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Jury Diversity: A Relevant Theme in American Jurisprudence

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When your *jury venire* is a homogeneous sea of citizens, unconnected to a criminal defendant in terms of race, religion, age, ethnicity, gender or sexual orientation, does this inconsistency disenfranchise a defendant from receiving a fair and impartial jury trial and, if so, is greater juror diversity the answer?

Nationally, the trend is to attain jury diversity, and efforts are underway to achieve that goal; however, jury diversity is not statutorily or constitutionally guaranteed. In all criminal proceedings, both the United States Constitution[1] and the New Jersey State Constitution[2] guarantee a criminal defendant the right to a speedy and public trial by an *impartial jury*[3] of the state and district wherein the crime shall have been committed.[4] The concept of juror diversity, then, does not appear to be specifically constitutionally guaranteed; rather, a defendant is entitled to an impartial jury panel only. There is a strong implication, however, that a criminal jury must consist of a jury of one's peers. However, that concept is not found within the scope of either constitution and, despite some suggestion to the contrary, the constitutional right to an impartial jury does not necessarily translate into guaranteeing a jury of one's peers.

The idea of a jury of one's peers first materialized in, and is found in one of the lasting principles of, the Magna Carta,[5] wherein it states, "No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment *of his peers* or by the law of the land." During the American Revolution, colonists believed they were entitled to the same rights guaranteed in the Magna Carta and, as a result, those rights were subsequently embedded into the laws of their states and later into the United States Constitution and Bill of Rights.[6] The idea of a jury of one's peers has evolved from English common law into our constitutional guarantee of an impartial jury. Today, however, the concept of an impartial jury is believed to be best achieved through the presence of juror diversity. This initiative, consequently, has emerged as a relevant theme in contemporary American jurisprudence.

Today's defendant expects to have a *jury venire* consistent with his or her own race, religion, age, ethnicity, gender or sexual orientation. Unfortunately, the current dilemma facing defendants across the country is the measurable absence of a diverse jury pool, which often gives the appearance of an unfair judicial proceeding. In an effort to rectify that problem, jurisdictions nationally are struggling to provide defendants with *jury venires* that accurately reflect the defendant's "peers."[7] "Criminal defense attorneys are often presented with a jury that features a majority of white, upper-middle class individuals who are then responsible for judging the guilt or innocence of a defendant who does not share their same characteristics or background."[8]

Current social science research, suggests that heterogeneous juries make better decisions.[9] A recent study found that diverse juries had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements.[10] Moreover, when it comes to issues of race, a more diverse jury was more likely to discuss race-related topics and raise questions about racism.[11] Additionally, further research demonstrates how jury composition can influence both the perceived fairness of the trial and the perceived accuracy of the jury's decision.[12]

Historically, minorities have been disproportionately excluded from jury service, a result of a combination of factors at each stage of the juror identification process.[13] At the initial stage, juror notification methods, usually by regular mail, often fail to identify or reach minorities for the simple reason that they generally are more transient.[14] At the *venire* stage, those minorities who actually receive notification report for jury duty at a lower rate than the majority because they tend to disregard the jury summons.[15] At the petit jury stage, minorities are often eliminated through the use of both peremptory and for-cause strikes.[16]

In New Jersey, the juror selection process begins with the preparation of a juror source list, which is statutorily mandated.[17] A jury population is then selected from a list of county residents whose names and addresses are obtained from a merger of registered voter lists, licensed drivers, filers of state gross income tax returns and filers of homestead rebate or credit application forms.[18] Although the use of multiple lists would appear to produce a more diverse jury pool, nationally the reverse appears to be the case.

In 1995, the Eastern District of Pennsylvania joined several other federal districts in a two-year project to determine whether using multiple lists improved minority representation, specifically African-Americans and Hispanics, in the jury selection process.[19] Curiously, the overall conclusion was that supplementation of the primary source list (voter registration lists) with one additional list (drivers' license lists) resulted in the actual increase of under-representation of those minorities.[20]

In an effort to increase juror diversity, many states have endeavored to supplement their primary source lists; however, each additional list came with its own limitations. When Colorado considered using utility customer lists to expand their primary source list, the proposal was rejected as age, gender and economically biased, noting that most utility listings are under the name of the male member of the household.[21] Similar issues existed with the use of telephone directories and property tax records, both of which under-represented young adults. New York is most similarly situated to New Jersey in that it combines various lists (voter registration, drivers' license, income tax payers, welfare and unemployment compensation recipients) in populating its jury pool.[22] It is unclear, however, if the expansion of New York's primary source list is truly effective in creating real juror diversity.[23]

