent investigation of all arrests . . . in over 3,500 police departments across the country found that 95% of departments arrested black people at a higher rate than other racial groups.”) (citing Brad Heath, *Racial Gap in U.S. Arrest Rates: ‘Staggering Disparity,’* USA TODAY (Nov. 19, 2014, 2:24 PM), <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207>); RACE AND PUNISHMENT, *supra* note 133, at 28 (stating that “blacks were twice as likely as whites to be arrested during a traffic stop”) (citing EITH & DUROSE, *supra* note 132, at 7); THE SENTENCING PROJECT, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICY MAKERS* 6 (stating that African-Americans constituted only 14% of drug users in 2006, but represented 35% of those arrested for drug offenses).

138. RACE AND PUNISHMENT, *supra* note 134, at 25 (“Prosecutors are more likely to charge people of color than whites with crimes that carry heavier sentences under mandatory minimum and habitual offender laws.”) (citing Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 80 (2013)); Charles Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481 (1998).

139. BLACK LIVES MATTER, *supra* note 137, at 11 (“Blacks are more likely than whites to be confined awaiting trial.”) (quoting NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 93 (2014)).

140. *Id.* at 12 (stating that “people of color . . . are more likely to be convicted”) (citing NAT’L RESEARCH COUNCIL, *supra* note 138, at 93–94); *see also* OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM, *REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM* 3 (1994) (stating that “the evidence suggests that, as compared to similarly situated nonminorities: . . . minorities are more likely to be convicted”).

141. BLACK LIVES MATTER, *supra* note 137, at 11 (stating that “[b]lacks are more likely than whites . . . to receive incarcerative rather than community sentences”) (quoting NAT’L RESEARCH COUNCIL, *supra* note 139, at 93).

142. RACE AND PUNISHMENT, *supra* note 134, at 26 (“Judges are also more likely to sentence people of color than whites to prison and jail and to impose longer sentences, even after accounting for differences in crime severity, criminal history, and educational level.”) (citing Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges’ Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145 (2001)); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?* 65 AM. SOC. REV. 705 (2000); Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427 (2000).

Americans are also more likely to report unfair<sup>143</sup> or physically threatening<sup>144</sup> experiences with the police than are whites. To the extent that parallel statistics exist regarding the perspectives of Latinos as a group, the results are similar.<sup>145</sup>

There is substantial evidence, presumably as a result of those experiences, that African-Americans and whites (again, as groups if not as individuals) have different perspectives on courts and the justice system.<sup>146</sup> Specifically, African-Americans are less likely than whites to have confidence in the police,<sup>147</sup> and are more likely to think police engage in brutality<sup>148</sup> and racism.<sup>149</sup> Most significantly, African-Americans are more likely than white

143. RACE AND PUNISHMENT, *supra* note 134, at 29 (“[O]ne of every three African Americans reported being treated unfairly by the police because of their race, whereas closer to only one of ten whites reported unfair treatment for any reason at all.”) (citing MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 41–42 (2010)); *id.* at 29 n.158 (“Similarly, a 1999 Gallup survey found that blacks are nearly twice as likely as whites to report personal unfair treatment by the police (43% versus 24%, respectively), and nearly four times as likely to report experiencing unfair police treatment because of their race (34% versus 9%, respectively.”) (citing Mark Gillespie, *One Third of Americans Believe Police Brutality Exists in Their Area*, GALLUP (Mar. 22, 1999), <http://www.gallup.com/poll/4003/one-third-americans-believe-police-brutality-exists-their-area.aspx>); Ronald Weitzer & Steven A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME AND DELINQUENCY 494, 505 (1999) [hereinafter “Perceptions of Discrimination”] (In a study based on a combination of three nationally representative telephone surveys of adults in the U.S. in 1995 and 1995, for a total of 3934 respondents, 38% of Black respondents answered “yes” to the question “Have you personally ever felt treated unfairly by the police or by a police officer specifically because you are [White/Black]?” as compared to only 7.3% of whites.).

144. RACE AND PUNISHMENT, *supra* note 134, at 29 (“Several surveys conducted between 2002 and 2008 have shown that Hispanics were up to twice as likely, and blacks were up to three times as likely as whites to experience physical force or its threat during their more recent contact with the police.”) (citing CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T. OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 6, 12 (2011)).

145. *See supra* notes 136–46.

146. ABRAMSON, *supra* note 106, at 167 (observing that “whites and blacks occupy different places in American society and that these differences affect attitudes toward the death penalty, police officers, and the criminal justice system. Because such differences exist, we strive to recruit jurors from a cross section of the community.”).

147. Yesilernis L. Peña et al., *Race and Support for the Criminal Justice System: A Matter of Asymmetry* 14 (Russell Sage Found., Working Paper No. 181, N.D.), [https://www.russellsage.org/sites/all/files/u4/Pena,%20Federico,%20%26%20Sidanius\\_Race%20%26%20Support%20of%20the%20Criminal%20Justice%20System.pdf](https://www.russellsage.org/sites/all/files/u4/Pena,%20Federico,%20%26%20Sidanius_Race%20%26%20Support%20of%20the%20Criminal%20Justice%20System.pdf) (A study that collected data from four consecutive administrations (1997 through 2000) of telephone survey of L.A. County adults demonstrated that “Blacks take a less positive view of the police than Whites do . . . even after conservatism, fear of crime and random violence, and a variety of demographic variables are taken into consideration.”).

148. RACE AND PUNISHMENT, *supra* note 134, at 29 (“[W]hen a 1999 Gallup survey asked Americans about perceptions of police brutality in their neighborhoods, 58% of non-whites believed police brutality took place in their area, in contrast to only 35% of whites.”) (citing Gillespie, *supra* note 143).

149. *Id.* (“[A] 2002 survey found that while three-quarters of blacks and half of Hispanics expressed that the police treated blacks and Hispanics worse than whites in their city, three-quarters of whites stated that the police treated all of these groups equally.”) (citing Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1009–30 (2005));



people to describe the criminal justice system as unfair and racially biased.<sup>150</sup> Indeed, in a 2013 Gallup poll, 68% of African-Americans said that “they saw the criminal justice system as biased against blacks,” as compared to only 25% of whites.<sup>151</sup>

Whites are more likely to overestimate the percentage of crimes committed by African-Americans,<sup>152</sup> are more supportive of harsh penalties in

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*id.* at n. 144 (“Similarly, Pew’s 2013 survey found that seven-in-ten blacks and one-third of whites said that blacks are treated less fairly than whites in their dealings with the police while 68% of blacks and 27% of whites said blacks are not treated as fairly as whites in the courts.”) (citing *King’s Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RESEARCH CTR. (Aug. 22, 2013), <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities>).

150. *Id.* at 29 (A 2013 poll found “the majority of blacks describing the justice system as discriminatory and the majority of whites rejecting this characterization.”) (citing Frank Newport, *Gulf Grows in Black–White Views of U.S. Justice System Bias*, GALLUP (July 22, 2013), <http://www.gallup.com/poll/163610/gulf-grows-black-white-views-justice-system-bias.aspx>); see also NAT’L CTR. FOR STATE COURTS, *HOW THE PUBLIC VIEWS THE STATE COURTS* 8 (2009) (National survey data showed that “[a]lthough most Americans (83%) feel that ‘people like them’ are treated either better or the same as others, that perception is not shared by African-Americans. Two-thirds of African-Americans feel that ‘people like them’ are treated somewhat or far worse than other people [by the courts].”); *id.* (“Almost 70% of African-American respondents think that African-Americans, as a group, get ‘Somewhat Worse’ or ‘Far Worse’ treatment from the courts, whereas over 40% of White/Non-Hispanic and Hispanic respondents have that opinion.”); *id.* at 30 (National survey data showed that “as compared to Whites/Non-Hispanics, both African-Americans and Hispanics were significantly less likely to agree” that “[j]udges are generally honest and fair in deciding cases.”); Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POL. 762–83 (2005); Weitzer & Tuch, *supra* note 143, at 498 (Data from a combination of three nationally representative telephone surveys of adults in the U.S. in 1995 and 1995, for a total of 3934 respondents, demonstrated that “[m]ore than 7 in 10 Blacks, but fewer than 4 in 10 Whites, think that Blacks receive harsher treatment” in the operations of the criminal justice system.); Karen McGuffee et al., *Is Jury Selection Fair? Perceptions of Race and the Jury Selection Process*, 20 CRIM. JUST. STUD. 445, 452 (2007) (A national sample of 1182 respondents revealed that “68% of African-Americans believe the courts give harsher sentences to African-Americans compared to only 14% of whites who endorse this view” and “[w]hile over one-half (56%) of whites believe the system treats people as fair, only about one-fourth (26%) of African-Americans view the system as such. Even more striking, only 39% of African-Americans trust the courts to provide a fair trial while 74% of whites endorse a view of fairness in the courts.”) (citing Jon Hurwitz & Mark Peffley, *Racial Polarization on Criminal Justice Issues: Sources and Political Consequences of Fairness Judgments* (n.d.) (unpublished manuscript) [http://www.uky.edu/AS/PoliSci/Peffley/pdf/PeffleyHurwitzAPSAPaper\\_8-22-01\\_.PDF](http://www.uky.edu/AS/PoliSci/Peffley/pdf/PeffleyHurwitzAPSAPaper_8-22-01_.PDF)).

151. RACE AND PUNISHMENT, *supra* note 134, at 33 (noting that “this represented the largest gap on this question since the early 1990s”) (citing Newport, *supra* note 150).

152. *Id.* at 13 (“A national survey conducted in 2010 asked white respondents to estimate the percentage of burglaries, illegal drug sales, and juvenile crime committed by African Americans. The researchers found that the respondents overestimated actual black participation in these crimes—measured by arrests—by approximately 20 to 30 percent (between 6.6 to 9.5 percentage points).”) (citing Justin T. Pickett et al., *Reconsidering the Relationship Between Perceived Neighborhood Racial Composition and Whites’ Perceptions of Victimization Risk: Do Racial Stereotypes Matter?*, 50 CRIMINOLOGY 145, 155–56, 160 (2011)).

the criminal system,<sup>153</sup> and are also more likely to think that people of color are adequately represented in the jury system.<sup>154</sup>

Accordingly, the primary problem with the all-white jury is not that the white jurors are racist, although, as Justice O'Connor has observed: "It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials . . ." <sup>155</sup> Nor is the problem that an all-white jury would deprive an African-American defendant of a number of "guaranteed" pro-defense votes from African-American jurors, because aggregate data about white and black perspectives cannot predict how individual people will vote on a particular case.<sup>156</sup> Rather, the real problem with an all-white jury is that its deliberations are impoverished by the absence of the different perspectives that African-Americans and Latinos might bring to the table. In particular, the jury's role as a hedge against government oppression is undermined by the absence of a perspective that may be particularly attentive to how the government can abuse its power.

Consider a dramatic study conducted by Duke University researchers of over 700 criminal trials over a ten year period.<sup>157</sup> The researchers compared conviction results when there was at least one African-American in the jury pool, with the results when there were no African-Americans in the jury

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153. *Id.* at 9 ("When asked on another national survey whether 'the courts in this area deal too harshly or not harshly enough with criminals,' 73% of whites responded 'not harshly enough' in contrast to 64% of blacks during the 2000s.") (citing James D. Wright et al., *Crime, Punishment, and Social Disorder: Crime Rates and Trends in Public Opinion over More than Three Decades*, in *SOCIAL TRENDS IN AMERICAN LIFE: FINDINGS FROM THE GENERAL SOCIAL SURVEY SINCE 1972*, at 146, 158 (Peter V. Marsden ed., 2012)).

154. NAT'L CTR. FOR STATE COURTS, *supra* note 150, at 7. ("Fifty-six percent of respondents agree that 'Most juries are not representative of the community' and, as compared to Whites/Non-Hispanics, both African-Americans and Hispanics were more likely to agree.").

155. *Georgia v. McCollum*, 505 U.S. 42, 68–69 (1992) (O'Connor, J., dissenting) ("[T]he outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors."); *see also id.* at 60–61 (Thomas, J., concurring) (asserting that it remains true "that the racial composition of a jury may affect the outcome of a criminal case," and that as a result, "securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial"); Gary A. Hengstler, *How Judges View Retrial of L.A. Cops*, A.B.A. J., Aug. 1993, at 70, 70–71 (A 1992 survey of 401 state and federal judges revealed that 34% of them "concluded that race probably affects the verdict of an all-white jury when one of the parties on trial is black."). For a discussion of the role of implicit bias in courtroom, see Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 835–42 (2012).

156. *See, e.g.*, Sommers & Ellsworth, *supra* note 127, at 1018 ("In many of the mock juror studies reviewed above, Black jurors rated Black defendants as more likely to be guilty than not and demoted conviction rates as high as 80%."); *see also* Peters v. Kiff, 407 U.S. 493, 503–04 (1972) ("It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.").

157. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1027–28 (2012).

pool.<sup>158</sup> And the results were striking. When there was at least one black juror, juries convicted black and white defendants at almost equal rates.<sup>159</sup> But when the trial was heard by juries from a pool lacking any African-Americans, the all-white juries convicted African-American defendants 81% of the time, but convicted white defendants only 66% percent of the time.<sup>160</sup> This study and others<sup>161</sup> “rais[e] obvious concerns about whether black defendants receive a fair trial in jurisdictions with a small proportion of blacks in the jury pool.”<sup>162</sup>

### 3. Government Interest in Racially Representative Juries

The government shares the criminal defendant’s interest in racially representative juries.<sup>163</sup> As the Supreme Court has recognized, trial by a lay jury is “critical to public confidence in the fairness of the criminal justice system.”<sup>164</sup> Why do we generally not run into the streets and riot when the government drags away one of our neighbors and locks him up? In part, we refrain because the jury’s role increases our faith in the correctness of the outcome.<sup>165</sup> Our fears that our neighbor’s conviction was unjust (because the policeman was biased, or the prosecutor had only weak evidence, or the judge cares only about reelection) are mitigated when we know that members of our

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158. *Id.* at 1019.

159. *Id.*

160. *Id.*

161. McGuffee et al., *supra* note 150, at 451 (noting that although studies of the relationship between racial composition of juries and trial outcomes have produced contradictory evidence, “[t]he vast majority of . . . studies report that white mock jurors are more apt to view a black defendant than a white defendant as guilty”); Sommers & Ellsworth, *supra* note 127, at 1010 (“[N]o consensus has been reached regarding the influence of a defendant’s race on White mock jurors. Some studies have suggested that White jurors are biased against Black defendants, others have yielded no evidence of bias, and a few researchers have found that White jurors are biased against White defendants. But substantial evidence exists to support the conclusion of many legal scholars that, at least under some conditions, White jurors exhibit racial bias in their verdicts and sentencing decisions.”).

