

## ACHIEVING FAIR CROSS-SECTIONS ON IOWA JURIES IN THE POST-*PLAIN* WORLD: THE *LILLY-VEAL-WILLIAMS* TRILOGY

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### DEDICATION TO CHIEF JUSTICE MARK CADY

*This Article focuses on a three-year-old opinion from the Iowa Supreme Court, State v. Plain, and a trilogy of cases decided last year, what we have called the Lilly-Veal-Williams trilogy, insofar as those cases secure, affirm, and advance understanding of the constitutional right to an impartial jury as drawn from a fair cross-section of the community. In a larger sense, this Article is about the continuing efforts of the Iowa Supreme Court, especially over the last decade, to address racial disparities, protect civil rights, and improve the administration of justice. It is an understatement to say these efforts owe much to the leadership of Chief Justice Mark Cady before his most untimely death in November 2019. To these efforts, the late Chief Justice Cady brought the formidable array of his personal qualities. He was a scholar and student of the law who was well aware of and championed Iowa's rich history in regard to civil rights and the Iowa constitution's equality principle. He was, in our experience, without peer in his willingness to listen and understand, identify what needed to or could be done, and act. He was always the Chief and stood out, but his humility, camaraderie, humor, and profound decency unfailingly erased differences in position and deepened friendship. While the Chief did not author the court's opinions in Plain or the Lilly-Veal-Williams trilogy, his roles as leader, bridge-builder, and consensus-maker are clearly evident in the years leading up to these decisions and afterward. He earnestly and visibly supported the Branstad Committee that led to reforms of the Iowa Code dealing with juries. Under his leadership, the court appointed and charged committees to continue that work; and the Iowa judicial branch successfully initiated efforts significantly and dramatically improving jury management practices and requiring training of the entire judicial branch to address implicit bias—training that was to be refreshed and renewed annually. As he wrote in the special concurring opinion in Plain, "Today's decision identifies several ways for our justice system to improve. We should never stop looking for others." In the ensuing years, again under his leadership, the court continued and intensified efforts to improve, especially in regard to*

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*protections of the impartial jury right. For his leadership on addressing racial disparities, protecting civil rights, and improving the administration of justice in Iowa, we dedicate this Article to our late Chief Justice Mark Cady.*

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## I. INTRODUCTION

### A. *Constitutional Text and History*

The Sixth Amendment to the U.S. Constitution guarantees an accused, “[i]n all criminal prosecutions,” the right to “an impartial jury of the State and district wherein the crime shall have been committed.”<sup>1</sup> It is one of a cadre of fundamental rights guaranteed a defendant, including “the right to a speedy and public trial,” the right “to be informed of the nature and cause of the accusation,” the right to confront witnesses against him, and the right “to have the Assistance of Counsel for his defence” — on a par in importance with each of those rights.<sup>2</sup> Arguably, the right to an impartial jury is of even greater importance because it is the jury that ultimately will decide the guilt or innocence of the accused.

The Sixth Amendment’s guarantee of “an impartial jury of the State and district where the crime shall have been committed” addressed one of the Founders’ earliest expressed concerns and grievances.<sup>3</sup> Thus, in 1774, the First Continental Congress declared, “[T]he respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to that course of that law.”<sup>4</sup> And two years later, among the list of grievances articulated in the Declaration of Independence were “depriving us in many cases, of the benefits of Trial by Jury” and “transporting us beyond Seas to be tried for pretended offenses.”<sup>5</sup> The right to trial “by their peers of the vicinage” was all the more important because the alternative was trial by the

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1. U.S. CONST. amend. VI.

2. *Id.*

3. *Id.* The Bill of Rights speaks to the importance and right to a jury in two other Amendments including, of course, the Fifth (right to be indicted by a grand jury in felony cases) and the Seventh (right to jury trial in suits at common law). *Id.* amend. V; *id.* amend. VII.

4. WILLIAM GRIFFITH, *HISTORICAL NOTES OF THE AMERICAN COLONIES AND REVOLUTION, FROM 1754 TO 1775* 115 (1843).

5. *Declaration of Independence: A Transcription*, NATIONAL ARCHIVES, <https://www.archives.gov/founding-docs/declaration-transcript> [<https://perma.cc/FK4X-DCVS>].