Another shortfall in securing a diverse *jury venire* appears to be juror non-responsiveness.[24] Individuals who believe nothing would happen if they fail to appear for jury service are less likely to appear than those who believe a consequence would result from their nonappearance.[25] In 2013, the national non-response rate was between 20 percent to nearly two-thirds.[26] The lack of jury diversity has been linked to juror non-responsive rates, and some federal courts are taking steps to address the problem.[27] For example, Eastern District of Michigan Judge David Lawson ordered those jurors who failed to appear for jury duty to appear in his court, warning them that their continued absence would result in arrest, jail time or a monetary fine.[28] His colleague, Judge Denise Page Hood, took an educational approach and required those who failed to appear for jury service to appear in her courtroom and observe the jury selection process in its entirely.[29] It appears that many courts agree the sanction for failing to appear for jury duty, or the mere threat of sanction, effectively increases juror turnout.[30]

In 1997, a pilot project initiated in Eau Claire, Wisconsin, found that increasingly aggressive steps to follow up with nonresponsive individuals reduced the juror non-response rate from 11 percent for the first mailing to five percent after a second mailing, with the rate falling below one percent after a third mailing that included an order to show cause and warrant.[31] The Los Angeles County Superior Court had equally similar results from its Summons Sanction

Program.[32] The failure to appear rate for jury summonses on the first mailing was 41 percent; however, follow-up efforts significantly reduced the final non-response rate to merely 2.7 percent.[33] Additionally, the National Center for State Courts obtained detailed information from more than 1,400 state courts about their jury operations from 2004 through 2006, and found that 80 percent of state courts conducted some form of follow-up on non-responders and jurors who failed to appear.[34] Courts that reported sending a second summons or notice showed non-response and failure to appear rates 24 to 46 percent less than courts that reported no follow-up after a first notice.[35] These results strongly suggest that when courts take affirmative steps to enforce a jury summons, the nonresponsive rate drops significantly.[36] Since nonresponsive rates directly impact achieving a diverse *jury venire*, decreasing nonresponsive rates would suggest the availability of a more diverse *jury venire*.

Even if there is full minority representation in a *venire*, the judicial system still allows for the exclusion of minorities from sitting juries through the exercise of peremptory challenges.[37] In an effort to remedy uncontrolled discrimination through the use of peremptory challenges, however, the Supreme Court, in *Batson v. Kentucky*,[38] stated that the equal protection clause of the 14th Amendment of the United States Constitution guarantees that a jury is "selected pursuant to nondiscriminatory criteria."[39] In so doing, the Court explicitly prohibits a prosecutor from using a peremptory strike for the purpose of removing a juror based solely upon their race.[40] The Supreme Court has expanded *Batson* to include gender as well as races other than African-American.[41]

This issue was also addressed by the New Jersey Supreme Court in *State v. Gilmore*.[42] In *Gilmore*, the Court cited the New Jersey Constitution,[43] which protects fundamental rights independently of the United States Constitution, and referred to federal constitutional law only as establishing the floor of minimum constitutional protection.[44] The Court observed that the right to a trial by an impartial jury does not require that petit juries actually chosen must be an exact microcosm of the community, but rather the guarantee that the state's use of peremptory challenges may not unreasonably restrict the possibility that the petit jury will contain a representative cross section of the community.[45] In *State v. Osorio*, the New Jersey Supreme Court implemented the employment of a three-step process whenever it has been asserted that a party has exercised peremptory challenges based on race or ethnicity.[46] With these guarantees in place, the actuality of achieving a truly diverse jury panel, if the *venire* contains a true amalgam of individuals, is more probable than not.

Despite no specific constitutional guarantee that a jury must consist of one's peers, steps are in place nationally to ensure a defendant receives a more diverse jury panel. Whether it is through the expansion of jury source lists, imposed sanctions for failing to appear for service, or through motion practice, defendants are now entitled to a heterogeneous jury. Nationally, it is recognized that homogenous *jury venires* pose a perceived, if not very real problem, in achieving justice.

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Endnotes

1. U.S. Const., Art. 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, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.")