162. Anwar et al., *supra* note 157, at 1021.

163. Only the defendant has standing to enforce the constitutional fair cross-section guarantee, but the JSSA and many state statutes extend standing to the government.

164. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *see also Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“Jury service . . . ensures continued acceptance of the laws by all of the people.”); *Peters v. Kiff*, 407 U.S. 493, 502–03 (1972) (“[U]nconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.”). Indeed, one national survey revealed that “[c]onfidence in local police and in the U.S. Supreme Court is associated with confidence in the courts in the community.” NAT’L CTR. FOR STATE COURTS, *HOW THE PUBLIC VIEWS THE STATE COURTS* 13 (1999).

165. “Procedural justice research establishes that the perception of being treated fairly is more important than a favorable outcome in predicting whether a person views authority as legitimate.” K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 274 (2009).

own community were the ones to reach the ultimate conclusion that our neighbor was guilty.<sup>166</sup>

Juries that are racially representative are particularly critical to public confidence in the justice system.<sup>167</sup> “One of the goals of our jury system is ‘to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.’”<sup>168</sup> That goal can only be realized by a representative jury system, as the evidence shows that people believe that racially representative juries are more fair than racially homogenous juries.<sup>169</sup> Indeed, some of the modern era’s largest civil protests and disturbances stemmed from public outrage over verdicts rendered by juries that were not racially representative,<sup>170</sup> or the failure to subject racially charged events to jury

166. See McGuffee et al., *supra* note 150, at 456 (citing a study of 138 respondents in Tennessee county who received and responded to a jury summons, in which “[t]he overwhelming majority of respondents (92%) believe that most jury verdicts are correct, and 96% of the respondents believe that juries try hard to do the right thing”).

167. ABRAMSON, *supra* note 106, at 202–03 (“The jury gives legitimacy to an accused’s imprisonment, even execution, because ordinary persons like ourselves give the verdict. But the jury’s ability to maintain public confidence in the administration of justice is fragile. It depends in part on drawing the jury from the community at large so that all groups have a potential say in how justice is done.”); see also OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM, *supra* note 140, at 78 (“The perception of fairness can be critical, and it is difficult to achieve that without racial or ethnic diversity among the jurors who are deciding a case, particularly when one of the litigants is a member of a racial or ethnic minority. Therefore, it is hard to overstate the significance of the lack of diversity on jury panels . . .”).

168. *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (quoting *Powers v. Ohio*, 499 U.S. 400, 413 (1991)).

169. Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1184 (1994) (“[T]here is some support for the claim that jury representativeness is one of those [procedural] features that matters most to people when assessing the fairness of jury proceedings.”); see also Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1049 (2003) (citing a survey of 320 jury-eligible individuals that demonstrated “when the jury did not include minority members, observers viewed the trial as less fair when it produced a guilty verdict than when it produced a not guilty verdict. . . . [and] when the process fails to produce a heterogeneous jury (i.e., the all-White jury), then observers are more likely to find a trial that produced a negative outcome for the defendant to be unfair”); Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VA. J. SOC. POL’Y & L. 645, 662, 665 tbl. I (1997) (citing a telephone survey of California residents conducted in 1995 in the wake of the O.J. Simpson trial, in which two-thirds (67%) agreed that the “decisions reached by racially diverse juries are more fair than decisions reached by single race juries”). Even Justice Thomas has recognized that “[t]he public, in general, continues to believe that the makeup of juries can matter in certain instances.” *McCollum*, 505 U.S. at 61 (Thomas, J., concurring).

170. The reaction to the acquittal of the police officers accused of beating Rodney King—by a jury that included no African Americans—is the most striking example. See Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL’Y & L. 445, 450 n.21 (1994) (reviewing HIROSHI FUKURAI ET AL., *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE* (1993) (citing Lou Cannon, *National Guard Called to Stem Violence After L.A. Officers’ Acquittal in Beating; Justice Dep’t to Review Case*, WASH. POST (Apr. 30, 1992),

scrutiny.<sup>171</sup> Consider the civil disturbances that followed the Ferguson, Missouri shooting of Michael Brown by Darren Wilson, a white police officer. One of the largest protests that followed the announcement that Wilson would not be indicted was in St. Louis, where “about 200 protesters staged a mock trial of Darren Wilson,”<sup>172</sup> thereby inserting the community judgment that is missing in the absence of trial by a representative jury.

The justice system particularly needs the legitimizing power of representative juries in light of the gross overrepresentation of people of color in our jails and prisons.<sup>173</sup> As explained above, these figures cannot be explained by disproportionate criminal involvement.<sup>174</sup> Public confidence in the justice system, as highlighted by a concurring judge evaluating a fair cross-section claim, is likely undermined by “the failure of a criminal law system, before which is tried a large number of persons from an ethnic group, to include within its mechanisms the peers of those charged, at least in some reasonable measured proportion to their membership in the population.”<sup>175</sup> “Given the requirements of the Sixth Amendment and the importance of both the reality and the appearance of fairness in our criminal justice system,

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<https://www.washingtonpost.com/archive/politics/1992/04/30/national-guard-called-to-stem-violence-after-la-officers-acquittal-in-beating/90304d56-6bab-4b94-80f7-5a95657c1db8>).

Another striking example is the deadly riots in Miami following the acquittal by an all-white jury of the white officers charged with the fatal beating of Arthur McDuffie, a black motorist. *See id.* (citing Keith Harrison, *Reaction to Verdict Is Another Hung Jury*, WASH. POST, Aug. 11, 1990, at A10). More recently, national protests occurred in the wake of the not-guilty verdict by a majority-white jury for George Zimmerman, charged with the shooting death of Trayvon Martin. *See* Michael Pearson et al., *Verdict Doesn't End Debate in Trayvon Martin Death*, CNN (July 15, 2013, 9:36 PM), <http://www.cnn.com/2013/07/15/justice/zimmerman-verdict-protests> (“[D]emonstrators from a wide variety of races. . . expressed the same belief: that Martin’s death was spurred by racial profiling and that Zimmerman’s acquittal was unjust.”).

171. For example, nationwide protests occurred after a grand jury failed to indict police officers in the police killing of Eric Garner in New York. *See* J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), [http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?\\_r=0](http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0). Another recent example is the police killing of Michael Brown in Ferguson, Missouri. *See* Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

172. Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html> (emphasis added).

173. *See* RACE AND PUNISHMENT, *supra* note 134, at 5 (“While blacks and Latinos together comprise 30% of the general population, they account for 58% of prisoners.”) (citing *QuickFacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/00> (last visited May 11, 2016)); *see also* E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012 (2014), <http://www.bjs.gov/content/pub/pdf/p12targ112.pdf>.

174. *See generally* BLACK LIVES MATTER, *supra* note 137 (describing sources of racial disparity in the criminal justice system).

175. *United States v. Pion*, 25 F.3d 18, 27 (1st Cir. 1994) (Torruella, J., concurring) (emphasis added).

creating a jury pool that represents a fair cross section of the community is a compelling governmental interest.”<sup>176</sup>

#### 4. American Juries May Not Be Racially Representative

Although racially representative juries are a compelling government interest and a critical constitutional entitlement, there is substantial evidence that jury pools across the county are disproportionately white.

Much of that evidence comes directly from court-appointed committees tasked with assessing the role of race in the justice system.<sup>177</sup> Indeed, court-appointed committees “throughout the country have found minority underrepresentation in jury composition, most notably in the makeup of the jury pool from which the jury ultimately is selected.”<sup>178</sup> As one state supreme

176. *United States v. Ovalle*, 136 F.3d 1092, 1106 (6th Cir. 1998).

177. *See, e.g.*, ALASKA SUPREME COURT ADVISORY COMM. ON FAIRNESS & ACCESS, REPORT OF THE ALASKA SUPREME COURT ADVISORY COMMITTEE ON FAIRNESS AND ACCESS 83 (1997) (“Ethnic minority respondents were under-represented in some communities when compared to the proportion of ethnic minorities counted in census data.”); FLA. SUPREME COURT RACIAL & ETHNIC BIAS COMM’N, “WHERE THE INJURED FLY FOR JUSTICE”: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 13 (Deborah Hardin Wagner ed., 1991) (“The present system of selecting jurors . . . does not result in juries which are racial and ethnic composites of the community.”); MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., FINAL REPORT S-13 (1993) (“[J]ury pools rarely, if ever, are representative of the racial composition of our communities.”); N.D. COMM’N TO STUDY RACIAL & ETHNIC BIAS IN THE COURTS, FINAL REPORT AND RECOMMENDATIONS 18 (2012) (“Minority under-representation on North Dakota juries is a continuing concern for state courts.”); OHIO COMM’N ON RACIAL FAIRNESS, THE REPORT OF THE OHIO COMMISSION ON RACIAL FAIRNESS 34 (1999) (“The under-representation of minorities, especially those of low socioeconomic status has been found to be the rule throughout the United States. More than likely, Ohio experiences similar patterns of under-representation. . . . We received evidence of such under-representation . . .”); OR. SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYS., *supra* note 40, at 3 (1994) (“Too few minorities are called for jury duty, and even fewer minorities actually serve on Oregon juries.”); PAULA L. HANNAFORD-AGOR & G. THOMAS MUNSTERMAN, CTR. FOR JURY STUDIES, NAT’L CTR. FOR STATE COURTS, COURT SERVS. DIV., THIRD JUDICIAL CIRCUIT OF MICHIGAN JURY SYSTEM ASSESSMENT i (2006) (“[T]he proportion of African-Americans in the . . . jury pool was approximately half of what was expected given their representation in the community.”); PA. SUPREME COURT COMM. ON RACIAL & GENDER BIAS IN THE JUSTICE SYS., FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 54 (2003) (“[Jury selection policies] fail at each step of the process to include a representative number of minorities.”); S.D. EQUAL JUSTICE COMM’N, FINAL REPORT AND RECOMMENDATIONS 8 (2006) (“Juries in South Dakota rarely represent the racial composition of a community.”); Ga. Supreme Court Comm’n on Racial & Ethnic Bias in the Court Sys., *Let Justice Be Done: Equally, Fairly, and Impartially*, 13 GA. ST. U. L. REV. 687, 808–09 (1996) (“Information from eleven counties . . . shows that the proportion of [non-black] ethnic minorities serving in these communities are generally less than the proportion [reported in the census].”); J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1476 (1996) (“The . . . experience of judges and counsel in Los Angeles is that the jury panels assigned to courtrooms are not truly representative of the community.”); N.Y. State Judicial Comm’n on Minorities, *Report of the New York State Judicial Commission on Minorities*, 19 FORDHAM URB. L.J. 181, 242 (1992) (“Minorities are significantly underrepresented on many juries in the court system.”).

178. NEB. MINORITY & JUSTICE TASK FORCE, FINAL REPORT 17 (2003) (“[M]any researchers

court commission observed: “People of color waiting for justice or judgment abound. Yet, somehow, people of color on the other side of the courtroom—in the jury box—are very hard to find. In fact, jury pools rarely, if ever, are representative of the racial composition of our communities.”<sup>179</sup> Even judges have acknowledged that the fair cross-section challenges raised by criminal defendants demonstrate “real problems with the representation of African-Americans on our juries, and the crisis of legitimacy it creates,”<sup>180</sup> and describe the evidence of underrepresentation as “disquieting,”<sup>181</sup> “troubling,”<sup>182</sup> and “worthy of concern.”<sup>183</sup>

So this is the problem: criminal defendants have a unique constitutional entitlement that does not require proof of discrimination, the violation of which is both invisible and damaging, and there is evidence that this constitutional right is in jeopardy. This Article examines the difference between the federal and state legislatures’ responses to that same problem. While Congress responded by enacting a robust statute that provides defendants with the tools to enforce the fair cross-section right, most states have enacted only incomplete substitutes. Many of these anemic state statutes miss the very components of the federal law that make it possible for defendants to enforce their cross-section rights.

### III. THE FAIR CROSS-SECTION RIGHT IN FEDERAL COURTS: AN EXPLICIT RIGHT TO DISCOVERY

The Sixth Amendment’s fair cross-section entitlement was translated into a statutory right in 1968 with the federal Jury Selection and Service Act

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have found that this is ‘the rule’ rather than the exception.” (citation omitted)).

179. MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., *supra* note 177, at S-13.

180. *United States v. Green*, 389 F. Supp. 2d 29, 80 (D. Mass. 2005).

181. *United States v. Royal*, 174 F.3d 1, 12 (1st Cir. 1999) (describing the statistics offered regarding the representation of African-Americans as “disquieting” and the jury system at issue as “a situation leaving much to be desired”); *see also* *State v. Tremblay*, No. P1 97-1816AB, 2003 WL 23018762, at \*15 & n.19 (R.I. Mar. 19, 2003) (finding the material presented by the defendant “unsettling” and “disquieting”).

182. *United States v. DeFries*, 129 F.3d 1293, 1301 n.5 (D.C. Cir. 1997) (“The import of appellants’ evidence is troubling . . . and . . . the statistical disparities, if supported by [additional evidence], could support an inference that a jury venire was not composed of a fair cross-section of the community.”).

183. *United States v. Shine*, 571 F. Supp. 2d 589, 599 (D. Vt. 2008); *see also* *People v. Currie*, 87 Cal. App. 4th 225, 235 (Cal. Ct. App. 2001) (“[U]nderrepresentation of African-Americans on . . . jury venires . . . is a long-standing problem.”); *Commonwealth v. Tolentino*, 663 N.E.2d 846, 851 (Mass. 1996) (“[Evidence] does not negate totally the possibility that jury venires . . . do not adequately reflect the racial and ethnic composition of the county populations.”); *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994) (“[T]he evidence—both anecdotal and statistical—indicates that there is some underrepresentation in fact.”); *State v. Ramseur*, 524 A.2d 188, 239 (N.J. 1987) (“[T]he results are still far from optimal. Greater representativeness on the jury panels is obviously desirable.”).

("JSSA").<sup>184</sup> Drafted and enacted in the throes of the civil rights movement, the JSSA was explicitly designed to advance and protect the fair cross-section right.

