

2-1-1991

United States v. Gelb: The Second Circuit's Disappointing Treatment of the Fair Cross-Section Guarantee

Mark A. Kornfeld

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Mark A. Kornfeld, *United States v. Gelb: The Second Circuit's Disappointing Treatment of the Fair Cross-Section Guarantee*, 57 Brook. L. Rev. 341 (1991).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol57/iss2/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

UNITED STATES v. GELB:^{*} THE SECOND CIRCUIT'S DISAPPOINTING TREATMENT OF THE FAIR CROSS-SECTION GUARANTEE

INTRODUCTION

The Sixth Amendment guarantees every criminal defendant the right to a trial by an impartial jury.¹ To protect this guarantee and to ensure the legitimacy of jury decisions it is essential that the process of jury selection be impartial.² As a result, discriminatory jury selection procedures have historically been an issue of profound constitutional concern.³

^{*} 881 F.2d 1155 (2d Cir.) (before Lumbard, Newman & Miner, JJ.; opinion per Miner, J.), *cert. denied*, 493 U.S. 994 (1989).

¹ U.S. CONST. amend. VI states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"

At his inaugural address in 1801, Thomas Jefferson indicated that "trials by juries impartially selected" were a fundamental principle of our government, which suggests that the Sixth Amendment drafters were concerned about jury selection when placing the word "impartial" into the Sixth Amendment. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 312 (J. Richardson ed. 1897). See also Note, *The Cross-Section Requirement and Jury Impartiality*, 73 CALIF. L. REV. 1555, 1558 (1985) ("The concept of impartiality consequently has come to designate both the detachment of the selection process and the selection of jurors."). However, the representative cross-section requirement, a right entitling defendants to jury selection systems free of unfair exclusion was not "officially" recognized until *Taylor v. Louisiana*, 419 U.S. 522 (1975); see note 6 and accompanying text *infra*.

² See Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images and Procedures*, 64 N.C.L. REV. 501, 504 (1986) (recognizing that jury selection procedures must appear fair because "[w]hat a jury looks like to the community will affect the community's respect for the verdict").

Massaro recognizes that the legitimacy of jury decisions will become highly suspect when jury selection procedures do not correspond to people's image of a fair jury. *Id.* at 517-19 (citing *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled in part*, *Batson v. Kentucky*, 476 U.S. 79, 101 (1986)). In *Swain* a black defendant was convicted of raping a white woman by an all white jury so composed after the prosecutor eliminated all prospective black jurors through use of peremptory challenges. The Supreme Court upheld the defendant's conviction, finding that the prosecutor's discriminatory use of peremptories to systematically eliminate prospective black jurors did not violate the 14th Amendment. *Swain*, 380 U.S. at 224. See also J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 2 (1977) (claiming that "the perception that the composition of a jury affects its verdict is the basis of challenges by defendants to the juries that convicted them").

³ The most significant early jury selection case was the venerable and oft-cited deci-

While courts have consistently held that the Constitution does not require a defendant's petit jury⁴ to be of any particular composition,⁵ a defendant's right to a fair cross-section of the community on the jury venire is constitutionally entrenched as "fundamental to the jury trial guaranteed by the Sixth Amendment."⁶ A constitutionally fair cross-section requires that "the jury wheels, pools of names, panels or venires from which the

sion by the Supreme Court in *Strauder v. West Virginia*, 100 U.S. 303 (1879) (where the Court invalidated a facially discriminatory statute that permitted only white male adults to serve as jurors, holding that the exclusion of blacks from the pool of jurors from which the petit jury was selected violated the defendant's right to equal protection under the law).

⁴ The choice of the petit jury, the jury that actually decides a defendant's fate, is the final and arguably most important phase of the jury selection process. However, this Comment focuses on the constitutional problems surrounding the composition of the jury pool, and the defendant's own venire, randomly selected, from which the petit jury is ultimately chosen.

The typical stages of jury selection in a criminal case under the federal method of jury selection can be described as follows: Potential jurors are randomly selected from a master jury wheel created from a master source list—a particular source of names, such as a list of registered voters, a list of those with driver's licenses, or multiple source lists aimed at a more representative pool of prospective jurors. After this initial selection, the screening process begins with potential jurors filling out a jury questionnaire. This qualification process will result in the exemption and exclusion of some jurors. The jury selection officials may also have some discretionary authority to excuse potential jurors based on legitimate requests by jurors or based on the subjective judgment of officials (although the latter is disfavored). This process produces a list of individuals qualified for service, which is called the jury pool or qualified pool. Upon need, jurors are selected at random from the jury pool and summoned for jury service. Jurors assigned for a specific case are referred to as the venire or panel. The petit jury is ultimately selected from the venire after the voir dire stage, in which jurors respond to specific questions and may be excused for cause, excused for "no cause"—where each side uses its allotted number of peremptory challenges—and excused by the court for hardship reasons. See B. BONARA & E. KRAUSS, *JURYWORK: SYSTEMATIC TECHNIQUES* (2d ed. 1983) [hereinafter "JURYWORK"]. See note 15, regarding jury selection procedures in New York.

⁵ The diverse nature of our society makes the notion of completely representative petit juries administratively unrealistic. The *Strauder* Court noted early on that a defendant had no "right to a grand or petit jury composed in whole or in part of persons of his own race or color . . ." 100 U.S. at 305. While this list is by no means exhaustive, the following decisions have affirmed this principle. *Batson v. Kentucky*, 476 U.S. 79, 85 n.5 (1986); *Duren v. Missouri*, 439 U.S. 357, 364 n.20 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Fay v. New York*, 322 U.S. 261, 284 (1947); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

⁶ *Taylor*, 419 U.S. at 530. The implications of this decision should not be understated. Essentially, *Taylor* establishes the notion that jury selection procedures are constitutionally safeguarded, irrespective of the substantive fairness of the petit jury's verdict. Hence, even in the absence of any bias or prejudice by a jury that convicts a defendant, the defendant's constitutional rights may have been compromised, thereby warranting a reversal. See text accompanying notes 33-40 *infra* (discussing *Taylor*).

juries are drawn must not systematically exclude distinctive groups in the community”⁷

The Second Circuit recently had occasion to examine the fair cross-section protection in *United States v. Gelb*.⁸ In *Gelb* the defendant alleged that a practice of granting Jewish individuals postponement of service during a three-week period encompassing the major Jewish holidays was an exclusionary jury selection procedure which denied him his constitutional right to a fair cross-section. While the court correctly rejects *Gelb*'s challenge, its superficial treatment of the fair cross-section issue was flawed.⁹ The Second Circuit's sparse opinion fails to address the question of exclusionary procedures raised by *Gelb*. Instead the court resolves *Gelb*'s claim through an inflexible application of constitutional doctrine, relying on suspect policy found outside the Second Circuit.¹⁰

⁷ *Id.* at 538. See also *Massaro*, *supra* note 2, at 533 (The fair cross-section is one drawn from a pool from “which no distinctive group in the community is under-represented due to systematic exclusion in the jury selection process.”). Central to this guarantee is that it ensures only a venire of randomness, one free of systematic exclusion. It does not ensure any particular venire. See *Note*, *supra* note 1, at 1565 (“Rather than being entitled to a [fair] cross-sectional venire, then, the challenger has a right only to a fair chance, based on random draw, of having a jury drawn from a representative panel. At this stage the paramount concern is procedural detachment.”).

⁸ 881 F.2d 1155 (2d Cir.), *cert. denied*, 493 U.S. 994 (1989). *Gelb*'s fair cross-section challenge is unusual, unlike more “traditional” jury selection challenges—facially discriminatory jury selection statutes or prosecutorial misconduct in the exercise of peremptory challenges.

⁹ *Gelb* is not alone in his failure to receive a favorable ruling on religion-based challenges. In a very terse opinion, not even cited by the *Gelb* court, the Second Circuit held that a defendant was not denied a fair cross-section of the community when the district court refused to grant an adjournment for the eight-day Passover season and made efforts to accommodate prospective jurors of Jewish faith by announcing that there would be no session on the principal holidays. *United States v. Suskin*, 450 F.2d 596 (2d Cir. 1971). Additionally, other circuits have treated fair cross-section challenges regarding the absence of Jewish people from the jury pool with similar brevity and disfavor. See, e.g., *Scott v. Dugger*, 891 F.2d 800, 804 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 224 (1990), (where despite evidence that prospective Jewish jurors were excused from service for the holiday of Yom Kippur, defendant's claim that he lacked a fair cross-section of the community because jury selection was conducted on the holiday was still deemed “meritless”); *Grech v. Wainwright*, 492 F.2d 747 (5th Cir. 1974) (where the court upheld the district court's discretion to exclude Jewish jurors in the face of a Sixth Amendment challenge). See text accompanying notes 139-52 *infra* discussing why the Second Circuit ultimately reached the right result in *Gelb*.

¹⁰ See *United States v. Bucci*, 839 F.2d 825 (1st Cir.), *cert. denied*, 483 U.S. 844 (1988) (rejecting appellant's claim that the government impermissibly excluded Italian-Americans based on the presumption that individuals whose surnames ended with a vowel were of Italian ethnicity); *United States v. Sgro*, 816 F.2d 30 (1st Cir. 1987), *cert.*

As a consequence of the Second Circuit's troubling analysis, the significance of the fair cross-section guarantee has been diluted: defendants raising religion- or ethnicity-based jury selection challenges may be unable to demonstrate that they are being deprived of the right. Moreover, the court's limited treatment of the fair cross-section requirement raises questions about a subtle distinction between traditional jury selection challenges and religion- or ethnicity-based jury selection challenges.¹¹ This is particularly true in light of the more expansive readings the fair cross-section requirement has received in other contexts.¹²

Fundamental to the Sixth Amendment guarantee is the idea that for a jury to be fair, it must be free of any bias. However, since the jury is composed of human beings with human prejudices, impartiality can never really be guaranteed. The Supreme Court has enunciated a three-part test that a defendant must satisfy in order to make out a Sixth Amendment violation. In *Duren v. Missouri*¹³ the Court held that a group alleged to be excluded must be a distinctive group in the community, that the representation of this group in venires must not be unfair and unreasonable in relation to the numbers of such persons in the community and that this group's underrepresentation must be due to systematic exclusion in the jury selection process.¹⁴

This Comment argues that when confronting fair cross-section challenges appellate courts must not mechanically apply the second element of the *Duren* test. Defendants have no conclu-

denied, 484 U.S. 1063 (1988) (rejecting appellant's challenge that the government violated the Equal Protection Clause by using its peremptory challenge to exclude the only two jurors whose surnames sounded Italian). See text accompanying notes 86, 90-93 *infra* discussing the facts of these cases.

¹¹ See text accompanying notes 133-38 *infra* discussing how as a result of *Gelb* the different fair cross-section challenges may not be treated equally.

¹² In *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989), the Second Circuit affirmed a reading of the fair cross-section protection which found that the Sixth Amendment was implicated at the challenges stage of the selection process. The court held that a prosecutor's invidious use of peremptory challenges to systematically exclude a cognizable group is a violation of the Sixth Amendment, which guarantees the defendant the possibility of a jury that represents a fair cross-section of the community. *Roman*, 822 F.2d at 224 (citing *McCray v. Abrams*, 750 F.2d 1113, 1125 (2d Cir. 1984), *cert. granted and vacated*, 478 U.S. 1001 (1986)). See also note 51 *infra* discussing expansive notions of standing for violations of the fair cross-section guarantee.

¹³ 439 U.S. 357 (1979).

¹⁴ *Id.* at 364.

sive way to show unreasonable representation of religious or ethnic groups to the trial court, since no statistical data exist regarding any specific religious or ethnic group's representation on the jury pool.¹⁵ In view of this tremendous proof problem, trial courts hearing jury selection challenges under *Duren* should permit defendants initially to make a less rigid prima facie showing of unreasonable representation, thereby shifting the emphasis to whether the defendant has demonstrated that this legally recognized group has been systematically excluded from the jury selection process.¹⁶ Similarly, appellate courts should evaluate

¹⁵ Jury selection procedures in New York illustrate the problem. Like the federal jury selection procedures already noted (*see* note 4 *supra*), the selection of potential jurors is made by a process aimed at gaining a representative cross-section. N.Y. JUD. LAW. § 500 (Consol. Supp. 1991). The commissioner of jurors selects names at random from voter registration lists, as well as any lists specified by the chief administrator of the courts (for example, utility subscribers, those with driver's licenses, or registered owners of cars). *Id.* §§ 506-507. From this master list, the commissioner then determines the qualifications of a prospective juror from the information provided by the qualification questionnaire, including requests for service in certain months, requests not to serve in certain months, and any automatic disqualifications or claimed exemptions. *Id.* § 509. This process produces the "jury pool." Members of the jury pool are selected at random to serve on a particular venire.