2. N.J. Const., Art. I, Para. 10. ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.)

3. N.J. Const., Art. I, Para. 10.

4. U.S. Const., Art. VI.

5. Magna Carta, 1215.

6. National Archives and Records Administration, https://www.archives.gov/exhibits/featured_documents/magna_carta/ (last visited August 29, 2016).

7. Ashish S. Joshi and Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, ABA Section of Litigation, 2015.

8. *Id*., *citing,* Hong Tran, Jury Diversity: Policy, legislative and legal arguments to address the lack of diversity in juries, *Defense*, May 2013, at 6.

9. *Id*.

10. Samuel Sommers, On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations, 90 (4) *Journal of Personality and Social Psychology* 597 (2006).

11. Sonia Chopra, Ph.D., Preserving Jury diversity by Preventing Illegal Peremptory Challenges: How to Make a Batson/Wheeler Motion at Trial (and Why You Should), *The Trial Lawyer*, 12 (Summer 2014).

12. Leslie Ellis & Shari Seidman Diamon, Race, Diversity and Jury Composition: Battering and Bolstering Legitimac, 78 (3) *Chicago-Kent Law Review* 1033 (2003)

13. Edward S. Adams & Christian J. Lane, Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection, 73 (3) *New York University Law Review* 703 (1998).

14. *Id*.

15. *Id*.

16. *Id.*

17. N.S. Stat. §2B:20-2 (2016). Presently, in New Jersey the eligibility requirements for jury service are established in N.J.S.A. 2B:20-1 and specifically state that, "Every person summoned as a juror shall be 18 years of age or older, shall be able to read and understand the English language, shall be a citizen of the United States, shall be a resident of the county in which the person is summoned, shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States, and shall not have any mental or physical disability which will prevent the person from properly serving as a juror."

18. *Id.*

19. Hong Tran, Jury Diversity: Policy, legislative and legal arguments to address the lack of diversity in juries, *Defense*, May 2013, at 8.

20. *Id*.

21. *Id*.

22. *Id*.

23. Statement of Prof. Valerie P. Hans, Public Hearing on Jury Diversity, Assembly Standing Committees On Judiciary and Codes, New York State Assembly, New York NY (April 30, 2009).
24. John B. Bueker, Jury Source Lists: Does Supplementation Really Work?, 82 *Cornell L. Rev*. 390 (Jan. 1997).
25. *Id*.
26. Ronald Randall, James W. Woods and Robert G. Martin, Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool, *Justice System Journal* 29, no. 71:75 (2008).
27. Joshi and Kline, *supra*.
28. Tran, *supra.*
29. *Id*.
30. *Id*., *citing,* Hong Tran, Jury Diversity: Policy, legislative and legal arguments to address the lack of diversity in juries, *Defense*, May 2013, at 8.
31. Paula Hannaford-Agor, Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded, 59 *Drake Law Rev*. 762, 785 (2011).
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.
37. Adams and Lane, *supra,* at 720-721.
38. 476 U.S. 79 (1986).
39. Adams and Lane, *supra,* at 722; *citing, Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986).
40. Adams and Lane, *supra,* at 722; *citing, Batson v. Kentucky*, 476 U.S. 79, 89 (1986).
41. Adams and Lane, *supra,* at 723. *See also, Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991); *Holland v. Illinois*, 493 U.S. 474, (1990); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).
42. 103 N.J. 508 (1986).
43. N.J. Const. art. 1, ¶¶ 5, 9, and 10.
44. *State v. Gilmore*, 103, N.J. 508, 523-524 (1986).
45. *Id*. at 529.
46. *State of New Jersey v. Oscar Osorio*, 199 N.J. 486, 492 (2009). (Step one requires that the party contesting the exercise of a peremptory challenge make a *prima facie* showing that the peremptory challenge was exercised on the basis of race or ethnicity. The burden of proof only requires the challenger to tender sufficient proofs to raise an inference of discrimination. If that burden is met, step two is triggered and the burden shifts to the party exercising the peremptory challenge to prove a race or ethnicity neutral basis supporting the execution of the peremptory challenge. The trial court must then decide whether that party has presented a reasoned, neutral basis for the challenge or if the explanation tendered is pretext. Once that analysis is completed, the third step is triggered and requires the trial court to weigh the proofs adduced in step one against those presented in step two and determine whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias.).