

6.2 Overview

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. 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.

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

Although the right to be judged by a fair and impartial jury of one’s peers is a bedrock principle of the American criminal justice system, jury pools from which jurors are selected do not necessarily reflect the racial and ethnic composition of the communities from which they are drawn. Courts “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.” *See* NEBRASKA MINORITY AND JUSTICE TASK FORCE, FINAL REPORT 17 (2003) (noting that “many researchers have found that this is ‘the rule’ rather than the exception”); FLORIDA 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.”); *see also* MINNESOTA SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL REPORT 32 (1993) (“[J]ury pools rarely, if ever, are representative of the racial composition of our communities.”).

A. Benefits of Representative Juries

Legitimacy of the criminal justice system. The right to trial by jury is protected by both the federal and North Carolina constitutions, and North Carolina citizens have a corresponding right to serve as jurors. Criminal defendants and potential jurors share an interest in a non-discriminatory jury formation process; the courts have therefore held that it is “necessary and appropriate for the defendant to raise the rights of the juror[s]” prevented from participating in jury service on account of their race. *Powers v. Ohio*, 499 U.S. 400, 414 (1991).

Juries play an important role in upholding democratic values by vesting decision-making authority in ordinary citizens. *See id.* at 406 (“The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.”); *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) (“The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.”). Reliance on juries “validates the justice system

through community participation, provides a check against governmental abuses of power, educates citizens and promotes civic engagement, and promotes integration and mutual understanding across social groups.” *State v. Saintcalle*, 309 P.3d 326, 368 (Wash. 2013) (Gonzalez, J., concurring). Exclusion or underrepresentation of racial minorities on juries undermines these democratizing effects. See EQUAL JUSTICE INITIATIVE, [ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY](#) 38 (2010).

Juries and jury pools that underrepresent racial minorities also may create a perception of unfairness, a problem that is distinct from the actual fairness of decisions rendered by such juries. *Id.* (noting that “[c]ommunities of color across the country have rejected and continue to reject criminal verdicts handed down by all- or predominantly-white juries”). Juries are often faced with difficult, complicated questions, and the right answers may not always be popular. In such cases, the absence of diversity may make a questionable jury verdict difficult to accept. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1048 (2003) (observers may be less likely to conclude that a trial is fair when an all-White jury finds a defendant guilty).

Jury deliberations. The racial composition of juries may affect jury deliberations. Some studies have concluded that racial diversity improves the deliberative processes of the jury. See, e.g., NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 74 (2007) (concluding that research on heterogeneous decision-making groups supports claim that diversity on juries improves fact-finding); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285–95 (2000) (considering the influence of race on jury deliberations and observing that jurors of color may be more likely to raise the subject of race, thereby broadening the jury’s discussion of relevant issues). In one study, researchers observed that mock juries that were racially diverse deliberated longer, considered a wider range of information, perceived evidence more accurately, were more likely to correct factual errors, and perceived themselves as more legitimate than all-White, homogeneous mock juror groups. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006). Researchers conducting the study concluded that “diverse groups were also more open-minded in that they were less resistant to discussions of controversial race-related topics.” *Id.* at 608.

Some researchers have found that the risk of racial bias is higher when issues of race are not “salient”—in other words, when they are present but not discussed. See *supra* § 1.3, Potential Factors Relevant to Racial Disparities in the Criminal Justice System; see also Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2001). Diverse juries may be more likely to make the subject of race salient by openly discussing race. One researcher concluded that jurors on racially diverse juries are more likely to acknowledge the influence of race on their own perceptions and the perceptions of other jurors. William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at*

the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White, 53 DEPAUL L. REV. 1497, 1532 (2004). Another study suggests that diverse juries may be more likely to discuss sensitive issues of race, including racial profiling. Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 86 (2008); see also Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953 (2009).

Case outcomes. Some researchers have concluded that the racial composition of jury pools may influence case outcomes. For example, one recent study conducted by Duke University researchers found that when there are no potential Black jurors in the pool, Black defendants are more likely than Whites to be convicted of at least one crime (81% chance for Black defendants versus 66% chance for White defendants). See Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1021, 1032 (2012) (concluding that “defendants of each race do relatively better when the jury pool contains more members of their own race”). The authors found this effect regardless of whether potential Black jurors are actually seated on a trial jury. This study found, for example, that juries formed from all-White jury pools convict Black defendants of drug crimes at a 25% higher rate than they convict White defendants. *Id.* at 1038. When at least one Black potential juror is added to the pool, conviction rates of White defendants rise and Black defendants fall. *Id.*

Other studies have concluded that the race of seated jurors influences case outcomes. See, e.g., Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 82–99 (1993); Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 633 (2005) (finding small but statistically significant influence of juror race on verdicts).

