THE MEANS AND ENDS OF REPRESENTATIVE JURIES

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INTRODUCTION

The last several decades have brought radical changes to notions of whether and how impartiality exists in juries, and the relevance of race, gender, and other demographic distinctions to those notions. Changes in the jurisprudence of juries have largely mirrored those shifts in consensus. The model impartial juror is no longer the middle-to-upper class male property owner known among similar citizens as a man of good moral character and moderate temperament. Instead, society recognizes the judgment of such people as one perspective among many, no more or less neutral than any other. We have replaced the ideal notion of an impartial jury as one comprising such men with one that combines all the particular viewpoints, perspectives, and life experiences of a given jurisdiction, one that, as the Supreme Court has summarized the idea, represents a cross-section of the community.1

The law of juries requires that jury panels2 be randomly selected from the community in order to achieve a representative sampling of

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2 The terminology of jury pools, master lists, wheels, panels and venires can be confusing. I employ the terms in what appear to be their most common usages, and as the Supreme Court usually employs them. See Duren v. Missouri, 439 U.S. 357 (1979) (providing terminology and definitions of jury pools). Jury pool and jury master list (or master file) are synonyms for the sources from which jurisdictions identify potential jurors, usually voter lists, driver registration records, and perhaps other sources such as taxpayer records. Jury wheel refers to those persons, identified from the master list, who are qualified to be jurors; it is from the jury wheel that potential jurors are summoned for service. Jury panel or venire refers to the group summoned for service on a particular occasion, from which some are
citizens. One recurrent problem with this methodology, however, is that randomly selected jury panels are not always fully or regularly representative of all segments of the relevant community. More specifically, racial and ethnic minorities, as well as the young, old, and poor, are consistently underrepresented in most federal and state court jury pools and wheels.³

The disjunction between the procedural mechanism of random selection and the substantive goal of diverse and representative jury panels recurs for two reasons. First, random selection procedures traditionally are intended to hinder the efforts of discriminatory officials to manipulate the jury selection process. Thus, if the system is unaffected by actual discriminatory intent, we pay little critical attention to the outcomes produced by facially neutral selection procedures. Second, many “random” procedures regularly yield very predictable, non-random deficiencies in their outcomes. For instance, random selection from the most common source list for juries, voter registration rolls, consistently underrepresents racial minorities across both jurisdiction and time.⁴

Effects like the underrepresentation of racial minorities, which result from the disjunction between the method and goal of jury selection, indicate a need to reevaluate both prongs of the equation. The selection of representative cross-sections of jurors is a substantive goal that requires different, more closely examined procedures than the more limited goal of restricting the impact of discriminatory intent on jury composition. While a certain emphasis, implying particular types of remedies, is required for regulating the discretion of state officials who administer the jury system, different mechanisms must be utilized to ensure that all eligible members of a community are included on the jury master list and that selection of jury panels from that list does not

⁴ See infra text accompanying notes 23-46.
result in consistent, predictable deficiencies that underrepresent certain groups. Moreover, while the fair cross-section doctrine of the Sixth Amendment only regulates jury composition through the stage of selecting the venire, it may be argued that it protects against processes that diminish the venire's representativeness without regard to discriminatory intent.

_Race and the Jury: Racial Disenfranchisement and the Search for Social Justice_, 5 ("Race and the Jury") by Hiroshi Fukurai, 6 Edgar W. Butler, 7 and Richard Krooth, 8 combines new empirical research with a comprehensive survey of existing social science literature on the array of problems—and responses—surrounding jury selection procedures and their often unintended effect of disenfranchising some citizens from participation on juries. The title of the book underrepresents its scope, for although the book focuses primarily on racial disparities, it also presents a broad collection of data on a variety of other demographic differences (e.g., age, economic status, and residential stability) that distinguish potential jurors and mark their differing rates of participation in the jury process. The book's most important contribution, however, is a detailed examination of subtle and often unintentional difficulties in placing panels of jurors in the courtroom who are fully and consistently representative of the citizenry from which they are drawn. As the authors show, these difficulties occur at several stages of the jury selection process.

To place this empirical data in a doctrinal context, this Review in Part I presents a brief overview of the constitutional law of impartial juries, specifically addressing the fair cross-section doctrine that is the impetus for contemporary jury selection procedures. Part II, drawing from the book's broad collection of research findings, assesses the many ways that the facially neutral procedures used to compile jury master lists and draw names from them fail to serve fully the goal of a representative jury pool. Part III discusses the Sixth Amendment standards that define the constitutionality of jury selection procedures, and

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5 See supra note 3.
6 Professor, University of California, Santa Cruz.
7 Professor, University of California, Riverside.
8 Professor, University of California, Berkeley and Sonoma State University.
also assesses the feasibility of litigating remedies for the facially neutral procedures identified in *Race and the Jury* that adversely influence the jury panel’s representativeness. This Review takes the position that most procedures adversely affecting distinctive groups in the selection process are cognizable under the fair cross-section requirement in part because the doctrine, unlike equal protection doctrine, has little concern for the intent of public officials. Rather than serving as a limited antidiscrimination principle, merely checking the discriminatory intent of state actors, the fair cross-section doctrine guarantees that the jury panel’s representativeness will not be undermined by procedures that systematically skew the demographics of the jury panel. Finally, Part IV briefly reviews problems affecting the jury panel’s representativeness that are not cognizable under the Sixth Amendment, and this Part suggests policy options to remedy those problems.

I. THE FAIR CROSS-SECTION DOCTRINE

The Sixth Amendment to the United States Constitution guarantees that, “[i]n 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.”\(^9\) It was not until recent decades that the United States Supreme Court interpreted the content of the “impartial jury” clause to mean that the jury must be drawn from a fair cross-section of the community,\(^10\) an understanding that Congress adopted as federal statutory policy as well.\(^11\)

The intellectual evolutions that led to the notion that an impartial jury must necessarily be drawn from a cross-section of the community entailed a shift in several early views about the nature of juries, collective impartiality, and human judgment. The representative jury re-

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9 U.S. Const. amend. VI.


11 28 U.S.C. § 1861 (1993) (stating that it is the “policy of the United States” that “an accused faces a jury from a fair cross section of the community”).
placed the notion of the elite "blue ribbon" jury composed of "hand-pick[ed] jurors of exemplary moderation and wisdom," a necessarily unrepresentative group from which some members of the community were deliberately excluded. The contemporary requirement that the jury represent a fair cross-section of society premises the concept of impartiality on the jury’s diversity. A jury is more likely to fit contemporary notions of neutrality if it is made up of representatives of all segments and groups of the community, thereby creating a body that can reflect "the commonsense judgment of a group of laymen." The jury cannot exercise such judgment "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." Justice Thurgood Marshall explained the concept thus: "[w]hen 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."

Juries serve purposes beyond examining evidence and rendering a verdict on the guilt of a particular defendant. This Review will operate

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12 Akhil R. Amar, Note, Choosing Representatives by Lottery Voting, 93 Yale L.J. 1283, 1287-88 (1984). See also Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105, 1124-25 (1989) (noting that the key-man system had the "noble ambition" of seeking "intelligent and responsible people" for jury service). This is the premise of the "key man" system of jury selection, in which one upstanding citizen is designated to select a group of similarly qualified citizens to serve as jurors.

13 See Amar, supra note 12, at 1287.

14 Apodaca, 406 U.S. at 410 (plurality opinion of White, J.) (quoting Williams, 399 U.S. at 100).

15 The other major function of the fair cross-section doctrine is to engender public confidence in the justice system; if the system is overseen by all segments of the community, its judgments have added legitimacy. Unrepresentative jury panels "create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." Kiff, 407 U.S. at 503.

16 Kiff, 407 U.S. at 503. See also Dennis v. United States, 339 U.S. 162, 183 (1950) (Frankfurter, J., dissenting) ("[O]ne cannot have confident knowledge of influences that may play and prey unconsciously upon [jurors'] judgment."); Toni Massaro, Peremptories or Peers?: Rethinking Sixth Amendment Doctrine, Images and Procedures, 64 N.C. L. Rev. 505, 545-47 (1986) (noting that "[o]ne function of the jury ... is to satisfy a community-centered interest in participation in the justice system by injecting representative community voices and values into the decision process.").
on the assumption that a jury drawn from a fair cross-section is more representative of the community and thus more democratic. Under this assumption, a jury drawn from a fair cross-section is thereby better suited to fulfill the jury’s function of serving as a democratic check on the government actors who run the criminal justice system—judges, prosecutors, and police. The fair cross-section doctrine “guard[s] against the exercise of arbitrary power” and “make[s] available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor,”17 and the “compliant, biased, or eccentric judge.”18 The judgment of the community, after debate among its various subgroups, is less likely to share the prejudices of prosecutors or judges.19

Finally, the fair cross-section requirement serves to “preserve[] ‘public confidence in the fairness of the criminal justice system.’”20 One need only look at public reaction to controversial verdicts rendered by single-race juries to find support for that assertion.21 The Supreme Court, in developing the fair cross-section doctrine, recognized an evolution in the public understanding of impartiality. Juries


18 *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). See also *Taylor*, 419 U.S. at 531 (noting that juries guard against “the professional or perhaps overconditioned or biased response of a judge”).

19 See Massaro, supra note 16, at 508-10.


21 Public reaction to the verdict, by a jury that included no African-Americans, in the state court trial of police officers accused of beating Los Angeles motorist Rodney King is a prime example. See Lou Cannon, National Guard Called to Stem Violence After L.A. Officers’ Acquittal in Beating; Justice Dept to Review Case, Wash. Post, Apr. 30, 1990, at A1 (noting that three officers were cleared of all charges against them, and one officer was found not guilty of all charges except one, on which the jury was hung).