Crown's judges, whom the King "ha[d] made [ ] dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."<sup>6</sup>

### B. Interpretation by the U.S. Supreme Court

The right to an "impartial jury" transcends the guarantee of a jury free of obvious bias and has long been held to mean an accused is entitled to a jury that is representative of the community.<sup>7</sup> Nearly 150 years ago, the Supreme Court held in *Strauder v. West Virginia* the exclusion of blacks from juries violated the Constitution by denying the defendant equal protection of the laws.<sup>8</sup> The Court explained, "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."<sup>9</sup> The Court in *Strauder* explained, "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors."<sup>10</sup> A representative jury provides protection against "the apprehended existence of prejudice," and in excluding black persons from serving on juries, West Virginia was depriving black defendants, but not white defendants, of that protection.<sup>11</sup>

*Strauder* was clear in its meaning and explicit in its holding, but the Court's opinion did not end the practice of states excluding blacks from service on juries.<sup>12</sup> Although the exclusion was not embodied in "the written words" of the state's law but instead the result of discretion vested in jury commissioners, substantially the same issue came before the Court 60 years later in *Smith v. Texas*.<sup>13</sup> Speaking for a unanimous Court, Justice Hugo Black stated, "It is part of the established tradition in the use of juries as

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6. *Id.*; see U.S. CONST. amend. VI.

7. See U.S. CONST. amend. VI.

8. *Strauder v. West Virginia*, 100 U.S. 303, 308–10 (1879). Tragically, *Strauder* proved to be one of the last Supreme Court rulings protecting the rights of African Americans in the nineteenth century and for decades into the twentieth century.

9. *Id.* at 308.

10. *Id.* at 309; see also *Georgia v. McCollum*, 505 U.S. 42, 60 (1992) (Thomas, J., concurring).

11. *Strauder*, 100 U.S. at 309.

12. See, e.g., *Smith v. Texas*, 311 U.S. 128, 130–31 (1940).

13. *Id.* at 130. Whereas *Strauder* involved exclusion of blacks from juries, *Smith* involved exclusion of blacks from grand juries. Equal protection, and the understanding of what a jury is, apply to both.

instruments of public justice that the jury be a body truly representative of the community.”<sup>14</sup> Racial discrimination resulting in the exclusion of blacks from jury service not only violated the Constitution and laws of the United States, Justice Black continued, “but is at war with our basic concepts of a democratic society and a representative government.”<sup>15</sup>

*Smith* was followed by three cases in which the Supreme Court continued its focus on the importance of juries as “representative” if they are to be the “instruments of public justice” the Court intended them to be.<sup>16</sup> In *Thiel v. Southern Pacific Co.*, a civil damage suit, the evidence showed the court clerk and jury commissioner regularly and “intentionally excluded from the jury lists all persons who work for a daily wage,” including day laborers like bricklayers, machinists, and carpenters because they were likely to claim financial hardship and avoid jury service.<sup>17</sup> In striking down the practice, the Court explained that whether in criminal or civil proceedings, the “American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community.”<sup>18</sup> That did not mean every jury had to “contain representatives of all the economic, social, religious, racial, political and geographical groups of the community;” but it did mean prospective jurors had to “be selected by court officials without systematic and intentional exclusion of any of these groups.”<sup>19</sup> Justice Felix Frankfurter, joined by Justice Stanley Reed, dissented on the facts of the case but agreed, “Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . ,

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14. *Id.*

15. *Id.*

16. *Ballard v. United States*, 329 U.S. 187, 193 (1946) (holding that in a jurisdiction in which women were eligible to serve on juries, “purposeful and systematic exclusion of women from the panel in this case” was disapproved, requiring reversal of judgment upon jury verdict); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 221 (1946); *Glasser v. United States*, 315 U.S. 60, 83–84 (1942) (condemning alleged selection as jurors only of women who were members of the League of Women Voters and who had taken “jury classes whose lecturers presented the views of the prosecution,” while systematically excluding other members who were otherwise qualified).

17. *Thiel*, 328 U.S. at 221–22. Because *Thiel* was a civil damage suit, the Sixth Amendment’s impartial jury guarantee “in all criminal prosecutions” did not apply, and instead, the Seventh Amendment was applicable; but the Court’s understanding of and commands regarding a “jury” are the same whether the case is a criminal prosecution to which the Sixth Amendment applies or a civil suit under the Seventh Amendment. *See* U.S. CONST. amends. VI, VII.

18. *Thiel*, 328 U.S. at 220.

