

STANDARDS FOR DISPARITY IN JURY POOLS

- Criminal defendants frequently challenge the composition of their jury pools on the ground that the pools are not representative of the population in the community. Challenges under the U.S. Constitution are possible under the Fifth or Sixth Amendments. As a practical matter, challenges under the Fifth Amendment are rarely available, because they require a showing of a purposeful discriminatory act, rather than merely discriminatory effect.
- Accordingly, most challenges, and most significant case law, falls under the Sixth Amendment, which applies only to criminal matters. The right to an impartial jury guaranteed by the Sixth Amendment "comprehends a fair possibility for obtaining a jury constituting a representative cross-section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). The Sixth Amendment does not mandate juries that exactly mirror community population. Rather, it mandates that "jury wheels, pools of names, panels or venires from which juries are drawn ... not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."
- In *Duren v. Missouri*, 439 U.S. 357, 364 (1979), the Supreme Court established a three-part test to determine whether there is a *prima facie* violation of the Sixth Amendment in the jury pool context. Under *Duren*, the defendant must show "(1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of the group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." If a defendant makes a *prima facie* case, the government may rebut the case by "showing attainment of a fair cross-section to be incompatible with a significant state interest." *Duren*, 439 U.S. at 368.
- Courts differ on statistical methods employed to determine degree of underrepresentation. If a distinct group comprises ten percent of the jury-eligible population in a geographic area, but comprises only five percent of the jury pool in that geographic area, is that a five percent underrepresentation, or a fifty percent underrepresentation? Courts differ on which measurement to use. *See U.S. v. Rioux*, 930 F. Supp. 1558, 1568-70 (D. Conn. 1995).
- In cases employing the former approach, courts have approved jury pool procedures that have resulted in disparities between two and eleven and a half percent. *See Rioux*, 930 F. Supp. At 1570 (listing cases). Other courts have disapproved systems that resulted in disparities between ten and sixteen percent. *See, e.g., Hernandez v. Texas*, 347 U.S. 475 (1954) (14%).
- Where impermissible underrepresentation is found, there is no requirement that a defendant show malicious intent by the governing body. For example, in *U.S. v. Osorio*, 801 F. Supp. 966 (D. Conn. 1992), the court found a Sixth Amendment violation where the jury pool was drawn from lists that inadvertently excluded registered voters from two cities in the geographic area that had large Hispanic and African-American populations.
- A Sixth Amendment violation can also occur where procedures for excusing jurors from service result in systematic exclusion of an identifiable group. In *Duren*, the defendant

challenged an Iowa statute that allowed women to be automatically excused from jury service upon their request. After determining that this policy had resulted in jury pools that were less than thirty percent female, the Supreme Court found a violation of the Sixth Amendment.

- The Federal Jury Selection and Service Act ("JSAA") provides that all litigants in Federal courts entitled to trial by jury shall have the right to "juries selected at random from a fair cross section of the community" and that no citizen shall be excluded from jury service on account of race, color, religion, sex, national origin, or economic status. The JSAA requires each U.S. District Court to devise a plan for random selection of jurors, which must utilize voter registration lists, or lists of actual voters and any other source or sources of names necessary to foster the policies of the Act. *See* 28 U.S.C.A. Sec. 1861, *et. seq.*
- Oregon statutory law entitles criminal defendants to an "impartial jury," but does not mandate that the jury necessarily be made up of a fair cross-section of the community. *See* ORS § 136.001. However, Oregon law does mandate that the opportunity for jury service "shall not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in this state." ORS § 10.030.

O.R.S. § 10.030

- ▶ West's Oregon Revised Statutes Annotated Currentness(Refs & Annos)
Title 1. Courts of Record; Court Officers; Juries
 ▣ Chapter 10. Juries
 ▣ General Provisions

→ **10.030. Eligibility; discrimination prohibited**

<Text of section amended by multiple laws from the 2007 Regular Session of the Oregon Legislative Assembly. See also following version of this section.>

(1) Except as otherwise specifically provided by statute, the opportunity for **jury service** shall not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in this state.