Reaction to the verdict by the predominantly black jury in the drug and perjury trial of former Washington, D.C. Mayor Marion Barry is another example. Out of the several charges presented to it, the jury found Barry guilty on only one misdemeanor possession charge. See Keith Harristone, Reaction to Verdict is Another Hung Jury, Wash. Post, Aug. 11, 1990, at A10 (noting that “reaction [to the Barry verdict] came mostly along racial lines, with blacks generally supporting the mayor and whites disappointed by the verdict”); Jill Nelson, After the Verdict, Food for Thought, Wash. Post, Aug. 11, 1990, at C4 (reporting comments by black Washington citizens who were generally happy with the verdict as a victory for Barry).
of a single race are seen to reflect a particular, non-neutral viewpoint uninformed by different perspectives. The fair cross-section doctrine, by preferring juries of diverse backgrounds and viewpoints, acknowledges that bias comes not simply from obvious sources such as pretrial publicity or overt racial prejudice. The doctrine recognizes that communities consist of non-fungible subgroups, whose judgments may differ from those of other subgroups and from those of the whole.\footnote{22} An impartial jury is not simply a group of individuals acting in good faith; their judgment depends also on perspectives and unconscious assumptions that are in some part affected by and predicted in group affiliations or social history.

II. THE ELUSIVE GOAL OF RANDOM SELECTION

Inadequacies in achieving the two goals of juror master lists— inclusion of every eligible citizen and representation of all segments of the community\footnote{23}—enter at the beginning of the juror identification process, when jurisdictions compile master lists of residents to serve as jurors. Disparities arise from both policy choices and the logistical or mechanical difficulties of compiling and updating a master list of all residents in a community. Governments have traditionally turned to two sources that approximate such a list: voter registration rolls and, less often, driver registration records. Both are probably the most comprehensive single-source lists available in most jurisdictions, but each has significant deficiencies with regard to inclusiveness and representativeness.

The decision to draw jurors from voter rolls incontrovertibly contributes to under-inclusive and unrepresentative jury panels.\footnote{24} For ex-

\footnote{22} See Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (plurality opinion of White, J.) (acknowledging that groups within a community have distinctive viewpoints that their members represent on juries: "[w]e . . . cannot accept . . . that minority groups . . . will not adequately represent the viewpoint of those groups simply because they may be outvoted in the final result") (emphasis added); Johnson v. Louisiana, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting) (objecting to the notion that non-unanimous jury verdicts permit jurors to "ignore the views of their fellow panel members of a different race or class").

\footnote{23} Fukurai et al., supra note 3, at 46 (citing American Bar Association, Standards Relating to Juror Use and Management, Standard 2 (1983)).

\footnote{24} Id. at 45. See also id. at 18, Table 2-1 (summarizing differing rates of voter registration among Americans according to racial or ethnic background (citations omitted)). For the
ample, the underrepresentation of poor citizens and people of color on voter registration rolls was so entrenched\(^{25}\) that it prompted both a series of Supreme Court decisions\(^{26}\) to lift restrictions on the franchise and the Voting Rights Act.\(^{27}\) Two decades after those reforms, however, Congress still recognized a need for the National Voter Registration Act of 1993\(^{28}\) to improve registration rates. Until the

1988 presidential election, 67.9% of whites were registered, 64.5% of blacks, and 35.5% of Hispanics; overall, only 66.6% of the eligible population registered to vote. Id.


The Congress finds that—

... (a) Findings...

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation... and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this subchapter are—

(1) to establish procedures that will increase the number of eligible citizens who register to vote ...;
Voter Registration Act, few serious efforts had been made to ensure that voter registration lists were fully inclusive of the eligible population. Voter rolls are estimated to exclude up to one-third of the adult population, skewing the jury pool to overrepresent the elderly and relatively affluent and to underrepresent racial minorities.\(^{29}\) The decision to draw names from a source so well known—and in some cases deliberately manipulated—to be unrepresentative might fairly be seen as a disingenuous effort to compile a representative jury wheel.\(^{30}\)

The traditional view of jury selection rests on the older, pre-cross-section vision of juries, which assumed that the best jurors are active, upstanding citizens of good moral character, and in that respect are an elite subgroup of the community. This pre-cross-section vision does not mesh with the contemporary notion of impartiality that depends upon a representative cross-section of citizens. This conclusion gains strength if one assumes that some people decline to register to vote not simply out of laziness, but as an affirmative demonstration of their disaffection with the political process and public institutions. Their non-registration, then, is a demonstration of a social perspective that

\(\text{(4) to ensure that accurate and current voter registration rolls are maintained.}\)

\(^{29}\) Fukurai et al., supra note 3, at 45. See also Piven & Cloward, supra note 25, at 256-59 (noting difficulty of estimating numbers of registered voters, pointing out inaccuracies in standard estimates, and concluding that the most likely estimate is that 63% to 64% of eligible voters were registered in 1986); Lapidus, supra note 27, at 93-96 (discussing burdens placed on citizens that make registration difficult and noting that such burdens account for low voter registration, especially among racial minorities); Mary N. Stone, Voter Registration: Context and Results, 17 Urb. Law. 519 (1985) (discussing variations among states' voter registration laws, their origin as a means to restrict access to the franchise, and their effects on registration rates).

\(^{30}\) Residency requirements for voter registration skew the voter list as well, because people employed in the unstable secondary job market change addresses more frequently, and thus often require re-registration. Fukurai et al., supra note 3, at 45. One traditional argument for the use of voter lists as a primary source for jury master lists is that, because voter registration is voluntary and requires affirmative effort by the individual, it screens out citizens who have so little interest in their society and public institutions that they do not bother to vote. Id. Under this view, citizens who are lazy and disinterested would also make undesirable jurors and so are best screened out by the use of voter lists. Id. (quoting Hearings on Federal Jury Selection Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm., 90th Cong., 1st Sess. 253 (1967) (statement of Judge Irving R. Kaufman, chairman of the committee of federal judges who drafted an earlier version of the 1968 Jury Selection Act)).
needs to be represented as one element of a community’s diverse viewpoints, particularly since part of many juries’ task is to assess the credibility of public officials and institutions such as the police.\(^{31}\) If the community includes lazy or disaffected nonvoters, then, so should the jury pool.

Increasingly, a minority of jurisdictions, mostly at the state level,\(^{32}\) has made efforts to improve the representativeness of the jury wheel by supplementing voter rolls with other sources of names. A common source is driver registration records.\(^{33}\) Yet driver lists, while they document low-income citizens and racial minorities in numbers closer to their actual proportions in the population, still somewhat underrepresent those groups.\(^{34}\) They also underrepresent the elderly\(^{35}\) and women,\(^{36}\) both of whom drive less than their younger, male counterparts.\(^{37}\) A few other source lists, such as public benefits records, property tax records, and annual local census data, are available\(^{38}\) but are not in widespread use and are likely to have comparable problems of under-inclusiveness.

The book documents other logistical problems that hinder the gathering of a comprehensive jury pool. The combining of two or

\(^{31}\) Id. at 18, 54-55 (noting that racial minorities have lower rates of voter registration and arguing that they share a “widespread mistrust of government and those with legal authority” and have “learned to mistrust the fairness in most racially dominated institutions of power, such as law enforcement agencies”).

\(^{32}\) Id. at 47.

\(^{33}\) Id. at 46. California, for instance, has required since 1981 that driver registration lists supplement voter lists as a source for prospective jurors. Id. Nevada’s largest judicial district around Las Vegas has used a driver list as the only source for jurors since 1980. Id. at 47. See Jan Hoffman, New York Casts for Solutions to Gaping Holes in Juror Net, N.Y. Times, Sept. 26, 1993, § 1, at 1, 44 (noting New York uses three source lists: voter rolls, driver’s license lists, and mailing lists of state tax payers).

\(^{34}\) When I first began practicing law as a public defender, I was amazed at how many of my low-income clients did not have driver’s licenses—and often had never had one—though they had been eligible for several years and frequently drove cars.

\(^{35}\) Fukurai et al., supra note 3, at 47.

\(^{36}\) In 1981, while an estimated 91% of males held driver’s licenses, only 75% of women did. Id.

\(^{37}\) Id.

\(^{38}\) Id. at 47.
more source lists creates problems of name duplication that are surprisingly intractable; some jurisdictions have conceded their computer programs cannot eliminate all duplicate names.\textsuperscript{39} Colorado once reported that, even after scanning for duplicate names, ten percent of residents’ names appeared more than once on jury wheels.\textsuperscript{40} Minority residents’ names, therefore, are less likely to appear twice on a multiple-source list, which means that in a random selection of jurors from that list they have a reduced chance of being called.\textsuperscript{41} Atlantic City County, New Jersey at one point had 180,000 names on its jury master list when only 130,000 adults lived in the county.\textsuperscript{42} Moreover, minority jurors are underrepresented on both voter rolls and driver records, though to a lesser extent on the latter, and thus one list does not catch most of the names missing from the other.\textsuperscript{43} The representativeness of jury wheels is thus unintentionally but distinctly undermined by these logistical difficulties.

The frequency with which jury master lists are updated from source lists also affects their representativeness. Federal law requires updating jury wheels once every four years.\textsuperscript{44} Relying on voter rolls, such an interval between updates means that residents who are age seventeen at the time of an update will not be added to the jury wheel until they are twenty-one, if they register to vote in that interval.\textsuperscript{45} \textit{Race and the Jury} identifies studies that have shown that infrequent updates of jury wheels multiply the underrepresentation of minority residents found in voter rolls.\textsuperscript{46}

Finally, \textit{Race and the Jury} notes that another practical difficulty that depresses minority residents’ participation in jury pools is the re-

\textsuperscript{39} Id. at 50. Most of the authors’ authority for these problems are more than a decade old; whether advances in the computer technology of the last several years has improved the ability to eliminate duplicate names is unknown.

\textsuperscript{40} Id.

\textsuperscript{41} Id. at 51.

\textsuperscript{42} Id. at 50.

\textsuperscript{43} Id. at 50-51.


\textsuperscript{45} Fukurai et al., supra note 3, at 49.

