

WHAT HURRICANE KATRINA TAUGHT US
ABOUT FAIR CROSS-SECTION CLAIMS

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THE PROBLEM:

After Hurricane Katrina, criminal defense lawyers in the Eastern District of Louisiana faced the prospect that African-American representation on jury venires would nose-dive because the majority of evacuations were from New Orleans, where the African-American population was concentrated. Criminal trials in federal court resumed in January, 2006, four months after Katrina, and true to predictions, there were fewer African-Americans on venires than before. What to do?

The Federal Public Defender's Office responded by filing challenges to the composition of jury venires under the fair cross-section requirement of the Sixth Amendment. For the most part, these challenges were not well received. After all, the judges and court staff had worked hard to get the system functioning again. The judges changed their initial position of excluding evacuees from the "community" that served as a baseline for comparison; they ultimately included evacuees who intended to return. We managed to show an absolute disparity of more than 10% between the rate of African-American representation on venires and the rate of African-American representation in the community. But the judges said the disparity was due to Hurricane Katrina, not to the jury selection system. We argued multiple causation, i.e., both were responsible. But we still lost.

In the course of litigating these claims, we learned that fair cross-section claims rarely succeed. The stumbling block is often the test used to measure whether the disparity is substantial. But even when defendants pass that hurdle, they still lose because courts attribute the disparity to sociological characteristics or personal failings on the part of prospective jurors rather than the jury selection system.

This break-out session will discuss that problem and a proposed solution.

I. Fair cross-section claims are based on the Sixth Amendment of the Constitution, not the Equal Protection Clause.

This is important because courts tend to treat fair cross-section claims as “equal protection lite.” Equal protection claims require proof of discriminatory intent. Fair cross-section claims do not. Rather, they require proof that underrepresentation is “due to systematic exclusion in the jury selection process.”

Courts tend to misinterpret what “due to systematic exclusion” means. Some courts have mistakenly required proof of discriminatory intent. Other courts look for blameworthiness. If they can shift the blame to members of the underrepresented group (i.e., they are less likely to return juror questionnaires), they conclude the jury selection process does not “exclude” them.

This is the wrong approach. The Supreme Court read the right to a jury selected from a fair cross-section of the community into the Sixth Amendment because the Equal Protection Clause did not adequately address problems in jury selection.

On the one hand, Southern jury commissioners claimed they drew up lists of potential jurors from people they knew and they did not know any qualified African-Americans. The Supreme Court said they had a duty to find them. But the Equal Protection Clause does not create an affirmative duty; it merely forbids intentional discrimination.

On the other hand, there was a movement in the North against elite “blue ribbon juries.” Women and day laborers were pressing for greater representation. The rationale for not calling these groups for jury service was “benign,” and the Court had not yet ruled out benign motivation as a defense to an equal protection violation.

Both Congress and the Supreme Court acted to address the problem.

Congress enacted the Jury Selection and Service Act of 1968, which established procedures for random selection of jurors in federal court. 28 U.S.C. §§ 1861 *et seq.*

The Supreme Court recognized an affirmative right to a jury drawn from a fair cross-section of the community in **Taylor v. Louisiana**, 419 U.S. 522 (1975). It spelled out the elements of a *prima facie* case in **Duren v. Missouri**, 439 U.S. 357, 364 (1979):

- (1) a distinctive group;
- (2) whose representation on venires was not fair and reasonable;
- (3) due to systematic exclusion in the jury selection process.

This third prong, “due to systematic exclusion,” is merely a **causation** requirement. The challenger must prove a **causal connection** between the underrepresentation and an aspect of the jury selection system.

II. The second element – substantial underrepresentation – is problematic, especially where the underrepresented group is only a small proportion of the population, due to the test that the lower courts use for “substantial.” The biggest obstacle, however, has been the third element – tying underrepresentation to the jury selection process.