The problem for defendants like Gelb concerns the qualification form. Neither the New York form (*id.* § 513), nor the federal form (28 U.S.C. § 1869 (1969)) provides information on the religious or ethnic background of jurors. Without this as a source of jury pool composition data, defendants are left with the virtually impossible burden of establishing the second prong of *Duren*. In short, defendants may be unable to demonstrate a group's significant underrepresentation unless a lesser showing is allowed.

¹⁶ On its face the *Duren* test requires defendants to show the trial court significant underrepresentation on "venires" from which the petit jurors are selected. *Duren*, 439 U.S. at 364. However, in *Gelb*, the Second Circuit's analysis of what occurred in the district court focused on the defendant's inability to demonstrate the unreasonable representation of Jewish people on his own venire. *Gelb*, 881 F.2d at 1162 ("Gelb's sixth amendment claim must fail for lack of a showing that Jews were underrepresented in his venire.").

In considering *Duren* challenges, this Comment supports the reading of *Duren* that allows trial courts to focus on a defendant's own venire, as a representative sample of the jury pool, in determining whether a defendant has demonstrated the underrepresentation of a legally distinctive group. See note 15 *supra* describing the difficulty of uncovering jury pool composition data on religious or ethnic groups. Other circuits have followed this position when applying the second element of *Duren*. See, e.g., *Singleton v. Lockhart*, 871 F.2d 1395, 1398 (8th Cir.) (representation of blacks on defendant's venire was statistically reasonable where blacks made up 23.7% of the venire and 27.2% of the population), *cert. denied*, 493 U.S. 874 (1989); *Trujillo v. Sullivan*, 815 F.2d 597, 610 (10th Cir. 1987) (rejecting defendant's *Duren* claim on grounds that defendant's showing that a distinctive group's representation in the jury venire was not fair and reasonable in relation to the number of such persons in the community was insufficient as a violation absent a showing that the venire's underrepresentation was the product of the jury selec-

Duren challenges in this principled and realistic manner, or the Sixth Amendment fair cross-section requirement will be rendered a dead letter for defendants seeking to show the systematic exclusion of groups other than race- or gender-based groups.¹⁷

Part I of this Comment surveys the history of the fair cross-section requirement and how it developed into a fundamental constitutional guarantee. Part II examines the factual and procedural history of Gelb's case at both the district and circuit court levels. Part III critically evaluates the circuit court's reasoning, challenging the court's wisdom in resting its decision on the second prong of the *Duren* test, which required Gelb to show that Jews were underrepresented in venirees in a manner disproportionate to the number of Jews in the Eastern District. This section offers instead Gelb's failure to demonstrate the systematic exclusion of Jews pursuant to the third prong of *Duren* as the more effective resting place for the court's decision.

tion process), *cert. denied*, 484 U.S. 929 (1987). *But see, e.g.*, *Timmel v. Phillips*, 799 F.2d 1083, 1087 (5th Cir. 1986) (rejecting defendant's *Duren* challenge at the second element, the court held that merely showing one case of alleged underrepresentation does not rise to a "general" underrepresentation required for establishing a *prima facie* case); *United States v. Miller*, 771 F.2d 1219, 1228 (9th Cir. 1985) (holding that the *Duren* Court's use of the plural when describing "venires" from which "juries" are selected indicated that a violation of the underrepresentation element cannot be premised on underrepresentation on a single jury venire).

Allowing for this interpretation will focus *Duren* challenges on the element of systematic exclusion. Defendants' rights are not automatically violated by a mere showing of statistical imbalances between a group's representation on a venire and its percentage of the community. *See Singleton*, 871 F.2d at 1399 ("Evidence of a discrepancy on a single venire panel cannot demonstrate systematic exclusion."). In showing systematic exclusion defendants will have to go beyond their own venire to demonstrate why the underrepresentation is a product of the system—a showing that may inevitably demonstrate significant underrepresentation on other venires. Therefore, where a defendant has no reason to believe and cannot make a *prima facie* showing that a group's underrepresentation was the result of exclusionary practices inherent in the jury selection system, *Duren* challenges will not succeed.

With regard to the systematic exclusion prong of the analysis, Gelb's argument is that Jewish people were being granted requests for postponement of service until after the Jewish "holiday season"—from September until early October—by the jury commissioner. It was this practice of postponements for Jewish people that Gelb ultimately argued was the "systematic exclusion" of Jewish people. *See text accompanying note 52 infra* describing Gelb's evidence regarding systematic exclusion.

¹⁷ These groups may acquire jury composition pool data from the federal qualification questionnaire filled out by potential federal jurors.

I. HISTORICAL DEVELOPMENT OF THE FAIR CROSS-SECTION REQUIREMENT

On its face, the Sixth Amendment does not provide an explicit fair cross-section requirement for defendants.¹⁸ Rather, the constitutional guarantee of a fair cross-section is the product of judicial evolution.¹⁹ Early cases addressing fairness in jury selection procedures were deeply concerned with the Fourteenth Amendment right of the newly emancipated black man not to be excluded from serving on a jury.²⁰ Although the defendant in these cases raised the Sixth Amendment challenge,²¹ the Supreme Court's attention and rhetoric were focused on the equal rights of the excluded person and not squarely on the defendant's right to a fair trial.²² In essence, early jury selection chal-

¹⁸ See note 1 *supra*.

¹⁹ *Id. See, e.g.,* Duren v. Missouri, 439 U.S. 357 (1979) (establishing the standards for when a fair cross-section deprivation has occurred); Taylor v. Louisiana, 419 U.S. 522 (1975) (holding this right to be an essential ingredient of the Sixth Amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (holding Sixth Amendment jury selection provision applicable to state governments via the Fourteenth Amendment); Glasser v. United States, 315 U.S. 60, 86 (1942) (where the Court introduced the "cross-section of the community" as the goal of jury selection procedures); Smith v. Texas, 311 U.S. 128, 130 (1940) (where the Court found representativeness to be an important characteristic of the Sixth Amendment right to an impartial jury). See text accompanying notes 20-47 *infra*.

²⁰ *See, e.g.,* Martin v. Texas, 200 U.S. 316, 319 (1906) ("[I]t is the settled doctrine of this court that 'whenever by any action of a State . . . all persons of the African race are excluded, solely because of their race or color . . . the equal protection of the laws is denied to [the defendant].'" (quoting Carter v. Texas, 177 U.S. 442, 447 (1900))); Gibson v. Mississippi, 162 U.S. 565, 580-81 (1896) (" . . . a denial to citizens of the African race, BECAUSE OF THEIR COLOR, of the right or privilege accorded white citizens of participating as jurors in the administration of justice would be a discrimination against the former, inconsistent with the [14th] amendment . . ."); Neal v. Delaware, 103 U.S. 370, 397 (1880) (The fact that no black person had ever been summoned for jury duty in the state, although the black population in 1880 exceeded 26,000, was prima facie evidence of denial of equal protection under the Constitution).

²¹ The systematic exclusion by state law jury selection statutes did not result in challenges by the excluded members, but rather, by the defendant. Hence, defendants were able to escape conviction by vindicating the equal protection rights of others. For a contemporary illustration of state-sanctioned discrimination during peremptories, see Powers v. Ohio, 111 S.Ct. 1364 (1991) (where in reversing a white defendant's murder conviction, the Court held that the defendant had standing to vindicate the equal protection rights of black venirepersons who had been unfairly discriminated against during jury selection procedures).

²² Concern that Blacks not be branded or stigmatized by a statute which excluded them from jury service was at the core of the *Strauder* decision:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, be-

lenges did not rely on whether particular groups had been included to satisfy a defendant's right to an impartial jury; rather, they asserted the rights of the jurors.

The Supreme Court did not consider whether the inclusion of particular community members was a necessary element of the right to an impartial jury until 1940. In *Smith v. Texas*²³ the Court planted the seed for the Sixth Amendment fair cross-section requirement through a dramatic depiction of the jury's role, which included an explicit reference to the need for community representativeness on the jury.²⁴

The *Smith* Court's suggestion was expanded just two years later in *Glasser v. United States*, a jury selection case not involving the Fourteenth Amendment in which the Court used the words "cross-section of the community" for the first time.²⁵ The

cause of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

²³ 311 U.S. 128 (1940). In *Smith*, the Court reversed a black defendant's conviction on the grounds that although Texas's statutory scheme for selecting grand jurors was facially neutral, its impact on blacks was discriminatory and a violation of the equal protection of the law. *Id.* at 131-32. Specifically, grand jury figures for that state from 1931 to 1934 indicated that only 18 of 512 people summoned for grand jury duty were black. *Id.* at 129.

²⁴ The Court in *Smith* went so far as to suggest that the notion of a representative jury is a foundational part of democracy, which is undercut by the exclusion of groups due to racial discrimination.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society . . .

311 U.S. at 130 (Black, J.). See also Massaro, *supra* note 2, at 532 ("Justice Black's description of the jury as a body 'truly representative of the community' went beyond a jury free from discrimination and hinted that a defendant may have an affirmative right to have certain members of the community included in the jury.").

The notion of representativeness may wrongly suggest that a defendant is entitled to a petit jury composed in a particular manner that represents the defendant's community; the notion of representativeness in fact refers to a system free from systematic exclusion, ensuring the chance that the jury will be representative. No case has ever held that the notion of community representativeness extends to the petit jury. See note 5 *supra*.

²⁵ 315 U.S. 60, 84, 86 (1942) (defendant challenged the exclusion of women not members of the League of Women Voters under the 5th and 6th amendments on grounds that League members attended jury classes which were biased in favor of the prosecution).

Court held that "while officials may exercise discretion to assure a competent, representative body, they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of a jury as a cross-section of the community."²⁶ Therefore, implicit in the *Glasser* Court's holding, the goal of jury administrators responsible for empaneling the venire from the source lists must be to strive for a jury that reflects all parts of the community.²⁷

In a legislative commitment to the fair selection of jurors from a cross-section of the community, Congress passed the Federal Jury Selection and Service Act of 1968.²⁸ The Act sought to eliminate any possible discrimination in jury selection procedures that might hinder representative venires from being empaneled by mandating that selection for jury service be accomplished by a method of random selection.²⁹ Congress believed that if the selection of jurors was done at random, representative juries would ultimately result.³⁰

Despite these attempts at recognizing a fair cross-section requirement, the Supreme Court did not solidify a defendant's constitutional right to a jury drawn from a fair cross-section of the community until its 1970s decisions in *Taylor v. Louisiana*³¹ and *Duren v. Missouri*.³² In *Taylor*, the Court questioned whether the presence of a fair cross-section of the community on

²⁶ 315 U.S. at 86.

²⁷ See text accompanying notes 28-30 *infra* describing how The Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 (1968), sought to remove discretion from jury administrators in selecting the venire, emphasizing the principle of random selection. In addition, certain source lists that the commissioners may use at their discretion are disfavored. These disfavored lists include tax lists and property lists. *JURYWORK*, *supra* note 4, at 5-17 to 5-18.

²⁸ 28 U.S.C. §§ 1861-1869 (1968).

²⁹ *Id.* § 1861 ("[T]he policy of the United States [is] that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.").

³⁰ As one respected jury scholar has noted, by putting together a complete list of eligible jurors and selecting randomly from it, "the laws of statistics will produce representative juries most of the time." J. VAN DYKE, *supra* note 2, at 18.

³¹ 419 U.S. 522 (1975) (defendant successfully challenged the constitutionality of the Louisiana jury selection scheme that excluded women from service unless they volunteered).

³² 439 U.S. 357 (1979) (defendant successfully challenged the constitutionality of the Missouri jury selection scheme that allowed women automatic exemptions if they so requested).

the jury venire was an essential feature of the defendant's Sixth Amendment guarantee to an impartial jury trial.³³ Taylor, a male defendant, challenged the constitutionality of Louisiana's jury selection scheme, which provided that women could not be chosen for jury service unless they volunteered.³⁴ Taylor believed he had been denied his constitutional right to a fair trial by a jury of a representative segment of the population, since his 175-person venire had no women on it.³⁵

In reversing the defendant's kidnapping conviction, the Court held that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."³⁶ The Court reasoned that such a view was consistent with the adoption of federal legislation governing jury selection³⁷ and was not inconsistent with its jury selection opinions since 1940.³⁸

³³ 419 U.S. at 526. The Court reached the fair cross-section issue as a result of its historic decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held that the Sixth Amendment provision for a jury trial bound the states through the Fourteenth Amendment. *Id.* The Court thus had to decide if the fair cross-section protection was a feature of the Sixth Amendment with which Louisiana would be required to comply.

³⁴ 419 U.S. at 523. The Louisiana statute, which was repealed subsequent to the conviction of the defendant but prior to the Court's decision, provided in pertinent part: "A woman shall not be selected for jury service unless she has previously filed with the clerk of the court of the parish in which she resides a written declaration of her desire to be subject to jury service." LA. CODE CRIM. PROC. ANN. art. 402 (West 1967) (repealed).

For a discussion of a defendant's standing to bring a claim that a group other than his or her own has been excluded in violation of the fair cross-section protection, see note 51 *infra*.

³⁵ 419 U.S. at 524.

³⁶ *Id.* at 528.