\textsuperscript{46} Id. at 49-50.
lation between residential mobility and juror participation. African-Americans, and other minority groups such as Asians and Hispanics, have higher rates of residential mobility than do whites.\textsuperscript{47} The authors suggest that this situation is a reflection of relative income and job status; minorities are more likely to be employed in low wage, seasonal or otherwise unstable sectors of the labor market, which correlates with more frequent residence changes.\textsuperscript{48} Residential mobility may affect whether citizens are ever added to jury master lists at all, but it even more directly affects the citizen’s ability to be summoned once selected from the master list.\textsuperscript{49} If a master list underrepresents African-Americans to begin with, then the inability to track down those on the list with a summons by mail aggravates the deficiency. Worse, it is argued, jury commissioners often make little effort to track down “undeliverables,” and may purge them from master lists.\textsuperscript{50}

Residential mobility may be a factor in one of the most disturbing findings documented by \textit{Race and the Jury}—that of “gerrymandered” judicial districts. Fukurai, Butler, and Krooth employ the term here somewhat differently than it is used in discussions of legislative voting districts, where “gerrymandering” describes deliberate efforts to draw district boundaries to include and exclude certain groups, usually along racial or party-affiliation lines. With regard to jury rolls, the authors document extreme variations in representation of various

\textsuperscript{47} Id. at 48.

\textsuperscript{48} Id. at 21-23, 23 n.9. A similar pattern recurs with regard to age: younger residents move more frequently than older ones, making them less accessible to the jury summons system. Id. at 23 n.9, 24. The trends for race and age overlap, so that young minorities are the most likely to move frequently and thus to be excluded from jury pools.

\textsuperscript{49} Id. at 21-22.

\textsuperscript{50} Id. at 23; Hoffman, supra note 33, at 44 (noting that 50-60\% of juror questionnaires are never completed, “usually because they were sent to a wrong address or were tossed by the recipient into the next morning’s garbage”).

Representativeness of jury pools may be undermined by a related factor—residential location. In many state court jurisdictions, the courts set a distance from the courthouse which allows a juror who lives beyond that limit to request to be excused from serving. See Fukurai et al., supra note 3, at 43-44 (discussing San Bernardino County, California as an example). Federal law allows district courts to follow a similar policy. See 28 U.S.C. §§ 1866(c), 1869(j). In areas with segregated residential patterns, such rules permit exclusion of jurors from outlying areas who may belong disproportionately to one racial or ethnic group. See Fukurai et al., supra note 3, at 43-44.
neighborhoods, or census tracts, within a given judicial district; there is no evidence that the formal district boundary is drawn along racial lines, only that jurors are not summoned equally from all neighborhoods within the district. Focusing as an example on Los Angeles County, which has several courthouses and defines judicial districts as the area within a twenty-mile radius of a courthouse, the authors found that:

a systematic inclusion and exclusion of certain neighborhoods have led to a significant underrepresentation of racial minorities on jury panels. Particular neighborhoods with high concentrations of blacks and other minorities have been systematically excluded from the defined boundaries of the judicial districts. By regulating the degree of minority participation on jury panels, an effective mechanism for gerrymandering judicial districts was created and enforced. For example, a three-month study of jury representation in Los Angeles in 1985 revealed that . . . areas [within a defined judicial district] with high concentrations of racial and ethnic minority residents were systematically excluded from jury service.51

The findings are startling. The Long Beach Judicial District, for instance, can be divided into 538 census tracts. Due to residential segregation, tracts vary significantly in their racial composition. Over the period of study, half the jurors called lived in just thirty-five tracts—or 6.5% of the district.52 On the other hand, 60.6% of the census tracts in the district (i.e., 326 tracts) had not one juror called from them; another 117 census tracts (21.7% of the district) had no more than four jurors called.53 Yet one census tract had twenty-two jurors summoned from it.54 These disparities were closely associated with the racial and ethnic make-up of the neighborhoods. The 60.6% of tracts unrepresented in jury pools had populations on average that were more than

51 Id. at 30.
52 Id.
53 Id.
54 Id.
half black and Hispanic, which is above the percentage for the district as a whole. The one tract that was represented twenty-two times had a black and Hispanic population of just 6.1%, which was well below the whole district's proportion.\textsuperscript{55} The authors found similar disparities in other Los Angeles County districts.\textsuperscript{56}

The data show that the racially disproportionate selection of jurors is "systematic" only in that it is pronounced and consistent;\textsuperscript{57} the authors offer no definitive explanation for the disparity and do not demonstrate that the disparity is systematic in the sense of being purposefully instigated, though their use of the term "gerrymander" suggests that they believe it to be.\textsuperscript{58} Nevertheless, Fukurai, Butler, and Krooth rule out jury qualification criteria (e.g., that jurors must be U.S. citizens, proficient in English, have no felony record, etc.) as the cause of the disparity. The underrepresented neighborhoods had almost as many qualified jurors as the overrepresented neighborhoods.\textsuperscript{59}

The authors imply that gerrymandering is a deliberate and separate effect serving to suppress minority participation on juries.\textsuperscript{60} They do not specifically examine, however, how much if any of these "gerrymander" effects can be attributed to other identified causes of minority underrepresentation, such as inadequate source lists and residential mobility. Elsewhere they note that even facially neutral selec-

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\textsuperscript{55} Id. at 30-32, Table 2-9.

\textsuperscript{56} Id. at 33.

\textsuperscript{57} Thus, they use the term in the same manner that the Supreme Court has employed in the Sixth Amendment jury selection cases. See Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

\textsuperscript{58} The authors describe other disparities as "systematic" in a similar manner. For example, they note that some jurors' employers continue to pay jurors a salary during jury service while others do not, which leads the latter group to request—and receive—excuses for economic hardship more frequently. This practice skews the jury pool in terms of economic status as well as by race, to the extent race may correlate with economic status. Fukurai et al., supra note 3, at 120-21, 124. The authors, however, describe this practice as introducing "a systematic bias in juror pools . . . if these excuses are not randomly distributed in the population." Id. at 120.

\textsuperscript{59} Id. at 33.

\textsuperscript{60} Id. at 34 (summarizing several "mechanisms of discrimination" and noting that "[i]n addition, a different court and judicial strategy regulates the degree of minority participation on juries through gerrymandered judicial districts").
tion methods likely enacted in good faith produce consistently disparate results. Nonetheless, the tremendous disparity found in the Long Beach District study supports the assumption that something more is at work than inadequate lists, duplicate names, skewed random selection, and inability to summon some jurors.

Fortunately, the methodologies that identified the problem of disparate neighborhood representation producing racially unrepresentative jury wheels also yield a solution. Instead of identifying jurors from a list of all names in the district, without regard to residential segregation—which the authors call simple random selection—the authors suggest a method of cluster sampling, pursuant to which jurors are drawn from many neighborhood level subdivisions of a district (e.g., census tracts). The probability that jurors would be drawn from any given tract would be proportionate to that tract’s population size. Thus, if a district is divided into one hundred equal-size tracts, and one hundred jurors were to be called for service, a cluster sampling method of selection would ensure that one juror was drawn from each tract, although within each tract jurors would be drawn randomly. If ten of the tracts were twice as big as the other ninety, jurors would be drawn from those ten at twice the rate they would be from the remain-

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61 Id. at 50 ("[W]hen fifth-letter alphabetization was used to pick jurors, the panel would have the same fifth letter in their last names and so some panels had large numbers of Jewish names (e.g., Wiseman and Feldman) or Italian names (e.g., Ferando and Dinardo."). A court held that system invalid. Id.

62 See id. at 165-90. The tremendous disparity in neighborhood representation found despite random selection procedures presumably arises from some method of jury master file composition—or selection methodology from that file—that breaks down along neighborhood lines. Perhaps voter names come not in one long alphabetized roll but in a series of lists organized by local precincts; perhaps this procedure and concomitant problem vary among counties and states, so that cluster-sampling would have a less dramatic remedial effect in some jurisdictions. Information on the first points—the construction of the master file and the selection methodology used to draw names from it—should be available, though it is not discussed in Race and the Jury. Whether cluster-sampling would remedy disparities in other jurisdictions, assuming the structure of their jury wheels and selection methods vary, is probably a topic for further empirical research. Nevertheless, the authors of Race and the Jury have provided a valuable remedial proposal at least for those jurisdictions that encounter problems like those of Los Angeles County.

63 Id. at 166-70, 178-89.

64 Of course, since tracts are likely to vary in population size, large tracts would have proportionately more jurors drawn from them than small ones.
ing tracts. Under a simple random selection method, one hundred jurors would be drawn from the district without regard to the local census tract they resided in, meaning that one hundred jurors might come from, perhaps, only twenty tracts. Given the patterns of residential segregation persisting in most American jurisdictions, such an outcome could yield racially disproportionate jury pools such as the authors found in Los Angeles County jury pools.

It is important to note that there is no objective way to implement a procedure for random selection of jurors from a given community; simple random selection is no more neutral than cluster sampling, and cluster sampling does not deliberately engineer the racial composition of jury pools. Every system requires several choices to be made before the apparatus can be constructed. Putting all jurors in the jurisdiction into one wheel and drawing randomly from it is no more impartial or random than subdividing the jurisdiction by its many census tracts, randomly selecting a number of tracts from which to draw jurors for a

65 The authors do not address the issue of the population basis according to which proportionality is to be calculated for each tract: will it be based on the number of jurors in each tract who are actually on the master list, or on the tract’s actual population (even though only a subset of that population is found on the master list)? There is a good argument for using the latter figure—actual population—because it would help correct for disparate rates at which different group members’ names appear on the master list. For instance, only 50% of eligible jurors in a largely black census tract may appear on the master list, but 75% of eligibles in a mostly white tract may be listed. If proportionality is calculated by listed jurors, then cluster sampling ensures geographic diversity across the jurisdiction but does not help correct for inadequate source lists. On the other hand, if actual population is the basis of the calculation, racial disparities in source would be compensated for, but at the price of placing an extra burden of jury duty on those citizens who are on the master list but whose racial group is underrepresented. That is, the listed jurors from the largely black tract positioned above would be called for service more frequently because they are representing, in some sense, a population twice as big as is found on the master list. Jurors from the white tract, on the other hand, are representing a tract population only a third again as big as the number of them who appear on the master list.