19. *Id.*

partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civil responsibility.”<sup>20</sup>

In 1968, Congress enacted the Federal Jury Selection and Service Act and stated it is “the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”<sup>21</sup> That same year, the Supreme Court held the Sixth Amendment’s requirement that juries have to be drawn from a cross-section of the community that is broadly representative applies to the states through incorporation of the Fourteenth Amendment in *Duncan v. Louisiana*.<sup>22</sup>

This line of cases interpreting the Sixth Amendment’s fair cross-section command culminated in *Taylor v. Louisiana* and *Duren v. Missouri*.<sup>23</sup> Both cases involved the underrepresentation of women on juries on account of state law.<sup>24</sup> In Louisiana, women were excluded by law from jury service unless they affirmatively filed a written declaration of desire to be subject to service.<sup>25</sup> In Missouri, women were by law subject to jury service but were given an automatic exemption upon request—indeed, women who did not affirmatively request but failed to file anything were presumed to have made the request and granted the exemption.<sup>26</sup> Both provisions were held to constitute systematic exclusion of women from the accused’s jury.<sup>27</sup> In *Taylor*, the Court stated succinctly that “petit juries must be drawn from a source fairly representative of the community.”<sup>28</sup> The actual trial jury did not have to “mirror the community and reflect the various distinctive groups in

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20. *Id.* at 227 (Frankfurter, J., dissenting). In *Brown v. Allen*, the Court again emphasized that a list from which a state draws citizens for jury service must “reasonably reflect[] a cross-section of the population suitable in character and intelligence for [jury] duty,” although it rejected a claim that development of jury lists from tax records was impermissibly discriminatory because it led to underrepresentation of African Americans. 344 U.S. 443, 474 (1953).

21. 28 U.S.C. § 1861 (2018).

22. U.S. CONST. amend. VI; *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

23. *Duren v. Missouri*, 439 U.S. 357, 368–69 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

24. *See Duren*, 439 U.S. at 357; *Taylor*, 419 U.S. at 522.

25. *Taylor*, 419 U.S. at 523.

26. *Duren*, 439 U.S. at 359.

27. *See id.* at 360; *Taylor*, 419 U.S. at 531.

28. *Taylor*, 419 U.S. at 538.

the population[,] . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”<sup>29</sup>

Beyond its holding, *Taylor* is especially notable for its articulation of the purposes for the “fair cross-section” requirement; in interpreting how to apply it, it makes sense to determine whether the jury selection policy or practice that is in question in a given case is consistent with those purposes.<sup>30</sup> One purpose of the jury, the Court in *Taylor* explained, harkening back to *Strauder*, “is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”<sup>31</sup> It provides the “assurance of diffused impartiality” that Justice Frankfurter noted in *Thiel*, and constitutes protection against oppression.<sup>32</sup> A second purpose the Court in *Taylor* emphasized is that it was “critical to public confidence in the fairness of the criminal justice system.”<sup>33</sup> Quoting extensively from *Ballard*, the Court emphasized men and women were not “fungible,” and the absence of women from a jury panel would mean it was not “truly representative”—an “influence” would be lost.<sup>34</sup> The absence of a distinctive group from the grand jury, jury pool, or jury panel from which the trial jury is ultimately drawn undermines the appearance of fairness and casts doubt on the legitimacy of the process.<sup>35</sup> Third, and finally, a broadly representative jury should be maintained “because sharing in the administration of justice is a phase of civil responsibility.”<sup>36</sup>

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29. *Id.*

30. *Lockhart v. McCree*, 476 U.S. 162, 174–75 (1986).

31. *Taylor*, 419 U.S. at 530. This explanation of the jury’s purpose is consistent with the United States’ constitutional history and reflects the Founders’ intentions. *See supra* text accompanying note 3.

32. *Taylor*, 419 U.S. at 530.

33. *Id.*

34. *Id.* at 531.

35. *See United States v. Green*, 389 F. Supp. 2d 29, 80 (D. Mass. 2005). There is some inconsistency in courts’ terminology as to the various stages of the jury selection process, and this can cause some confusion. In Iowa, the sum total of prospective jurors reporting for service is called the “jury pool,” whereas the jurors drawn from the pool and assigned for service to a courtroom, judge, or trial—from which the trial jury is selected—is called a “jury panel.” *See IOWA CODE* § 607A.3 (2019). In other jurisdictions it is called a “jury venire.”