A. *THE JSSA: PURPOSE AND PLAIN LANGUAGE PROTECT THE FAIR CROSS-SECTION RIGHT AND PROVIDE ACCESS TO JURY RECORDS*

1. The Purpose of the JSSA Is to Protect the Fair Cross-Section Right

The JSSA's first objective is articulated in the "Declaration of Policy," and echoes the Sixth Amendment in asserting that: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."<sup>185</sup> The JSSA's second objective echoes the Fourteenth Amendment's prohibition on discriminatory jury selection.<sup>186</sup>

The JSSA's remaining sections provide for the implementation and enforcement of the two objectives. First, the implementation section requires each district to "specify detailed procedures . . . [that] shall be designed to ensure the random selection of a fair cross section of the persons residing in the community . . ."<sup>187</sup> Second, the enforcement section allows a criminal defendant to "move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of [the JSSA] in selecting the grand or petit jury."<sup>188</sup>

2. Plain Language of the JSSA Provides Access to Jury Records

The enforcement provision of the JSSA provides criminal defendants with a critical tool for enforcing the fair cross-section right: the statute entitles defendants to access the records of the jury selection system. This is the core component that is missing in most states; in the absence of access to jury selection records, the fair cross-section right is essentially unenforceable.

As discussed in Part II, defendants cannot look at a jury and determine whether their fair cross-section right is being violated. Instead, defendants need to be able to examine the steps of the jury selection process that occur before the jury appeared. The only way to conduct that examination is to access jury selection records.

The JSSA explicitly provides for access in two ways: First, the JSSA explicitly provides for access in the section entitled "Challenging compliance

184. 28 U.S.C. §§ 1861–1878 (2012).

185. *Id.* § 1861.

186. *Id.* § 1862 ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.").

187. *Id.* § 1863(b)(3).

188. *Id.* § 1867(a).



with selection procedures.”<sup>189</sup> When a defendant is preparing a motion to dismiss the indictment or to stay the proceedings—on the grounds that the jury office has substantially failed to comply with the JSSA—the defendant is entitled to access “[t]he contents of records or papers used by the jury commission or clerk in connection with the jury selection process.”<sup>190</sup> Specifically, “[t]he parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion.”<sup>191</sup>

Second, the same section of the JSSA explicitly describes a criminal defendant’s entitlement to records as one of the limited exceptions to the general rule of non-disclosure. The JSSA states:

The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except . . . as may be necessary in the preparation or presentation of a motion [by a criminal defendant] under subsection (a) . . . of this section . . . .<sup>192</sup>

In addition to those two explicit entitlements to records before filing a cross-section claim, the JSSA’s description of what happens after a claim is filed implicitly recognizes the defendant’s right of access. After a defendant reviews the otherwise confidential jury selection records (at the discovery stage),<sup>193</sup> he or she must decide whether that information would support a *prima facie* fair cross-section challenge. If the defendant decides to challenge the selection process, the JSSA provides that the motion must include “a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the JSSA].”<sup>194</sup> And in support of that motion, the defendant “shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence.”<sup>195</sup>

In sum, the JSSA explicitly provides that before filing a fair cross-section challenge, a criminal defendant must be permitted to “inspect, reproduce, and copy” the records used in connection with the jury selection process.<sup>196</sup>

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189. *Id.* § 1867.

190. *Id.* § 1867(f).

191. *Id.* (emphasis added).

192. *Id.* (emphasis added).

193. *See supra* Part III.B.1.

194. 28 U.S.C. § 1867(d).

195. *Id.* (emphasis added).

196. *Id.* § 1867(f).

B. SUPREME COURT RECOGNIZES ENTITLEMENT TO JURY RECORDS

1. Supreme Court Relies on JSSA's Purpose and Plain Language in Granting Access to Records

Seven years after the JSSA was enacted, the Supreme Court held the JSSA gives a litigant “an unqualified right to inspection.”<sup>197</sup> The Court recognized this unqualified right in *Test v. United States*, where the defendant alleged that the jury selection process violated both the Sixth Amendment and the JSSA because it did not include a fair cross-section of the community.<sup>198</sup> Mr. Test requested “permission to inspect and copy the jury lists” for both the grand and petit jury, “assert[ing] that inspection was necessary for discovering evidence to buttress his claims.”<sup>199</sup> Notably, the Solicitor General joined with the petitioner in arguing that the JSSA “requires that a defendant be provided access to jury records as a matter of right.”<sup>200</sup>

The Court concluded that the defendant had “essentially an unqualified right to inspect jury lists,”<sup>201</sup> and the “essentially” caveat was only an acknowledgement that “[t]he statute does limit inspection to ‘reasonable times.’”<sup>202</sup> The “essentially unqualified” nature of the right of access meant that the defendant did not have to make any threshold showing before being granted access to the jury records. He simply had to make the timely request.<sup>203</sup>

The Supreme Court held there were two sources for the “essentially unqualified” right of inspection: the statute’s text and its purpose. First, “an unqualified right to inspection is required . . . by the plain text of the statute.”<sup>204</sup> Specifically, the Court held that the JSSA’s two explicit provisions

197. *Test v. United States*, 420 U.S. 28, 30 (1975).

198. *Id.* at 28–29. Specifically, the defendant objected to the underrepresentation of “persons under the age of thirty-five, the Spanish-surnamed, Negroes, and students.” Brief for Petitioner at 3, *Test*, 420 U.S. (No. 73-5993).

199. *Test*, 420 U.S. at 29. The trial judge denied the request, Test was convicted, and the denial of discovery was affirmed without discussion by the Tenth Circuit.

200. Brief for the United States at 5–6, *Test*, 420 U.S. (No. 73-5993); *see also id.* at 10 (“[W]e submit that the Act provides an unqualified right of inspection of jury records.”).

201. *Test*, 420 U.S. at 30 (emphasis omitted).

202. *Id.* at 30 n.4 (1975); *United States v. Layton*, 519 F. Supp. 946, 958 (N.D. Cal. 1981) (“This right is virtually absolute: the only limitation on this right of access is that the inspection must be done at ‘reasonable times.’”) (quoting 28 U.S.C. § 1867(f)); *see also United States v. Alden*, 776 F.2d 771, 773 (8th Cir. 1985) (“The [Supreme] Court further stated that the only limitation authorized by Congress on the disclosure of this information is that the disclosure be at reasonable times.” (emphasis omitted)).

203. Accordingly, because the defendant “was denied an opportunity to inspect the jury lists,” the Court remanded the case back to the trial court “so that [the defendant] may attempt to support his challenge to the jury-selection procedures.” *Test*, 420 U.S. at 30; *see also* Brief for the United States at 18, *Test*, 420 U.S. 28 (No. 73-5993) (discussing how the United States agreed that the lower courts had made materially erred in “depriv[ing] the defendant] of an opportunity to develop the requisite facts bearing on his” fair cross-section claim).

204. *Test*, 428 U.S. at 30.

for access “mak[e] clear that a litigant has essentially an unqualified right to inspect jury lists.”<sup>205</sup>

Second, the Supreme Court held that “an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute’s overall purpose of insuring ‘grand and petit juries selected at random from a fair cross section of the community.’”<sup>206</sup> As the Court explained, “without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.”<sup>207</sup> The United States conceded this point in its brief, recognizing that “such an unqualified right of discovery appears to be necessary to the effective use of the challenge procedures specified in the Act.”<sup>208</sup>

The Court recognized that the JSSA “grants access in order to aid parties in the ‘preparation’ of motions challenging jury-selection procedures” and that it was only after inspection that a defendant could decide whether a fair cross-section claim was warranted.<sup>209</sup>

## 2. Lower Federal Courts Recognize that JSSA’s Purpose Requires Access to Records

Similarly, every federal circuit court to consider the issue has likewise concluded that a litigant has an essentially unqualified right under the JSSA to inspect the jury selection records.<sup>210</sup> The federal courts therefore

<sup>205.</sup> *Id.* (emphasis omitted) (footnote omitted).

<sup>206.</sup> *Id.* (quoting 28 U.S.C. § 1861). The brief for the United States similarly asserted that the right to discovery was required both by the plain language of the statute and by the JSSA’s fair cross-section objective. Brief for the United States at 6, *Test*, 420 U.S. 28 (No. 73-5993) (The Act’s “language and legislative history both indicate that Congress required jury selection plans to be formulated to achieve the goal of selection from a cross section of the community.”).

<sup>207.</sup> *Test*, 420 U.S. at 30.

<sup>208.</sup> Brief for the United States at 8, *Test*, 420 U.S. 28 (No. 73-5993).

<sup>209.</sup> *Test v. United States*, 420 U.S. 28, 30 (1975). Indeed, the defendant had asked the Supreme Court to hold both that he had been improperly denied access to records and that he had made out a prima facie claim. *Id.* at 29 n.2. But the Court remanded on the distinct ground that he had erroneously been denied access, and declined to consider whether the evidence he was able to assemble “was sufficient to establish a prima facie case.” *Id.* at 30 n.2.

<sup>210.</sup> *See, e.g.*, *United States v. Stanko*, 528 F.3d 581, 587 (8th Cir. 2008) (“[A] litigant has essentially an unqualified right to inspect jury lists.” (emphasis omitted) (quoting *Test*, 420 U.S. at 30)); *United States v. Orlando-Figueroa*, 229 F.3d 33, 41 (1st Cir. 2000) (“Criminal defendants have an absolute right to inspect jury selection records . . . .”); *United States v. Miller*, 116 F.3d 641, 658 (2d Cir. 1997) (“[A] defendant plainly has a right to discovery . . . .”); *United States v. Curry*, 993 F.2d 43, 44 (4th Cir. 1993) (defendant is “entitled to inspect, reproduce, and copy the master jury list to support a motion for a new trial based upon a substantial failure to comply with the provisions of [the JSSA] in selecting the grand or petit jury”); *United States v. Studley*, 783 F.2d 934, 938 (9th Cir. 1986) (“The right to inspect jury lists is essentially unqualified.”); *United States v. McLernon*, 746 F.2d 1098, 1123 (6th Cir. 1984) (“The right to inspection extends to all jury selection materials relevant to a complete determination of whether a grand or petit jury has in fact been selected ‘at a random from a fair cross-section of the community.’” (quoting *Test*, 420 U.S. at 30)); *United States v. Koliboski*, 732 F.2d 1328, 1331 (7th Cir. 1984) (“Criminal defendants have the unqualified right to inspect jury lists.”); *United States v. Lawson*,

consistently reaffirm that “[t]o avail himself of the right of access to jury selection records, a litigant need only allege that he is preparing a motion to challenge the jury selection process.”<sup>211</sup> And the unqualified nature of a litigant’s discovery rights means that a “court may not premise the grant or denial of a motion to inspect upon a showing of probable success on the merits of a challenge to the jury selection provisions.”<sup>212</sup> Nor may a court “require a defendant requesting access to jury selection records to submit with that request ‘a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the Act].’”<sup>213</sup> In short, a “court is not free to establish additional requirements that defendants must meet in order to gain access to jury selection records.”<sup>214</sup>

Most importantly, the federal decisions recognize that the purpose of the statute requires the disclosure of jury system records.<sup>215</sup> For only after such

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670 F.2d 923, 926 (10th Cir. 1982) (“The Supreme Court characterizes a litigant’s right to inspect jury lists as essentially unqualified.”); *Gov’t of Canal Zone v. Davis*, 592 F.2d 887, 889 (5th Cir. 1979) (“The Supreme Court’s decision in [*Test*] is dispositive of the issue.”); *see also* *United States v. Pritt*, 458 F. App’x 795, 800 (11th Cir. 2012) (implicitly recognizing that defendant has a right to access “the requisite material to ascertain the facts that, under our precedent, are essential to his jury composition claims”); *United States v. Dean*, 367 F. App’x 83, 87 (11th Cir. 2010) (Defendant “correctly contends that a defendant is always entitled to inspect jury records according to [*Test*].”); *United States v. Hsia*, No. C. 98–0057, 2000 WL 194982, at \*1 (D.D.C. Feb. 2, 2000) (“Defendant therefore is entitled to inspect, reproduce and copy records or papers related to the selection of the grand jury, as authorized by 28 U.S.C. § 1867(f).”).

211. *United States v. Royal*, 100 F.3d 1019, 1025 (1st Cir. 1996) (emphasis added).

212. *United States v. Royal*, 174 F.3d 1, 4 (1st Cir. 1999).

213. *Royal*, 100 F.3d at 1025 (quoting 28 U.S.C. § 1867(d)); *see, e.g., Stanko*, 528 F.3d at 587 (“A defendant may not be denied this unqualified right even when he fails to allege facts which show a probability of merit in the proposed jury challenge, because [g]rounds for challenges to the jury selection process may only become apparent after an examination of the records.”) (quoting *United States v. Beaty*, 465 F.2d 1376, 1380 (9th Cir. 1972)); *United States v. Layton*, 519 F. Supp. 946, 958 (N.D. Cal. 1981) (“No probability of merit need be shown. To avail himself of this right of access to otherwise nonpublic jury selection records, a litigant need only allege that he is preparing a motion challenging the jury selection procedures. There is no doubt on this point whatsoever.”) (citation omitted); *see also Curry*, 993 F.2d at 44 (Litigant does not need to submit a “sworn affidavit showing why the [jury] list would be necessary.”); *United States v. Alden*, 776 F.2d 771, 773–74 (8th Cir. 1985) (“A defendant’s motion may not be denied because it is unsupported by a ‘sworn statement of facts’ . . . . Nor may a motion to inspect be denied because the defendant fails to allege facts which show a probability of merit in the proposed jury challenge.”) (citations omitted); *United States v. Marciano-Garcia*, 622 F.2d 12, 18 (1st Cir. 1980) (“[T]he district court erroneously required [appellants] to provide a ‘sworn statement of facts’ in support of their motion to inspect the court’s jury selection records.”).

214. *Alden*, 776 F.2d at 775. And if a defendant does submit some showing of a problem with the jury system—as the Fifth Circuit explained, “[s]ince the appellants’ right to inspection [i]s unqualified, whether or not the accompanying affidavit establishe[s] a prima facie case of defective jury selection process is of no import.” *Canal Zone*, 592 F.2d at 889.

215. *See, e.g., Royal*, 100 F.3d at 1025 (unqualified right to discovery because “without such access, a litigant will be unable to determine whether he has a meritorious claim”); *Alden*, 776 F.2d at 775 (“Grounds for challenges to the jury selection process may only become apparent after an examination of the records,” thus “[e]ven if the defendant’s anticipated challenges to the jury selection process, as articulated at the time of his motion for inspection, are without

discovery is granted will defendants “be in a position to make informed decisions as to whether the jury selection process warrants challenge and as to whether they prefer trial by a representative jury or before the court.”<sup>216</sup>

The federal courts’ application of the JSSA is not seamless,<sup>217</sup> but discovery requests are routinely granted.<sup>218</sup> This is in sharp contrast with the majority of states, whose laws fail to provide meaningful protection for the fair cross-section right.