³⁷ See text accompanying notes 28-30 *supra*.

³⁸ The Court did not look to a precise doctrine in rendering its decision. Rather, it found that "the unmistakable import of [its] opinions . . . since 1940 [and] not repudiated by intervening decisions" made this decision a logical and necessary extension. 419 U.S. at 528.

Some of the intervening decisions the Court was referring to include: *Peters v. Kiff*, 407 U.S. 493 (1972) (white defendant can properly challenge discriminatory jury selection procedures against blacks); *Carter v. Jury Comm'n*, 396 U.S. 320 (1970) (Court affirmed a district court order directing Alabama jury commissioners and clerk to comprise a jury selection list that did not racially discriminate against blacks but did not direct that the governor place blacks as members of the jury commission); *Brown v. Allen*, 344 U.S. 443, 474 (1953) (Court found tax lists appropriate source for jury selection lists, refusing to impose its own conception of the proper source, as long as the source reasonably reflects a cross-section of the population suitable for the duty); *Ballard v. United States*, 329 U.S. 187, 195 (1946) (Court reversed defendant's mail fraud conviction, finding that the systematic exclusion of women from the jury system denies the defendant the jury to which the law entitles him, as well as injuring the system, the law as an

The Court found that women were "sufficiently numerous and distinct from men" and that the Louisiana scheme did in fact systematically eliminate women from the jury pool, thereby denying the defendant his fundamental right to a fair cross-section.³⁹ Thus, for the first time, the Court recognized that the scope of the impartial jury requirement extended beyond the fairness of the petit jury to the distinctive constitutional inquiry about the fairness of jury selection procedures.⁴⁰

In *Duren v. Missouri* the Court reversed the defendant's conviction for first degree murder, and in doing so, confirmed the fundamental nature⁴¹ of the fair cross-section guarantee established by the *Taylor* decision.⁴² The Court accepted the defendant's argument that a jury selection scheme automatically exempting women from service upon their request⁴³ systematically excluded women from jury venires.⁴⁴ The Court also held

institution, the community and the democratic vision represented by the process in our courts).

³⁹ 419 U.S. at 531. Specifically, 53% of the people eligible for jury service in Taylor's judicial district were women, yet from Dec. 8, 1971, until Nov. 3, 1972, only twelve females out of 1800 people were drawn to fill jury venires. *Id.* at 524.

⁴⁰ See note 6 *supra*. Justice Rehnquist, who passionately dissented from the *Taylor* majority, was not convinced that the fair cross-section principle is a feature that should result in reversals absent a showing that this procedure produced some sort of visible bias on the petit jury. *Id.* at 538-39 (Rehnquist, J., dissenting) ("The Court's opinion reverses a conviction without a suggestion, much less a showing, that the appellant has been unfairly treated or prejudiced in any way by the manner in which his jury was selected.").

⁴¹ See note 6 *supra*.

⁴² *Duren*, 439 U.S. at 370. As he did in *Taylor*, Justice Rehnquist vociferously dissented. Once again, it is the dramatic result, the reversal of a murder conviction, at which his wrath is centered:

[T]he only winners in today's decision are those in the category of petitioner, now freed of his conviction of first-degree murder. They are freed not because of any demonstrable unfairness at any stage of their trials, but because of the Court's obsession that criminal venires represent a "fair cross-section" of the community, whatever that may be. The losers are the remaining members of that community—men and women seeking to do their duty as jurors and yet minimize the inconvenience that such service entails, judicial administrators striving to make the criminal justice system function, and the citizenry in general seeking the incarceration of those convicted of serious crimes after a fair trial.

Id. at 377-78 (Rehnquist, J., dissenting).

⁴³ Mo. REV. STAT. §494.031 (Supp. 1978)(repealed) provided in pertinent part: The following persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit . . .

(2) Any woman who requests exemption before being sworn as a juror.

⁴⁴ 439 U.S. at 362-63. The defendant brought forth evidence that 54% of the popu-

that the scheme led to the significant underrepresentation of women on the defendant's jury venire: of fifty-three members only five were women.⁴⁶ In reaching its decision, the Court expressly created the three-prong test that a defendant must satisfy to establish a prima facie violation of the fair cross-section requirement, affirming the significance of this right regardless of the actual composition of the jury involved.⁴⁶ Specifically a defendant must show that: (1) the group alleged to be excluded is a distinctive group in the community, (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and (3) that the underrepresentation is due to the systematic exclusion of the group in the jury selection

lation in his county were women (as of the 1970 census held to be valid) but that from June-October 1975, and January-March 1976, only 26.7% of those summoned for service, and only 14.5% of the weekly venires during the period in which his jury was selected, were women.

⁴⁶ *Id.* at 363.

⁴⁶ In his dissent, Justice Rehnquist demonstrated the ironic significance of a fair cross-section requirement, which exists regardless of the petit jury actually empaneled: "[U]nder the majority's fair-cross-section analysis, the underrepresentation of women of jury venires in Jackson County, Mo., would entitle petitioner Duren to reversal of his conviction even if the jury chosen in his case had been composed of all women." *Id.* at 373.

Until 1990, in the context of peremptory challenges, the Second Circuit would not have allowed such a result, engaging in a bottom-line, "no harm, no foul" analysis. If despite efforts at systematic exclusion through the discriminatory use of peremptory challenges, the actual jury composed included representatives from the group sought to be excluded, in numbers reasonable to that group's proportion in the community, the court would not find a constitutional violation warranting a reversal. *See, e.g.,* United States v. Ruiz, 894 F.2d 501, 507 (2d Cir. 1990) (finding any analysis of whether a group has in fact been unfairly excluded from the jury unnecessary where the prosecution effectively rebuts defendant's prima facie case of invidious use of peremptories by showing neutral reasons for their exercise); United States v. Alvarado 891 F.2d 439, 445 (2d Cir. 1989) (finding that a petit jury composed of 25% blacks and Hispanics reflected a representative jury in a district composed of 29% blacks and Hispanics, thereby refusing to vacate a half-black, half-Hispanic defendant's conviction where the prosecution may have attempted to systematically exclude those groups in use of peremptories), *vacated*, 110 S. Ct. 2995 (1990), *remanded to* 923 F.2d 253 (2d Cir. 1991); Roman v. Abrams, 822 F.2d 214, 229 (2d Cir. 1987), *cert. denied*, 498 U.S. 1052 (1989) (holding that even where prosecution could not rebut evidence of exclusion by use of peremptories, the petit jury was fairly representative and therefore no violation occurred).

However, the Supreme Court rejected this interesting approach when it vacated *Alvarado*, holding that decision to be inconsistent with the Court's decision in *Holland v. Illinois*, 493 U.S. 474 (1990) (in which the Supreme Court refused to extend the Sixth Amendment fair cross-section right to the petit jury, instead limiting it to the broader jury selection process).

process.⁴⁷

II. UNITED STATES V. GELB

A. Jury Selection and the District Court Opinion

In *Gelb* the defendant, a deeply religious Jewish person, challenged his 1988 mail fraud, RICO, bribery, and false income tax filing convictions, alleging discriminatory jury selection procedures.⁴⁸ Central to Gelb's appeal were several pretrial procedural rulings concerning jury selection procedures that he claimed improperly denied him his Sixth Amendment right to a fair cross-section of his community as articulated by the Supreme Court in *Duren*.⁴⁹

Thirteen days before his trial date, Gelb petitioned the district court for a postponement until the week of October 11th—one week after the holiday of Simchas Torah⁵⁰—based on the concern that the jury pool would not contain a proportionate number of potential jurors of Jewish faith, thereby denying him his guarantee of a venire reflecting a fair cross-section of the community.⁵¹ In support of his claim Gelb offered evidence sug-

⁴⁷ *Duren*, 439 U.S. at 364. Subsequent Supreme Court Sixth Amendment decisions have recognized the fair cross-section guarantee created by the *Duren* and *Taylor* decisions. See, e.g., *Teague v. Lane*, 489 U.S. 288, 292 (1989) (defendant's equal protection claim that prosecutor misused peremptories in violation of *Batson* was procedurally barred since defendant's conviction was final before *Batson* was decided); *Lockhart v. McGee*, 476 U.S. 162, 173-75 (1986) (trial court did not violate defendant's Sixth or Fourteenth Amendment rights by ruling to excuse prospective jurors, prior to the guilt phase of a bifurcated trial, who admitted at voir dire that they could never vote to impose the death penalty); *Wainwright v. Witt*, 469 U.S. 412, 461 (1985) (whether a prospective juror will automatically vote against the death penalty and thereby be subjected to dismissal from service is a fact question for the trial judge). However, the Supreme Court has not yet addressed any religion-based exclusionary challenges under the *Duren* test.

⁴⁸ *Gelb*, 881 F.2d at 1157.

⁴⁹ Gelb also challenged the application of the RICO statute, the application of the mail fraud statute and the district court's failure to declare a mistrial in response to the improper testimony of a witness. *Id.*

⁵⁰ Simchas Torah is a one-day festive holiday during which men parade in celebration of the Torah—the precious scripture of Jewish law.

⁵¹ Brief for Appellant at 1, *United States v. Gelb*, 881 F.2d 1155 (2d Cir.), cert. denied, 493 U.S. 994 (1989).

In *Gelb* the defendant was a member of the allegedly underrepresented group (Jews). However, the Supreme Court has read the fair cross-section guarantee broadly, allowing defendants to challenge the systematic exclusion of any cognizable group, including groups other than their own. *Holland*, 493 U.S. at 776 (white defendant has

gesting that "Jews called to serve jury duty in September and October 1988 'would be routinely excused from jury duty . . . simply by writing to the Jury Administrator.'"⁵² The government answered by offering evidence that Jewish people were excluded only on specific days and not during the entire holiday season.⁵³

The district court judge, in denying the motion, stated, "I have never felt the Jewish people are a cognizable racial group, different from the majorities of the rest of the whites in the United States."⁵⁴ Yet in spite of this ruling and the district court's posture on "Jewishness," the trial was ultimately delayed, and the defendant continued to press the issue of jury selection procedures.⁵⁵

standing to challenge the exclusion of black jurors); *Duren*, 439 U.S. at 353 (male defendant had standing to challenge the exclusion of women); *Taylor*, 419 U.S. at 526 (same); *Peters v. Kiff*, 407 U.S. 493, 500 (1972) ("the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class but other defendants as well in that it destroys the possibility that the jury will reflect a representative cross-section of the community"). The *Peters* Court recognized that a minority of state courts and lower federal courts have imposed a more restrictive "same class" rule with regard to discriminatory jury selection claims. *Peters*, 407 U.S. at 496-97 n.4.

⁵² *Gelb*, 881 F.2d at 1159 (quoting Gelb's wife's affidavit). The defendant's evidence was an affidavit submitted by his wife averring that someone at the Clerk's Office of the United States District Court for the Eastern District of New York had informed her of this practice. The identity of this clerk remains a mystery [and is sarcastically characterized by the government in opposition to defendant's motion as "an anonymous functionary."] Brief for Appellee at 24, 881 F.2d at 1155.

⁵³ The government offered an affirmation by the United States Attorney for the Eastern District of New York which stated that, according to Aileen O'Hare, a Jury Clerk for the Eastern District, excuses were granted only for the specific dates of the holidays. *Gelb*, 881 F.2d at 1159-60.

⁵⁴ *Gelb*, 881 F.2d at 1160. This poorly expressed characterization was at the heart of defense counsels' rage in its briefs to the Second Circuit—as evidenced by their strident argument that "the reasons for the absence of all Jewish jurors were . . . directly attributable to Judge Van Sickle's complete insensitivity to Gelb's religious convictions and the court's utter lack of familiarity with Judaism." Brief for Appellant at 14. Judge Van Sickle from the District Court of North Dakota sat by designation over the proceedings after Judge Platt decided—for reasons not fully disclosed by the record—not to continue as trial judge. *Id.* at 13. The switch to Judge Van Sickle was deeply disturbing to the defense, who felt that Van Sickle's conduct regarding Gelb's religious convictions was "destructive." *Id.* at 14.

⁵⁵ Brief for Appellant at 14-15. The denial of the motion to postpone trial was not contested by the defense in their argument to the Second Circuit. Specifically, Gelb argued to the Second Circuit that as a result of the judge's misconception, the judge subsequently failed to make any religion-related inquiries on voir dire and that this view foreclosed any meaningful inquiry into the Eastern District's possible practice of deferring Jewish individuals called for service during the Jewish holidays. *Id.* at 15.