36. *Taylor*, 419 U.S. at 531 (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946))

If *Taylor* is noteworthy not only for its holding but also its delineation of the purposes served by the fair cross-section requirement, *Duren v. Missouri* is a landmark because it confirms that an accused's right to a representative jury is grounded in the Sixth Amendment's right to an impartial jury, draws together the Court's Sixth Amendment jurisprudence, and articulates a three-pronged test for courts—federal and state—to apply in determining whether the Sixth Amendment has been violated in the process of selecting a jury.<sup>37</sup> In *Duren*, the Supreme Court explained:

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.<sup>38</sup>

If the defendant is successful in making a prima facie showing of infringement of defendant's “constitutional right to a jury drawn from a fair cross section of the community, it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest.”<sup>39</sup>

While straightforward, clearly stated, and well-supported by the Supreme Court's precedents, *Duren*'s three-pronged prima facie case test inescapably was not free of ambiguity and necessarily raised questions. Some, like whether women constituted a “distinctive” group, had been resolved in *Taylor*, and certainly African Americans or another recognizable racial or ethnic group would qualify.<sup>40</sup> A much more difficult question was how underrepresentation was to be calculated and measured, and what was the standard with which to compare the calculation? Three different tests have been developed by courts over the years: the “absolute disparity” test, the “comparative disparity” test, and standard deviation analysis.<sup>41</sup> Which

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(Frankfurter, J., dissenting)).

37. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Under *Taylor* and *Duren*, the fair cross-section principle at the core of the Sixth Amendment applies to all stages of the jury selection process, including the jury pools and jury panels, but not to the final trial jury.

38. *Id.*

39. *Id.* at 368 (citing *Taylor*, 419 U.S. at 533–35).

40. *See id.* at 364; *Taylor*, 419 U.S. at 530.

41. *See United States v. Rogers*, 73 F.3d 774, 776–77 (8th Cir. 1996). This case,



should be used? Are general population figures obtained from the U.S. Census appropriate or must there somehow be a determination and use of only a distinctive group's *jury-eligible* population, which would require exclusion of noncitizens and those under 18 years of age? Is that data available? Even if it is, are jury records maintained and available that record the race, ethnicity, and gender of prospective jurors at each stage of the jury selection process; and when is that information available or discoverable by the defendant?

Even if underrepresentation is found that satisfies *Duren's* second prong, what constitutes systematic exclusion? In some of the cases there was a statutory bar, as in *Strauder*; in other cases it was the discriminatory practice or exercise of discretion by state officials, as in *Smith* and *Thiel*; and in cases like *Taylor* and *Duren*, the bar was not absolute—women in Louisiana could have declared their readiness to serve on a jury, while women in Missouri could have declined to invoke the exemption the state extended to them on account of their sex—but the underrepresentation was significant.<sup>42</sup> Modern cases, moreover, raise a number of practical issues. There may be underrepresentation, but what caused it? Jury summons are returned “undeliverable;” there is a failure to respond to jury summons and jury questionnaires; even where summoned jurors respond online or in writing to the questionnaire, they may fail to appear. What, if any, affirmative obligation does the state judicial branch have to take steps to overcome these practical obstacles to securing jury pools and panels reflecting a fair cross-section of the community as guaranteed by the Constitution?

### C. *The Impartial Trial and Fair Cross-Section Guarantee in Iowa*

Iowa readily acknowledged the Sixth Amendment's command that juries be drawn from “a representative cross section,” and “systematic

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which was heavily relied upon by the Iowa Supreme Court in *State v. Plain*, reviewed the federal court jury selection process in Iowa, and pointed out that in jurisdictions with small minority populations, such as Iowa, the comparative disparity test provides a much more persuasive measurement than the absolute disparity test. See 898 N.W.2d 801 (Iowa 2017). *United States v. Rogers* also held a comparative disparity of 30 percent would be sufficient to meet the underrepresentation prong of the *Duren* test where African Americans comprised only 1.87 percent of Iowa's jury-eligible population. *Rogers*, 73 F.3d at 776–77.

42. See *Duren*, 439 U.S. at 364; *Taylor*, 419 U.S. at 530; *Thiel v. S. Pac. Co.*, 328 U.S. 217, 221–22 (1946); *Smith v. Texas*, 311 U.S. 128, 130–31 (1940); *Strauder v. West Virginia*, 100 U.S. 303, 308–10 (1879).

exclusion of an identifiable segment of society” is prohibited.<sup>43</sup> Indeed, it codified the fair cross-section principle in the very first section of Chapter 607A on “Juries.” But it looked to the U.S. Supreme Court’s opinion in *Castaneda v. Partida*, a case challenging the jury selection process on Fourteenth Amendment equal protection principles, not the Sixth Amendment, to determine whether the representation of a distinctive group in a jury pool or panel was fair and reasonable in relation to the number of such persons in the community, as required by *Duren*’s second prong.<sup>44</sup> In *State v. Watkins*, the Iowa Supreme Court drew from *Castaneda* that in some cases the underrepresentation is “so compelling that statistical proof of the imbalance is in itself enough to establish a prima facie case.”<sup>45</sup> However, how much imbalance was required in order to conclude it was “so compelling” was not made clear.