#### IV. THE FAIR CROSS-SECTION RIGHT IN STATE COURTS: INSUFFICIENT ACCESS TO RECORDS

All 50 states provide defendants with the same right protected by the Sixth Amendment and the JSSA: the right to a jury selected from a fair cross-section of the community. In almost half the states (23), that right is protected by a statute that has the explicit goal of providing criminal defendants (and other litigants) a jury selected from a fair cross-section—just like the JSSA.<sup>219</sup> In the remaining 27 states that right is protected through case law holding

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merit, the defendant may still inspect the jury records.”); *Marcano-Garcia*, 622 F.2d at 18 (holding that lower court erred when it denied a “motion to inspect the court’s jury selection records, and thus prevented [appellants] from establishing a factual basis for their motion to strike the jury”).

216. *Canal Zone*, 592 F.2d at 890.

217. Some federal judges read the entitlement of access too narrowly, and deny access to information defendants need to determine if a fair cross-section challenge is warranted. *See, e.g.*, *United States v. Miller*, 116 F.3d 641, 658 (2d Cir. 1997) (granting discovery “only to records and papers already in existence,” even though court had failed to collect the race data defendant needed to determine if jury pool complied with fair cross-section guarantee).

218. Most importantly, jury systems are required to disclose demographic information regarding the distinctive groups at issue. Courts consistently order the release of race, ethnicity, and gender data for each stage of the jury selection process. *See, e.g.*, *United States v. Savage*, Nos. 07-550-03, -04, -05, -06, 2013 WL 797417, at \*4 (E.D. Pa. Mar. 5, 2013) (granting access to “[s]preadsheets with statistical breakdowns by race and ethnicity” for jurors on the master wheel, qualified wheel, who were summoned, and who served). When a court has failed to collect race and ethnicity data, courts regularly allow defendants access to otherwise confidential jury questionnaires. *See, e.g.*, *United States v. Percival*, 756 F.2d 600, 614 (7th Cir. 1985). Courts have even permitted defense teams to contact jurors directly to collect race and ethnicity information. *See, e.g.*, *Ramseur v. Beyer*, 983 F.2d 1215, 1230 (3d Cir. 1992). Courts also routinely order the disclosure of the master jury wheels. *See, e.g.*, *United States v. McLernon*, 746 F.2d 1098, 1123 (6th Cir. 1984) (including the names on jury lists); *United States v. Rice*, 489 F. Supp.2d 1312, 1318 (S.D. Ala. 2007). Courts additionally require the disclosure of data and documents related to excuses, deferrals, or disqualifications. *See, e.g.*, *Savage*, 2013 WL 797417, at \*5. Courts also typically order disclosure of data and documents related to the summoning process and responses to summons. *See, e.g.*, *United States v. Holy Land Found. for Relief and Dev.*, No. 3:04-CR-240-G, 2007 WL 1452489, at \*1–2 (N.D. Tex. May 15, 2007), and of other types of jury selection records, such as information about proposed changes to the jury system. *See, e.g.*, *United States v. Williams*, CR. No. 06-000079 DAE, 2007 WL 1223449, at \*6 (D. Haw. Apr. 23, 2007). Finally, courts frequently order jury system administrators to participate in depositions designed to improve the defendant’s understanding of the jury selection system. *See, e.g.*, *United States v. Harvey*, 756 F.2d 636, 643 (8th Cir. 1985).

219. *See infra* Appendix, Part 1.

that criminal defendants are entitled to a fair cross-section, interpreting either the state jury selection statute or the state or federal constitution.<sup>220</sup>

Notwithstanding the shared fair cross-section goal, an original 50-state survey reveals that states are not providing the same access to jury records as the JSSA provides for federal defendants. As a result, criminal defendants in state courts are being denied access to the very records that the federal courts have deemed essential to a fair cross-section challenge. In other words, criminal defendants in state courts are being denied the fair cross-section guarantee. Because without the records, you cannot discover a violation of your right.

A. *STATE STATUTES: INADEQUATE PROTECTION FOR FAIR CROSS-SECTION RIGHT*

The alarming fact revealed by the survey is that, although all 50 states share the same fair cross-section goal as the JSSA, only nine states have a version of the JSSA's explicit statutory entitlement to access jury selection records.<sup>221</sup> And in only two states has the highest court held that a defendant is entitled to access jury records.<sup>222</sup> Therefore, as illustrated in Figure 2, there are 39 states where a defendant has a fair cross-section right, but no clear entitlement to access the records necessary to enforce that right.<sup>223</sup>

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220. *See infra* Appendix, Part 2.

221. *See infra* Appendix, Part 3. Of those nine state statutes, only four mirror the JSSA in that they include they include the two explicit entitlements to records in the federal statute (Hawaii, Idaho, Nebraska, and North Dakota). *Id.* The other five state statutes include one of the JSSA's two explicit discovery provisions, but not both (Delaware, Indiana, Kentucky, Maryland, and Pennsylvania). *Id.*

222. Those two states are Missouri and Nevada, and their state supreme court decisions are discussed in Part V.B.

223. *See infra* Appendix, Part 4.

Figure 2: States that Guarantee a Fair Cross-Section

<b>50 states guarantee a fair cross-section</b>	
23 states guarantee fair cross-section by statute	27 states guarantee fair cross-section through case law
↓	
9 states guarantee access to records by statute	2 states guarantee access to records through case law
↓	
<b>39 states fail to guarantee access to records</b>	

*B. STATE COURTS: IMPOSING BURDEN OF PROOF IN ABSENCE OF STATUTORY ENTITLEMENT TO DISCOVERY*

States' failure to provide an explicit statutory entitlement to jury records has two problematic consequences. The first is the probability that defendants and defense attorneys are less likely to request records in the absence of express statutory authority. Although it is impossible to measure the number of unfilled claims, it seems as a matter of logic that fewer defense attorneys will independently generate a request for jury records, than would make it if the unqualified entitlement was in the text of the statute.

The second problematic consequence is that, in the absence of an explicit statutory entitlement, state courts generally deny the requests for records defendants do make. State judges frequently base those denials on the absence of an initial showing of proof—the very proof requirement that has been uniformly rejected by the federal courts.<sup>224</sup> State courts are therefore putting the proverbial cart before the horse by requiring defendants to demonstrate a problem with the jury selection system in order to access the records that would tell them whether there is a problem with the jury selection system.

In several states, courts have established a threshold proof requirement that defendants must satisfy to obtain jury records. In California, for example, a defendant seeking to access records must make “a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion.”<sup>225</sup> Only after such a showing must the court “make a reasonable effort to

<sup>224.</sup> See *supra* Part III.B.2.

<sup>225.</sup> *People v. Jackson*, 920 P.2d 1254, 1268 (Cal. 1996).

accommodate the defendant's relevant requests for information."<sup>226</sup> A defendant in Kansas must likewise "assert facts that tend to raise a doubt as to whether the panel may be improperly constituted."<sup>227</sup> Only "[t]hen follows the inquiry to see if such suspicion, duly alleged, is supported by proof."<sup>228</sup> Similarly, in Florida, a defendant must make a "sufficient factual showing to raise a reasonable suspicion that the panel was improperly drawn" to get access to records.<sup>229</sup> Each of these standards requires a defendant to prove a problem with the jury system before accessing the only records that can reveal a problem.

Perhaps the best contrast with the JSSA is provided by Connecticut—the state where Mr. Osorio's federal right to discovery revealed the exclusion of two-thirds of African-American and Hispanic jurors. A state defendant in Connecticut would need "independent evidence" of "reasonable grounds to suspect that the panel is improperly constituted" before being permitted to inspect the jury system records.<sup>230</sup> But it is difficult to imagine what "independent evidence" a litigant could have uncovered when they jury officials themselves had not noticed either the problem or its striking racial impact.<sup>231</sup>

In other states, courts have not uniformly imposed a proof requirement, but individual judges deny defense requests for jury records on the grounds that the defendant has not proved a need for the records. For example, a Texas defendant requested access to jury selection records, claiming that, although the trial judge granted him a hearing on the composition of the jury pool, the hearing was "meaningless" without the records.<sup>232</sup> The trial judge denied the records request, concluding "[o]nly if [defendant's] class is substantially underrepresented on the indicting grand jury" will the court release information about previous grand jury panels.<sup>233</sup> The jury selection records were, of course, the only evidence of the grand jury's underrepresentation.

Judges have similarly rejected record requests in Alabama (no access to records "in the absence of some evidence [of a problem]");<sup>234</sup> Colorado (no access to records where "[d]efendant made no record . . . that would require further inquiry" into the randomness of jury selection);<sup>235</sup> Ohio (no access to

<sup>226.</sup> *Id.*

<sup>227.</sup> *State v. Holt*, 612 P.2d 570, 574 (Kan. 1980) (emphasis omitted) (quoting *Rojas v. State*, 288 So. 2d 234, 237 (Fla. 1973)).

<sup>228.</sup> *Id.* (quoting *Rojas*, 288 So. 2d at 237).

<sup>229.</sup> *Rojas*, 288 So.2d at 237.

<sup>230.</sup> *State v. Avcollie*, 453 A.2d 418, 423 (Conn. 1982).

<sup>231.</sup> *See supra* notes 19–20 and accompanying text.

<sup>232.</sup> *Pimentel v. State*, 710 S.W.2d 764, 777 (Tex. App. 1986).

<sup>233.</sup> *Id.*

<sup>234.</sup> *Griffin v. State*, 790 So. 2d 267, 312 (Ala. Crim. App. 1999), *rev'd on other grounds, Ex parte Griffin*, 790 So. 2d 351 (Ala. 2000).

<sup>235.</sup> *People v. Brown*, 218 P.3d 733, 740–41 (Colo. App. 2009) (denying claim that "the trial



records without “[d]istinct[ive] evidence” in support of the request and that “evidence must be more than mere statements of counsel of what they hope they will be able to prove”);<sup>236</sup> New York (no access to records where defendant “failed to set forth the necessary factual basis to establish a claim that the procedure utilized . . . to select the jury venire does not provide for selection of individuals from a fair cross-section of the community”);<sup>237</sup> Tennessee (no access to records unless defendant “makes a prima facie showing of a statutory or constitutional violation with regard to the preparation of lists of prospective jurors or the selection of jury venires or petit juries”);<sup>238</sup> Washington (no access to records where defendant made only “bare allegation that the jury list is not representative”);<sup>239</sup> and West Virginia (no access to records where defendants “have offered to produce virtually no evidence to support their claim of a Sixth Amendment violation”).<sup>240</sup>

Ironically, courts frequently underscore that the defendant’s request must rest on more than a “hope,” “desire,” or “expectation”<sup>241</sup> “that the requested discovery would establish that his right to a jury consisting of a fair cross section of the community was violated.”<sup>242</sup> For example, the Texas judge’s decision described above was affirmed on appeal when the appellate court noted that there was “only a desire to examine records for possible violations.”<sup>243</sup> But, as the Supreme Court has recognized, that “desire” is not only a sufficient basis to demand discovery, it reflects the limits of a defendant’s knowledge before the discovery request has been granted.

State legislatures acted illogically when they enacted statutes with the fair cross-section promise, without the language granting access to jury records. But that failure has been compounded where state courts have filled the statutory void with a threshold proof requirement. Demanding proof without giving defendants access to proof makes the fair cross-section right essentially unenforceable.

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court erred by not allowing further inquiry into [defendant’s] ‘concerns’ about the ‘randomness’ of the jury panel” where “[d]efendant produced no evidence that would even suggest a fair cross-selection violation” and “made no record . . . that would require further inquiry”).

236. *United States v. Hoffa*, 349 F.2d 20, 30 (6th Cir. 1965).

237. *People v. Lynch*, 654 N.Y.S.2d 562, 564 (N.Y. Cty. Ct. 1997).

238. *State v. Hester*, 324 S.W.3d 1, 52 (Tenn. 2010).

239. *State v. Cienfuegos*, 25 P.3d 1011, 1017 (Wash. 2001).

240. *State v. Hobbs*, 282 S.E.2d 258, 270 (W. Va. 1981).

241. *Griffin v. State*, 790 So. 2d 267, 311–12 (Ala. Crim. App. 1999), *rev’d on other grounds*, *Ex parte Griffin*, 790 So. 2d 351 (Ala. 2000) (affirming denial of request for “access to, inspection of, and copying of all of the jury system records” on grounds that defendant “provided no documentary or statistical evidence in support of his motion” and defendant’s argument instead “rests on the ‘expectation’ that the requested discovery would establish that his right to a jury consisting of a fair cross section of the community was violated”).

242. *Id.* at 312.

243. *Pimentel v. Texas*, 710 S.W.2d 764, 777 (Tex. App. 1986) (emphasis added).

## V. STATE COURTS ERR IN IMPOSING BURDEN OF PROOF: CROSS-SECTION PURPOSE DEMANDS DISCOVERY

As the Supreme Court recognized, access to jury records is necessary for enforcing the fair cross-section guarantee: “Without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.”<sup>244</sup> Thus, ensuring a fair cross-section is alone a sufficient basis for an unqualified right to discovery; even if there is no explicit statutory entitlement. Because selecting a jury from a fair cross-section is the purpose of either a statute or constitutional provision in all 50 states, it follows that state courts should recognize that the fair cross-section goal gives every state defendant a right to discovery.

Yet the majority of state courts appear to be denying discovery requests without considering the relationship between the request for records and the fair cross-section right. Instead, they have denied defendants’ discovery claims without referencing the fair cross-section purpose at all—even when the defendant has made that argument. Indeed, of the cases I examined for this article where the court denied discovery, I did not see any opinions where the court considered the relationship between the records request and the fair cross-section goal. Nor did any of those cases cite the absence of statutory language (as in the JSSA) explicitly granting discovery. Instead, in those cases, the courts simply imposed a threshold burden of proof, concluded that the defendant failed to meet it, and denied the request. Of course, this is not a case law survey, so no conclusions can be extrapolated from that observation. But it is striking that courts in a number of states have denied defendants access to records in the face of the fair cross-section guarantee, without ever articulating a rationale for doing so.

Just as striking are the few decisions that have considered the fair cross-section purpose of state statutes or constitutions in the absence of explicit statutory entitlements: Each one concluded that the purpose alone mandates discovery. Those cases illustrate this Article’s thesis: just as the Supreme Court recognized that the fair cross-section purpose of the JSSA requires access to records, so too should state courts recognize the fair cross-section purpose of their statutes or constitutions mandates “essentially unqualified” access to jury selection records.