66 Id. at 166-68. Cluster sampling, of course, remedies only part of the problem of unrepresentative jury pools. It does not address problems such as inadequate source lists, duplicate names, and residential mobility. Nevertheless, cluster sampling may help compensate for those deficiencies if residential segregation by race and economic class is pronounced in a jurisdiction. If the population of each tract is relatively homogeneous in terms of race and economic status, then jurors drawn from each tract are likely to meet the same demographic description (e.g., "middle class African-American," "high income white"). Given that assumption, cluster sampling may improve the rates at which underrepresented demographic groups are called for jury service, even though it does not address all underlying problems.
particular panel, and then drawing one juror from equal-sized tracts; both hinder discriminatory actors from manipulating the system. Yet the latter method partially corrects for the disproportionate results of the former that result from racial and economic segregation, and does so without employing a race- or wealth-based classification. It also more closely distributes the burden of jury service throughout the population. For the substantive goal of diverse and representative juries, therefore, the cluster sampling is the better policy choice, and the one more likely to serve the constitutional mandate of creating a jury pool that is a representative cross-section of the community.

III. LITIGATION OF SELECTION PROCEDURES UNDER THE SIXTH AMENDMENT

The central cases defining the standard for fair cross-section violations, *Taylor v. Louisiana*67 and *Duren v. Missouri*,68 each addressed deliberate policies aimed precisely at distinctive classes of potential jurors. Yet the Court’s analysis in these cases placed virtually no emphasis on the intention of the public officials involved. Given the context of those cases, however, the question might remain whether the fair cross-section doctrine is limited to policies clearly intended to result in disparities, and thus unavailable to facially neutral policies that have an adverse impact on the representation of distinctive groups. If, as some commentators suggest, the doctrine’s underlying purpose is only to hinder the discriminatory intent of officials,69 then a facially neutral selection procedure may not be actionable under the Sixth Amendment, regardless of its effect on jury panels.


Such an approach would create the problem of requiring the development of another theory of jury impartiality that denies race, gender, and class any role in its formulation, because a limited anti-discrimination principle would permit unrepresentative jury pools and panels as long as they were not the product of intentional discrimination. Part of that problem is confronting widespread public perceptions that single-race juries cannot always be trusted to yield impartial verdicts. See, e.g., Hoffman, supra note 33, at 44.
The doctrine is not so limited, however. The Court in Taylor and Duren formulated a Sixth Amendment analysis that makes the composition of the jury a matter of substantive concern with little regard to, or specific inquiry into, the intent or purpose of public officials. To reach and support these holdings, the Court refined an understanding of juries according to which a jury’s impartiality depends upon it being a body that represents a cross-section of the community. What the empirical research of Race and the Jury makes clear is that the goal of jury panels as cross-sections of the community cannot be achieved solely by the holdings of Taylor and Duren—that is, by holdings that invalidate only non-facially neutral policies intentionally aimed at a specific class.

The Court has never held impartial jury claims under the Sixth Amendment to the strict intent standard it formulated for some equal protection claims. Rather, the focus has been on whether exclusion

70 It is significant that the Court did so precisely at the same time it was formulating the restrictive intent requirement for some equal protection claims. Taylor (1975) and Duren (1979) were decided immediately before and after Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). Compare Davis (holding that disproportionate impact alone does not prove that there was a violation of the equal protection clause) and Arlington Heights (holding that a violation of the equal protection clause requires proof of racially discriminatory intent or purpose) with Taylor, 419 U.S. at 538 (“Louisiana’s special exemption for women operates to exclude them from petit juries, which in our view is contrary to the command of the Sixth . . . Amendment.”) (emphasis added) and Duren, 439 U.S. at 368 n.26 (noting that while in equal protection challenges to jury selection and composition, discriminatory purpose is an “essential element of the constitutional violation[,] . . . in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant’s interest in a jury chosen from a fair community cross section”).

71 See, e.g., Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 278-79 (1979) (holding that Massachusetts did not discriminate against women in violation of the equal protection clause by granting a preference to veterans); Arlington Heights, 429 U.S. at 252; Davis, 426 U.S. at 229.

In fact, the Court has implicitly designed an equal protection standard more favorable to claimants in the jury selection context than it has the employment and housing contexts at issue in Davis and Arlington Heights. See, e.g., Castaneda v. Partida, 430 U.S. 482, 494 (1977) (“[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs.”). See also Ortiz, supra note 12, at 1119-26 (arguing that the equal protection analysis in jury selection cases “fails to test for impermissible motivation” and is in practice largely a test for disproportionate impact).
of a cognizable group of potential jurors is "systematic" in the sense of being consistent over time and over the selection of multiple panels. The Sixth Amendment inquiry emphasizes the importance of a jury drawn from a fair cross of the community and, instead of requiring claimants to prove exclusion of certain citizens was the primary purpose of jury officials, focuses on the impact that selection procedures have on the jury pool and panel.\footnote{See \textit{Duren}, 439 U.S. at 364; \textit{Taylor}, 419 U.S. at 531.} Thus, the use of source lists that significantly underrepresent a racial group should be an actionable violation of the fair cross-section requirement, as should be a random selection procedure that draws half the venirepersons from seven percent of a jurisdiction's census tracts, with the effect of underrepresenting cognizable groups. The standards and burdens of proof for Sixth Amendment claims designed by the Court provide the opportunity to remedy many jury selection procedures that adversely impact the representativeness of jury pools, wheels, and panels.\footnote{For definitions of these terms, see supra note 2.}

In \textit{Taylor}, the Court struck down Louisiana's policy of including men automatically on the jury master list but including women only if they individually requested to be included by completing a written declaration. The Court noted that the "system does not disqualify women from jury service, but \textit{in operation} its conceded \textit{systematic impact} is that only a very few women \ldots are called for jury service."\footnote{\textit{Taylor}, 419 U.S. at 525 (emphasis added). See also id. at 535-36 ("[U]ntil today no case had squarely held that the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community.").} It observed that such a policy could not be justified "on merely rational grounds," but must serve "weightier reasons" to pass constitutional scrutiny.\footnote{Id. at 534. See also \textit{Duren}, 439 U.S. at 367 (quoting and affirming the principle that more than a rational basis is needed to overcome the right to a proper jury).} The Court held, "Louisiana's special exemption for women \textit{operates} to exclude them from petit juries," in violation of the Sixth Amendment.\footnote{\textit{Taylor}, 419 U.S. at 538 (emphasis added).}

The Court fleshed out the standard for fair cross-section claims in \textit{Duren}, which invalidated a Missouri policy that included women on
the jury master list but granted all women an exemption from service upon request or if they failed to appear when summoned. Duren specified that claimants must make out a "prima facie violation of the fair-cross-section requirement" by showing that a "distinctive" group is underrepresented due to "systematic exclusion of the group in the jury selection process." The state may rebut the claimant's evidence, but only with evidence that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group."

The Court's reasoning in both cases resonates with the language of disparate impact tests and gives little importance to state officials' intent in implementing procedures that produce unrepresentative master lists and jury panels. The cases specify a test clearly higher than an equal protection "rational relation test" and require from claimants a

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77 Duren, 439 U.S. at 360, 362.

78 Id. at 364. Specifically, claimants must show:

(1) that the group alleged to be excluded is a "distinctive" group within the community; (2) that the representation of this group 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.

Id.

79 Id. at 367-68. For a comparison of this test to the similar two-step test designed for equal protection challenges to jury panel composition, see Castaneda v. Partida, 430 U.S. 482, 495 (1977); Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972).

80 See Ortiz, supra note 12, at 1122-23 (arguing that the intent test in equal protection doctrine varies with the context of the challenge, and commenting that in jury selection cases the intent test "places both a lighter burden on the individual and a heavier burden on the state[,]" and that the claimant in such cases "need only show that the selection procedures have had a racially disparate impact . . . [and] were susceptible to abuse").

less onerous burden of proof than the intent requirement of equal protection doctrine. In *Duren*, the defendants' showed underrepresentation of women occurred "in every weekly venire" for nearly a year, which "manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." "Systematic," in Sixth Amendment claims, connotes consistency rather than intention, the clear pattern resulting from a policy choice rather than a discriminatory purpose.

By formulating the doctrine to give little consideration to the state's intent and instead to give primary consideration to the systematic impact of state policies, the Court avoided in fair cross-section jurisprudence the paradox of the restrictive "purpose" definition in equal protection doctrine, which rejects the common-sense conclusion that "a person intends the natural and foreseeable consequences of his voluntary actions" and instead subscribes to the belief that this person cannot be said to intend what she knows will be the consequences of a given action. The clear empirical evidence that facially neutral selection procedures produce unrepresentative jury lists and panels makes that position as unpersuasive in the jury selection process as anywhere in equal protection doctrine. If officials know—or can know—that a jury master list will be disproportionately white and non-poor if constructed from voter rolls, then it is hard to characterize the decision to use that source as impartial, and its adverse impact un-

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83 *Duren*, 439 U.S. at 366. See also id. at 367 (asserting that underrepresentation was "due to the operation of Missouri's exemption criteria").

84 For a discussion of the equal protection "purpose" doctrine in relation to other intent analyses in the law, see Pamela S. Karlan, Note, Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent, 93 Yale L.J. 111 (1983).

85 See *Feeney*, 442 U.S. at 278-79.
intentional, with regard to race and class. It is difficult not to hold officials accountable for ignoring publicly available knowledge that their facially neutral processes yield disproportionate results; conceptually, it would require ignoring their constructive, if not actual, knowledge of the disproportionate impact that facially neutral procedures have.\textsuperscript{86}

The absence of a strong intent requirement may reflect the Court's acknowledgement of the reduced government interest in the jury selection context.\textsuperscript{87} The only real interest the state can assert in this context is administrative efficiency. For example, the state could argue that voter rolls may be more easily accessible than other sources, or that cluster sampling would require a more advanced computer program. However, in the equal protection context, the state interest in administrative efficiency usually carries less weight with courts than other government interests. Examples of these other government interests and the means to achieve them include the assurance of qualified workers by means of an employment test;\textsuperscript{88} the guarantee of benefits to veterans in exchange for military service by means of employment

\textsuperscript{86} This issue can present itself at several points in the jury selection process. An example, as evidenced by the gerrymander studies, is the procedures used to draw names from the wheel after the composition of the jury master list. See supra note 61 and accompanying text.

Documentation of the impact of a given procedure makes officials' constructive—if not actual—knowledge of the disparity unavoidable, regardless of whether the procedure is facially neutral or chosen in good faith. The alternative is to risk that officials, who have access to the literature assessing the impact of selection procedures as well as first-hand observation of results in their jurisdiction, may deliberately select "neutral" procedures that they know will yield disparate results.