But two years later, in the case of *State v. Jones*, the Iowa Supreme Court answered that question and dealt a fatal blow to the fair cross-section right that seemed so clearly established.<sup>46</sup> The defendant was an African American who asserted he had been denied his right to an impartial jury drawn from a jury pool and panel representing a fair cross-section of the community served by the trial court.<sup>47</sup> The court analyzed the defendant’s claim under the three-prong *Duren* test and immediately determined Jones, an African American, was a member of a distinctive group.<sup>48</sup> It then turned to the second prong, which requires assessment of the disparity or deviation between the representation of that distinctive group in the community and its representation in the jury pool or panel. Citing *Castaneda*, the court stated, “[O]nly when this deviation becomes substantial is the fair cross-section requirement violated.”<sup>49</sup>

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43. *State v. Lohr*, 266 N.W.2d 1, 4–5 (Iowa 1978); *State v. Knutson*, 220 N.W.2d 575, 577 (Iowa 1974) (noting the right to an impartial jury under article I, section 10 of the Iowa constitution).

44. *Castaneda v. Partida*, 430 U.S. 482 (1977); *State v. Watkins*, 463 N.W.2d 411, 414 (Iowa 1990).

45. *Watkins*, 463 N.W.2d 414. *Castaneda v. Partida* required the disparity to be “substantial,” and the Iowa Supreme Court in *Watkins* cited authority concluding in similar terms that “[a] sufficiently great disparity between the representation of a group in the population and its representation on jury panels is enough to make out a prima facie case.” *Id.* at 415 (citing 2 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 375 (4th ed. 1982)).

46. *State v. Jones*, 490 N.W.2d 787, 792–94 (Iowa 1992).

47. *Id.* at 789–92.

48. *Id.* at 792–93.

49. *Id.* at 793.

Jones urged the court to adopt the comparative disparity test, but the court rejected that approach altogether and held the absolute disparity test was the sole measure of the defendant's proof of underrepresentation.<sup>50</sup> Then, citing *Swain v. Alabama*, the Iowa Supreme Court decided a defendant must show at least a 10 percent absolute disparity in the jury pool.<sup>51</sup> It ruled this comparison must be measured against the African American general population census percentage in Scott County, rejecting defendant's request to aggregate the population percentages of the various minority races.<sup>52</sup> Finding the absolute disparity was only 1.5 percent, the court concluded the defendant failed to make out a prima facie case.<sup>53</sup>

At the time the court decided *Jones*, there was not a single Iowa county in which any of Iowa's minority groups comprised 10 percent of the population. As a consequence, *Jones's* 10 percent threshold created an impossible barrier for Iowa's African Americans and other minorities. Even if a defendant were to prove total exclusion of members of a minority race, the Sixth Amendment claim would fail because the absolute disparity would never exceed 10 percent, and presumably, the percentage of

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50. *Id.* ("Comparative disparity is determined by taking the absolute disparity percentage and dividing that number by the percentage of the group in the total population. . . . Absolute disparity is determined by taking the percentage of the distinct group in the population and subtracting from it the percentage of that group represented in the jury panel."). Jones argued the entire Scott County minority population should be considered as one distinctive group, but the court rejected that argument as well. *Id.*

51. *Id.*

52. *Id.* Defendant's argument seeking to aggregate a "people of color" subgroup has been universally rejected by the case law, and this holding of *Jones* was not specifically addressed in *Plain*. The Authors submit the issue should be reconsidered in the context of jurisdictions where the various racial groups are small in number, like Iowa. While African American or Hispanic defendants would typically prefer a juror of their own race or ethnicity on the jury, it seems likely most would prefer a person of color, even of a different race or ethnicity, on their jury, making it racially mixed in preference to an all-white jury. The Authors suggest that, if the underrepresentation of persons of defendant's race would not satisfy *Duren/Plain's* second prong, but underrepresentation of persons of color would establish a prima facie case under the second prong, the option to aggregate should be available to the defendant. This would seem a fitting exercise of the Iowa Supreme Court's independent authority under article I, section 10, or its supervisory authority over the trial courts under article V, section 4 of the Iowa constitution.