Sentencing. The racial composition of the seated jury also may make a difference in jury sentencing. In one study, researchers found that the racial composition of the jury affected sentencing in non-capital felony cases. See Howard C. Daudistel et al., *Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases*, 29 J. APPLIED SOC. PSYCHOL., 317 (1999). The study found that the higher the composition of Latinos in the jury, the longer the sentences received by white defendants. *Id.* Although North Carolina jurors in non-capital cases play a limited role in sentencing determinations, they make certain consequential determinations, such as assessing disputed aggravating factors and determining habitual felon status. G.S. 15A-1340.16(a3); G.S. 14-7.5.

B. Possible Causes of Unrepresentative Jury Pools

Underrepresentation on jury pools may result from a variety of practices and methods used to identify, qualify, and excuse potential jurors. Section 6.5 of this chapter explains in greater detail the methods used to form juries in North Carolina, along with strategies for addressing racial disparities that may arise at various stages of the jury formation

process. Some examples of jury composition methods that may result in underrepresentation include:

- Exclusive reliance on voter registration lists. Voter registration lists are the most common source of juror names, and these lists tend to underrepresent Black and Latino citizens who are eligible to serve as jurors. *See* Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993); *see also* *United States v. Weaver*, 267 F.3d 231, 244–45 (3d Cir. 2001) (“[I]f the use of voter registration lists over time did have the effect of sizably underrepresenting a particular class or group on the jury venire, then under some circumstances, this could [violate the Sixth Amendment].” (quotation omitted)).
- Reliance on a limited number of source lists that do not reflect the diversity of the jury-eligible community. *See* Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 779–82 (2011). Even in jurisdictions where voter lists are supplemented with driver lists, as is the case in North Carolina, some studies have shown that exclusive reliance on these two lists underrepresents racial minorities. *See* ELIZABETH M. NEELEY, NEBRASKA MINORITY JUSTICE COMMITTEE, REPRESENTATIVE JURIES: EXAMINING THE INITIAL AND ELIGIBLE POOLS OF JURORS (2008).
- Insufficient renewal of master jury lists. Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 782–83 (2011). When lists are “not updated frequently . . . people who move often, such as renters, are often omitted.” Samuel R. Sommers, [On the Obstacles to Jury Diversity](#), THE JURY EXPERT (American Society of Trial Consultants), Jan. 2009, at 1 (last visited Aug. 28, 2014).
- Jury composition methods that rely on the return of jury questionnaires and do not provide for subsequent steps to follow up on undelivered jury summonses. Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 783–85 (2011). “[U]ndeliverable, disqualification, excusal and failure-to-appear rates tend to disproportionately decrease minority representation due to socio-economic factors such as mobility rates, criminal records, and financial hardship for lower-income individuals.” National Center for State Courts, [Jury Managers Toolbox: A Primer on Fair Cross Section Jurisprudence](#), NCSC CENTER FOR JURY STUDIES (2010); *see also* NEW YORK STATE UNIFIED COURT SYSTEM OFFICE OF COURT RESEARCH, JURY REPRESENTATIVENESS: A DEMOGRAPHIC STUDY OF JUROR QUALIFICATION AND SUMMONING IN MONROE COUNTY, NEW YORK (2011) (finding higher undeliverable rates, rates of non-response to qualification questionnaires, and excusals for service among Black people in Monroe County, New York).
- Glitches in automated jury composition systems. In some cases, computing errors have resulted in the unintended underrepresentation of racial minorities. For example, during a routine upgrade to the computerized voter system in Kent County, Michigan,

the software was accidentally programmed to choose names from the first 125,000 names entered on the master jury list instead of from the entire list of 500,000 names. Since the list was sorted alphabetically by zip code and the greatest proportion of Black people in Kent County lived in sequentially higher zip codes, the error suppressed Black representation on Kent County jury panels. Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 770 (2011)

- Qualification methods that erroneously exclude racial minorities from jury service. For example, in North Carolina, persons convicted of a felony are eligible to serve as jurors once their citizenship rights have been restored. G.S. 9-3. However, unless this point is explained clearly in the juror summons, potential jurors may erroneously conclude that they are permanently disqualified as a result of a felony conviction.
- Jury composition systems that permanently remove names upon disqualification where the disqualification should have been categorized as temporary. For example, if a juror is disqualified because he or she does not speak English, is not a citizen, or has a felony conviction, his or her disqualification is temporary, and procedures should ensure that the juror's name is not permanently excluded from future juror lists. See NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, [A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT](#) 10 (5th ed. 2013) (instructing that “if any persons were disqualified for reasons that are not permanent, then the commission must be sure that the reason for the disqualification remains if they are to be removed,” and that “the jury commission should review the computer’s list of persons previously found to be ineligible to be jurors regardless of the reason before any . . . names are deleted from the new jury list”).
- Jury composition practices that do not address barriers to jury service for low-income individuals. These barriers include lengthy terms of jury service, low compensation, risk of job loss, and hardships related to transportation, homelessness or insecure housing, or childcare costs. Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 785–88 (2011). Such barriers may produce racially disparate rates of hardship excusals, which may be granted before the potential juror enters the courthouse.