\textsuperscript{87} Daniel Ortiz has developed more fully a comparable argument that the intent inquiry in equal protection law varies with the context of the case. Thus, while in jury selection cases the intent inquiry is effectively a test for disparate impact, in employment cases, the intent requirement shows a greater concern with discriminatory purpose. Ortiz explains this variation as a means to balance individual and societal interests according to the relation of interests at issue to traditional market forces in liberal theory; thus, a lax intent inquiry in the context of jury selection cases allows aggressive judicial supervision of an interest not traditionally regulated by market forces, while a strict actual motivation standard in employment and housing contexts withholds judicial intervention from the government's decision to intervene—or not—in the market. See Ortiz, supra note 12, at 1107, 1119-26, 1140-42.

preferences;\textsuperscript{89} and the protection of property values by means of the maintenance of a facially neutral zoning policy.\textsuperscript{90}

Furthermore, the absence of an intent inquiry signals both the high value accorded to the fair cross-section doctrine and the Court's determination that the doctrine is more than a limited anti-discrimination principle designed to hinder discriminatory intent.\textsuperscript{91} The doctrine protects the representativeness of the jury pool and venire regardless of whether the imperfections are the result of an illicit purpose; the representativeness of the jury panel is crucial to giving content to the impartial jury clause, so the doctrine operates to correct any policy that consistently undermines the representativeness of the jury panel.\textsuperscript{92}

IV. NON-COGNIZABLE SELECTION PROCEDURES

Beyond the problems of maintaining a fully inclusive master list and summoning representative jury panels from it, a number of other local policy decisions—mostly those that respond to the economic and employment status or personal circumstances of jurors—affect the rep-

\textsuperscript{89} Feeney, 442 U.S. at 256.


\textsuperscript{91} Some commentators have argued that the doctrine should be so limited. See, e.g., Kull, supra note 67, at 17-21 (arguing that the cross-section doctrine leads to racial quotas in jury composition and urging that the limited anti-discrimination principle of neutrality govern jury procedures).

\textsuperscript{92} Some have suggested that taking the fair cross-section mandate this seriously leads to conscious engineering of the demographic make-up of jury panels—in short, to quotas—because random selection procedures provide no guarantee that jury panels will consistently be representative. Indeed, some jurisdictions have adopted racial quotas for jury panels to correct for the consistently unrepresentative results of their selection procedures. See id. at 18 (noting that such a system is used in DeKalb County, Georgia).

There should, however, be no need for such manipulation. If each key aspect of selection procedures is corrected for the disproportionate impact it has on the jury panel, then random selection will reliably produce representative venires. DeKalb County, Georgia, which employs a non-random balancing formula (with regard to race and age) to select venires, must do so because it uses a very unrepresentative source list—county voter rolls, which are unsupplemented by any other source. See id. If the county were to change its current practice and make its jury master list comprehensive, ensure that selection procedures drew names representatively from throughout the list, and guard against other elements that could skew the panel (e.g., grants of excuses, recalcitrant jurors who ignore summons), then there would be no need for quotas or other efforts to engineer a demographic balance.
resentativeness of petit juries. The Sixth Amendment provides no effective regulation of jury selection once a panel is called to the courthouse, given the fair cross-section doctrine's limitation to procedures that impanel the venire. Nevertheless, at several points after the selection of the jury panel, jurisdictions could improve the representativeness of their juries by changes in state statute and local policy that now serve to skew the petit jury's representativeness.

Of citizens summoned for jury duty, one-third or more may ask for and receive excuses from service, often for personal hardship. Along with such bases as child care difficulties and transportation problems, excuses are often granted for economic reasons. As one would expect, those who request excuses are not evenly distributed among the population. Fukurai, Butler, and Krooth found that the most important determinant of whether jurors sought an excuse was their employer's policy on continuing to pay employees during jury service. Employees secure with a continued salary during jury service are less likely to request excuses for economic reasons. One response to the economic impact of jury service would be to increase the compensation of jurors, albeit an unlikely option in the underfunded public sector. This reform could counterbalance employer policies against compensating workers during jury service, though it may not address

93 I also lay aside at this point the actions of the parties in exercising peremptory strikes, a practice governed by the Batson doctrine and which also affects the representativeness of petit juries. See Batson v. Kentucky, 476 U.S. 79 (1986).

94 See Taylor v. Louisiana, 419 U.S. 522, 534 (1975) ("The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare.") (citing Rawlins v. Georgia, 201 U.S. 638 (1906)); id. at 538 ("The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.").

95 See Fukurai et al., supra note 3, at 121-22 (noting that during one period studied in Los Angeles, 37% of those summoned were excused from jury service).

96 Id. at 64.

97 Id. at 119-20.

98 Id. at 120, 129, 136.
the concerns of higher-income senior workers, whose motivations to seek excuses may be more their responsibilities on the job than their potential lost income.99 A more limited response would be to increase juror compensation only during particularly long trials, which impose the greatest hardship on jurors. For example, compensation could be doubled for all jurors required to serve longer than one week, and tripled for those serving longer than a month.100

An alternative response would be to shift the economic cost onto the private sector by requiring employers to continue employee salaries during jury service, as well as prohibiting the firing of employees who are absent solely due to jury service. Such a statute, however, might not withstand constitutional scrutiny.101 If it should, the policy has the advantage of countering the incentives in the current system for employers not to continue salaries during jury service. Employers have at least two incentives to refuse to pay employees serving as jurors: they save money in labor costs and, since their employees will more often seek and be granted excuses from service if no payment is provided, they will have to contribute fewer employees to the jury system, thereby shifting the burden onto employers who do compensate their employees during service. That some employers continue to compensate workers during jury duty,102 however, probably indicates either that many employers do not engage in this somewhat cynical calculus, or that they balance other factors, such as employee morale and good corporate citizenship, against the incentives for nonpayment.

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99 This seems particularly likely if, as one would assume but the authors do not document, higher-income white-collar positions are more likely to be ones that continue salary during jury service.

100 In 1988, 96 federal criminal trials lasted one month or longer; in 1986, 335 federal civil trials lasted more than two weeks. Id. at 119.

101 See Hasegawa v. Maui Pineapple Co., 475 P.2d 679 (Haw. 1970) (declaring unconstitutional under the equal protection and takings clauses a Hawaii statute requiring that every employer who employs more than 25 persons pay compensation to each employee who serves on a jury equal to the difference between her normal wages and the amount received for jury duty).

102 Fukurai et al., supra note 3, at 123, 126-29.
Other factors related to employment status are less determinative of how likely a juror is to seek an exemption. For example, supervisors are less likely to seek excuses than those without supervisory duties, but senior employees ask for excuses more frequently than do junior employees.\textsuperscript{103} Owners of businesses request excuses more often than do non-owners, but those with higher incomes and higher educational attainment seek excuses more often than do less educated and lower income workers.\textsuperscript{104}

Jurisdictions need to pay closer attention to the effect that granting excuses—both those based on individual scenarios of hardship and those granted categorically as a matter of policy—has on the representativeness of jury panels. Many jurisdictions need to reassess the criteria for granting excuses, particularly occupation, that skew jury panels’ representativeness. New York, for example, exempts workers in twenty-five occupations from jury service.\textsuperscript{105} Although there are good reasons for excusing certain professions,\textsuperscript{106} every exemption of an occupation makes the pool a less accurate cross-section of the community; police officers are a segment of every community, as are physicians, attorneys, and other occupations frequently excused from service.

Finally, jurisdictions might simply search for ways to make jury service more efficient and less burdensome, so that less time is spent

\textsuperscript{103} Id. at 137. See also id. at 129 (younger workers more likely to seek excuses than older workers).

\textsuperscript{104} Id. at 134-35. Perhaps low-income workers seek excuses less often because the difference between their work income and juror compensation is smaller. In 1993 in Clarke County, Georgia, for instance, jurors were paid $25 a day for jury service (plus a free lunch), while the daily earnings of one working eight hours at minimum wage was $36. Low-income workers might also feel that their presence is less crucial to their employers and that substitutes can fill in more easily, while high income, senior employees (and business owners) have more responsibilities that only they can easily execute. That speculation is countered, however, by the fact that “supervisors” and older workers (who presumably are senior workers) seek excuses less often. Id. at 136. See also id. at 129.

\textsuperscript{105} Hoffman, supra note 33, at 44 (noting that professionals are underrepresented in New York jury pools, yet exemptions are automatically granted for 20 occupations including lawyers, clergy, podiatrists, physical therapists, and embalmers).

\textsuperscript{106} Police officers, for example, are almost always peremptorily struck by criminal defendants, and one also might argue that they already play a public service role in the criminal justice system. Fukural \textit{et al.}, supra note 3, at 67; Hoffman, supra note 33, at 44.
waiting at the courthouse and service is thereby less of an imposition.107 Nevertheless, if the inclusiveness and representativeness of jury panels are improved by changes in earlier stages of the selection process, the impact of excuses may be less significant.

CONCLUSION

Empirical research of the type provided by *Race and the Jury* contributes invaluably to the jurisprudential issues surrounding jury selection. Nevertheless, it cannot answer the bottom-line policy questions about how to respond to racial and demographic disparities in jury composition. Moreover, the relevance of this research is contingent upon decisions of constitutional and regulatory policy. An objective demonstration of the disparate impact of a particular procedure is a separate issue from whether we care about that impact, and whether it is, or should be, of constitutional concern.

If there is a fault in *Race and the Jury*, it is its conflation of empirical issues and legal-political ones.108 The authors make no attempt to hide their strong preference for racially well balanced juries as well as both their contempt for constitutional doctrine and administrative practices that do not ensure such juries,109 and their conviction that

107 See Fukurai et al., supra note 3, at 120. See also Hoffman, supra note 33, at 44 (noting that “New York City jurors often spend hours waiting in crowded hallways, then are ushered into rooms with harsh lighting and bad ventilation and are offered seats on hard benches or chairs with the springs poking out,” and describing reforms in some jurisdictions to make jury service less burdensome, including phone service that allows jurors to call in to see if their presence is needed on a given day and limiting service to one day or one trial).