53. *Id.* at 794. African Americans comprised 4.1 percent of the Scott County general population, but only 2.6 percent of its jury panels. "Here, the absolute disparity is the difference between 4.1 percent and 2.6 percent (two out of seventy-five in the jury panel) or 1.5 [percent]." *Id.* at 793.

underrepresentation would also not be found “substantial” or sufficient to warrant finding a violation of the Fourteenth Amendment.<sup>54</sup> The court’s reliance on *Swain* was regrettable. African American percentages of southern states and counties were significantly higher than in Iowa and in double digits. But the court did not acknowledge nor appreciate the different Deep South context of *Swain* or that *Swain*’s challenge to the jury panel was based on the Fourteenth Amendment Equal Protection Clause, which requires proof of purposeful or intentional discrimination.<sup>55</sup> Jones’s fair cross-section claim arose under the Sixth Amendment, which requires only a showing of sufficient racial impact.<sup>56</sup> *Jones* notably failed to discuss either *Taylor* or *Duren*, the two leading Sixth Amendment fair cross-section cases, nor did its opinion explore why the vital purposes the Supreme Court has stated are served by the Sixth Amendment’s impartial jury guarantee might support a different analysis of *Duren*’s second prong, and a different result.<sup>57</sup>

If the impenetrable barrier *Jones* created with its 10 percent absolute disparity test was not obvious to the court, it certainly was to Iowa criminal defense counsel. They recognized fair cross-section constitutional claims were a dead letter, and eventually they stopped raising Sixth Amendment impartial jury claims except occasionally on grounds of noncompliance with Iowa Code 607A.<sup>58</sup>

As a Criminal Justice Working Group Committee appointed by Governor Terry Branstad (hereinafter “the Branstad Committee”) found in 2015, *Jones* impacted not just every jury trial involving defendants who were African American or persons of color, but also the vast majority of criminal cases involving African American and minority defendants that resulted in guilty pleas.<sup>59</sup> *Jones* undeniably increased the bargaining power of prosecutors, and perhaps encouraged overcharging, thereby adversely influencing plea negotiations. Facing the specter of all-white juries and the “apprehended existence of prejudice,” many African American defendants

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54. *See id.*

55. *See id.*

56. *See id.* at 792.

57. *See infra* text accompanying notes 41, 52.

58. *See, e.g.,* *State v. Chidester*, 570 N.W.2d 78 (Iowa 1997); *see* Email from Robert Rigg, Dir., Criminal Def. Clinic, Drake Law School, to Russell Lovell (May 1 & 2, 2020) (on file with Author). Professor Rigg also advised that defense counsel assumed the court system’s compliance with the statutory fair cross-section requirement set forth in Iowa Code § 607A.1 until the *State v. Washington* decision in 2015. *See infra* notes 106, 107.

59. *See infra* text accompanying notes 78–81.

were likely intimidated from exercising their right to a jury trial and pleaded to a lesser charge rather than risk a verdict of “guilty” on a charge carrying a more severe, possibly mandatory, minimum sentence.<sup>60</sup>

*D. Reinvigoration of the Impartial Jury and Fair Cross-Section Guarantee in Iowa: State v. Plain and the Lilly-Veal-Williams Trilogy*

Twenty-five years later, in *State v. Plain*, the Iowa Supreme Court overruled *Jones* in a landmark opinion written by the late Justice Daryl Hecht that was unanimous in analyzing defendant Plain’s claim that he had been denied his right under the Sixth Amendment to a jury drawn from a fair cross-section of the community.<sup>61</sup> The court affirmed the conviction, but conditionally; it remanded the case for a determination of a range of Sixth Amendment issues candidly and thoughtfully explored in the court’s opinion.<sup>62</sup>

*Plain* demanded significant changes in jury selection and management by judges, court administrators, jury managers, prosecutors, and defense lawyers; and it brought to the forefront an array of additional issues relevant to the right to an impartial jury. In an email to colleagues, the state court administrator at the time referred to “the post-*Plain* world,” and conversations about “going forward” in it.<sup>63</sup> There are several points about *Plain* that signify its status as a landmark.