Five days before his August 22nd trial date was to commence the defendant entered a hospital for a surgical procedure.⁵⁶ Defendant's motion for a twelve-week postponement in order to recover was denied, and the trial date was set for September—one week before the Jewish holiday of Rosh Hashana—giving the defendant approximately one month to recover.⁵⁷ The defendant, still concerned with Jewish representation in the jury pool, again requested an adjournment to "insure the availability of prospective Jewish jurors in numbers which [bear] a proportionate relationship to the population of Jews in the counties from which the Eastern District draws its jurors."⁵⁸

The district court again denied defendant's motion and undertook the process of empaneling a petit jury. At voir dire, conducted by the bench, there was no inquiry into the religious or ethnic background of the prospective jurors, nor was there any formal request by defense counsel for such an inquiry.⁵⁹ A jury was quickly empaneled, and after a six-week trial the defendant was convicted of violating the RICO Act, the federal mail fraud statute, the federal bribery statute and the Internal Revenue Code.⁶⁰

⁵⁶ Brief for Appellee at 21. The government claimed that the defendant's gallstone removal was a tactic to delay the proceedings and was not an actual emergency. *Id.* at 21 n.5. In fact it was termed "elective" by the Second Circuit. *Gelb*, 881 F.2d at 1160. For a discussion of whether defendant's conduct constituted a waiver of his cross-section right, estopping him from raising a fair cross-section challenge, see note 116 *infra*.

⁵⁷ Brief for Appellant at 14. A two-day holiday, Rosh Hashana is the start of the Jewish New Year. Rosh Hashana is literally translated as "head of the year." E. GAMORAN, *HELLEL'S HAPPY HOLIDAY* 28 (1953).

⁵⁸ Brief for Appellant at 1. The defendant produced statistical evidence from the most recent state census of the principal New York counties from which jurors are selected in the Eastern District—Kings County, Queens County and Nassau County. According to the census, the population of Jewish persons was 19%, 17% and 23%, respectively. *Id.* at 25 n.9.

⁵⁹ *Gelb*, 881 F.2d at 1160. It is this Comment's position that an inquiry into the religious or ethnic background of prospective jurors in some form may ultimately be necessary to ensure the defendant's right to a fair cross-section. For a general discussion of the policy arguments for and against the making of such an inquiry, see note 126 *infra*. See also notes 129-32 and accompanying text *infra* discussing whether *Gelb* waived his claim by not formally asking Judge Van Sickle to inquire into the religious or ethnic affiliations of his venire persons.

⁶⁰ 881 F.2d at 1155. Neither the district court nor the Second Circuit explicitly indicated whether the petit jury or the venire that convicted the defendant contained any Jewish people. However, it is not disputed by the appellees anywhere in the record that there were no Jewish people on the defendant's petit jury. Appellant's Petition for Rehearing and for In Banc Consideration at 5 n.3. See notes 7 and 46 and accompanying

B. *The Second Circuit Decision*

Gelb argued before the Second Circuit that the district court erred by denying his motion for a brief adjournment, claiming that this denial ensured the unavailability of prospective Jewish jurors in numbers proportional to the population of Jews in the Eastern District.⁶¹ Gelb also argued that due to the district court's adverse characterization of the cognizability of Jews, the court wrongfully failed to inquire into the religious affiliations of prospective jurors.⁶²

At the outset of its opinion the court proceeded under the fair cross-section principle espoused in *Taylor v. Louisiana*, noting that the Sixth Amendment right to a trial by jury "unquestionably includes the right to a petit jury drawn from a pool that is a representative cross-section of the community."⁶³ However, the court rejected Gelb's claim that the district court unconstitutionally deprived him of a pool of potential jurors representative of his community by not postponing his trial until after the Jewish holiday season.⁶⁴

The court succinctly distinguished *Gelb* from the Supreme Court's decision in *Batson v. Kentucky*.⁶⁵ In doing so, the Second Circuit recognized that *Batson* involved prosecutorial misconduct in the exercise of peremptory challenges, while *Gelb* was concerned with the effects of judicial rulings and inherent systematic intrusions on the makeup of both the jury pool and the defendant's venire.⁶⁶ The court focused its analysis instead on

text *supra* examining the relationship between the fair cross-section and the petit jury's actual composition.

⁶¹ Brief for Appellant at 1.

⁶² *Id.* at 1-2. The Second Circuit opinion ignores this claim. Moreover, it seems the Second Circuit believed that the district court's remark was during trial, when it actually was made during pretrial motions. Defendant contended that it was this pretrial characterization that shaped the district court's negative attitude towards "Jewishness" and prevented inquiry into prospective jurors' beliefs at this stage in the jury selection process. Appellant's Petition for Rehearing and For In Banc Consideration at 4. See text accompanying notes 117-19 *infra* discussing the court's failure to consider this issue.

⁶³ *Gelb*, 881 F.2d at 1161 (citing *Taylor*, 419 U.S. at 528). Technically, the court misstated *Taylor* here. The fair cross-section requirement guarantees that the jury pool be drawn in a nondiscriminatory manner—not that the pool be a representative cross-section.

⁶⁴ *Id.*

⁶⁵ 476 U.S. 79 (1986).

⁶⁶ *Gelb*, 881 F.2d at 1161. This Comment resists the temptation to invent a strong connection between *Batson* and *Gelb* where one does not logically exist. While both may

the three-prong standard set forth in *Duren v. Missouri*, which lists the elements that a defendant must meet to establish a prima facie violation of the fair cross-section protection.⁶⁷ In applying this standard, the court held that in order to be successful Gelb needed to demonstrate: (1) that the Jewish community is a "distinctive group" in the community;⁶⁸ (2) that the representation of Jews in venires drawn in the Eastern District of New York is not fair and reasonable in relation to the number of such persons in the community;⁶⁹ and (3) that this under-

lead to an unfair cross-section on the petit jury, the route to the discriminatory practice varies considerably. Put simply, *Batson* involves discriminatory practices by the prosecution in trying to shape the petit jury after the venire has been empaneled, while *Gelb* focuses on an exclusionary practice that denied a defendant an opportunity for a representative venire before the venire was empaneled.

⁶⁷ *Id.* See text accompanying notes 14 and 47 *supra*.

⁶⁸ The words "cognizable," "distinctive" and "identifiable" are used seemingly interchangeably when describing this element. However, there is no single formulation for what is considered a cognizable group. A cognizable group has been defined by the Supreme Court as "a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Castenada v. Partida*, 430 U.S. 482, 494 (1971) (Court found 40% disparity between Mexican-American population and Mexican-American grand jury figures for an 11-year period to be sufficient prima facie showing of intentional discrimination in grand jury selection). Similarly, the Court has described cognizability in terms of whether a group has been singled out "for different treatment not based on some reasonable classification." *Hoyt v. Florida*, 368 U.S. 57, 60 (1961) (citing *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (Court upheld a Florida statute exempting women from service unless they volunteered). The Court has also held that a group is legally cognizable if it displays distinctive "qualities of human nature and varieties of human experience" or a unique perspective on events. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972). Historical discrimination is a factor, and groups identified as "discrete and insular minorities" will be recognized as distinctive. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (where in upholding Congress's right to regulate the shipment of milk products in interstate commerce, the Court indicated that for statutes directed at particular religious, national or racial minorities, a more searching judicial inquiry may be necessary than that undertaken when reviewing economic legislation in order to protect those groups' position in the political process).

See also *JURYWORK*, *supra* note 4, at 5.05[1] to 5.05[2] (discussing different formulations of what constitutes a cognizable group and an analysis of the legal cognizability of various groups); *Project: Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988-1989*, 78 GEO. L.J. 1107, 1110 n.1917 (1990) (weighing the cognizability and noncognizability of various groups, including whites (held to be cognizable in *Roman*, 822 F.2d 214, 228 (2d Cir. 1987)) [hereinafter *Project*]; Rossenson, *Note: Wainwright v. Witt: The Court Casts a False Light Backward*, 66 B.U.L. REV. 311, 314 (1985) (finding a group distinct under the Sixth Amendment if the group is limited by some factor, the group has similarities in attitude or experience, and has interests that cannot be properly represented if excluded from the jury selection process).

⁶⁹ As to what constitutes a "fair and reasonable" relation, no specific parameters

representation was due to the systematic exclusion of the group by the jury selection process.⁷⁰

The Second Circuit acknowledged that the district court was wrong to conclude that Jews are not their own distinctive group in the community; yet it also concluded that it was at the second prong of *Duren* where Gelb's argument failed.⁷¹ The court posited that Gelb did not adequately demonstrate that Jews were underrepresented in his venire, refusing to credit defendant's claim that "virtually none of the [potential jurors'] surnames carried any suggestion of being Jewish."⁷² The court reasoned that "stereotypical ethnic or religious characterizations of surnames are unreliable and only tenuous indicia of the jury's makeup"⁷³ and supported its position by referring to opinions of the First Circuit.⁷⁴ The court added that underrepresentation cannot be presumed absent a specific correlation between being Jewish and having a Jewish surname, again buttressing its posi-

exist. *Duren* held that women are underrepresented when they constitute 54% of the community but only 15% of venires. *Duren*, 439 U.S. at 364-66. The *Duren* Court accepted six-year-old census data as adequate proof of the percentage of eligible jurors who were women. *Id.* at 365 n.24. Most circuits look at the "absolute disparity" of the group reflected, measured by the difference between the percent of the group eligible for jury duty and the percent on the venire. *Project*, *supra* note 68, at 1110 n.1917. However, since eligible juror data is often unavailable, courts generally accept overall population data as a substitute. *See, e.g.*, *People v. Harris*, 36 Cal. 3d 36, 51-58, 679 P.2d 433, 441-45, 201 Cal. Rptr. 782, 790-94 (1984).

Some courts have set the deviation figure at 10% for what is to be considered significant underrepresentation. *See, e.g.*, *Singleton v. Lockhart*, 871 F.2d 1395, 1398 (8th Cir. 1989) (finding the underrepresentation of blacks on the venire to be fair and reasonable when representation was within 3.6% of the population in the community from which the potential jurors were selected), *cert. denied*, 110 S. Ct. 207 (1989); *United States v. Rodriguez*, 776 F.2d 1509, 1511-12 (11th Cir. 1985) (holding that the absolute disparity of 6.67% for Blacks and 5.52% for Hispanics did not establish a prima facie case of significant underrepresentation).

⁷⁰ To satisfy this element, a defendant must be able to point to a particular feature of the jury selection system that produced the underrepresentation. *See, e.g.*, *Duren*, 439 U.S. at 366 (petitioner showed that underrepresentation of women occurred upon the creation of the jury wheel from which persons were summoned).

⁷¹ *Gelb*, 881 F.2d at 1160-61 (citing *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987)) (finding Jews to be a distinctive racial group for the purposes of raising a 42 U.S.C. § 1982 civil rights claim).

⁷² *Gelb*, 881 F.2d at 1161.

⁷³ *Id.* at 1161-62.

⁷⁴ *Id.* at 1162 (citing *United States v. Bucci*, 839 F.2d 825 (1st Cir. 1988), *cert. denied*, 488 U.S. 844 (1988); *United States v. Sgro*, 816 F.2d 30 (1st Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988)). *See* text accompanying notes 86-93 *infra* discussing these cases.

tion with a First Circuit cite.⁷⁵ Hence, finding that Gelb did not satisfy the second prong of *Duren*, the court declined to address whether Jewish individuals were systematically excluded from the jury process.⁷⁶

Additionally, the Second Circuit ignored Gelb's plea that the district court unconstitutionally refused to explore the religious identities of Gelb's venire persons,⁷⁷ because of the district court's incorrect conception regarding Jewish cognizability.⁷⁸ The Second Circuit also refused to address whether the district court's view adversely affected Gelb's ability to show whether Jews were underrepresented on his venire; the court held simply that no such showing had been made.⁷⁹

III. ANALYSIS

The Second Circuit's decision in *Gelb* is problematic in that it matter-of-factly rejects the defendant's Jewish surname argument as unreliable. The court fails to consider that relying on the absence of surnames may be the only way defendants can show the underrepresentation of a particular religious or ethnic group on the defendant's venire or the total jury pool. Additionally, the court's opinion fails to address whether exploring the religious or ethnic affiliations of venire members may ultimately be necessary to insure a defendant's constitutional fair cross-section guarantee; the court thereby creates the potential for unequal application of the guarantee among criminal defendants.⁸⁰ By resting its decision on Gelb's failure to demonstrate underrepresentation rather than focusing on the more probative question of systematic exclusion, the Second Circuit undermined the constitutional fair cross-section requirement.

⁷⁵ *Id.* at 1162 (citing *Bucci*, 839 F.2d at 834). See text accompanying notes 96-103 *infra* discussing how *Bucci* relates to *Gelb*.

⁷⁶ *Gelb*, 881 F.2d at 1162. See text accompanying notes 139-46 *infra* discussing why the court should have rested its decision on the third prong of the *Duren* test.

⁷⁷ See Brief for Appellant at 1-2, 14.

⁷⁸ See note 54 and accompanying text *supra*.

⁷⁹ *Gelb*, 881 F.2d at 1161.

⁸⁰ See note 138 and accompanying text *infra*.