108 One example: In discussing the frequently employed qualification that a juror must speak English and how that rule depresses Hispanic participation on juries, the authors assert that “[i]f a significant percentage of defendants are Spanish-speaking Hispanics, the participation of Spanish-speaking peers is called for.” Fukurai et al., supra note 3, at 54.

109 For one example, see id. at 27 (“Blue-ribbon juries are therefore still empowered to parade their constitutionality and to give judicial justification to the systematic exclusion of racial minorities from juries.”). See also id. at 76 (“Both legal and extralegal factors, however, lead to nonrepresentative juries, which are abhorrent to the democratic ideals of a trial by jury.”).
racism continues to affect jury selection. There is a good argument for making such positions known in a text largely focused on empirical research: it is better the reader know the researchers’ perspectives, since they exist whether they are discussed or not, so that she can evaluate the empirical conclusions in light of that bias. But the point remains that data does not determine policy choices and is only relevant in the context of those choices.

Nevertheless, for lawyers and legal scholars wrestling with the idea of jury impartiality and the practice of jury selection, Race and the Jury provides valuable and disturbing information as well as practical and inspiring insights on the reconstruction of the jury system. If the application of the fair cross-section doctrine as a remedy to the procedures identified in Race and the Jury is problematic—and it is suggested here that it should not be—then the current predicament in the jurisprudence of juries requires a choice: do we renounce the vision built on the idea that juries should represent a cross-section of the

110 See, e.g., id. at 54 ("Many minorities see no reason to participate in an institution [the judicial system generally, and jury selection in particular] controlled by those who lord it over them.").

111 The authors, it should be noted, do use race when they act as jury consultants. The book’s final chapter describes the authors’ use of scientific jury selection methods on behalf of the defendants in the infamous McMartin child molestation trial in California. The authors gathered survey data revealing that “the race of the prospective jurors was one of the most crucial factors differentiating those who expressed the opinion that the defendants were guilty.” Fukurai et al., supra note 3, at 208. Based on that data, the defendants struck Hispanic and Native American jurors from the panel and sought to keep black, white, and Asian jurors. Id. Their efforts resulted in an unrepresentative petit jury (and in favorable verdicts or deadlocks).

The fact that race often correlates with jurors’ perspectives on a case emphasizes the importance of selection procedures that produce representative panels. Because race correlates with a juror’s viewpoint, a racially diverse panel is one inclusive of all the community’s viewpoints; also, because litigants will try to skew the petit jury’s representativeness to exclude perspectives unfavorable to their side, the government needs to empanel representative venires both to be fair to both parties and to counter the parties’ attempts to eliminate certain viewpoints.

112 See Donald J. Black, Sociological Justice 3 (1989) (reprimanding “sociologists for confusing facts and values in the study of law—what is and what ought to be”); Donald J. Black, The Boundaries of Legal Sociology, 81 Yale L.J. 1086, 1087 (1972) (criticizing sociologists for “confus[ing] scientific questions with policy questions” and arguing, “[v]alue considerations are as irrelevant to a sociology of law as they are to any other scientific theory of the empirical world.”).
community and formulate another, narrower one to support the holdings of cases such as Taylor and Duren? Or, do we affirm the current vision of juries and carry it forward, as far as practical, with holdings in other contexts and at other stages of the jury selection process? The Court has given no indication that it intends to revise the premises of the fair cross-section requirement, and public opinion shows no signs of accepting an understanding of jury impartiality without regard to race and other demographic differences.\textsuperscript{113} Race and the Jury provides a good starting point for developing strategies to improve the representativeness of jury panels—by improving random selection procedures rather than moving toward a system of quotas or demographic balancing, whether through local, voluntary reform or litigation under the Sixth Amendment.

\textsuperscript{113} See supra note 21 and accompanying text. See also supra note 14 (citing Peters v. Kiff, 407 U.S. 493, 503 (1972) (plurality opinion of Marshall, J.), which notes that unrepresentative jury panels “create the appearance [to the public] of bias”).
LEGAL RIGHTS, MEDICAL REMEDIES

Paul A. Lombardo*


INTRODUCTION

For several years after it was first identified in 1981,¹ Acquired Immune Deficiency Syndrome ("AIDS") confounded lawyers faced with questions about its legal significance. The new disease arrived as diseases usually do, unaccompanied by a legal reference text that would assist the diligent counselor in delivering a level of advice transcending mere speculation. Did physicians have a legal duty to treat AIDS patients? Were employers allowed to exclude employees infected with AIDS from the work force? Could a client with AIDS recover damages after discrimination or ill treatment prompted by the disease? Responses to these queries were neither confident nor clear. Moreover, the cluster of illnesses characteristic of AIDS had been grouped earlier under a medical acronym—GRID (Gay Related Immune Deficiency)—which marked AIDS as a malady relevant only to the homosexual minority. A fatal disease linked in the popular consciousness with the sexual habits of a socially marginal group posed an unlikely focal point for mainstream legal analysis.

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¹ Gena Corea, The Invisible Epidemic: The Story of Women and AIDS 5 (1992). In 1982, the Centers for Disease Control coined the name Acquired Immune Deficiency Syndrome. Id. at 15.
The development in 1985 of a laboratory test which could isolate the Human Immunodeficiency Virus ("HIV") and identify those who carried the disease only raised more perplexing legal questions. Whose claims to a right to know another person's HIV status should be honored? Did landlords or spouses, police departments or schools have a clear "right" to learn who was infected? Were mandatory HIV tests a legally appropriate method for identifying disease carriers? Could an HIV-infected person invoke a right to privacy or expect the usual duty of medical confidentiality to be observed by caregivers?

As recently as 1987, courts and legislatures in most jurisdictions had not addressed these questions. In their search for touchstones of legal advice, attorneys were left to puzzle through the precedential value of nineteenth century appellate opinions or similarly antiquated public health statutes. Today, after seven years, the gap in AIDS-related law has disappeared. Every state, as well as the District of Columbia and Puerto Rico, has passed at least one statute addressing AIDS-related issues as part of its legal response to AIDS. Many ju-

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2 I pick 1987 as a reference point because it was then that cases such as Vincent Chalk’s began to receive national attention. Chalk taught the hearing-impaired at a school in Orange County, California. When he revealed to his superiors that he had AIDS, they promptly barred him from the classroom. Chalk sued and won a landmark decision which guaranteed job security for public employees with AIDS. Chalk v. United States Dist. Court, 840 F.2d 701, 709-10 (9th Cir. 1988) (holding that teacher with AIDS was not required to disprove every theoretical possibility of harm and that the potential that teacher’s return to classroom would produce fear and apprehension in parents and students did not justify a denial of a preliminary injunction).


risdictions have adopted dozens of laws spanning a broad spectrum of AIDS-related issues. These laws reveal the impact of the AIDS epi-

demic in areas as varied as insurance,\textsuperscript{4} products liability,\textsuperscript{5} employment and housing discrimination,\textsuperscript{6} confidentiality,\textsuperscript{7} and domestic relations.\textsuperscript{8}

The abundance of legislative activity in recent years has been matched by a similarly high level of judicial response. A review of appellate court decisions related to AIDS from 1987 through 1993 yields more than five hundred opinions from state\textsuperscript{9} and federal courts.\textsuperscript{10} An ongoing compilation of case reports from trial courts,

\begin{itemize}
  \item See, e.g., Ga. Code Ann. § 51-1-28 (1993) (negligence a prerequisite to recovery for damages resulting from transfusions, transplants, and transfers of HIV-infected human blood, tissue, organs, etc.).
  \item See, e.g., Miss. Code Ann. § 99-19-203 (1991) (positive HIV or AIDS test shall be reported to both the spouse of the person convicted of a sex offense and to the spouse of the victim); R.I. Gen. Laws § 23-6-17 (1993) (physician may notify spouse of AIDS-infected patient if clear and present danger of AIDS transmission to spouse and if patient will not warn spouse); S.C. Ann. § 44-29-146 (1991) (physician or state agency identifying and notifying a spouse of a person having HIV infection or AIDS is not liable for damages resulting from the disclosure); Tex. Health & Safety Code Ann. § 81.103 (West 1994) (a positive test may be released to spouse); W. Va. Code § 16-3C-2(g)(1) (1993) (premarital screening).
  \item See, e.g., Doe v. McNulty, 630 So. 2d 825, 828 (La. 1993) (holding that jury award of $700,000 was not excessive where plaintiff claimed that physician failed to diagnose her earlier as HIV positive); Valery v. Southern Baptist Hosp., 630 So. 2d 861, 863 (La. Ct. App. 1993) (holding that damage claim by hospital security guard for exposure to HIV was precluded by exclusive remedy under worker’s compensation statute); Carroll v. Sisters of Saint Francis Health Servs., 868 S.W.2d 585, 594 (Tenn. 1993) (holding that visitor could not recover emotional damages based on fear of contracting AIDS without proof that she was actually exposed to HIV).
  \item See, e.g., Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993) (holding that as a matter of law, postal worker suffering from AIDS had right to request transfer to another location where he could obtain better medical treatment); Camarillo v. McCarthy, 998 F.2d 638, 639-40 (9th Cir. 1993) (HIV-segregated prison unit did not violate prisoner’s constitutional rights); Phelps v. Field Real Estate Co., 991 F.2d 645, 650-51 (10th Cir. 1993) (affirming dismissal of suit against former employer for discharge based on positive AIDS test, because discharge did not violate Colorado handicap discrimination statute, and
\end{itemize}
administrative agencies, and human rights commissions contains more than one thousand entries. Most tribunals, including the United States Supreme Court, have struggled with HIV/AIDS and this litigation, like legislation, has added to the body of AIDS-related law. Any attorney seeking guidance in this area today is faced with an excess rather than an absence of legal authority.

A comparable explosion has taken place in the publication of secondary legal sources. The wake left by new law has been filled with a backwash of legal commentary. In the midst of new casebooks, treatises, "nutshell" compilations, and innumerable articles on AIDS and the law, a volume focusing specifically on civil rights questions because there was not sufficient evidence to establish that the discharge was motivated by an intent to interfere with employee benefits protected by ERISA).