A. Here are some examples of how the problem manifests itself:

1. The defendant complains that use of the voter registration list as the sole source for jurors results in underrepresentation of African-Americans because African-Americans register to vote at a lower rate than whites.

Result: defendant loses. Court says underrepresentation is due

to failure on the part of African-Americans to register to vote, not the jury selection system. See **United States v. Weaver**, 267 F.3d 231, 244-45 (3rd Cir. 2001).

2. Jurors are chosen from local resident lists, which the defendant complained were not updated often enough in localities with African-American concentrations. The statistics show that people in African-American neighborhoods failed to return juror questionnaires in disproportionate numbers but do not distinguish between non-returns due to official misfeasance (failure to update addresses) and non-returns due to sociological factors (higher transience rate among A-As or personal choice).

Result: defendant loses. It should be enough to prove official malfeasance played some role but under current First Circuit law, it is not. **United States v. Green**, 389 F. Supp. 2d 29 (D. Mass.) (Gertner, J.), mandamus granted on other grounds, **In Re United States**, 426 F.3d 1 (1st Cir. 2005).

B. Errors:

1. Requiring that jury selection system be *sole* cause.
in concurrent causation cases:

Katrina might be considered a contributing cause but continued use of pre-Katrina addresses to summon jurors after the hurricane was clearly a cause as well. where allocation of underrepresentation among alternate causes is not possible, e.g., **Green**

Proposal: apply tort causation rules, including switching the burden of proof after initial showing by challenger.

2. Avoiding responsibility when jury selection system predictably leads to underrepresentation due to known demographic/sociological characteristics.

Proposal: use disparate impact analysis.

III. Disparate impact claims: **Griggs v. Duke Power Co.**, 401 U.S. 424 (1971), as modified by **Wards Cove Packing Co. v. Atonio**, 490 U.S. 642 (1989), and the Civil Rights Act of 1991.

A. Model: employment discrimination law (Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*)

disparate treatment claims: intentional discrimination

disparate impact claims: a specific practice or policy impacts a protected group more harshly

B. **Griggs:**

African-American job applicants challenge Duke’s requirement of a high school diploma and satisfactory score on standardized aptitude test for employment in any department except Labor (where African-Americans were concentrated). Both operated to disqualify African-Americans at a higher rate than whites. Neither was shown to be job-related.

To remove unnecessary barriers to employment, “**Congress has now required that the posture and condition of the job-seeker be taken into account.** It has provided that the vessel in which the milk is proffered be one all seekers can use.” 401 U.S. at 431 (emphasis added).

Absent proof of business necessity, the requirements violate Title VII, regardless of employer intent.

“[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” 401 U.S. at 432 (internal citation omitted).

C. Application to fair cross-section claims:

1. Changes paradigm: not an accusation of discrimination but rather identification through statistical analysis of a facially neutral aspect of the system which stands in the way of a common goal: fair and reasonable representation of all segments of the community on venires.
2. Makes clear that the jury selection system must take “the posture and condition” of prospective jurors “into account.”
If African-Americans have a higher transience rate, jury selection system must update addresses more often.

If African-Americans tend to register to vote at a lower rate than whites, jury selection system must use additional sources besides voter registration list.

D. Justification for using disparate impact model for fair cross-section claims:

1. Just as Title VII was intended to promote a value beyond the anti-discrimination principle, that is, removal of barriers to employment, so too the fair cross-section claim recognized by the Supreme Court was also intended to promote a value beyond the anti-discrimination principle, that is, fair and reasonable representation of the community on venires.
2. The Supreme Court’s statement in **Duren** that fair cross-section claims do not require intentional discrimination came in the midst of a series of decisions about which constitutional claims do require intentional discrimination. Plaintiffs were pushing for extension of disparate impact claims to the Equal Protection Clause and the Fifteenth Amendment, but the Supreme Court said no. Hence, the Supreme Court knew it was creating a disparate impact claim when it decided discriminatory intent was not necessary to a Sixth Amendment fair cross-section claim.