A. *Failure to Demonstrate Underrepresentation: The Second Circuit's Troubling Analysis*

1. The Surname Argument

As prima facie evidence that Jews were underrepresented in both his venire and the jury pool in a manner not fair and reasonable in relation to the number of such persons in the community, Gelb contended that "[v]irtually none of the [potential jurors] surnames carried any suggestion of being Jewish."⁸¹ Essentially Gelb's claim was that it did not even sound like there were any Jewish people in his venire; he thus inferred that Jewish people were significantly underrepresented in his venire. The Second Circuit dismissed this evidence as stereotypical in nature, finding it unreliable as to whether Jews were in fact underrepresented on Gelb's venire.⁸² Based on this position, the court held that Gelb did not adequately demonstrate that his venire lacked proper Jewish representation, and therefore Gelb failed to satisfy the second prong of the *Duren* standard.⁸³ To buttress this rejection of Gelb's Jewish surname argument, the court turned to two decisions of the First Circuit Court of Appeals, *United States v. Sgro*⁸⁴ and *United States v. Bucci*.⁸⁵

In *Sgro* the First Circuit rejected a challenge by the appellant, an Italian-American, that by peremptorily challenging "the only two Italian-surnamed jurors on the venire," and thus attempting on impermissible grounds to exclude a cognizable group in the community of which the defendant was a member, the government violated the *Batson* test.⁸⁶ For a defendant to make a prima facie case of purposeful discrimination by the prosecution under this test, the defendant must be a member of a cognizable racial group, and the prosecutor must have peremptorily removed members of the defendant's race from the ve-

⁸¹ *Gelb*, 881 F.2d at 1161.

⁸² *Id.* at 1161-62. See text accompanying notes 72-75 *supra*.

⁸³ 881 F.2d at 1162.

⁸⁴ 816 F.2d 30 (1st Cir. 1988).

⁸⁵ 839 F.2d 825 (1st Cir. 1988).

⁸⁶ 816 F.2d at 32. The First Circuit sought to reinforce its position by questioning whether defendant's name, which ended in a vowel, immediately suggests an Italian heritage. *Sgro*, 816 F.2d at 33 n.2 ("The unsatisfactory vagueness of the record is highlighted by the fact that there is nothing which in any way indicates that appellant-defendant's name, *Sgro*, hardly one in common usage, is 'Italian-American'.")

nire.⁸⁷ The defendant can assume that the exercising of peremptories is a practice providing “the opportunity for discrimination.”⁸⁸ Lastly, the defendant must show that these facts and other relevant circumstances raise an inference that the prosecutor used the practice to exclude the venire persons based on their race.⁸⁹ The First Circuit held that “conclusory allegations” regarding jurors’ surnames were insufficient to meet the burden of cognizability and therefore failed the *Batson* test.⁹⁰

In *Bucci* the First Circuit found appellant’s claim that the government’s use of peremptory challenges violated the Sixth Amendment to be “based on pure conjecture.”⁹¹ That court posited that those challenging the government’s use of peremptories must offer evidence of “the ethnic or racial composition of the community from which the jurors are drawn and of what surname endings indicate about that ethnic or racial composition.”⁹² The court held that “there was no evidence presented from which it could be found that persons whose surname ends [sic] in a vowel are Italian-Americans.”⁹³ Hence, *Bucci* foreclosed defendants from offering juror surnames as evidence of Italian ethnicity.

While at first glance the *Gelb* court’s quick disposal of the

⁸⁷ *Batson v. Kentucky*, 476 U.S. 79, 93 (1986). This test differed from the *Duren* test in that a defendant raising a fair cross-section challenge under *Duren* need not be a member of a cognizable group, nor a member of the excluded group. However, the Supreme Court has recently held that a defendant need not be a member of the excluded group to challenge the discriminatory removal of potential jurors. *Powers v. Ohio*, 111 S. Ct. 1364 (1991) (white defendant could assert a *Batson* violation where prosecutor improperly used peremptory challenges to eliminate potential black jurors). See note 51 *supra* discussing standing.

⁸⁸ 476 U.S. at 95 (quoting *Whitus v. Georgia*, 385 U.S. 545, 552 (1967)).

⁸⁹ *Id.* at 95-96.

⁹⁰ *Sgro*, 816 F.2d at 33.

⁹¹ *Bucci*, 839 F.2d at 834. See note 12 *supra* regarding the applicability of the Sixth Amendment to discriminatory use of peremptory challenges by the prosecution.

⁹² *Id.* As in *Sgro*, the defendant in *Bucci* was an Italian-American who challenged the government’s use of peremptories against jurors whose last names ended in a vowel. *Id.* at 832.

⁹³ *Id.* at 834. It is hard to imagine what sort of evidence the court was seeking. Even if counsel proffered positive studies showing a correlation between last names ending in vowels and Italian ethnicity, the only way to show that these conclusions were necessarily applicable to the defendant’s venire would have been to ask the jurors if they were Italian-American. In essence, since there were no statistics regarding particular ethnic or religious groups on the venire, the only way to have determined conclusively if the excluded jurors were of Italian descent would have been to ask them.

surname issue appears both legally principled and morally sound, since it does not allow constitutional challenges to be made using stereotypes that might otherwise be offensive, a more probing inquiry reveals that the court improvidently relied on *Sgro* and *Bucci*. *Sgro* essentially held that a defendant cannot satisfy the burden of proving cognizability absent a showing of the nexus between surnames and ethnicity.⁹⁴ Since Gelb did not proffer the surname argument to establish cognizability, having easily satisfied that part of the *Duren* standard, *Sgro* is inapposite and of little use in determining Gelb's fate.⁹⁵

Moreover, the court overlooked a position within its own circuit raised by *United States v. Biaggi*⁹⁶ that directly contradicts *Bucci* regarding the inferences to be drawn from surnames of jurors in relation to the ethnicity of those jurors. Had the Second Circuit considered the *Biaggi* reasoning, Gelb's constitutional challenge would have received a more thoughtful and principled disposition.⁹⁷ Specifically, the surname argument raised by Gelb ultimately may have necessitated a factual determination of whether members of the Jewish community were underrepresented in his venire.⁹⁸

In *Biaggi* the Second Circuit affirmed a district court opinion⁹⁹ that the defendant, an Italian-American, made out a prima facie case of impermissible discriminatory use of peremptory challenges where the government used its first five peremptories to exclude venire members whose surnames ended in vowels.¹⁰⁰ The Second Circuit in *Biaggi* noted the district court's observation that "Americans of Italian descent . . . often have commonly identifiable surnames . . ." ¹⁰¹ The court implicitly ac-

⁹⁴ *Sgro*, 816 F.2d at 33.

⁹⁵ See text accompanying note 71 *supra*.

⁹⁶ 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

⁹⁷ The absence of *Biaggi* in the Second Circuit opinion was likely the product of judicial oversight, since both the defense (Brief for Appellant at 27) and the prosecution (Brief for Appellee at 23) cited to it.

⁹⁸ See text accompanying notes 124-32 *infra* for a discussion of the necessity of such a determination.

⁹⁹ *United States v. Biaggi*, 673 F. Supp. 96 (E.D.N.Y. 1987).

¹⁰⁰ *Biaggi*, 853 F.2d at 95-96. The prosecution challenged Joseph Angerome, Frand Lauriciano, Andrew Baccarella, Patricia Randazzo and Louis Devito. *Biaggi*, 673 F. Supp. at 97. The Second Circuit also upheld the district court's finding that the prosecution's race-neutral explanations were adequate, ultimately dismissing defendant's challenge. *Biaggi*, 853 F.2d at 96.

¹⁰¹ *Biaggi*, 853 F.2d at 96.

cepted the district court's findings that "Italian-Americans' shared ancestry is easily visible in their Italian surnames"¹⁰² and that "[t]hese observable, distinguishable names constitute a clearly identifiable factor separating Italian-Americans from most other ethnic groups."¹⁰³ In effect, unlike the analogous *Bucci* decision, the Second Circuit in *Biaggi* held that Italian defendants could use the surnames of prospective jurors as evidence of the Italian ethnicity of those jurors so as to raise an inference that the prosecutor intentionally sought to exclude Italians from the petit jury.

Gelb's use of the surname argument was not raised in the context of a prosecutor using peremptories to exclude prospective jurors.¹⁰⁴ Rather, Gelb posited the surname argument in order to demonstrate that Jews were significantly underrepresented on the venire empaneled prior to voir dire.¹⁰⁵ In

¹⁰² *Biaggi*, 673 F. Supp. at 102. Such a position has received support from the Supreme Court. The Court has recognized that Mexican ancestry may be apparent from surnames. *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (relying on the absence of Mexican surnames in jury pools over an 11-year period, the Court found that the defendant had made a prima facie showing of discrimination in the selection of grand jurors).

¹⁰³ *Id.* at 100. The court expressly rejected the *Sgro* court's conclusion on the cognizability of Italian-Americans and found them to be a legally cognizable group. *Id.* at 100-02.

¹⁰⁴ *Biaggi*, 853 F.2d at 92. The real question is whether a defendant's claim that the surnames of his venire panel left no suggestion of Jewish ethnicity can on some level be analogized to Italian defendants' claims that jurors whose last names end in vowels are Italians against whom the prosecution is discriminating. This Comment argues that for purposes of the second element of *Duren*, this analogy is appropriate.

¹⁰⁵ Had the prosecutor in *Gelb* challenged ten people with last names ending in -katz, -itz, -berg or -feld—stereotypically Jewish—it is possible under the *Biaggi* rationale that the prosecutor would be forced to offer religion or ethnicity-neutral explanations under *Batson*. Thus, the absence of such names from the venire should also be recognized as evidence that this community was underrepresented on Gelb's venire.

This Comment recognizes the government's argument that of course many Jewish persons have surnames that do not "carry any suggestion of their religion" and that "some persons who are not born Jewish can choose to become Jewish later in life." Brief for Appellee at 24-25. However, despite these arguments, this Comment posits that where a defendant can demonstrate that a group has been systematically excluded from jury service, the significantly underrepresented prong of the *Duren* test can be presumed satisfied. For example, had Gelb produced evidence that within the last two years 150 people randomly selected by the jury commissioner each year were granted postponements during this three-week period (what Gelb deemed the "Jewish holiday season"), these people would have been absent from the total jury pool. If the court found these postponements were an unjustifiable practice of systematically excluding potential Jewish jurors from the pool from which Gelb's venire was ultimately chosen, then it would be proper for the court to conclude that the defendant had shown significant underrepresentation (i.e., a few postponements would not give rise to a finding of "systematic"

rejecting this "evidence" in *Gelb*, the court contended that judges cannot automatically presume underrepresentation every time a defendant claims that the surnames of the venire members suggest some groups' underrepresentation.¹⁰⁶ In essence, the court refused to extend *Biaggi's* surname principle, which would allow a defendant to satisfy inferentially the prima facie burden of whether a particular religious or ethnic group was significantly underrepresented on the venire from which the jurors were selected. The Second Circuit's underlying position was that even if this extension has conceptual appeal,¹⁰⁷ it gives defendants a constitutional windfall to which they are not entitled.¹⁰⁸

However, by adopting the *Bucci/Sgro* rationale that the surnames of prospective jurors alone do not, as a matter of law, indicate the ethnic or religious composition of the jurors, the *Gelb* court unjustly ignored the *Biaggi* decision and failed to consider the burden facing defendants in individual circumstances.¹⁰⁹ A defendant should not need to produce a linguistics

exclusion), this despite the presence of people on defendant's venire who were in fact Jewish despite having non-Jewish surnames. Essentially, where a defendant demonstrates systematic exclusion of a particular group, a *Duren* challenge should not be rejected for lack of a mechanism to prove affirmatively that groups' significant underrepresentation. A defendant should be able to develop the element of underrepresentation by the use of surnames and the subsequent showing of systematic exclusion.

¹⁰⁶ *Gelb*, 881 F.2d at 1162.

¹⁰⁷ Since the court presumes invidious discrimination when the government excludes people from jury service based on surnames, it would be convenient to presume underrepresentation if the venire is generally without certain surnames. See note 105 *supra* discussing a potential flaw in the above argument.

¹⁰⁸ For example, had the *Gelb* court presumed underrepresentation of Jews in a fifty-person venire based on the surname theory, yet ten members were in fact Jewish, *Gelb* would not have actually been denied his fair cross-section requirement since Jews would not have been significantly underrepresented (20% of the community, 20% of the venire). Yet had *Gelb* somehow been able to show the court that there was evidence of systematic exclusion, he might have been able to get a new trial. However, since demonstrating a practice of systematic exclusion is likely to lead to a showing of significant underrepresentation, those instances where defendants could conceivably receive a windfall are not significant enough to undermine this Comment's position on how a defendant is to satisfy the second element of the *Duren* inquiry.

¹⁰⁹ For example, had *Gelb's* surname argument proved true and there were in fact no Jewish people on his venire, *Gelb* would have made a prima facie showing of significant underrepresentation for purposes of *Duren*. Yet *Bucci* and *Sgro* do not give the defendant the benefit of the surname doubt in trying to make this argument. The court's adoption of the First Circuit's inflexible and unjust rationale creates the need for a more appropriate balance in weighing a defendant's fundamental guarantee. See notes 115 and 126 *infra* discussing how this Comment seeks to strike the balance.

expert to make a prima facie case that a cognizable group has been significantly underrepresented.¹¹⁰ Rather, the court should evaluate the legitimacy of the argument against the backdrop of the entire *Duren* challenge.¹¹¹ When the defendant has made a strong showing of lack of surnames and when the cognizable and systematic exclusion elements have been satisfied under *Duren*, the court should presume that the element of significant underrepresentation has been shown and that a prima facie *Duren* violation has been established.