12 American Nat’l Red Cross v. S.G. and A.E., 112 S. Ct. 2465, 2467 (1992) (holding that supplier of HIV-infected blood was allowed to remove state-law tort action to federal court through a provision in supplier’s national charter).


arising as a result of the AIDS epidemic has been published by the American Civil Liberties Union (ACLU). Shortly thereafter, a second book was produced by another advocacy program, the Yale AIDS Law Project. In different ways, both these books provide ready reminders of how thoroughly the legal landscape has been altered by this most recent medical scourge.

I. AIDS AGENDA

The nine essays included in AIDS Agenda began as a series of briefing papers prepared by the ACLU AIDS Project. Edited by Brooklyn School of Law Professor Nan Hunter and ACLU AIDS Project Director William Rubenstein, AIDS Agenda addresses three topical areas that pose particularly troubling questions for legal policymakers. The first section of the book is entitled Emerging Populations. It discusses the problems of groups affected in unique ways by AIDS: women; adolescents; and HIV infected parents. The second section of the book is entitled Rights in the Context of Health Care. Included here are essays on the duty of health care providers to treat HIV infected patients, a summary of the debate over insurance coverage for medical treatment following HIV infec-


19 See AIDS Agenda, supra note 17, at 3-117.

20 Nan D. Hunter, Complications of Gender: Women and HIV Disease, in AIDS Agenda, supra note 17, at 5, 5-39.

21 Phyllis Arnold, Betwixt and Between: Adolescents and HIV, in AIDS Agenda, supra note 17, at 41, 41-67.


23 See AIDS Agenda, supra note 17, at 121-234.

24 Mark H Jackson & Nan D. Hunter, "The Very Fabric of Health Care": The Duty of Health Care Providers to Treat People Infected by HIV, in AIDS Agenda, supra note 17, at 123, 123-46.
tion, and an analysis of public funding for AIDS medical care. The book's final section, New Issues in Civil Rights, contains a survey of cases in which the criminal law has been invoked, ostensibly to deter the spread of AIDS, and a close examination of AIDS-discrimination law in light of the Americans with Disabilities Act.

The topics explored in AIDS Agenda are a reminder that the pace of social adjustment is rarely synchronized with the schedule for legal change. Formal rules that proscribe discrimination based on disease status, for example, do not displace the social context in which such discrimination thrives. The first essay in AIDS Agenda demonstrates this truism, showing how women with AIDS are plagued by pervasive sexism no less than by the disease.

In Complications of Gender: Women and HIV Disease, Nan Hunter suggests that since the appearance of AIDS, women who contract the disease have been systematically neglected. Because AIDS was viewed first as a disease affecting gay men, the earliest cases in women were often overlooked or even denied by physicians. Educational materials focused on preventing transmission among men. Women who contracted the disease were portrayed primarily as sources of infection rather than individuals with their own health problems. This portrayal ignored the fact that for reasons of

25 Mark H. Jackson, Health Insurance: The Battle Over Limits on Coverage, in AIDS Agenda, supra note 17, at 147, 147-79.
27 See AIDS Agenda, supra note 17, at 237-300.
28 Mark H. Jackson, The Criminalization of HIV, in AIDS Agenda, supra note 17, at 239, 239-70.
29 Chai R. Feldblum, Workplace Issues: HIV and Discrimination, in AIDS Agenda, supra note 17, at 271, 271-300.
30 Hunter, supra note 20, at 5, 5-39.
31 Id. at 10.
32 Id. at 7.
33 Id. at 6.
physiology alone, women are over ten times more likely than men to contract HIV infection from a sexual partner. 34

Hunter explains how the “social invisibility of women” during the early years of the epidemic led to a medical response that included neither effective preventive strategies for women nor educational programs designed to alert them to the risks of infection. 35 AIDS is not a single disease, and its diagnosis depends upon the appearance of specific symptoms as indicators for a number of opportunistic infections. 36 Together these infections make up the syndrome that constitutes AIDS. The infections that occur first among women with HIV are often signaled by gynecological symptoms. 37 The formal definition of AIDS has, until very recently, excluded these symptoms, thereby effectively ruling out an opportunity for women to receive early diagnosis and care. Because many women are not diagnosed with HIV infection until they are near death, gender-specific data on the natural history and progression of the disease is sparse. 38 In the political battle for research and treatment funds targeted for women with AIDS, an unrecognized disease among uncounted victims carries no political weight.

Hunter argues for more medical research on women generally, noting that for too long, women’s health concerns were recognized only if they became mothers. 39 The traditional linkage of maternal and child health puts women, unlike men, at unique risk as subjects of state intervention and coercion. Proposals to force sterilization of HIV-infected women or otherwise reduce their likelihood of giving birth raise thorny questions about reproductive rights. Similarly troubling is the practice of excluding women with AIDS both from research protocols and from treatment, on the basis that systemic medical interventions might harm an unborn child. Hunter challenges the assumptions behind these practices, concluding that AIDS has exacer-

34 Corea, supra note 1, at 84-85.
35 Hunter, supra note 20, at 7-9.
36 Id. at 10.
37 Id.
38 Id. at 11.
39 Id. at 6, 17, 17 n.60, 30.
bated the difficulty faced by women in obtaining access to health care and in freely choosing when, and when not, to accept it.\footnote{Id. at 9-30.}

Other contributors to this volume alert the reader to different populations whose medical conditions create special legal vulnerabilities. Phyllis Arnold, a member of the New York University Law faculty, details the particularly complex problems of adolescents.\footnote{Arnold, supra note 21, at 41, 41-67.} How should we balance the prerogative of parents to veto sex education with the realization that sexually active adolescents desperately need accurate information about AIDS?\footnote{Id. at 47-48.} How should a program of confidential counseling be structured within a population that may need parental consent before taking an HIV test?\footnote{Id. at 45-46, 48-51, 54-55, 58-60.} In their exploration of questions like these, the essays in \textit{AIDS Agenda} highlight the ways that AIDS has forced a rethinking of existing policy where law intersects with medicine and other social institutions.

Other essays focus on additional dilemmas, but perhaps the most dramatic impact of the book is to be found in the numerous too-bizarre-to-believe accounts of cases, many of which have already made it through the courts: a hospital allegedly dumps a patient in need of an operation after it performs an HIV test without consent and learns that the patient tests positive;\footnote{Jackson & Hunter, supra note 24, at 123, 125.} a hospital refuses to provide dialysis to HIV infected patients who suffer from end-stage renal disease and will die without that treatment;\footnote{Id.} a convenience store chain announces that it will not cover medical costs for employees who present claims related to "personal life-style decisions" such as drug or alcohol abuse, self-inflicted wounds, or AIDS;\footnote{Jackson, supra note 25, at 147, 150.} a Texas court judges an HIV-infected inmate who spits at a prison guard guilty of attempted murder and sentences him to life in prison.\footnote{Jackson, supra note 28, at 239, 242.}
This anecdotal evidence illustrates the failure of national AIDS education efforts. Despite the widely publicized difficulty of transmission absent sexual intimacy, needle-sharing, or blood-to-blood contact, fear of the disease remains overpowering to even the most informed. The infected are subjected to moralistic censure, stigma, and exclusion, as if they had chosen to embrace fatal illness.

*AIDS Agenda* succeeds in highlighting a number of situations where the presence of AIDS has led to an absence of civil rights, but it neglects a number of other issues. For example, legal developments in privacy and confidentiality are treated only briefly throughout the book. But since the public exposure of disease status is associated with all types of discrimination, this corner of the law could easily have been the subject of a major essay. First Amendment cases also raise major civil rights questions, where the fear of widespread infection is used as a pretext to close adult book stores, or where opponents of AIDS education programs challenge the programs as obscene in order to block funding. In addition to the First Amendment, other areas where an even more extensive body of case law exists, such as the effect of AIDS on prison conditions, are not mentioned.

Identifying areas which might have been investigated in *AIDS Agenda* serves as a reminder not so much of the limitations of this

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48 See, e.g., AIDS Agenda, supra note 17, at ix (referring to the presence of statutory requirements of confidentiality for HIV-related medical records in all but a few states); id. at 48-61 (discussing confidentiality concerns of HIV-infected adolescents); id. at 91-92 (discussing confidentiality problems facing HIV-infected parents); id. at 243-48 (exploring privacy rights in the context of testing the HIV status of defendants charged with criminal spitting and biting).


51 See, e.g., Camarillo v. McCarthy, 998 F.2d 638, 639-40 (9th Cir. 1993) (HIV-segregated prison unit did not violate prisoner's constitutional rights); Gates v. Deukmijian, 987 F.2d 1392, 1405 (9th Cir. 1992) (reasonable attorney fees owed in meritorious challenge to segregated housing and treatment of HIV-infected inmates); Harris v. Thigpen, 941 F.2d 1495, 1521 (11th Cir. 1991) (segregated housing facilities for HIV positive inmates did not violate prisoners' Fourteenth Amendment privacy rights).
book, but of the potential impact of epidemic disease upon the law and upon the social fabric. Disease preys upon the most vulnerable, and as the contributors to *AIDS Agenda* repeatedly point out, more than race, gender, age, drug use, or sexual preference, the most common denominator of those who fall ill with AIDS is poverty.\textsuperscript{52} The most vulnerable medically turn out to be the most vulnerable legally. The rhetoric of "civil rights" must ring particularly hollow to those who endure AIDS as just one final cost of being poor.

**II. AIDS LAW TODAY**

*AIDS Agenda* is a book written primarily by lawyers; elaborate footnoting and extensive case discussions make lawyers its most likely audience as well. In contrast, *AIDS Law Today* is consciously aimed at a much broader population of readers. As a result, it is accessible both to the lay public and to attorneys with an interest in how American law has been altered as a result of the AIDS epidemic.

The second book produced by the Yale AIDS Law Project,\textsuperscript{53} *AIDS Law Today*, was deliberately crafted not only for use by those with legal training, but also for others whose professions require them to confront the legal issues created by the HIV epidemic. Temple law professor Scott Burris begins the volume with a short chapter designed to help the lay reader assimilate the material that will follow.\textsuperscript{54} In fourteen pages, Burris makes sense of the arcane language of lawyers in the practical context of an interpersonal dispute. Entitled *A Little Law for Non-Lawyers*, the introductory piece follows a hypothetical plaintiff whose HIV-contaminated blood transfusion forces her into the legal system. Burris walks the reader through the case from the hiring of a lawyer to motions, judgments, and appeals, paying special attention throughout his discussion to clarifying how the structures of the law

\textsuperscript{52} See, e.g., *AIDS Agenda*, supra note 17, at xi (AIDS has become "concentrated among the most impoverished ... segments of society."); id. at 3 ("HIV disease is in fact increasingly a disease ... of the poor."); Shacknai, supra note 26, at 181 ("A growing proportion of HIV-infected people will be poor, uninsured, or underinsured.").


operate. Burris is straightforward without being condescending, and his exercise provides an appropriate introduction to this user-friendly book.