First, the court unequivocally held the defendant’s right to a jury drawn from a fair cross-section of the community derives solely from the Sixth Amendment, not the Fourteenth Amendment’s Equal Protection Clause, so the defendant did not have to show African Americans were purposefully and intentionally excluded from jury pools and panels.<sup>64</sup> The court applied *Duren*’s three-pronged test in light of the purposes the U.S. Supreme Court has articulated as being served by the Sixth Amendment’s fair cross-section principle and concluded its earlier reliance on *Castaneda* and *Swain*, rulings which were both grounded on equal protection principles, was “mistaken.”<sup>65</sup> The State argued that even if there was an underrepresentation of blacks in the Black Hawk County jury pool, “the defendant did not establish evidence

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60. *See Jones*, 490 N.W.2d at 793.

61. *State v. Plain*, 898 N.W.2d 801 (Iowa 2017).

62. *Id.* at 829.

63. E-mail from David Boyd, then-State Court Adm’r, to Kurt Swain, First Assistant State Pub. Def. (July 19, 2017, 3:08 p.m. CST) (on file with Authors).

64. *Plain*, 898 N.W.2d at 823–24 n.9.

65. *Id.* at 821–26.

of discriminatory intent.”<sup>66</sup> Justice Hecht responded, “The State conflates the test for a violation of the Equal Protection Clause (which requires a showing of intent) with the test for a violation of the Sixth Amendment (which does not).”<sup>67</sup> The court held proof of discriminatory intent was irrelevant to Plain’s Sixth Amendment claim:

The Sixth and Fourteenth Amendments both protect the impartiality of a jury. \* \* \* While the Fourteenth Amendment’s Equal Protection Clause bars the intentional exclusion of protected minority groups, the *Sixth Amendment guarantees that minority groups will not be systematically excluded, even where there is no evidence of intentional exclusion.*<sup>68</sup>

Second, the court pointed out that in no county in Iowa did African Americans or any other minority group reach 10 percent, and it overruled *Jones* insofar as *Jones* required exclusive use of the absolute disparity test with a 10 percent threshold.<sup>69</sup> The court recognized that under the *Jones* test, African Americans could be totally excluded from jury pools without violation of the Sixth Amendment.<sup>70</sup> In place of the exclusive reliance upon the absolute disparity test mandated by *Jones*, the court directed lower courts to pursue “a flexible approach” and authorized them to consider “multiple analytical models” in their analysis of *Duren*’s underrepresentation prong.<sup>71</sup> Without a doubt, *Plain* created a clean slate. Many of the courts that erroneously construed discriminatory intent as a prerequisite for a Sixth Amendment fair cross-section claim also set a correspondingly high absolute disparity test threshold, as *Jones* did, and other courts set a 40–50 percent threshold showing on the comparative disparity test.<sup>72</sup> As Professor Nina Chernoff explained, “Because the disparity figure in a fair cross-section case is not being used as evidence of discrimination, it does not need to be substantial enough to indicate discrimination—it simply has to fail to be ‘fairly representative of the local population otherwise eligible for jury service.’”<sup>73</sup>

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66. *Id.* at 823–24 n.9.

67. *Id.* at 824 n.9.

68. *Id.* at 823 n.9 (emphasis added) (citations omitted).

69. *Id.* at 825–26.

70. *Id.*

71. *Id.* at 825–27.

72. *See, e.g., State v. Jones*, 490 N.W.2d 787, 792–94 (Iowa 1992).

73. Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141,

Third, the court recognized *Jones* obliterated the historic purposes of the fair cross-section requirement—fairness of jury decision-making on the ground and in the mind of the public.<sup>74</sup> The court cited scholarly studies showing the impact of exclusion of African Americans from juries.<sup>75</sup> Whereas a jury with one or more black jurors would convict a white and a black defendant at about the same percentage rate, an all-white jury convicted black defendants 81 percent of the time while a racially mixed jury did so only 66 percent of the time.<sup>76</sup> The impact on jury deliberations and outcome, not to mention the appearance of fairness, was obvious.<sup>77</sup> The court also expressly acknowledged the large racial disparities in the incarceration of African Americans in Iowa’s prison system, with African Americans accounting for 3.3 percent of Iowa’s population but more than 25 percent of Iowa’s prison population.<sup>78</sup> The racial disparity has become so large that Iowa has consistently ranked among the two or three states with the greatest racial disparities in its criminal justice system.<sup>79</sup>

Fourth, the second watershed constitutional ruling in *Plain*, one of transparency and access, is a corollary to its Sixth Amendment holding. The court held that “the constitutional fair cross-section purpose alone is sufficient to require access to the information necessary to prove a prima facie case.”<sup>80</sup> The court noted the defendant’s counsel had been unable to obtain from the court system the jury records and information needed to determine whether African Americans were underrepresented on jury pools in Webster County in the six months preceding *Plain*’s trial.<sup>81</sup> It observed that, unlike federal law, the Iowa Code did not provide a statutory right of access to that information.<sup>82</sup> But recognizing that access to the jury data was critical to enforcement of the fair cross-section right, the court held

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159 (2012) [hereinafter Chernoff, Hastings].