Therefore, the Second Circuit in *Gelb* erred by discarding the defendant's surname argument. By rejecting the use of surnames as a potential indicator of a venire's religious or ethnic composition, the *Gelb* decision created a virtually insurmountable burden for defendants seeking to show significant underrepresentation under *Duren*.¹¹² The *Gelb* court failed to see that, with the satisfaction of the other *Duren* elements, the lack of certain surnames must be accepted in order to fully guarantee the fair cross-section requirement; it may be the only method of proof available to the defendant trying to show the significant

¹¹⁰ A defendant's position will be much stronger if an expert like an anthropologist or other "names" expert testifies that the list of names in the venire or the jury pool indicate the significant underrepresentation of the particular group. Under this scenario a defendant can certainly be considered to have made a prima facie showing to satisfy that element of *Duren*. See *Biaggi*, 637 F. Supp. at 100 (defendant alerted the district court that, in the opinion of linguistics experts, the last names of the struck jurors were clearly Italian-American).

¹¹¹ Since the Supreme Court limits the fair cross-section principle to cognizable groups only, the underrepresentation of many groups would not be actionable. The first element threshold would not be met and therefore inquiries into the second element would be unnecessary. Reply Brief for Appellant at 5 n.2, *Gelb*, 881 F.2d 1155. See *Biaggi*, 673 F.2d at 100 (The court recognized the need for limits on this element: "Because discrimination in the venire under the Sixth Amendment may be statistical, the definition of a single 'cognizable' group must be narrowly drawn lest any group imaginable by defense counsel be found numerically underrepresented."). See also *Barber v. Ponte*, 772 F.2d 982, 999 (1st Cir. 1985) (in banc) (where the court endorsed limiting this element, warning that blue-collar workers, yuppies, Rotarians, Eagle Scouts and endless other classifications could receive protection), cert. denied, 475 U.S. 1050 (1986); see note 68 *supra* discussing the various definitions for what makes a group cognizable.

Additionally, the court could treat the third element, systematic exclusion, before deciding the question of significant underrepresentation. Thus, only if the court is convinced that there is demonstrable systematic exclusion would it possibly need to enter the sensitive area of asking jurors about their religious or ethnic affiliations. See note 113 *infra* discussing this inquiry.

¹¹² See text accompanying notes 117-32 *infra* discussing the "failure to inquire" argument.

underrepresentation of a cognizable group.

If the court is unwilling to accept the claimed lack of appropriate surnames on the venire, in conjunction with a showing of a group's systematic exclusion, as evidence of that group's significant underrepresentation, defendants may never be able to satisfy the second prong of *Duren*. At a minimum, the court must treat the surname argument as a motion to inquire into the religious or ethnic backgrounds of venire persons—an invasion that district courts are extremely reluctant to make.¹¹³ Despite the intrusion upon potential jurors, when the defendant's Sixth Amendment constitutional rights will be bypassed in the absence of an investigation, district courts must investigate the religious or ethnic affinity of venire members to see if the allegedly underrepresented group is in fact unfairly underrepresented.¹¹⁴ In short, where the defendant can make a prima facie showing of the systematic exclusion of a cognizable group, and there exists no other mechanism for a defendant to demonstrate significant underrepresentation,¹¹⁵ the district court's broad discretion must

¹¹³ The general presumption is that there is something egregious about asking potential jurors about their religious or ethnic affiliations. See, e.g., *United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979) ("As to religion, our jury system was not designed to subject prospective jurors to a catechism of their tenets of faith, whether it be Catholic, Jewish, Protestant, Mohammedan, or to force them to publicly declare themselves to be atheists."), cert. denied, 446 U.S. 907 (1980). This is further evidenced by jury questionnaire forms which often provide no space for jurors to indicate their religious, ethnic or racial affiliations. See, e.g., N.Y. JUD. LAW § 513 (Consol. Supp. 1989) (the jury questionnaire mailed to prospective jurors in New York).

¹¹⁴ See Comment, *Voir Dire Limitations as a Means of Protecting Juror's Safety and Privacy: United States v. Barnes*, 93 HARV. L. REV. 782, 783, 791 (1980) (recognizing that where the defendant can demonstrate that he or she will be precluded from obtaining an impartial jury, the need to investigate potential jurors' religious and ethnic backgrounds may outweigh the possible harm of such an investigation).

Trial courts in both state and federal courts have made this investigation in assessing the legitimacy of a defendant's claim that the prosecutor has invidiously discriminated in its use of peremptories. See, e.g., *Biaggi*, 673 F. Supp. at 98 (court asked jurors upon discharge whether they had Italian relations to assess defense counsel's argument of invidious use of peremptories by the prosecution); *People v. Kagan*, 101 Misc. 2d 274, 420 N.Y.S.2d 987 (Sup. Ct. 1979) (trial judge brought four excused jurors into chambers to determine if they were Jewish after the defense claimed that the prosecutor sought to exclude them based on their last names).

¹¹⁵ Courts could avoid the potential problem of having to inquire into the personal lives of prospective jurors by accepting lack of certain surnames as prima facie evidence of significant underrepresentation of a cognizable group, and thereby shift the analysis to whether there is evidence of the systematic exclusion of that group. However, where a surname analysis offers little in establishing a prima facie case of underrepresentation, courts may still be able to avoid intruding into the personal lives of jurors.

defer to the defendant's fundamental fair cross-section right, necessitating an inquiry into the religious or ethnic affiliations of the venire persons.¹¹⁶

2. Failure to Explore the Religious Affiliations of the Venire in *Gelb*:

Another of *Gelb*'s main arguments before the Second Circuit was that his constitutional right to a fair cross-section was violated due to the district court's refusal to explore during voir dire the religious affinities of the members of his venire.¹¹⁷ *Gelb* attributed this refusal to the district court's erroneous characterization that "Jewish people are [not] a cognizable racial group different from the majorities of the rest of whites in the United States."¹¹⁸ It was *Gelb*'s position that by asserting as a "threshold matter that Jews did not constitute a 'cognizable racial group,'" the court prevented him from demonstrating a fair

For example, surnames may be of no use in determining whether Baptists, Protestants, or Catholics were significantly underrepresented in the venire from which the jury was chosen. This does not automatically mean that upon request the trial court must inquire as to the venire persons' religious or ethnic beliefs. Rather, only if the defendant can establish a prima facie case that these groups were in some way being systematically excluded must a district court inquire into the potential jurors' personal lives. This inquiry would be made to confirm whether there was in fact significant underrepresentation on the defendant's venire as a product of this prima facie showing of systematic exclusion. See note 126 *infra* describing how, when the entire *Duren* challenge is evaluated, inquiries into the religious or ethnic affiliations of venire persons will likely be unnecessary.

¹¹⁶ However, there may be extreme policy reasons that weigh in favor of not inquiring into the personal lives of potential jurors—even at the possible expense of a defendant's rights. See *United States v. Barnes*, 604 F.2d at 121, 140-41, 168 (2d Cir. 1979) (where the trial court indicated sua sponte that the names and addresses of jurors would be withheld from counsel to ensure the safety of jurors). The court in *Gelb* may not have needed to make an inquiry nor accept defendant's surname theory for reasons outside the confines of the *Duren* test. The defendant's trial was initially scheduled for August 22, 1988. However, due to the defendant's surgery five days before trial (see note 56 and accompanying text *supra*), the trial was delayed. If the government's stance was correct and *Gelb*'s surgery was an unnecessary procedure designed to delay the trial (Brief for Appellee at 21 n.5), *Gelb* invited any fair cross-section violation and should have been effectively estopped from claiming a constitutional violation that he manufactured. See text accompanying notes 139-52 *infra* discussing why no inquiry into the jurors' religious affiliations was necessary within the parameters of *Duren* since the defendant had not established a prima facie case of systematic exclusion of potential Jewish jurors.

¹¹⁷ Brief for Appellant at 1-2.

¹¹⁸ *Gelb*, 881 F.2d at 1160. The court did not technically *refuse* to explore the religious affiliations of the prospective jurors since defense counsel did not formally ask the court to inquire. *Id.*

cross-section deprivation.¹¹⁹

The Second Circuit's treatment of this portion of Gelb's appeal was flawed and insufficient. The court did not indicate why it was unnecessary to respond to this legitimately posed constitutional challenge. By not giving Gelb's claims any genuine consideration, the court evaded important issues regarding the fair cross-section challenge. Consequently, the court missed a tremendous opportunity to establish a functional cross-section requirement.

The court's response was simply to acknowledge that Jews are in fact a legally cognizable group, opting not to address the impact the district court's characterization may have had on the defendant's ability to prove a constitutional deprivation.¹²⁰ Additionally, the Second Circuit wrongly concluded that the district court judge's characterization occurred during trial and not during pretrial motions concerning jury selection—a district court error that led to debatably “fatal” consequences for the defendant.¹²¹

After acknowledging cognizability, the court dismissed appellant's claim for failure to demonstrate significant underrepresentation of Jews on the venire, matter-of-factly rejecting defendant's contention that the surnames of his venire persons did not suggest a fairly representative venire.¹²² The court offered no guidance on how the defendant was to make a prima facie case of significant underrepresentation when faced with a district court judge insensitive to a religion-based challenge.¹²³

¹¹⁹ Brief for Appellant at 26. Gelb argued that Judge Van Sickle's predisposition towards Jewish people evinced an intent to disregard the problem of Jewish underrepresentation on the venire, making it impossible to determine how many, if any, venire members were Jewish. *Id.* at 25.

¹²⁰ *Gelb*, 881 F.2d at 1161. Gelb's attorney continues to hammer this point in a post-appellate motion to the Second Circuit. Appellant's Petition for Rehearing and for In Banc Consideration at 4 (“Given Judge Van Sickle's definitive closing of the door on this issue, it is a cruel, unfair and poorly-grounded result to conclude, as the panel decision has, that Gelb failed to demonstrate underrepresentation of Jews in the venire . . . and consequently failed the second prong of the *Duren* test.”).

¹²¹ *Id.* at 4. However, since Gelb's claim ultimately fails elsewhere (*see* text accompanying notes 139-52 *infra*) this error by the Second Circuit is properly viewed as “harmless.” *See* FED. R. CRIM. P. 52(a) (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”).

¹²² *Gelb*, 881 F.2d at 1161-62.

¹²³ *See* Brief for Appellant at 14-15 (describing Judge Van Sickle's remarks regarding Judaism and the Jewish holidays). *But see* Brief for Appellee at 22 (“Judge Van

More specifically, having held that Jews were in fact a legally cognizable group and having rejected defendant's surname theory, the court needed to decide if direct inquiry into the religious or ethnic affinities of venire members was nevertheless constitutionally mandated.¹²⁴ Pertinent to this question is whether such an inquiry needs to be formally requested by defendants¹²⁵ and whether there exist compelling policy reasons against a personal inquiry into each venire member's religious or ethnic affiliation.¹²⁶

Sickle exercised great patience, permitting Gelb to halt the trial during each of the seven trial days that Gelb observed the holidays.").

¹²⁴ See text accompanying notes 133-38 *infra* describing the predicament defendants raising religion or ethnicity-based fair cross-section challenges face if such an inquiry is not in some instances constitutionally mandated.

¹²⁵ As indicated (see text accompanying note 113 *supra*), the court should treat the surname argument, if not accepted on its own as a fulfillment of *Duren's* second prong, as a motion to inquire into the religious beliefs of the jurors, dispensing with the need for a formal request by the defendant. However, the *Gelb* opinion implicitly suggests that the defendant's failure to petition the court to inquire into the religious belief of prospective jurors was in fact fatal to defendant's claim.

¹²⁶ Quite predictably, the government argued that such an inquiry would wreak public policy havoc:

The policy implications of Gelb's position are equally awkward. First, it is ridiculous to suggest that judges must inquire into a potential juror's religious beliefs or that juries must be composed of representative numbers of Baptists, Buddhists, and Bahais . . . Taken to its logical conclusion, Gelb's argument would make it virtually impossible to schedule a trial in a district as religiously, racially and ethnically diverse as the Eastern District of New York.

Brief for Appellee at 25 n.6.

The government's position opposing an inquiry into each venire person's ethnicity or religious beliefs would have tremendous merit if district court judges were automatically required to make this inquiry upon request from the defendant. This Comment rejects that position, claiming rather that such an inquiry is only to be made when the defendant can show a group to be cognizable (which may prevent an inquiry at the outset), when the court rejects the absence of appropriate-sounding surnames as *prima facie* evidence of significant underrepresentation, and when the defendant brings forth *prima facie* evidence that a group has been systematically excluded from service. In essence, inquiries are to be made as a last resort in *Duren* challenges. See note 115 *supra*.