### A. FAIR CROSS-SECTION PURPOSE OF STATE STATUTES MANDATES DISCOVERY

As described in Part III and illustrated in Figure 2, there are 39 states that are missing a statutory right to access records, and in 14 of those states a statute guarantees defendants a jury selected from a fair cross-section. These states have enacted the statutory guarantee, but lack the statutory language granting access. Defendants in those states should be able to rely on the statute’s purpose alone to obtain jury records. This point was illustrated by

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244. *Test v. United States*, 420 U.S. 28, 30 (1975).

the case of *Gause v. United States*, which explicitly articulates why the fair cross-section goal takes precedence over the possibility that the state legislature purposefully omitted the discovery entitlement.<sup>245</sup>

*Gause*, an en banc decision from the D.C. Court of Appeals (the D.C. equivalent of a state supreme court), interpreted the D.C. Jury Act.<sup>246</sup> The D.C. Jury Act has the stated purpose of ensuring juries are selected from a fair cross-section of the community, but is missing the JSSA's explicit provision that the defendant "shall be allowed to inspect, reproduce, and copy [jury selection] records or papers at all reasonable times."<sup>247</sup>

Larry Gause requested access to jury selection records in the trial court, and the trial judge denied the motion because the defendant "failed to present a *prima facie* case in support of his claim that the [District's jury] system for the selection of jurors violate[d] the . . . Sixth Amendment[] and the" District's jury selection statute.<sup>248</sup> Mr. Gause was convicted and appealed, arguing the trial judge erred in imposing a threshold burden of proof before granting him access to the jury records.<sup>249</sup> A panel of the D.C. Court of Appeals upheld the conviction, holding that the absence of an express statutory entitlement to jury records left room for the trial judge to impose a threshold burden of proof.<sup>250</sup>

The en banc court was therefore squarely presented with the key question: does the statute's purpose give a defendant an unqualified right to access records or does the missing statutory entitlement give the court discretion to require some evidence of a problem before granting access? The court ultimately "decline[d] to impose a threshold showing requirement, because to do so would *undermine the [D.C. statute's] stated purpose* by creating an unnecessary hurdle for litigants seeking discovery of jury pool information in connection with a challenge to the fairness of the jury selection process."<sup>251</sup>

The court did not ignore the missing language in the state jury statute, and began its analysis by comparing the D.C. Jury Act with the JSSA.<sup>252</sup> The court observed that "the statutes are nearly identical in their stated purposes," but the court "acknowledge[d] and analyze[d] the absence in the [D.C. statute] of explicit language stating that litigants may inspect jury records."<sup>253</sup> The court concluded that, "*given the virtually identical purposes of both statutes, . . . this difference alone, without any clear legislative history or intent,*

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245. *Gause v. United States*, 959 A.2d 671, 673 (D.C. 2008).

246. *Id.*

247. 28 U.S.C. § 1867(f) (2012).

248. *Gause*, 959 A.2d at 673 (describing the trial court's decision).

249. *Id.*

250. *Id.* at 679.

251. *Gause v. United States*, 6 A.3d 1247, 1249 (D.C. 2010) (en banc) (emphasis added).

252. *Id.*

253. *Id.*

is insufficient to accord less protection to District of Columbia litigants” than would be provided under the JSSA.<sup>254</sup>

In holding that the statute’s purpose of ensuring a fair cross-section required unfettered access, the en banc court cited *Test* for the rule that the JSSA’s “Declaration of Policy,” (“nearly identical” to the policy of the state statute) “confers an independent basis for the ‘unqualified right to inspection.’”<sup>255</sup> The court recognized that the imposition of even a modest threshold burden of proof “contravenes the very purpose of the [D.C. jury statute] by forcing a litigant to put the proverbial cart before the horse.”<sup>256</sup> Such a burden would impose a legal catch-22: “[A] threshold requirement places the burden on the litigant to prove—or prove to a lesser degree—the merits of his or her constitutional claims in order to garner access to the nonpublic and confidential information necessary to prove the merits of his or her claim.”<sup>257</sup> In sum, the en banc court concluded that “like the Supreme Court in *Test*, [we] are unwilling to import into the statute a threshold showing requirement, which in our view would serve only to impose an unnecessary hurdle for litigants in contravention of the stated purpose of the [D.C. jury statute].”<sup>258</sup>

Based on the state statute’s fair cross-section goal, the court held that “a litigant preparing a possible motion challenging the jury selection process may inspect certain materials that are used ‘in connection with the [jury] selection process’ *without* a threshold showing that there is reason to believe such discovery will ultimately substantiate a statutory or constitutional violation.”<sup>259</sup> Instead, “[t]he only qualification is that the litigant’s request must be ‘in connection with the preparation or presentation’ of such a motion.”<sup>260</sup>

The *Gause* court’s analysis is directly applicable to the states that similarly have a governing statute that guarantees a fair cross-section but lacks the express entitlement to discovery.

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254. *Id.* (emphasis added). “From 1968 until 1986, the jury selection system in the District of Columbia was governed by the [JSSA]. Then, in 1986, Congress enacted the [D.C. Jury Statute] ‘to provide for the establishment of an independent jury system for the District of Columbia Superior Court.’” *Id.* at 1250 (citation omitted).

255. *Id.* at 1252 n.8 (quoting *Test v. United States*, 420 U.S. 28, 30 (1975)).

256. *Id.* at 1256.

257. *Id.* (“[T]he practical implication of even the ‘very modest’ threshold showing requirement that our dissenting colleagues would impose is inconsistent with the reality that ‘without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.’”) (quoting *Test*, 420 U.S. at 30).

258. *Id.* at 1258.

259. *Id.* at 1257 (emphasis added).

260. *Id.* (citation omitted).

B. FAIR CROSS-SECTION PURPOSE OF STATE OR FEDERAL CONSTITUTION MANDATES  
DISCOVERY

As described in Part III and illustrated in Figure 2, there are 27 states that do not have a jury statute, but have recognized in case law that defendants have a constitutional right to a jury selected from a fair cross-section of the community. The highest courts of two of those states have held that defendants have an attendant right to access records.<sup>261</sup> Thus there are 25 states that have issued decisions guaranteeing a fair cross-section, but have yet to issue a binding decision guaranteeing a right to access jury records.

The point that the constitutional fair cross-section purpose is alone sufficient to justify access to records is illustrated by cases from four courts—the Supreme Courts of Missouri and Nevada, an appellate New Jersey court, and the pre-JSSA Fifth Circuit—where, in contrast to *Gause*, there was no applicable state statute. In each case the court held that the constitutional right to a fair cross-section required unqualified access to discovery.

The courts in Missouri, Nevada, and New Jersey were each faced with a criminal defendant's request for data on the racial and ethnic composition of the jury pool.<sup>262</sup> Each court acknowledged that their state had no statutory equivalent to the JSSA, and each granted the defendant's request for jury data on purely constitutional grounds, recognizing that access was necessary to enforcement of the fair cross-section right.<sup>263</sup>

Access was necessary because, as the Supreme Court of Missouri stated, the “cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right.”<sup>264</sup> The Nevada Supreme Court similarly based its holding on the reality that “[w]ithout this information, [the defendant's] ability to show a potential violation of his constitutional right to a grand jury drawn from a fair cross-section of the community is limited.”<sup>265</sup> And the New Jersey court, which “reject[ed] the

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261. *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. 1980); *Afzali v. State*, 326 P.3d 1, 3 (Nev. 2014).

262. *Saitz*, 594 S.W.2d at 607 (Defendant requested the “disclosure of data maintained by the (circuit) clerk of the court relating to the master grand jury list” that he could use to determine race and ethnicity data.); *Afzali*, 326 P.3d at 1 (Defendant made a pre-trial request for “information that would identify the racial composition” of grand jury venires.); *State v. Ciba-Geigy Corp.*, 573 A.2d 944, 946 (N.J. Super. Ct. App. Div. 1990) (Defendant requested “information concerning the race and ethnic background” of grand jurors.).

263. *Saitz*, 594 S.W.2d at 608 (“The court is bound, however, by the United States Supreme Court’s determination of a state court defendant’s constitutional right to have his case considered by a grand jury drawn from a fair cross-section of his community.”); *Afzali*, 326 P.3d at 3 (“[T]his court is bound by Supreme Court precedent, and . . . a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community.”); *Ciba-Geigy*, 573 A.2d at 946 (affirming defendants’ claim to right to information based “upon both federal and state constitutional precepts”).

264. *Saitz*, 594 S.W.2d at 608.

265. *Afzali*, 326 P.3d at 1. The court found that the defendant was “entitled to information relating to the racial composition of the grand jury so that he may assess whether he has a viable

state's contention that defendants are entitled to the discovery they seek only if they meet the good cause standard," likewise reasoned that "[i]t would be virtually impossible for defendants who are endeavoring to ascertain if a successful attack on the grand jury selection process can be advanced if the facts necessary to prove a defect in the selection process are withheld."<sup>266</sup>

The Fifth Circuit similarly concluded that discovery is constitutionally required in a case that arose prior to the enactment of the JSSA—an analogous context to a state without a jury selection statute.<sup>267</sup> The Fifth Circuit held a right to discovery was "imposed by the Constitution," and accordingly granted the defendant access to confidential jury questionnaires that included race data.<sup>268</sup> The court concluded that the defendant needed access to the government's records because the court "must have all the facts in order to make an intelligent determination."<sup>269</sup> And without the race information contained on the jury questionnaires, "we do not have all the facts which appellant alleges are necessary to a decision in this case—facts which he asserts would assist us in deciding whether there has been a violation of his constitutional rights."<sup>270</sup> The constitutional protections mandated an entitlement to discovery because without the data the court was unable to conduct an intelligent analysis.

These cases recognize that the constitutional fair cross-section right is meaningless without access to the government's records about the jury selection system. Their analysis is directly applicable to the states that have recognized a defendant's right to a jury selected from a fair cross-section, but have yet to hold that defendants have an attendant right to access records.

## VI. ANALYSIS AND CRITIQUE OF STATE COURTS' RATIONALES FOR DENYING ACCESS

Why have state courts imposed threshold proof requirements on defendants when the federal courts have uniformly recognized that the fair cross-section right cannot be enforced unless defendants have access to jury records? This question is particularly confounding given the absence of legislative history suggesting that any state purposefully eliminated the right to access jury records contained in the JSSA. And, as explained in the previous

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constitutional challenge," because, "[a]s the Supreme Court of Missouri noted when considering this same issue, '[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right.'" *Id.* at 3 (quoting *Saitz*, 594 S.W.2d at 608). Moreover, "[i]n analyzing [the JSSA], the United States Supreme Court stated that its purpose was to ensure grand juries were selected at random from a fair cross-section and noted that 'without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.'" *Id.* (quoting *Test v. United States*, 420 U.S. 28, 30 (1975)).

266. *Ciba-Geigy Corp.*, 573 A.2d at 947, 950.

267. *Mobley v. United States*, 379 F.2d 768, 773 (5th Cir. 1967).

268. *Id.* at 772–73.

269. *Id.* at 773.

270. *Id.* at 772.

Part, the courts that *have* considered a records request in light of the fair cross-section goal have *granted* access to those records. The courts that deny those requests have not referenced the cross-section goal of their state statutes or constitutions. It is therefore impossible to know why the purpose-driven logic of *Test* and the federal courts has not been consistently adopted at the state level.

This Part analyzes and critiques possible reasons courts may be denying access. In doing so, I distinguish between: (1) concerns that are legitimate, but are not actually threatened by defendants' discovery requests; (2) concerns based on a misunderstanding of the law; and (3) problems caused by inadequate advocacy.

A. *COURTS MAY DENY DISCOVERY BASED ON LEGITIMATE CONCERNS THAT ARE NOT ACTUALLY THREATENED BY DEFENDANTS' DISCOVERY REQUESTS*

When courts articulate a reason for denying discovery to defendants, they typically refer to: (1) the secrecy and privacy traditionally associated with the jury; (2) the threat to judicial efficiency and the related administrative burden of complying with discovery requests, particularly when the jury system has not collected or compiled race and ethnicity data; and (3) the fear that successful fair cross-section claims could bring the criminal system to a halt. Each rationale is rooted in a legitimate concern, but the practical application of jury record discovery entitlement does not threaten these interests in a meaningful way.

1. *Concerns About Protecting the Privacy of the Jury Are Legitimate, but Not Threatened by Discovery*

Many aspects of the jury process are secret: deliberations are protected from scrutiny,<sup>271</sup> the work of jury commissions is typically kept confidential,<sup>272</sup> and jury selection records are generally not publicly available.<sup>273</sup> The traditional secrecy of the jury system is augmented by more modern concerns with the misuse of personal data, as well as the fear that jurors' service may put them in physical danger.<sup>274</sup> Even in the face of a clear statutory entitlement (and certainly in the absence of one), granting defendants access to jury records and information about jurors can feel inconsistent with the well-established tradition of secrecy.

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271. See, e.g., 705 ILL. COMP. STAT. 315/1(a) (2007).

272. See, e.g., GA. CODE ANN. § 15-12-23(a) (2010).

273. See, e.g., ARK. CODE ANN. §16-32-103(e)(2) (Supp. 2015).

274. See, e.g., *United States v. Gotti*, No. S8 02CR743(RCC), 2004 WL 2274712, at \*6 (S.D.N.Y. Oct. 4, 2004) (“[Defendant] is not entitled to unencumbered access to juror information, and given the concerns about juror safety expressed above, he will not have it.”); *State v. Simms*, 518 A.2d 35, 40 (Conn. 1986) (citing “historical reluctance to interfere with the secrecy of grand jury proceedings”).

The desire to protect the anonymity of jurors and the secrecy of jury deliberations is supported by significant law and sound policy. But granting defendants access to discovery does not jeopardize these interests. After all, defendants are routinely granted discovery in the federal system and jurors' privacy and safety interests have not been noticeably jeopardized. Nor is there evidence that the 11 states that allow access to records have jeopardized the privacy or safety of potential jurors.