(2) Any person is eligible to act as a juror in a civil trial unless the person:

- (a) Is not a citizen of the United States;
- (b) Does not live in the county in which summoned for **jury service**;
- (c) Is less than 18 years of age; or
- (d) Has had rights and privileges withdrawn and not restored under ORS 137.281.

(3)(a) Any person is eligible to act as a juror in a criminal trial, beginning on or after December 5, 1996, unless the person:

- (A) Is not a citizen of the United States;
- (B) Does not live in the county in which summoned for **jury service**;
- (C) Is less than 18 years of age;
- (D) Has had rights and privileges withdrawn and not restored under ORS 137.281; or
- (E) Has been convicted of a felony or served a felony sentence within the prior 15 years.

(b) As used in this subsection:

- (A) "Felony sentence" includes any incarceration, post-prison supervision, parole or probation imposed upon conviction of a felony or served as a result of conviction of a felony.
- (B) "Has been convicted of a felony" has the meaning given that term in ORS 166.270.

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(4) A person who is blind, hard of hearing or speech impaired or who has a physical disability shall not be ineligible to act as a juror or be excluded from a **jury list** or **jury service** on the basis of blindness, hearing or speech impairment or physical disability alone.

(5) No person is eligible to act as a juror in any circuit court of this state within 24 months after being discharged from **jury service** in a federal court in this state or circuit court of this state unless that person's service as a juror is required because of a need for additional jurors.

(6) In addition to the disqualifications listed in subsection (2) of this section, a person is ineligible to act as a juror on a grand jury if the person has been convicted of a felony, other than a felony traffic offense, or has served a felony sentence, other than a sentence for a felony traffic offense, within the prior 15 years. As used in this subsection, "conviction" means an adjudication of guilt upon a verdict or finding entered in a criminal proceeding in a court of competent jurisdiction.

<Text of section amended by multiple laws from the 2007 Regular Session of the Oregon Legislative Assembly. See also preceding version of this section.>

(1) Except as otherwise specifically provided by statute, the opportunity for **jury service** may not be denied or limited on the basis of race, religion, sex, sexual orientation, national origin, age, income, occupation or any other factor that discriminates against a cognizable group in this state.

(2) Any person is eligible to act as a juror in a civil trial unless the person:

- (a) Is not a citizen of the United States;
- (b) Does not live in the county in which summoned for **jury service**;
- (c) Is less than 18 years of age; or
- (d) Has had rights and privileges withdrawn and not restored under ORS 137.281.

(3)(a) Any person is eligible to act as a juror in a criminal trial, beginning on or after December 5, 1996, unless the person:

- (A) Is not a citizen of the United States;
- (B) Does not live in the county in which summoned for **jury service**;
- (C) Is less than 18 years of age;
- (D) Has had rights and privileges withdrawn and not restored under ORS 137.281; or
- (E) Has been convicted of a felony or served a felony sentence within the prior 15 years.

(b) As used in this subsection:

- (A) "Felony sentence" includes any incarceration, post-prison supervision, parole or probation imposed upon

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conviction of a felony or served as a result of conviction of a felony.

(B) "Has been convicted of a felony" has the meaning given that term in ORS 166.270.

(4) A person who is blind, hearing or speech impaired or physically disabled is not ineligible to act as a juror and may not be excluded from a **jury list** or **jury service** on the basis of blindness, hearing or speech impairment or physical disability alone.

(5) A person is ineligible to act as a juror in any circuit court of this state within 24 months after being discharged from **jury service** in a federal court in this state or circuit court of this state unless that person's service as a juror is required because of a need for additional jurors.

(6) In addition to the disqualifications listed in subsection (2) of this section, a person is ineligible to act as a juror on a grand jury if the person has been convicted of a felony, other than a felony traffic offense, or has served a felony sentence, other than a sentence for a felony traffic offense, within the prior 15 years. As used in this subsection, "conviction" means an adjudication of guilt upon a verdict or finding entered in a criminal proceeding in a court of competent jurisdiction.

Amended by Laws 1971, c. 630, § 1; Laws 1975, c. 781, § 4; Laws 1977, c. 262, § 1; Laws 1985, c. 703, § 2; Laws 1989, c. 224, § 3; Laws 1997, c. 313, § 8; Laws 1997, c. 736, § 1; Laws 2007, c. 70, § 4, eff. Jan. 1, 2008; Laws 2007, c. 100, § 13, eff. Jan. 1, 2008.