The defendant, not to be outdone on the not-even-considered question of policy, contended that the government's slippery slope argument was exaggerated.

The fact that Jews are only one of very few groups which the Supreme Court has declared as a "distinctive" or "cognizable" group entitled to more sensitive treatment belies the government's "policy" objection to Gelb's argument. The government overstates its concern when it contends that all defendants of all groups could insist on protection of their fair cross-section rights The Supreme Court has narrowly limited the category of a distinctive or cognizable group; it is not an issue which every defendant can invoke as to every conceivable group.

The Second Circuit's opinion does not discuss the merits of inquiring into the religious or ethnic affiliations of the prospective jurors.¹²⁷ The only hint of the court's position on the "need

Reply Brief for Appellant at 5 n.2. Gelb's position has support. *See, e.g.,* Lockhart v. McGee, 476 U.S. 162 (1986) (jurors absolutely opposed to the death penalty are not a distinctive group for purposes of the fair cross-section requirement); United States v. Canfield, 879 F.2d 446, 447 (8th Cir. 1989) (residents of the city of Minneapolis do not share a clearly identifiable factor and are therefore not distinctive); Ford v. Seabold, 841 F.2d 677, 681 (6th Cir. 1988) (young adults and college students do not comprise distinctive groups), *cert. denied*, 488 U.S. 928 (1988); United States v. Puleo, 817 F.2d 702, 706 (11th Cir. 1987) (jurors with last names beginning with the letters M-Z are not distinct), *cert. denied*, 484 U.S. 978 (1987); Ananya v. Hanson, 781 F.2d 1, 5-8 (blue collar and less-educated individuals are not cognizable groups); United States v. Balistrieri, 778 F.2d 1226, 1229 (7th Cir. 1985) (rural community members not distinct), *cert. denied* 477 U.S. 908 (1986). *Cf.* United States v. Sanchez-Lopez, 879 F.2d 541, 547 (9th Cir. 1989) (Hispanics comprise a distinct group); United States v. Herbert, 698 F.2d 981, 984 (9th Cir. 1983) (Native Americans are a distinctive group), *cert. denied*, 464 U.S. 821 (1983). Additionally, persons of various religious beliefs not yet classified by federal courts will likely constitute cognizable groups since religion is covered by 28 U.S.C. § 1862 (1963), which forbids discrimination in selecting jurors of any group based on their religious beliefs.

¹²⁷ Such an inquiry will undoubtedly invade a juror's privacy interest in nondisclosure. *See, e.g.,* United States v. Barnes, 604 F.2d 121, 130, 140 (2d Cir. 1979) (in which the court indicated that people will be reluctant to serve as jurors if their personal concerns are subject to probing and cited cases describing a general privacy interest). *But see* Comment, *supra* note 114, at 792 (challenging the Barnes court's failure to suggest the source of the interest or delineate its scope).

A personal inquiry may also plant a seed for bias where it would otherwise not exist. *See Harper, Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1369 (1985). Jurors who would otherwise not have had any conscious thoughts regarding the sex, race, religion, ethnicity, or class of the defendant, may now speculate as to why they are being asked intrusive questions. The jurors might take offense to the questions and hold it against the defendant, or those in the same group as the defendant may assume that they are supposed to support the defendant. In either case, by inquiring, the court may be opening the door for prejudice, especially at the challenges stage of voir dire. Attorneys will now know who is in a defendant's group and may use that information in their exercise of peremptories—an exercise that may ultimately result in discriminatory practices, raising *Batson* problems.

However, these considerations cannot blindly control every circumstance but rather must be balanced against a possible deprivation of a defendant's constitutional right. Most recently, a Queens judge has entered into the controversial area of questioning potential jurors about their sexual orientation. *See* N.Y. Times, Nov. 5, 1991, at B3, col. 5 (In "gay bashing" murder case, Judge Ralph Sherman of New York State Supreme Court asked one of the prospective jurors during voir dire whether she was homosexual or bisexual.). For purposes of a *Duren* challenge this Comment balances the competing interests between defendants' rights and potential jurors' rights by mandating an inquiry into the personal lives of venire persons only after defendants do two things. A defendant must make a prima facie showing of the systematic exclusion of a cognizable group from jury service and the defendant must be unable to demonstrate affirmatively the significant underrepresentation in the jury pool of that group by other means.

to inquire" argument was the straightforward presentation of how the jury was empaneled. Here the court noted that "[d]uring voir dire, the court did not inquire into the religious beliefs of prospective jurors, nor did Gelb's attorney request such an inquiry."¹²⁸ In essence, the Second Circuit's underlying position may have been that by failing to request such an inquiry the defendant waived his right to a fairly representative jury venire.¹²⁹

It is unfortunate that the Second Circuit did not affirmatively state that the defendant's conduct constituted a waiver of his constitutional right. However, under the Federal Rules of Criminal Procedure, when a criminal defendant does not raise defenses or objections that must be made prior to trial, those arguments and defenses are waived.¹³⁰ Therefore, since Gelb never petitioned the district court to inquire about the religious or ethnic background of his venire persons, this argument was waived despite the defendant's post-appeal position to the contrary.¹³¹ Moreover, even if Gelb's request for an inquiry into the

¹²⁸ *Gelb*, 881 F.2d at 1160.

¹²⁹ Defendant's post-appeal brief lends support to this view. Petition for Rehearing at 3 ("In its decision, the panel incorrectly read the record in concluding that Gelb had failed to preserve his Sixth Amendment right to a balanced venire and petit jury.").

¹³⁰ Specifically, the Federal Rules of Criminal Procedure state:

Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

FED. R. CRIM. P. 12(f). Gelb's attorneys apparently erred by not specifically petitioning the court to ask jurors about their religious beliefs at voir dire. While it is unlikely that Judge Van Sickle would have felt inclined to make such an inquiry, it seems, as a matter of consistency, thoroughness and prudence, that Gelb's attorney should have requested him to do so. Because Gelb did not formally ask for the inquiry, the Second Circuit now had a quick "out" regarding Gelb's challenge—that since he did not ask for an inquiry the district court did not have to make one. Had Gelb made such a request, and had he been denied, the Second Circuit may have been unable to evade the question of whether the district court was required to make such an inquiry. See text accompanying notes 133-38 *infra* describing the possible need for such an inquiry to insure the rights of defendants raising religion- or ethnicity-based Sixth Amendment challenges.

¹³¹ In a last-ditch effort to shift the blame onto Judge Van Sickle for Gelb's own failure to request an inquiry, Gelb argues:

[I]t is difficult to accept the concept that Gelb's constitutional right to a fairly representative jury pool . . . should be deemed lost because Gelb's attorney, after having vigorously focused Judge Van Sickle's attention on the jury selection issue, did not take the additional step of suggesting religion-related voir dire questions after Judge Van Sickle so categorically ruled that Jews were

religious and ethnic composition of his venire had been viewed as retained, Gelb's failure to satisfy the systematic exclusion element of the *Duren* test made this inquiry constitutionally unnecessary.¹³²

3. The Danger of *Gelb*: Unequal Protection of the Fair Cross-Section Requirement

By not exploring the merit of Gelb's surname argument, and by the court's possible—albeit silent—validation of a judicial policy of never needing to inquire into the religious or ethnic affinities of prospective jurors, the Second Circuit may have created a tremendous problem for any defendant seeking to raise a religion- or ethnicity-oriented fair cross-section claim.¹³³ Defendants seeking to establish a *Duren* claim regarding the systematic exclusion of cognizable religious or ethnic groups are left with virtually no mechanism to prove the second element of significant underrepresentation. A defendant will have tremendous difficulty showing that a particular religious or ethnic group has been significantly underrepresented if the court is unwilling to accept the claimed lack of appropriate surnames as an inference of the group's underrepresentation and is similarly unwilling to place an affirmative duty on the trial court to conduct an inquiry

not a 'cognizable racial group.'

Petition for Rehearing at 3-4. The Second Circuit could have granted relief from the waiver under the "cause shown" provision of Rule 12(f) of the Federal Rules of Criminal Procedure, but declined to do so. See note 130 *supra*. Specifically the court could have ruled that since Gelb's argument focused on the issue of the availability of potential jurors, the district court's failure to inquire constituted reversible error. This Comment has posited that the district court should treat the surname argument as a motion to make an inquiry, if the court first rejects the lack of certain surnames as an indicator of significant underrepresentation. See text accompanying note 113 *supra*.

¹³² See text accompanying notes 139-52 *infra* discussing defendant's failure to demonstrate systematic exclusion.

¹³³ In *Gelb* the court may not be validating a policy of not inquiring into the religious affinities of prospective jurors in a fair cross-section challenge, but rather, simply restraining itself from deciding the question in this case - a course of action entirely proper for a federal court. In another context the Second Circuit has expressly refused to allow an inquiry into the ethnic background of jurors. Cf. *United States v. Barnes*, 604 F.2d 121, 140-41 (2d Cir. 1979) (where the court held that refusal to permit inquiry into prospective jurors' ethnic backgrounds did not prevent the intelligent exercise of peremptory challenges). In *Barnes* Judge Meskill dissented vigorously, arguing that the district court's refusal to pose defendant's questions to jurors about their ethnic and religious backgrounds hindered their ability "to exercise meaningfully their right to peremptory challenge." *Id.* at 169 (Meskill, J., dissenting).

into the religious or ethnic background of prospective jurors. In evaluating race-based or gender-based jury selection challenges, federal district courts can rely on the jury pool data assembled from the juror qualification forms and effectively determine whether that group has been significantly underrepresented.¹³⁴ Thus, a *Duren* challenge of race or gender exclusion can be disposed of fairly at this stage. Alternatively, if the defendant satisfies this element with statistics, the court will turn to the more crucial element of systematic exclusion.¹³⁵ However, no such data exists regarding the religious or ethnic background of jurors in the jury pool, making it very difficult to demonstrate certain groups' significant underrepresentation.¹³⁶ Rather, for a defendant to make this showing district courts need to allow defendants to demonstrate significant underrepresentation by the lack of certain surnames from the venire or jury pool. Alternatively, where this surname theory is inapplicable or not accepted, the district court may need to inquire into the religious or ethnic beliefs of venirepersons—where the defendant has made a prima facie showing that a cognizable group has been systematically excluded from potential service and where this prima facie showing does not itself resolve the question of significant underrepresentation.¹³⁷

Having flatly rejected the surname theory raised in *Duren* challenges as inherently unreliable, the Second Circuit has unwarrantedly created a circumstance where potentially worthy *Duren* defendants will be prevented from meeting the second element of the test (assuming the *Gelb* opinion is also read to preclude inquiries into the religious or ethnic backgrounds of prospective jurors for purposes of *Duren*). The undeniable consequence of such an interpretation will be the unequal application of the guarantee among criminal defendants.¹³⁸ Addition-

¹³⁴ Federal juror qualification forms provide information about a potential juror's race, date of birth, education, occupation and county of residence. 28 U.S.C. § 1862 (1963). See generally *JURYWORK*, *supra* note 4, at §§ 6-10 to 6-12, discussing the sources of jury pool composition data and the qualification process.

¹³⁵ Central to this definition of the fair cross-section is the notion that no group be underrepresented due to systematic exclusion in the selection process. See note 7 *supra*.

¹³⁶ See note 15 *supra*.

¹³⁷ See note 16 *supra*.

¹³⁸ Defendants raising religion- or ethnicity-based fair cross-section challenges could argue that by preventing them from showing proof of an element of a constitutional violation, the court is denying them equal protection under the law. In essence, what is a

ally, the court's overall treatment of the claim leaves the impression that any religion- or ethnicity-based fair cross-section challenges are inconsequential and destined to fail.

B. *Systematic Exclusion: A Better Resting Place*

The Second Circuit could have easily disposed of this appeal and in the process avoided potential equal protection problems had it focussed on Gelb's failure to demonstrate adequately that Jewish people were systematically excluded from the jury pool.¹³⁹ Resting its decision on systematic exclusion would have been analytically sound since the fundamental concern of the fair cross-section requirement is whether any distinctive group has been systematically excluded.¹⁴⁰ Moreover, had the court considered this element, its decision would have been firmly supported by the weight of the evidence rather than speculation and questionable policy from another circuit.¹⁴¹

Supreme Court Sixth Amendment decisions involving exclusion of cognizable groups have focused on systematic exclusion from jury pools.¹⁴² Unlike the defendants in *Duren* and *Tay-*

fundamental right for defendants when investigating the exclusion of blacks or women may not be a fundamental right when investigating the exclusion of a particular religious or ethnic group.

¹³⁹ The court found only that Gelb did not adequately demonstrate that his venire lacked proper Jewish representation. *Gelb*, 881 F.2d at 1162.