There are four reasons why granting discovery does not threaten jurors' privacy or safety. First, the data defendants need is *aggregate* data about the race of potential jurors over multiple venires. The identity of individual jurors, or even the group of jurors on a petit jury, is legally irrelevant to a cross-section claim, so defendants will never need to access that kind of information. Second, both constitutional and statutory cross-section claims must be filed before the trial begins, so there is no possibility that defendants will have access to otherwise secret jury deliberations.<sup>275</sup>

Third, as in other contexts where sensitive information is at issue, courts have the power to issue protective orders to provide additional safeguards.<sup>276</sup> For example, a court can release jury data pursuant to an order that requires the attorneys and experts accessing the data to keep the information confidential.<sup>277</sup> A court can even release data pursuant to an order that provides the attorneys with access, but prevents the defendant from seeing the data.<sup>278</sup>

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275. Under the JSSA, a motion must be made "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. § 1867(a) (2006). State statutes often have similar timing requirements. *See, e.g.*, COLO. REV. STAT. ANN. § 13-71-139(1) (West 2015). Constitutional fair cross-section challenges must be raised before trial, pursuant to Federal Rule of Criminal Procedure 12(b) or state equivalent. *See, e.g.*, United States v. Ovalle, 136 F.3d 1092, 1108 (6th Cir. 1998). Nor do defendants need information about jury deliberations to raise a cross-section claim. *See, e.g.*, Ciba-Geigy Corp., 573 A.2d at 947 (rejecting the argument that secrecy afforded grand jury proceedings limited defendant's access to jury records because "[i]t is clear that defendants are not inquiring into why they were indicted by the grand jury; they want to know the composition of the grand jury which indicted them").

276. *See, e.g.*, IOWA CT. R. 2.14 (6)(a) ("Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate.").

277. *See* United States v. Rice, 489 F. Supp.2d 1312, 1324 (S.D. Ala. 2007). Courts can require the defendant's expert to provide an affidavit of confidentiality before accessing confidential juror information. United States v. Savage, Nos. 07-550-03, -04, -05, -06, 2013 WL 797417, at \*5 (E.D. Pa. Mar. 5, 2013). Courts also often circumscribe the use of disclosed information without executing a formal protective order. *See, e.g.*, United States v. Causey, Criminal No. H-04-025, 2004 WL 1243912, at \*15 (S.D. Tex. May 25, 2004).

278. *See, e.g.*, United States v. Shapiro, 994 F. Supp. 146, 148 (E.D.N.Y. 1998) ("The Supreme Court made it clear in [*Test*] that a litigant has 'essentially an *unqualified* right to inspect jury lists' . . . . However, in light of [the defendant's] well documented history of behavioral problems . . . the Court clearly acted within the exercise of its discretion in determining, for security reasons, that the information should not be turned over to [the defendant], but to [his] attorney . . . ." (citations omitted)).



Fourth, many state statutes that fail to explicitly provide for discovery make other jury records publicly accessible. For example, some states make the master list of jurors available to the public upon request.<sup>279</sup> These records are (unfortunately) not the race and operational data defendants need to pursue a cross-section claim, but the public availability of some jury records undercuts the argument that all juror information must be kept secret. Some states also coordinate the jury selection process with the federal courts located in that state.<sup>280</sup> So a single jury selection process might produce one list of jurors for the state court and a second list for the federal court. The importance of keeping the state list secret is diminished where federal defendants have an unqualified right to access the same data sent to the federal court.

## 2. Concerns for Judicial Efficiency and Administrative Burdens Are Legitimate, but Not Threatened by Discovery

Courts are often concerned that granting defendants' discovery requests will "consume enormous amounts of time and energy of our already overburdened trial courts, with concomitant delays in their calendars."<sup>281</sup> This is a particularly live concern when granting the request would first require the jury office to generate the data for the first time. Indeed, a number of state courts do not collect race data on potential jurors,<sup>282</sup> and a request for such data therefore necessitates a new and time-consuming research effort.<sup>283</sup>

Courts appropriately pay attention to the risk of incurring administrative and judicial costs and delays. But again, the federal system has hardly ground

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279. See, e.g., ALA. CODE § 12-16-57(a) (LexisNexis 2012) ("The jury commission for each county shall compile and maintain an alphabetical master list of all persons in the county who may be called for jury duty, with their addresses and any other necessary identifying information."); *Id.* § 12-16-57(c) ("The master list shall be open to the public for inspection at all reasonable times.").

280. See *Handbook on Jury Use in the Federal District Courts*, FED. JUDICIAL CTR. 12 (1989), [http://www.fjc.gov/public/pdf.nsf/lookup/juryuse.pdf/\\$file/juryuse.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/juryuse.pdf/$file/juryuse.pdf).

281. *State v. Avcollie*, 453 A.2d 418, 423 (Conn. 1982) (quoting *Rojas v. State*, 288 So. 2d 234, 237 (Fla. 1973)).

282. See, e.g., *State v. Moore*, No. CR10112785, 2012 WL 6785194, at \*3 (Conn. Super. Ct. Dec. 10, 2012) ("None of the [jury official] witnesses who testified had any way of knowing the racial make-up of the jurors summoned for jury duty in this or any other case . . ."); *State v. Carter*, No. 23246-8-III, 2005 WL 2672772, at \*9 (Wash. Ct. App. Oct. 20, 2005) ("Here, there was no evidence presented concerning the representation of racial minorities in Benton County jury pool lists. Although defense counsel called E. Kay Staples, Benton County Clerk, to testify as to the number of African American and Hispanic residents in any given year that are called for jury service, Ms. Staples stated she could not provide a number because such statistics were not kept in Benton County.").

283. See, e.g., *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. 1980) (Directing court clerk to "make available to [the defendant] the demographic information sought . . . as soon as is practicable. If the clerk does not have in his possession information on race and gender, he should, to comply with this order, obtain it forthwith and thereafter provide relator with that data.").

to a halt, despite the routine grants of discovery. And there is similarly no evidence that the 11 states with an explicit right to discovery are overburdened. As is true for privacy, a closer look at the actual burden of discovery reveals that requests can be easily accommodated.

First, a number of states already require jury offices to collect data on the racial representativeness of their jury systems.<sup>284</sup> In those states, responding to a discovery request could be as simple as turning over (or posting online) a pre-existing document that reports on the percentage of, say, African-Americans and Hispanics in the jury pool over a two-year period. This is the model used by the federal system: federal courts are required to complete an “AO-12” form that lists the percentage of jurors by race, ethnicity, and gender in the jury pool, alongside parallel census data for the jurisdiction.<sup>285</sup> A federal defendant’s discovery request begins, and may end, with a copy of the AO-12 form.<sup>286</sup>

Second, and relatedly, courts retain the power to reject requests for information if the defendant has not yet made adequate use of the information that is available. So if a jurisdiction posted accurate data on the racial make-up of the jury pool, and a defendant ignored that data and instead requested the opportunity to delve into the jury system’s database, a court could deny that request without impairing the cross-section right.<sup>287</sup> For

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284. See, e.g., MASS. GEN. LAWS ch. 234A, § 79 (2014) (“On or before the first day of April of each year, the jury commissioner shall issue an annual report for the previous calendar year . . . . The report shall contain demographic and financial data and data on juror management and jurors’ satisfaction with the jury system.”); see also MINN. STATE GEN. PRACTICE R. 803(b)(1); N.Y. JUDICIARY LAW § 528 (McKinney Supp. 2015); UTAH CODE ANN. § 78B-1-106 (LexisNexis 2012); W. VA. CODE ANN. § 52-1-16 (West 2002).

285. 28 U.S.C. § 1863(a) (2012) (“Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify.”). “According to instructions provided by the Administrative Office on the form, the AO-12 form ‘is required to be completed upon . . . [t]he periodic refilling of the master wheel . . . .’” United States v. Hernandez-Estrada, No. 10cro558 BTM, 2011 WL 1119063, at \*11 (S.D. Cal. March 25, 2011) (alterations in original) (quoting Form AO-12: Jury Representativeness Statistics, Data Collection Instructions, General).

286. The AO-12 has some limitations as a model because some courts fail to produce timely reports. See, e.g., United States v. Hernandez-Estrada, 704 F.3d 1015, 1022 (9th Cir. 2012) (recognizing that the district “has been derelict in completing the AO-12s on time”). Some courts’ AO-12 forms have a large proportion of missing entries for race and ethnicity data. See *id.* at 1024 (“The percentages of those in the qualified wheel who did not answer the race and ethnicity questions—11.56% and 33.81% respectively—are significant.”).

287. See, e.g., United States v. Pritt, 458 F. App’x 795, 800 (11th Cir. 2012) (denying defendant’s request for additional discovery when “[he] was given access to records that enabled him to calculate the relevant absolute disparities. . . . [and] was thus given the requisite material to ascertain the facts that, under our precedent, are essential to his jury composition claims”); State v. Ciba-Geigy Corp., 573 A.2d 944, 950-51 (N.J. Super. Ct. App. Div. 1990) (“[D]efendants may not come before a court and ask for the court’s aid to obtain information as to the race and ethnicity of the pool of jurors who comprised the jury which indicted them without showing they have in good faith exhausted available data and that their request for further data is not made for delay, harassment, or for impermissible intrusion upon others and upon public resources.”).

example, at least one federal district court has issued an administrative order that recognizes that a defendant is entitled to “juror number; race; and Hispanic ethnicity” information upon request, but that a party seeking “more detailed information and records” must first show good cause.<sup>288</sup>

Third, the database for jury systems is typically refreshed every two or four years.<sup>289</sup> Accordingly, the jury office would only have new data to collect and disclose every two or four years. In other words, the jury office would not need to generate new data for each individual discovery requests—all requests made during the “life” of a single jury wheel could be answered with the same set of data.<sup>290</sup>

Fourth and finally, suggesting that the *defendant’s* request imposes a burden on the court ignores the court’s own, pre-existing responsibility to maintain a representative jury system, as well as the government’s shared interest in such a system. Courts must collect race and ethnicity on jurors to properly administer the jury system, independent of any request by defendants.<sup>291</sup> A defendant’s request only constitutes a new, additional burden when the jury system has failed to collect the information it needs.

### 3. Concerns About the Scope of Remedies Are Legitimate, but Not Threatened by Discovery.

Courts also worry about opening the floodgates to baseless discovery requests,<sup>292</sup> as well as to successful challenges that may require overturning numerous convictions. In one case, cited frequently in opinions denying discovery, the court suggested that in light of the speedy trial requirement, “requir[ing] our trial courts to expend endless hours exploring attacks on the

288. *United States v. Patel*, No. 11-CR-20468, 2012 WL 1959563, at \*2 (E.D. Mich. May 30, 2012) (citing Eastern District of Michigan Administrative Order No. 00-AO-060).

289. *See, e.g.*, IDAHO CODE §2-213(4) (2015).

290. *See, e.g.*, *State v. McDowell*, 832 S.W.2d 333, 335 (Mo. Ct. App. 1992) (“In regard to defendant’s challenge to the composition of the petit jury, a stay of all jury trials in the City of St. Louis was granted in another case upon an identical motion. Approximately two weeks before defendant’s trial, the trial court adopted an administrative order issued by the St. Louis City Circuit Court which corrected the perceived deficiencies. Defendant presented no evidence that the new procedures were inadequate. Thus, the administrative order adopted by the trial court addressed defendant’s concerns prior to defendant’s trial. Defendant’s point is denied.” (footnote omitted)).

291. *See ABA Principles for Juries & Jury Trials*, AM. BAR. ASS’N, [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_juryaddendum.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_juryaddendum.html) (last visited May 11, 2016) (“The court should maintain demographic information as to its source lists, summonses issued, and reporting jurors.”); MINN. GEN. R. PRAC. 806(e) (“The jury commissioner shall review the jury source list . . . for its inclusiveness and the jury pool for its representativeness of the adult population in the county and report the results to the chief judge of the judicial district.”); *see also* N.Y. JUDICIARY LAW § 528 (McKinney 2003); UTAH CODE ANN. § 78B-1-106 (LexisNexis 2012).

292. *See, e.g.*, *State v. Avcolle*, 453 A.2d 418, 423 (Conn. 1982) (expressing concern about “open[ing] every grand jury panel, no matter how perfectly impartial and representative, to a full-scale investigation”) (emphasis omitted) (quoting *Rojas v. State*, 288 So. 2d 234, 237 (Fla. 1973)).

grand jury panel which are without factual basis of any kind might well result in needlessly freeing felons without trial.”<sup>293</sup> And because fair cross-section challenges are to the jury venire or pool—and not an individual petit jury—one defendant’s successful fair cross-section challenge can have implications for every defendant whose jury was selected from that same pool.

Courts appropriately consider the systemic effects their decisions in individual cases may have on every jury pulled from the violative venire. But even to the extent that “fear of too much justice” constitutes a legitimate concern, courts can limit their holdings’ retroactivity. For example, courts that found fair cross-section violations have limited the retroactive application of their decisions.<sup>294</sup> It is thus possible to grant defendants’ discovery requests without having “a disastrous effect on the administration of justice.”<sup>295</sup>

### B. COURTS MAY DENY DISCOVERY BASED ON A MISUNDERSTANDING OF THE LAW

A close review of many fair cross-section cases suggests a few unspoken rationales for denying jury discovery requests that may reflect a misunderstanding of the law. Courts may be: (1) confusing the discovery stage of the cross-section claim with the subsequent merits stage; (2) confusing fair cross-section claims with equal protection claims; and (3) resisting the operation of a burdenless request as inconsistent with the general rule that there is not a right to discovery in criminal trials, and therefore dismissing legitimate discovery requests as disingenuous “fishing expeditions.” To the extent that these problems undergird the denial of discovery requests, they indicate a misunderstanding of the fair cross-section right.

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293. *Rojas*, 288 So. 2d at 237 (“[T]his we will not permit.”).

294. *See, e.g.,* *People v. Hubbard*, 552 N.W.2d 493, 504–05 (Mich. Ct. App. 1996) (“Having concluded that the Kalamazoo County jury array procedure was systemically flawed between the mid-1980s and 1992, we further conclude that this decision shall have retrospective application only to the extent of direct appeals currently pending, or filed after the issuance date of this decision, where the jury array issue was specifically and seasonably raised in the trial court and properly preserved for appellate review.”), *overruled on other grounds by* *People v. Bryant*, 822 N.W.2d 124 (Mich. 2012), *and* *People v. Harris*, 845 N.W.2d 477 (Mich. 2014); *see also* *State v. Long*, 523 A.2d 672, 676–77 (N.J. Super. Ct. App. Div. 1987) (discussing that this is in part because “a retroactive rule would have a disastrous effect on the administration of justice” and “[w]e concur that the reform of the jury selection process should have prospective application only”); *State v. Long*, 499 A.2d 264, 273–74 (N.J. Super. Ct. Ch. Div. 1985) (holding decision should have only prospective application and that “[t]rials may proceed while the jury commission moves with alacrity to comply with the mandate of the law”); *State ex rel. Stanley v. Sine*, 594 S.E.2d 314, 321 (W. Va. 2004) (“Given that our decision herein involves a determination of a matter of first impression with far-reaching application to all jury trials previously had in Berkeley County since approximately 1998 and those jury trials currently pending in that county’s courts, we conclude that the rulings we announce today should apply prospectively only.”).

295. *Long*, 523 A.2d at 676–77.