2004 Electronic Pocket Part Update

2007 Legislation

Laws 2007, c. 70, § 4, amended this section by rewriting Subsec. (4), which prior thereto read:

"(4) A person who is blind, hearing or speech impaired or physically disabled shall not be ineligible to act as a juror or be excluded from a **jury list** or **jury service** on the basis of blindness, hearing or speech impairment or physical disability alone."

G Procedure. The motion for substitution may be made by any party, or by the successors in interest or representatives of the deceased party or the party with a disability or the successors in interest of the transferor and shall be served on the parties as provided in Rule 9 and upon persons not parties in the manner provided in Rule 7 for the service of a summons.

Laws 2007, c. 100, § 13, amended this section by rewriting Subsecs. (1), (4) and (5), which prior thereto read:

"(1) Except as otherwise specifically provided by statute, the opportunity for **jury service** shall not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in this state.

"(4) A person who is blind, hearing or speech impaired or physically disabled shall not be ineligible to act as a juror or be excluded from a **jury list** or **jury service** on the basis of blindness, hearing or speech impairment or physical disability alone.

"(5) No person is eligible to act as a juror in any circuit court of this state within 24 months after being discharged from **jury service** in a federal court in this state or circuit court of this state unless that person's service as a juror is

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required because of a need for additional jurors."

Laws 2007, c. 100, § 36, eff. Jan. 1, 2008, provides:

"The amendments to ORS 10.030 by section 13 of this 2007 Act apply to opportunities for **jury service** arising on or after the effective date of this 2007 Act."

Laws 2007, c. 70, § 5, amended this section by substituting "deceased party or the party with a disability" for "deceased or disabled party" in Subsec. G.

CROSS REFERENCES

Criminal procedure felony convictions, withdrawal and restoration of rights, see ORS 137.281.

Grand juries, organization and composition, see ORS 132.010.

Juries, qualifications of jurors, see ORS 54.050.

Rules of Civil Procedure, jurors, challenging compliance with selection procedures, see ORCP 57.

LAW REVIEW AND JOURNAL COMMENTARIES

Juries and Race in the Nineteenth Century, James Forman, Jr., 131 Yale L.J. 895 (2004).

Voter Registration Status as a Jury Service Employment Test: Oregon's Retracted Endorsement Following Buckley v. American Constitutional Law Foundation, Inc. Rose Jade, 39 Willamette L. Rev. 557 (2003).

LIBRARY REFERENCES

2003 Main Volume

Key Numbers

Jury  38 to 56.

Westlaw Key Number Searches: 230k38 to 230k56.

Encyclopedias

C.J.S. Juries §§ 269, 276, 283 to 304.

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C**Effective:[See Text Amendments]**United States Code Annotated CurrentnessTitle 28. Judiciary and Judicial Procedure (Refs & Annos)

▣ Part V. Procedure

▣ Chapter 121. Juries; Trial by Jury (Refs & Annos)

→ § 1863. Plan for random jury selection

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. 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. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall--

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: *Provided, however,* That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be fixed by the district court plan at a rate not to exceed \$50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of

prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title. The plan for the district of Massachusetts may require the names of prospective jurors to be selected from the resident list provided for in chapter 234A, Massachusetts General Laws, or comparable authority, rather than from voter lists.

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years.

(5)(A) except as provided in subparagraph (B), specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(B) specify that volunteer safety personnel, upon individual request, shall be excused from jury service. For purposes of this subparagraph, the term "volunteer safety personnel" means individuals serving a public agency (as defined in section 1203(6) of title I of the Omnibus Crime Control and Safe Streets Act of 1968) in an official capacity, without compensation, as firefighters or members of a rescue squad or ambulance crew.

(6) specify that the following persons are barred from jury service on the ground that they are exempt: (A) members in active service in the Armed Forces of the United States; (B) members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession; (C) public officers in the executive, legislative, or judicial branches of the Government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession, who are actively engaged in the performance of official duties.

(7) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any

case where the interests of justice so require.