Editors Burris, Dalton, and Judith Leonie Miller assembled their material in a semi-textbook format that includes five separate parts. Along with the legal primer, Part One, entitled Background,\textsuperscript{55} contains information on the natural history of the disease written by two physicians,\textsuperscript{56} an essay on AIDS and the history of public health,\textsuperscript{57} and reflections on the AIDS/Law intersection from the perspective of a patient.\textsuperscript{58} Part Two, \textit{Primary Public Health Measures against HIV}\textsuperscript{59} is composed of four essays, two each by Burris and public health expert Larry Gostin. Gostin’s article, \textit{Traditional Public Health Strategies},\textsuperscript{60} which deftly surveys the history of public health law by reference to major cases, parallels the introductory piece by Burris in that it presents information in a practical and straightforward way while not overwhelming the reader in legal minutiae. Essays on the use of HIV education as a preventative strategy,\textsuperscript{61} insights into drug dependency,\textsuperscript{62} and the issue of testing and privacy rights\textsuperscript{63} complete Part Two. Part Three, \textit{HIV in the Public Sector},\textsuperscript{64} looks at criminalizing HIV

\textsuperscript{55} AIDS Law Today, supra note 18, at 1-56.

\textsuperscript{56} Helena Brett-Smith \& Gerald H. Friedland, Transmission and Treatment, \textit{in} AIDS Law Today, supra note 18, at 18, 18-45.

\textsuperscript{57} Allan M. Brandt, A Historical Perspective, \textit{in} AIDS Law Today, supra note 18, at 46, 46-53.

\textsuperscript{58} Belinda Ann Mason, A Seat on the Merry-Go-Round: A Consumer’s View, \textit{in} AIDS Law Today, supra note 18, at 54, 54-56.

\textsuperscript{59} AIDS Law Today, supra note 18, at 57-184.

\textsuperscript{60} Larry Gostin, Traditional Public Health Strategies, \textit{in} AIDS Law Today, supra note 18, at 59, 59-81.

\textsuperscript{61} Scott Burris, Education to Reduce the Spread of HIV, \textit{in} AIDS Law Today, supra note 18, at 82, 82-114.

\textsuperscript{62} Larry Gostin, Drug Dependency and HIV, \textit{in} AIDS Law Today, supra note 18, at 150, 150-83.


\textsuperscript{64} AIDS Law Today, supra note 18, at 185-294.
transmission, unique problems of HIV in prisons, governmental restrictions on reproductive rights of the HIV infected, and discrimination in various federal sector programs. It is mirrored by Part Four, Private Sector Responses to HIV, which consists of three articles on discrimination, tort law, and the legal protections available to help the HIV-infected obtain and keep housing. The final section, HIV in the Health Care and Insurance Systems, completes the volume with articles concerning the difference between physicians and lawyers, the peculiar quandary of health care workers in the era of AIDS, and the general puzzle of health care access amidst our system of private health insurance.

Non-lawyers make a major contribution to AIDS Law Today. For instance, in A Historical Perspective, medical historian Allan Brandt reprises a section from No Magic Bullet, his landmark study of the history of venereal disease. Brandt explains the Progressive Era social hygiene movement and places AIDS in the context of other sexually

69 AIDS Law Today, supra note 18, at 295-364.
71 Donald H. J. Hermann & Scott Burris, Torts: Private Lawsuits about HIV, in AIDS Law Today, supra note 18, at 334, 334-64.
73 AIDS Law Today, supra note 18, at 365-432.
74 Daniel M. Fox, Physicians versus Lawyers: A Conflict of Cultures, in AIDS Law Today, supra note 18, at 367, 367-76.
75 Troyen A. Brennan, Patients and Health Care Workers, in AIDS Law Today, supra note 18, at 377, 377-403.
76 Mark Scherzer, Private Insurance, in AIDS Law Today, supra note 18, at 404, 404-32.
77 Brandt, supra note 57, at 46, 46-50.
transmitted diseases. He describes the campaign to eradicate venereal disease by abolishing prostitution during World War I and notes that it was not only medically ineffectual, but represented a “concerted attack on civil liberties in the name of public health.” His historical perspective on other infectious diseases is a reminder of society’s inability to properly appreciate risk. Although we discount the significant risks to our health of engaging in such common activities as smoking and overeating, we magnify the risk, if any, of contracting AIDS through casual contact. This human failing is one that reverberates in recent judicial decisions on AIDS. Perhaps the most resonant of Brandt’s commentaries concerns our tendency of repeating past failures by mounting legal attacks on diseased populations when we fail to defeat the diseases themselves.

Another strong contribution by a nonlawyer is *Physicians versus Lawyers: A Conflict of Cultures*, by historian Daniel Fox. This brief

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79 Brandt, supra note 57, at 49.

80 See, e.g., Munetaka Sugiishi & Fuminaro Tukatsu, Abstract, Cigarette Smoking is a Major Risk Factor for Coronary Spasm, 269 JAMA 3079 (1993); W.T. Longstreth, Jr. & Lorene M. Nelson, Letter to the Editor, Smoking Cessation and the Risk of Stroke in Women, 269 JAMA 2214, 2214 (1993) (“We found cigarette smoking increased the risk of subarachnoid hemorrhage. . .


82 New York Academy of Medicine, Working Group, The Risk of Contracting HIV Infection in the Course of Health Care, 265 JAMA 1872, 1872 (1991) (“Substantial public anxiety has been created concerning what is in fact a minimal risk.”); Prevention and Control of Acquired Immunodeficiency Syndrome; An Interim Report, 258 JAMA 2097, 2100 (1987) (“The transmission of AIDS does not occur through casual contacts.”).

83 See, e.g., Faya v. Almaraz 620 A.2d 327, 336-37 (Md. 1993) (holding that patients alleging fear of acquiring AIDS after discovering that their surgeon had the AIDS virus when he performed surgery on them was not unreasonable as matter of law, though patients did not identify any actual channel of transmission of the AIDS virus or claim HIV-positive test); Kerins v. Hartley, 21 Cal. Rptr. 2d 621, 632 (Cal. Ct. App. 1993) (holding that patient could recover emotional distress damages, if otherwise provable, for “window of anxiety,” period between discovery of physician’s infection and receipt of information indicating her freedom from infection with reasonable medical certainty, despite estimates that patient’s overall risk of developing AIDS was one in 24 million).

84 Brandt, supra note 57, at 48-50.

85 Fox, supra note 74, at 367, 367-76.
examination of the differences between the two professions should be required reading for any lawyer who has an interest in medical jurisprudence and for any physician who feels particular antagonism toward lawyers. Fox delineates fundamental disagreements between doctors and lawyers concerning five issues: the nature of authority; the resolution of conflict; the relative importance of procedure and substance; the nature and significance of risk; and the legitimacy of politics as a method of problem solving.86

The emergence of lawyers as advocates for AIDS patients has dramatized the realization that until the end stages of the disease, lawyers can often do more for patients than doctors. But attorneys and physicians are often, by temperament and training, creatures of different species. As Fox makes clear, increased scientific sophistication among lawyers could help to bridge the cultural gap to the medical profession; similarly, legal awareness among physicians could aid the development of more workable public health policies.87 Reading Fox’s essay will help all professionals understand the roots of the interprofessional conflicts that have often been exacerbated as a result of the AIDS epidemic.

It is billed as A New Guide for the Public,88 but AIDS Law Today is most impressive as a guide for lawyers. Particularly effective are articles by Scott Burris summarizing privacy law and the impact of AIDS testing disclosure,89 and commentary on the cases that have arisen out of the AIDS education debate.90 In Education to Reduce the Spread of HIV,91 Burris addresses the conflicts among the prerogatives and responsibilities of governments facing the AIDS epidemic. The discussion recalls recent controversial proposals such as free needle exchanges for drug abusers and the “condomania” wars—advocates of the “just say no” sexual abstinence policy posed against “sexual

86 Id. at 369.
87 Id. at 376.
88 See AIDS Law Today, supra note 18.
89 Burris, supra note 63, at 115-49.
90 Burris, supra note 61, at 82-114.
91 Id.
realists" who promote a prophylactic in every lunchbox. Does government have an obligation to provide AIDS education? May government compel attendance, for medical emergency workers or police, for example, at AIDS education sessions? May government censor public or even private AIDS education efforts, by withdrawal of funding for programs considered "obscene" or simply risqué?

Burris's essay includes analysis of First Amendment concerns that are neglected in many AIDS legal anthologies. This recognition of the constitutional dimension to the AIDS epidemic, in addition to the variety of topics covered elsewhere in the book, shows that the editors made a special effort to choose articles that contain a precis of each branch of the law, making this volume both accessible to legal novices and useful to practitioners or scholars in need of an overview text.

The lack of breadth in AIDS Agenda is overcome in AIDS Law Today, which demonstrates concretely the potential for producing a book that can address a topic with complex legal ramifications while being neither overly technical nor simplistic. Taken together, these books demonstrate the enormous influence AIDS has had on developments in the law, no less than on the society that has turned so often to law for solutions to AIDS-related conflicts.

From one point of view, the absence of a cure for HIV infection means that the plight of people living with HIV and AIDS has not improved since the disease first appeared. But, from another perspective, the job of the legal counselor exploring for the first time an AIDS-related legal issue is considerably more manageable than it was in the mid-1980s. It remains to be seen how long it will be until a cure for AIDS is found, thus making expertise in AIDS law, and the books that reflect that expertise, obsolete.

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92 Id. at 92, 103-05.
93 Id. at 92-94.
94 Id. at 94-96.
95 Id. at 96-103.
96 Id. at 100-02.