### 1. Confusing the Discovery Stage with the Merits Stage

Courts that impose a proof requirement may be confusing the discovery stage of a fair cross-section claim (where there is no proof requirement—a defendant need only allege he is preparing a motion) with the merits stage of the claim (where a defendant has the burden of proof and must satisfy the three elements of a *prima facie* case).

In one illustrative case, a defendant in Alabama made a discovery request for “access to, inspection of, and copying of all of the jury system records,” asserting that the documents were necessary to determine whether the jury lists underrepresented African-Americans.<sup>296</sup> In other words, the defendant was making a discovery request, not seeking to establish a *prima facie* claim. But the court denied the request for failure to meet the *prima facie* standard. According to the court, the defendant “provided no documentary or statistical evidence in support of his motion” even though “the burden of establishing a *prima facie* case rests on the defendant.”<sup>297</sup> The court noted the defense request “rests on the ‘expectation’ that the requested discovery would establish that his right to a jury consisting of a fair cross section of the community was violated,” but denied the request because the defendant “failed to establish these groups were underrepresented or that there was systematic exclusion of these groups in the jury selection process.”<sup>298</sup> The court’s analysis merged the two separate stages of discovery and proof—distinct stages according to the Supreme Court in *Test* and the logic of discovery’s role in the ultimate claim.

Relatedly, the states that have a jury selection statute often reference a section borrowed from the JSSA that requires a defendant to support his *prima facie* challenge with a written motion and affidavit “specifying the supporting facts and demographic data.”<sup>299</sup> Courts routinely cite this provision in denying the discovery request, failing to recognize that this language actually applies to the subsequent merits stage,<sup>300</sup> or that the JSSA’s proof requirement is intertwined with the statute’s discovery entitlement.

### 2. Confusing Fair Cross-Section with Equal Protection

Judges may also be confusing fair cross-section and equal protection doctrine, and erroneously denying records requests that do not allege discrimination. Equal protection claims require proof of discrimination, while fair cross-section claims do not—yet many courts have incorrectly imported

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296. *Griffin v. State*, 790 So.2d 267, 311 (Ala. Crim. App. 1999).

297. *Id.* at 312.

298. *Id.* at 312–13.

299. *People v. Brown*, 218 P.3d 733, 741 (Colo. App. 2009).

300. *Id.* (rejecting discovery request when “Defendant made no record . . . that would require further inquiry under either the Constitution or the Colorado Uniform Jury Selection and Service Act”).

the discrimination requirement into fair cross-section analysis.<sup>301</sup> Indeed, my survey of 167 state and federal cross-section cases decided between 2000 and 2010 revealed that one-third of the claims were denied because of the defendant's failure to demonstrate discrimination.<sup>302</sup> This widespread misunderstanding of the scope of the fair cross-section right could be playing a role in state courts' misapplication of the law.

### 3. Discomfort with a Burdenless Request and Distrust of Defense Motives

Courts' concerns with judicial efficiency and administrative burdens are aggravated in the absence of a threshold proof requirement. The idea that a defendant can make demands on the court system without any factual basis makes the attendant burdens feel even more onerous. One can almost hear the outrage in opinions that describe the defendant's request to "[conduct] a full-scale investigation of the . . . jury panel solely upon a mere assertion, not supported by so much as an affidavit . . . that the panel was improperly drawn,"<sup>303</sup> or "require our trial courts to expend endless hours exploring attacks on the . . . jury panel which are without factual basis of any kind."<sup>304</sup> This resistance to granting a burdenless request<sup>305</sup> may be in keeping with the sense that such requests are usually disfavored in criminal trials, where there is no general right to discovery.<sup>306</sup> Yet it is inconsistent with the unqualified nature of the right to access jury records.

Relatedly, some courts deny discovery requests based on a suspicion that the requests are disingenuous. For example, one court stated that a defendant's request for discovery could be "perhaps more accurately" described as "a fishing expedition of broad range."<sup>307</sup> Indeed, both fish and geese play a prominent role in denying defendants' discovery requests, as courts refuse to permit either "a fishing expedition,"<sup>308</sup> or "a wild goose chase at public expense."<sup>309</sup> Of course, fishing is exactly what is required,<sup>310</sup> because

301. 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).

302. *Id.* at 166.

303. *State v. Avcollie*, 453 A.2d 418, 423 (Conn. 1982) (quoting *Rojas v. State*, 288 So. 2d 234, 237 (Fla. 1973)).

304. *Rojas*, 288 So. 2d at 237.

305. *See, e.g., Avcollie*, 453 A.2d at 422; *State v. Anaya*, 456 A.2d 1255, 1264 (Me. 1983).

306. Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 561 (citing *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)).

307. *Avcollie*, 453 A.2d at 423 (quoting *Rojas*, 288 So. 2d at 237).

308. *Id.* at 422 ("Counsel for the defendant made no attempt to lay a foundation for the general allegations in the defendant's motion to dismiss. When questioned by the court, he admitted he could be accused of being on a fishing expedition and was unable to say what class was being discriminated against.").

309. *Anaya*, 456 A.2d at 1264 (denying defendant's request for funding for an expert to research underrepresentation because "[t]he criminal defendant's right to an adequate defense does not include a right to go on a wild goose chase at public expense").

310. *See United States v. Gotti*, No. S8 02CR743(RCC), 2004 WL 2274712, at \*6 (S.D.N.Y.

“without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.”<sup>311</sup>

C. *INADEQUATE ADVOCACY MAY CONTRIBUTE TO ERRONEOUS DISCOVERY DENIALS BY COURTS*

Inadequate advocacy by defense attorneys and prosecutors also contributes to state courts' failure to recognize that their legitimate concerns are not threatened by granting discovery requests.

Prosecutors sometimes contribute to judicial errors by arguing incorrectly that fair cross-section claims require proof of discrimination,<sup>312</sup> or that discovery requests require some initial proof of a problem with the jury system.<sup>313</sup> But discovery request denials are more frequently facilitated by defense attorneys who object to the jury composition only upon entering the courtroom. Because the composition of the petit jury is irrelevant to a cross-section claim, and because successful claims require evidence from more than one venire, lodging objections to the venire in the courtroom is futile. When defense attorneys fail to request the discovery they need to substantiate a fair cross-section claim, courts appropriately deny their objections, which are made without evidence on the day of trial.<sup>314</sup> The law is thus replete with cases where African-American and Latino defendants despair at their ability to

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Oct. 7, 2004) (“Although [the defendant] offers absolutely no basis for his purported belief that the jury lists will reveal impropriety in the selection process, and the Court views the motion as no more than a frivolous fishing expedition, the law dictates that [his] motion must be granted.” (citing *Test v. United States*, 420 U.S. 28, 30 (1975))).

311. *Test*, 420 U.S. at 30.

312. The Attorneys General of 14 states signed onto an amicus brief to the Supreme Court, incorrectly asserting that in order to prove a fair cross-section violation, a defendant has to prove that “the juror selection procedure is administered in [a] discriminatory manner,” by providing “evidence of actual discriminatory or exclusionary practices.” Brief of the States of Connecticut, Arizona, Colorado, Idaho, Maryland, New Mexico, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah and Wisconsin as Amici Curiae in Support of Petitioner at 32–33, *Berghuis v. Smith*, 559 U.S. 314 (2010) (No. 08-1402), 2009 WL 4247967, at \*32–33.

313. See, e.g., *State v. Ciba-Geigy Corp.*, 573 A.2d 944, 947 (N.J. Super. Ct. App. Div. 1990) (“[T]he State argues that before there may be contact with any of the persons who served as grand jurors, defendants must establish a likelihood that bias in the selection process exists.”).

314. See, e.g., *Riley v. State*, 496 A.2d 997, 1007 (Del. 1985) (“On the eve of trial and the Court’s conduct of *voir dire*, defendant . . . claimed that . . . the venire had become ‘unconstitutionally disproportionate’ for the trial of a young black charged with killing a middle-aged white shopkeeper,” but “[d]efendant’s motion contained no supporting affidavit showing either statistics as to the racial composition of other jury panels within the county or vital statistics as to the county’s population by race.”); *People v. Bradley*, 810 N.E.2d 494, 497 (Ill. App. Ct. 2004) (“[T]he jury venire marched into the St. Clair County criminal courtroom and counsel saw only one black person in the entire venire. Unnerved by a notable absence of black people on the panel, trial counsel commented upon the oddity and asked the trial judge to discharge the panel because of the obvious underrepresentation of blacks. . . . [T]his request for the panel’s discharge was denied, based upon the absence of any showing that the panel’s composition was the result of a systematic exclusion of African Americans from St. Clair County jury service.”).

secure a fair trial from white jury panels<sup>315</sup>—echoing the Supreme Court’s own pronouncements about why the cross-section right is critical—but the objection is lodged at the legally irrelevant petit jury.

In an illustrative example, an African-American defendant in a Florida court argued that “since all the members of the venire from which his jury was chosen were white, he had no chance to get a ‘jury of his peers’ that was a fair cross-section of the community in [that] [c]ounty.”<sup>316</sup> His claim was doomed, however, because “after the venire entered the courtroom, [defense] counsel simply commented to the court that ‘despite the fact that both of our clients are black, there are no blacks on the jury panel,’” and made a fair cross-section objection.<sup>317</sup> The court properly denied the claim, holding that “[s]ince counsel was presumably aware of the fair cross-section requirement and the *Duren* test for establishing a prima facie violation, it made no sense to claim, off the cuff, that there was an unrepresentative venire if . . . counsel did not have any supporting data.”<sup>318</sup> Courts like this one properly deny fair cross-section claims that are made without any supporting data, and obviously, courts cannot possibly “get it right” with regard to discovery requests that are never made.

## VII. CONCLUSION AND PROPOSED SOLUTIONS

The Supreme Court has repeatedly emphasized the importance of a representative jury pool for criminal trials. And the right to a jury selected from a fair cross-section of the community is protected by the Constitution, the JSSA, and the statutes or constitutions of all 50 states. But for criminal defendants in many states, this fundamental right is an empty promise because courts withhold the information necessary for enforcement. Courts’ refusal to allow access to jury selection records cannot be squared with each state’s fair cross-section guarantee, whether enshrined in a statute or constitution. The denial of access to records renders the fair cross-section right meaningless.

How can the cross-section guarantee be made meaningful in all states? The most effective solution is for states to add or enact statutory provisions that include the JSSA’s explicit right to discovery. This process might be facilitated if the American Bar Association were to draft and promote model language, although the text of the JSSA itself provides a sufficient model. Passing legislation, however, seems unnecessarily laborious when the

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315. See, e.g., *Mash v. Commonwealth*, 376 S.W.3d 548, 551 (Ky. 2012) (“From the start of the proceedings, Appellant believed that he would not get a fair trial in McCracken County because of his race. At a hearing on his motion for change of venue, Appellant argued that the fact that he was a middle-aged African-American man and the victim was a nineteen-year-old white man would prejudice a white jury against him.”).

316. *Gordon v. State*, 704 So. 2d 107, 110 (Fla.1997).

317. *Id.* at 112.

318. *Id.* at 111.



Supreme Court has recognized that the fair cross-section purpose alone mandates discovery.

A more practical solution—one that does not require legislative action—is for courts to simply make the aggregate data publicly available. Again, the federal system provides a potential model: the AO-12 form lists the percentages of racial and ethnic groups in the jury pool, alongside census data reporting on the percentages of those groups in the community.<sup>319</sup> New York state has also begun collecting and posting this data in an online report.<sup>320</sup> Posting this simple data set on the court’s website would preclude the need to make or grant any discovery requests unless the data revealed the underrepresentation of a distinctive group.<sup>321</sup> In some jurisdictions that do not currently collect or count race and ethnicity data, this would require generating the information, which has the added benefit of equipping the jury system to monitor itself. An effort to make aggregate data publicly available could be encouraged by local bar associations,<sup>322</sup> civil groups,<sup>323</sup> or national leaders on the issue such as the American Bar Association Commission on the American Jury Project,<sup>324</sup> or the National Center for State Courts.<sup>325</sup> In addition, most jurisdictions have a board of judges who implement the district’s jury plan and who can require the jury office personnel to produce and post this data.<sup>326</sup>

But even if states do not change their legislation and jury offices do not post the aggregate data, courts should still grant discovery requests and should be exhorted to do so through better advocacy by prosecutors and criminal defense attorneys. First, prosecutors must recognize, as did the United States in the *Test* litigation, that a defendant requesting discovery does not need to satisfy a threshold proof requirement, and the government

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319. See *supra* notes 285–86.

320. ANN PFAU, CHIEF ADMIN. JUDGE OF THE STATE OF N.Y., FIRST ANNUAL REPORT PURSUANT TO SECTION 528 OF THE JUDICIARY LAW 8–9 (2011), [http://www.nycourts.gov/publications/pdfs/528\\_ReportNov2011.pdf](http://www.nycourts.gov/publications/pdfs/528_ReportNov2011.pdf). The report provides simple charts and graphs that illustrate the representation of distinctive groups in the jury pool, as compared to the community.

321. For a detailed description of what and how data could be presented, see Nina W. Chernoff & Joseph B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, 33 JUST. SYS. J. 47 (2012). This article was adapted for and reprinted in JURYWORK: SYSTEMATIC TECHNIQUES § 5:40 (2013–2014 ed.).

322. See, e.g., OHIO COMM’N ON RACIAL FAIRNESS, *supra* note 177.

323. See, e.g., *Improving Justice for the D.C. Community*, COUNCIL FOR COURT EXCELLENCE, <http://www.courtexcellence.org> (last visited May 11, 2016).

324. See *Commission on the American Jury*, AM. BAR ASS’N, [http://www.americanbar.org/groups/judicial/american\\_jury.html](http://www.americanbar.org/groups/judicial/american_jury.html) (last visited May 11, 2016).

325. “The National Center for State Courts is an independent, nonprofit court improvement organization” widely recognized as the preeminent authority on and resource for state jury systems. *About Us: From Clearinghouse to Full-Service Solution Provider*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org> (last visited May 11, 2016).