(8) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 952; Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54; Apr. 6, 1972, Pub.L. 92-269, § 2, 86 Stat. 117; Nov. 2, 1978, Pub.L. 95-572, § 2(a), 92 Stat. 2453; Nov. 19, 1988, Pub.L. 100-702, Title VIII, § 802(b), (c), 102 Stat. 4657, 4658; Oct. 29, 1992, Pub.L. 102-572, Title IV, § 401, 106 Stat. 4511.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., § 415 (Mar. 3, 1911, c. 231, § 278, 36 Stat. 1165).

Subsections (a) and (b) are new and merely declaratory of existing practice.

The phrase “or previous condition of servitude” was omitted as obsolete.

Changes were made in phraseology. 80th Congress House Report No. 308.

1968 Acts. House Report No. 1076, see 1968 U.S. Code Cong. and Adm. News, p. 1792.

1972 Acts. House Report No. 92-869, see 1972 U.S. Code Cong. and Adm. News, p. 2222.

1978 Acts. House Report No. 95-1652, see 1978 U.S. Code Cong. and Adm. News, p. 5477.

1988 Acts. House Report No. 100-889, see 1988 U.S. Code Cong. and Adm. News, p. 5982.

1992 Acts. House Report No. 102-1006 and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 3921.

C**Effective:[See Text Amendments]**

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
 [Ⓜ] Part V. Procedure
 [Ⓜ] Chapter 121. Juries; Trial by Jury (Refs & Annos)
 → **§ 1862. Discrimination prohibited**

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 952; Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54; Oct. 10, 1980, Pub.L. 96-417, Title III, § 302(c), 94 Stat. 1739.)

HISTORICAL AND STATUTORY NOTES**Revision Notes and Legislative Reports**

1948 Acts. This section makes provision for specific exemption of classes of citizens usually excused from jury service in the interest of the public health, safety, or welfare. The inclusion in the jury list of persons so exempted usually serves only to waste the time of the court. 80th Congress House Report No. 308.

1968 Acts. House Report No. 1076, see 1968 U.S. Code Cong. and Adm. News, p. 1792.

1980 Acts. House Report No. 96-1235, see 1980 U.S. Code Cong. and Adm. News, p. 3729.

Amendments

1980 Amendments. Pub.L. 96-417 prohibited discrimination against service as juror in the Court of International Trade.

1968 Amendments. Pub.L. 90-274 substituted provisions prohibiting discrimination against citizens in their service as jurors because of race, color, religion, sex, national origin, or economic status for provisions identifying three groups as exempt from jury service, including members of the armed forces on active duty, members of fire or police departments, and public officers actively engaged in the performance of official duties.

Effective and Applicability Provisions

1980 Acts. Amendment by Pub.L. 96-417 effective on Nov. 1, 1980 and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub.L. 96-417, as amended, set out as a note under section 251 of this title.

C**Effective:[See Text Amendments]**United States Code Annotated CurrentnessTitle 28. Judiciary and Judicial Procedure (Refs & Annos)

▣ Part V. Procedure

▣ Chapter 121. Juries; Trial by Jury (Refs & Annos)

→ § 1861. Declaration of policy

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. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 951; Sept. 9, 1957, Pub.L. 85-315, Part V, § 152, 71 Stat. 638; Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 411 and 415 (Mar. 3, 1911, c. 231, §§ 275, 278, 38 Stat. 1164, 1165).

The revised section prescribes uniform standards of qualification for jurors in Federal Courts instead of making qualifications depend upon State laws. This is in accord with proposed legislation recommended by the Judicial Conference of the United States.

The last paragraph is added to exclude jurors incompetent to serve as jurors in State courts. 80th Congress House Report No. 308.

1957 Acts. House Report No. 291, see 1957 U.S. Code Cong. and Adm. News, p. 1966.

1968 Acts. House Report No. 1076, see 1968 U.S. Code Cong. and Adm. News, p. 1792.

Amendments

1968 Amendments. Pub.L. 90-274 substituted provisions declaring the policy of the United States with respect to trial by jury and the opportunity to serve on such juries for provisions setting out the required qualifications of Federal jurors, including age, citizenship, residence, freedom from conviction of certain crimes, ability to read, write, speak, and understand the English language, and capability of rendering efficient jury service.