¹⁴⁰ This is the "fundamental" concern of the requirement because it is the *source* of the underrepresentation that determines whether the constitutional guarantee has or has not been violated. Note, *supra* note 1, at 1564 ("There is no right to have a particular group represented on a given . . . venire Protection, rather, is limited to an assurance that no group will be systematically excluded, and a purely fortuitous deviation from the ideal makeup of a jury does not in itself constitute a violation."). This is evidenced by the historical rhetoric concerning exclusionary practices (*see text accompanying note 19-25 supra*) as well as the statutory shift towards randomness (*see text accompanying notes 28-30 supra*).

¹⁴¹ *See text accompanying notes 84-95 supra*.

¹⁴² *See Harper, supra* note 127, at 1365. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 360 (1979) (Jury venires averaging less than 15% women over a period of about a year where 54% of the population was female reflected "systematic exclusion."); *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975) (evidence of eleven months of disproportionate representation was sufficient for finding systematic exclusion); *Smith v. Texas*, 311 U.S. 128, 131 (1940) (defendant showing that blacks were excluded from the grand jury over a three-year period constituted "systematic" exclusion). *See also Note, supra* note 1, at 1565 ("federal . . . law will infer a systematic flaw only from significant underrepresentation on a number of previous venires"). In essence, Gelb needed to show this exclusionary "practice" over the course of a year or two, although no case has authoritatively determined the appropriate period of time. At a minimum, Gelb needed to show that

lor,¹⁴³ Gelb offered no statistical support for his contention that the Eastern District's jury selection scheme systematically excluded Jewish people during this three-week period through an unjustified exemption practice.¹⁴⁴ Nor did Gelb present data to demonstrate a deficient number of Jewish people on other venues during the time of his trial or evidence that the Jury Administrator granted a statistically significant number of requests by Jews for postponement of service prior to his trial.¹⁴⁵ As a result, Gelb did not meet his all-important prima facie burden regarding the systematic exclusion prong of the *Duren* standard.¹⁴⁶

By not resting its decision on Gelb's lack of systematic exclusion evidence, the Second Circuit left open the question of systematic exclusion, offering no guidance on how properly raised systematic exclusion arguments will fare in the Second Circuit. In other words, had the court focused on what Gelb did not do at this prong, it could have created standards that other defendants would have to follow to satisfy the systematic exclusion prong of *Duren*. Specifically, a functional exclusion principle would, under *Duren*, require more than mere affirmation by the defendant of an exclusionary practice.¹⁴⁷ To demonstrate

Jewish people were not excused in disproportionate numbers during this three-week period by the jury system's commissioner, and were not excused to any great degree during other times of the year. This would establish a prima facie showing of systematic exclusion and would indicate the significant underrepresentation of Jewish jurors during this time period as compared to the rest of the year.

¹⁴³ See notes 39 and 44 *supra*.

¹⁴⁴ See note 152 *infra* discussing the "justification" of exclusionary procedures.

¹⁴⁵ In *Scott v. Dugger*, 686 F. Supp. 1488 (S.D. Fla. 1988), *aff'd*, 891 F.2d 800 (11th Cir. 1989), the defendant's Sixth Amendment fair cross-section challenge was rejected. The state court judge in an earlier proceeding, *Scott v. State*, 411 So. 2d 866 (Fla. 1982), denied defendant's motion for a one-day continuance since his trial was to begin on Yom Kippur, even though a deputy clerk testified that she granted five postponement requests due to the holiday. The court harshly found that the "appellant has failed to show that his jury pool was in fact defective." 891 F.2d at 804. Gelb did not even go this far, providing no affirmative evidence in support of this "practice," which his wife alleged in her affidavit. See note 52 *supra*.

¹⁴⁶ While the Second Circuit did not explicitly hold that Jews were not systematically excluded from Gelb's jury pool, in dicta it found that "the credible evidence shows that Jews can absent themselves from the jury selection process only on the specific dates of the holidays in question . . ." *Gelb*, 881 F.2d at 1162 (emphasis added).

¹⁴⁷ As noted (see note 52 *supra*), Gelb's sole source of evidence of systematic exclusion was the self-serving affidavit submitted by his wife averring that someone at the Clerk's Office of the United States District Court for the Eastern District of New York informed her that Jews called to serve jury duty in September and October 1988 "would

systematic exclusion, defendants would need to offer evidence of more than significant underrepresentation on their own venires; rather, defendants would have to establish tangible evidence of significant underrepresentation on past venires.¹⁴⁸ Without such evidence, defendants would fail to meet their prima facie burden.¹⁴⁹ However, the presence of such evidence would constitute a satisfaction of this element of *Duren*—raising an inference that the jury selection scheme improperly excluded that group from service.¹⁵⁰ Thus, the burden would be shifted to the state to justify its jury selection scheme as either nonexclusionary¹⁵¹

be routinely excused from jury duty . . . simply by writing to the Jury Administrator." 881 F.2d at 1159. Such "evidence" does not give rise to a prima facie showing of systematic exclusion. Cf. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249 (1986) (the plaintiff could not survive a summary judgment motion by resting on his allegations of a conspiracy without offering any substantive evidence tending to support his complaint). Gelb's showing is analogous to a state simply denying that its system is nonexclusionary. See *JURYWORK*, *supra* note 4, at § 5-59 ("[R]ebuttal evidence must be affirmative and substantiated rather than negative (i.e., bare denials) and suppositional. For example, assertions by selection officials that a racial disparity resulted from a lack of qualified blacks are insufficient.") (citations omitted).

¹⁴⁸ See note 142 *supra* discussing what Gelb needed to show to demonstrate systematic exclusion.

¹⁴⁹ Gelb's plea to the Second Circuit indicates a belief that almost any evidence will suffice to satisfy a defendant's prima facie case. Reply Brief for Appellant at 6 ("In any event, *Duren* requires only a prima facie showing of a systematic exclusion of a cognizable group from the venire and Gelb *certainly* made that showing.") (emphasis added). Gelb pleaded to the Second Circuit that the district court's troubling view regarding Jews as their own cognizable group "foreclose[d] any meaningful inquiry into the Eastern District's apparent practice in deferring Jewish individuals who were called for service during the period of Jewish holidays encompassing Yom Kippur to Simchas Torah." Brief for Appellant at 15. Adding to the litany of disrespect for the district court judge (see note 54 *supra*), the defendant described Judge Van Sickle's efforts to come to grips with the apparent practice of excusing Jewish jurors due to the holiday season as "superficial." Brief for Appellant at 15.

While this Comment has argued for a less rigorous burden regarding the "significant underrepresentation" element, a defendant cannot simply claim an exclusionary practice by the jury selection system to satisfy the element of systematic exclusion. Gelb's pleas rightly fell on deaf ears; the district court was under no obligation to make any efforts because the burden of a prima facie showing was clearly on the defendant. Additionally, unlike the district court's noninquiry into the religious beliefs of Gelb's jurors, on this question the court did in fact seek to determine if there was an exclusionary practice—receiving assurances from the Chief Clerk that the Clerk's Office had engaged in no such practice. *Id.*

¹⁵⁰ Under this Comment's reading of *Duren*, defendants would still need to show that their individual venires were in fact victimized by this exclusionary practice, as well as satisfying the threshold element of whether the underrepresented group is legally cognizable.

¹⁵¹ Unlike a statute that facially excludes a group from the jury selection process, or

or as reflecting a significant state interest.¹⁵²

prosecutorial conduct that evinces an exclusionary or discriminatory purpose in excluding jurors by peremptory challenges, the alleged systematic exclusion in *Gelb* concerns "excuses" or "exemptions" for a specific period. There is no discriminatory purpose in excusing potential Jewish jurors—only the possibility of a discriminatory impact. However, it is well-recognized that "when the defendant alleges violations of the Sixth Amendment fair-cross-section principle, no showing of intent to discriminate is required . . . systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section . . ." *People v. Harris*, 36 Cal. 3d 36, 57, 679 P.2d 443, 445, 201 Cal. Rptr. 782, 794 (quoting *Duren*). Whether such an impact, without any invidiousness, satisfied the "systematic exclusion" prong in this instance was a question the *Gelb* court did not have to consider since the defendant did not show evidence of systematic exclusion. Had he done so, this practice would likely have been viewed as satisfying *Duren's* systematic exclusion prong. See, e.g., *Duren* 439 U.S. at 367 (court found that a statute which did not affirmatively exclude women, but rather, gave them an automatic exemption from service if they requested one, satisfied the systematic exclusion prong of *Duren*). In his dissent in *Duren*, Justice Rehnquist argued that "the Court uses the word 'exclusion' contrary to any use of the word with which I am familiar." *Id.* at 374. See also *People v. Marrero*, 110 A.D.2d 785, 487 N.Y.S.2d 853 (2d Dep't 1985) (finding the fact that voir dire was conducted on the Jewish holiday of Succoth did not evince deliberate or systematic exclusion of members of the Jewish faith, thus rejecting defendant's fair cross-section claim). The potential impact of a finding of systematic exclusion in *Gelb* cannot be overstated. If there had been a systematic holiday season exemption, and the court held it to satisfy the systematic exclusion prong, the practical consequence would have been that any venire showing significant Jewish underrepresentation as a result of this practice would have been a *Duren* violation. All trials in this district during this time period would theoretically have to be postponed, effectively closing down the court system—a ludicrous result. The government's policy concerns become more viable in this context; however, the result of such a finding would be the abandonment of that practice of excusing jurors for more than the day of the holiday. See note 126 *supra*.

¹⁵² *Duren* describes this burden-shifting procedure:

The demonstration of a prima facie fair cross-section violation by the defendant is not the end of the inquiry into whether a constitutional violation has occurred. We have explained that "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. However . . . 'the right to a proper jury cannot be overcome on merely rational grounds'. [*Taylor*, 419 U.S. at 534]." Rather, it requires that a significant state interest be manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group.

Duren, 439 U.S. at 367-68 (citations omitted).

Had *Gelb* been able to demonstrate systematic exclusion, along with the other *Duren* elements, the government would have had the opportunity to justify the exclusionary practice of excusing Jewish jurors for the holiday season, as opposed to calling them for service and excusing them on specific holiday dates. See, e.g., *Duren*, 439 U.S. at 370 (where the Court rejected the state's rebuttal position that women should be allowed to claim an exemption for domestic reasons as not manifesting a significant enough state interest); *but cf.* *Rawlins v. Georgia*, 201 U.S. 638, 640 (1906) (where the Court found that a state may exclude special occupational categories from jury service on

CONCLUSION

Gelb is a Second Circuit decision with tremendous implications for defendants' fair cross-section guarantees. The decision inadequately evaluates the possible exclusion of religious or ethnic groups from jury selection procedures. Under the three-prong fair cross-section standard established by *Duren*, the *Gelb* court's discussion suggests that defendants can never rely on "stereotypical" evidence to demonstrate the significant underrepresentation of a legally cognizable group from the jury pool or venire. Critical examination reveals that the Second Circuit's opinion is shortsighted because there may be no other way to show the possible underrepresentation of religious or ethnic groups. The court also neglects the possibility that district courts may ultimately need to inquire into the religious or ethnic affiliations of the venire members in order to know if a group is underrepresented. Moreover, the Second Circuit's decision is poorly focused and analytically deficient since it does not address the more provocative element of *Duren*—the notion of a jury selection scheme that systematically excludes a legally distinct group.

The consequences of the Second Circuit's treatment of the fair cross-section requirement in *Gelb* are troubling. Future courts are left without any guidance for when a religion-based inquiry is necessary to insure all defendants equal constitutional guarantees. Defendants are without guidance as to how they are supposed to demonstrate the significant underrepresentation of a religious or ethnic group when they contend that there is a systematic practice of excluding this group. Courts are also left without standards for evaluating when an exclusionary practice gives rise to a constitutional violation. In essence, the *Gelb* decision leaves the fair cross-section requirement nonfunctional in the context of religion- or ethnicity-based challenges.

For purposes of this guarantee, district courts must be sensitive to the near-impossible task facing defendants seeking to demonstrate the significant underrepresentation of religious or ethnic groups for which no readily available data exist. Where applicable, the lack of certain surnames in disproportionate

the grounds that it is in the community's best interest if their regular work is not interrupted).

numbers from a defendant's venire should be credited as prima facie evidence of significant underrepresentation, thereby shifting the analysis to whether the defendant can prove that this group has somehow been systematically excluded from jury service. If the surname theory is discredited or inapplicable, district courts, upon request from the defendant, will need to permit an inquiry into the religious or ethnic backgrounds of venirepersons. This inquiry should be allowed where the defendant has brought forth prima facie evidence that a cognizable group has been systematically excluded, yet the evidence does not confirm defendant's allegations that this group has been significantly underrepresented.

Lastly, the court's overall treatment of Gelb's challenge indicates that religion- or ethnicity-based jury selection challenges are not favorably received and have little hope of success. It is evident that challenges like Gelb's will not receive the sort of principled evaluation that race- or gender-based jury selection challenges traditionally receive. As a result, the Second Circuit's decision has the ultimate consequence of undermining the Sixth Amendment's fair cross-section requirement for all defendants seeking to show the underrepresentation of religious or ethnic groups.

Mark A. Kornfeld