326. See, e.g., D.C. CODE 11-1904(b) (2012) (“The jury system plan shall be administered by the clerk of the Court under the supervision of the Board of Judges.”).

cannot object to records requests on this basis.<sup>327</sup> This recognition is consistent with the government's independent interest in racially representative jury pools, and the attendant public confidence in jury verdicts.<sup>328</sup>

Second, defense attorneys need to request the discovery necessary to substantiate a fair cross-section claim *before* walking into the courtroom. Defense attorneys need to help judges understand when denying discovery is based on a misunderstanding of the law, or why defendants' discovery requests can be granted without jeopardizing privacy or efficiency. Equipping attorneys to make these requests and arguments requires resources for training, and could be facilitated by continuing legal education classes.<sup>329</sup> It would also be useful if clear, accessible descriptions of the law were made available in practitioners' publications, such as the newsletters of bar associations or defense organizations.<sup>330</sup> Additional trainings for judges would also be valuable.<sup>331</sup>

Finally, scholarly attention to this issue will help illuminate the incongruity of guaranteeing a defendant a fair cross-section and yet refusing to grant discovery of the records crucial to enforcing that right. Ideally, legal scholarship would inform both judges' and attorneys' understanding of the fair cross-section right.

\* \* \*

The importance of a trial by a jury of one's peers was first recognized in England in 1215,<sup>332</sup> and is no less important in modern America. Today we are confronted with "an enormous racial chasm in responses toward the U.S. criminal justice system,"<sup>333</sup> based in part on the enormous chasm of experiences with the police officers, prosecutors, judges, and courts who

327. Brief for the United States, *Test v. United States*, 1974 WL 186121, at \*5-6 (Oct. 22, 1974).

328. *See supra* Part II.C.3.

329. *See, e.g.*, S.D. EQUAL JUSTICE COMM'N, *supra* note 177, at 9 ("The State Bar should regularly offer continuing legal education topics on challenging jury panels and the use of peremptory strikes.").

330. For example, the National Center for State Courts has a straightforward, seven-page description of the fair cross-section right on its website. *See* NAT'L CTR. FOR STATE COURTS, JURY MANAGERS' TOOLBOX: A PRIMER ON FAIR CROSS SECTION JURISPRUDENCE (2010), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/What%20We%20Do/A%20Primer%20on%20Fair%20Cross%20Section.ashx>; *see also* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, CHAMPION 4 (Dec. 2013), <https://www.nacdl.org/Champion.aspx?id=31215&terms=the+16+things>.

331. *See, e.g.*, UTAH JUDICIAL COUNCIL'S TASK FORCE ON RACIAL & ETHNIC FAIRNESS IN THE LEGAL SYS., RACIAL AND ETHNIC FAIRNESS: REPORT ON THE STATE OF THE CRIMINAL AND JUVENILE JUSTICE SYSTEM 69 (2000), <http://www.utcourts.gov/specproj/retaskforce/Reportfinal.pdf> ("Judges should receive training on the rights of individuals to serve on juries and defendants to have a jury that reflects a cross section of the community.").

332. MAGNA CARTA (1215).

333. RACE AND PUNISHMENT, *supra* note 134, at 33 (quoting MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 5 (2010)).

operate in that system.<sup>334</sup> As a result, juries must include a fair cross-section of African-Americans and Latinos, both in order to protect criminal defendants who are disproportionately people of color from “oppression by the government,”<sup>335</sup> and “to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.”<sup>336</sup> And that fair cross-section right is meaningless unless criminal defendants can access jury system records.

Criminal defendants are the only actors in the criminal justice system with both the standing and motivation to enforce the fair cross-section guarantee, and they can only do so after accessing jury system records. Therefore, states must recognize the “essentially . . . *unqualified*”<sup>337</sup> right of discovery that exists in the federal system. Only then will defendants be able to discover whether their juries are “truly representative of the community”<sup>338</sup> as the Constitution and the laws of all 50 states require.

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334. *See supra* Part II.C.2.

335. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

336. *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (quoting *Powers v. Ohio*, 499 U.S. 400, 413 (1991)).

337. *Test v. United States*, 420 U.S. 28, 30 (1975).

338. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

Appendix  
Part 1: Explicit Statutory Right to Fair Cross-Section

	<b>State</b>	<b>Statutory Provision</b>
1	AL	ALA. CODE § 12-16-55 (2015)
2	AZ	ARIZ. REV. STAT. ANN. § 21-302 (2015)
3	AR	ARK. CODE ANN. § 16-32-303 (2015) <sup>339</sup>
4	CO	COLO. REV. STAT. § 13-71-104(2) (2015)
5	DE	DEL. CODE ANN. tit. 10, § 4501 (2015)
6	HI	HAW. REV. STAT. § 612-1 (2015)
7	ID	IDAHO CODE § 2-202 (2015)
8	IN	IND. CODE § 33-28-5-9 (2015)
9	IA	IOWA CODE § 607A.1 (2015)
10	KS	KAN. STAT. ANN. § 43-155 (2015)
11	ME	ME. STAT. tit. 14 § 1201-A (2015) <sup>340</sup>
12	MD	MD. CODE ANN. CTS. & JUD. PROC. § 8-104 (2016)
13	MN	MINN. STAT. § 593.31 (2015) <sup>341</sup>
14	MS	MISS. CODE ANN. § 13-5-2 (2015)
15	MO	MO. REV. STAT. § 494.400 (2015)
16	NE	NEB. REV. STAT. ANN. § 25-1601.03(1) (West 2015)
17	NY	N.Y. JUDICIARY LAW § 500 (McKinney 2015)
18	ND	N.D. CENT. CODE ANN. § 27-09.1-01 (West 2015)
19	PA	42 PA. CONS. STAT. § 4501(1) (West 2016) <sup>342</sup>
20	SD	S.D. CODIFIED LAWS § 16-13-10.1 (2015)
21	UT	UTAH CODE ANN. 1953 § 78B-1-103(1)(a) (West 2015)
22	WA	WASH. REV. CODE ANN. § 2.36.080(1) (West 2015)
23	WV	W. VA. CODE ANN. § 52-1-1 (West 2015)

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339. Reference is to “adequate cross-section.”

340. Reference is to “broadest feasible cross-section.”

341. Reference is to “broadest feasible cross-section.”

342. Reference is to “a representative cross-section.”

Part 2: Case Law Recognizes Constitutional Right to Fair Cross-Section

	State	Citation
1	AK	Tugatuk v. State, 626 P.2d 95, 99-100 (Alaska 1981)
2	CA	People v. Jackson, 920 P.2d 1254, 1267 (Cal. 1996)
3	CT	State v. Griffin, 741 A.2d 913, 929 (Conn. 1999)
4	FL	Gordon v. State, 704 So. 2d 107, 110-11 (Fla. 1997)
5	GA	Ingram v. State, 323 S.E.2d 801, 810 (Ga. 1984)
6	IL	People v. Flores, 549 N.E.2d 1342, 1345 (Ill. 1990)
7	KY	Mash v. Commonwealth, 376 S.W.3d 548, 552 (Ky. 2012)
8	LA	State v. Daigle, 344 So. 2d 1380, 1389 (La. 1977)
9	MA	Commonwealth v. Soares, 387 N.E.2d 499, 510 (Mass. 1979)
10	MI	People v. Hopson, 743 N.W.2d 926, 927 (2008)
11	MT	State v. LaMere, 2 P.3d 204, 213 (Mont. 2000)
12	NV	Aesoph v. State, 721 P.2d 379, 381 (Nev. 1986)
13	NH	State v. Addison, 13 A.3d 214, 222 (N.H. 2010)
14	NJ	State v. Timmenedequas, 737 A.2d 55, 79 (N.J. 1999) <sup>343</sup>
15	NM	State v. Singleton, 28 P.3d 1124, 1127 (N.M. 2001)
16	NC	State v. Rogers, 562 S.E.2d 859, 877 (N.C. 2002)
17	OH	State v. Mack, 653 N.E.2d 329, 335 (Ohio 1995)
18	OK	Mitchell v. State, 884 P.2d 1186, 1195 (Okla. 1994)
19	OR	State v. Haugen, 243 P.3d 31, 38 (Or. 2010)
20	RI	State v. Lawless, 996 A.2d 166, 168-69 (R.I. 2010)
21	SC	State v. Stanko, 741 S.E.2d 708, 722 (S.C. 2013)
22	TN	State v. Hester, 324 S.W.3d 1, 51 (Tenn. 2010)
23	TX	Singleton v. State, 881 S.W.2d 207, 211 (Tex. App. 1994)
24	VT	State v. Jenne, 591 A.2d 85, 88-89 (Vt. 1991)
25	VA	Prieto v. Commonwealth, 721 S.E.2d 484, 506 (Va. 2012)
26	WI	State v. Coble, 301 N.W.2d 221, 237 (Wis.1981) <sup>344</sup>
27	WY	Espinoza v. State, 969 P.2d 542, 547 (Wyo. 1998)

343. Reference is to “a representative cross-section.”

344. Reference is to “a broad cross-section.”

## Part 3: Explicit Statutory Right to Access Records

	State	Statutory Provision	
		Explicit Right of Access	Access as Exception to General Rule of Non-Disclosure
1	DE		<p>DEL. CODE ANN. TIT. 10 § 4513(b) (2015). Disclosure and preservation of records</p> <p>Records used in the selection process shall not be disclosed, except in accordance with the jury selection plan or as necessary in the preparation or presentation of a motion challenging compliance with this chapter.</p>
2	HI	<p>HAW. REV. STAT. §612-23(d) (2015).</p> <p>The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection (a).</p>	<p>HAW. REV. STAT. §612-23(d) (2015).</p> <p>The contents of any records or papers used by the clerk in connection with the selection process shall not be disclosed, except as provided by other provisions of this chapter, in connection with the preparation or presentation of a motion under subsection (a), or upon order of the court.</p>
3	ID	<p>IDAHO CODE § 2-213(4) (2015).</p> <p>The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection (1) of this section.</p>	<p>IDAHO CODE § 2-213(4) (2015).</p> <p>The contents of any records or papers used by the jury commissioner or the clerk in connection with the selection process and not made public under section 2-206(4), Idaho Code, shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection (1) of this section.</p>
4	IN	<p>IND. CODE. § 33-28-5-21(e) (2015).</p>	

		The parties to the case may inspect, reproduce, and copy the records or papers of the jury administrator at all reasonable times during the preparation and pendency of a motion under subsection (a).	
5	KY		<p>KY. REV. STAT. ANN. § 29A.110 (2015).</p> <p>The contents of any records or papers used by the Administrative Office of the Courts or the clerk in connection with the selection process and not required to be made public under this chapter shall not be disclosed, except in connection with the preparation or presentation of a motion under the Rules of Civil Procedure or the Rules of Criminal Procedure or upon order of the Chief Justice.</p>
6	MD	<p>MD. CODE ANN. CTS. &amp; JUD. PROC. § 8-105 (2015).</p> <p>Information needed for challenges (b) The rules shall provide for access to, and copying of, information needed for a challenge under § 8-408 or § 8-409 of this title.</p>	
		<p>MD. CODE ANN. CTS. &amp; JUD. PROC. § 8-409 (2015).</p> <p>Access to records (c) On a showing that a party needs access to a record to prepare for a hearing on a motion</p>	

		<p>pending under this section, a trial judge may allow the party to inspect and copy a record as needed to prepare.</p> <p><i>See also</i> Lewis v. State, 632 A.2d 1175, 1176 (Md. 1993) (“The issue here is one of statutory construction. The question is whether [state law] confers on a litigant in a civil action or criminal cause that is to be tried to a jury a relatively unqualified right to inspect, reproduce, and copy records relating to the selection of prospective grand and/or petit jurors for the period of jury service relevant to the civil action or criminal cause. Applying the plain meaning of the statute, we shall hold that it does.”)</p>	
7	NE	<p>NEB. REV. STAT. ANN. § 25-1637(4) (West 2015)</p> <p>“The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection (1) of this section.”</p>	<p>NEB. REV. STAT. ANN. § 25-1637(4) (West 2015)</p> <p>The contents of any records or papers used by the jury commissioner or the clerk in connection with the selection process and not made public under Chapter 25, article 16, shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection (1) of this section, until after all persons on the revised proposed juror list have been discharged . . . .</p>



8	ND	<p>N.D. CENT. CODE ANN. § 27-09.1-12 (West 2015): Challenging compliance with selection procedures</p> <p>(4) “The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection 1.”</p>	<p>N.D. CENT. CODE ANN. § 27-09.1-12: Challenging compliance with selection procedures</p> <p>(4) The contents of any records or papers used by the clerk in connection with the selection process and not made public under this chapter shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection 1, until after all persons selected to serve as jurors have been discharged. . . .</p>
9	PA		<p>42 PA. CONS. STAT. ANN. § 4526(d) (West 2016)</p> <p>Records.—The contents of any records or papers used by the jury commissioners or their clerks in connection with the selection process and not made public under this subchapter shall not be disclosed (except in connection with the preparation or presentation of a petition filed under subsection (a) ) until after the list of qualified jurors or jury wheel has been emptied and refilled and all persons selected to serve as jurors before the list of qualified jurors or jury wheel was emptied have been discharged.</p>

## Part 4: Summary of States' Access to Records

	Right to Fair Cross-Section		Explicit Right to Access Records
	Guaranteed by Statute	Guaranteed by Case Law	
AL	✓		No
AK		✓	No
AZ	✓		No
AR	✓		No
CA		✓	No
CO	✓		No
CT		✓	No
DE	✓		Statutory right to access records
FL		✓	No
GA		✓	No
HI	✓		Statutory right to access records
ID	✓		Statutory right to access records
IL		✓	No
IN	✓		Statutory right to access records
IA	✓		No
KS	✓		No
KY		✓	Statutory right to access records
LA		✓	No
ME	✓		No
MD	✓		Statutory right to access records
MA		✓	No
MI		✓	No
MN	✓		No
MS	✓		No
MO	✓		Constitutional right to access records <sup>345</sup>
MT		✓	No
NE	✓		Statutory right to access records
NV		✓	Constitutional right to access records
NH		✓	No
NJ		✓	No <sup>346</sup>
NM		✓	No
NY	✓		No

345. The Missouri Supreme Court decision was issued before the state had enacted a jury selection statute. State *ex rel.* Garrett v. Saitz, 594 S.W.2d 606, 608 (Mo. 1980) (“Missouri is not bound by [the JSSA] and has no such state legislation.”). Missouri now has a statute guaranteeing a fair cross-section. See *infra* Appendix, Part 1.

346. As explained in Part V.B, a lower court in New Jersey has recognized the constitutional right to access records.

	Right to Fair Cross-Section		Explicit Right to Access Records
	Guaranteed by Statute	Guaranteed by Case Law	
NC		✓	No
ND	✓		Statutory right to access records
OH		✓	No
OK		✓	No
OR		✓	No
PA	✓		Statutory right to access records
RI		✓	No
SC		✓	No
SD	✓		No
TN		✓	No
TX		✓	No
UT	✓		No
VT		✓	No
VA		✓	No
WA	✓		No
WV	✓		No
WI		✓	No
WY		✓	No