74. See *Plain*, 898 N.W.2d at 821–26.

75. *Id.* at 826.

76. *Id.* at 825–26 (citing Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1055 (2012)).

77. See *id.* at 826.

78. *Id.* (citing Kyle Munson, *Black-White Disparities Persist in Iowa*, DES MOINES REGISTER (July 12, 2015), <https://www.desmoinesregister.com/story/news/local/kyle-munson/2015/07/12/black-iowa-statistics-economics-incarceration/30059517/> [https://perma.cc/LJD3-KGX9]).

79. *Id.*

80. *Id.* at 828.

81. *Id.*

82. 28 U.S.C. § 1868 (2018); *Plain*, 898 N.W.2d at 828.

defendants have a constitutional right to the court system's jury data without a prerequisite showing of underrepresentation.<sup>83</sup> Justice Hecht embraced the reasoning of the Missouri Supreme Court which found, "[T]he 'cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right.'"<sup>84</sup>

Fifth, *Plain* recognized the reality of implicit bias, its insidious nature, and its potential adverse impact on the judicial system.<sup>85</sup> The court recommended trial judges not sit back and acquiesce but be affirmative in addressing implicit bias, stating, "We strongly encourage district courts to be proactive about addressing implicit bias; however, we do not mandate a singular method of doing so."<sup>86</sup> The court was not prepared to "mandate" the means for courts to address implicit bias, nor was it prepared to draft, let alone dictate, the language of an instruction.<sup>87</sup> But the recognition of the reality of implicit bias and direction to lower courts to address it reinforced its holding insisting upon a representative jury drawn from a fair cross-section because it underscored the accused's right to an *impartial* jury, one free of both explicit and *implicit* bias.<sup>88</sup> The implicit bias component of the *Plain* decision has a clear interface with the shortcomings in the Iowa judicial system's jury selection process, which had been recognized two years earlier by the Branstad Committee.<sup>89</sup> Soon after the court decided *Plain*, Chief Justice Mark Cady committed the entire judicial branch—judges, court staff, every judicial branch employee—to annual training on implicit bias.<sup>90</sup>

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83. *Plain*, 898 N.W.2d at 828.

84. *Id.* (quoting *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. 1980) (en banc)).

85. *Id.* at 817.

86. *Id.* The district court "declined to give the [defendant's] requested implicit-bias instruction because it knew of no authority approving or requiring the instruction and because the instruction was not included in the Iowa State Bar Association's model instructions." *Id.* The Iowa Supreme Court held the trial court erred in its belief that "it lacked authority," as the proposed instruction was permissible in that it gave a "correct statement of antidiscrimination principles." *Id.* Because the evidence of guilt was strong, the court concluded the error was not prejudicial and therefore did not warrant reversal. *Id.*

87. *See id.*

88. *See id.*

89. *See infra* notes 106–13 and accompanying text.

90. *See* Mark S. Cady, *A Justice System's Response to Implicit Bias*, IOWA DEF. COUNS., <https://www.iowadefensecounsel.org/IDCAPdfs/Presentations/2017/JusticeCady.pdf> [<https://perma.cc/RN5P-VF58>].



Finally, the court's opinion in *Plain* is a landmark for its thoughtful and candid explication of the fair cross-section principles at the core of the Sixth Amendment's impartial jury guarantee, which necessarily resulted in overruling *Jones*. At the same time, it left many questions to be resolved. Some of the questions pertain to *Duren*'s second prong. When should one test rather than another—the “absolute disparity test,” the “comparative disparity test,” standard deviation analysis, or some combination—be applied? And if either of the former, what percentage is sufficient? Court decisions around the country are in grotesque disagreement. When would some combination of these tests be appropriate to apply, and how would that be done? In determining the percentage of the distinctive group, does one use general population figures or jury-eligible data, and if the latter, where is that available? Apart from that, how do you count people, maybe hundreds of people in a chosen period of time, who do not identify their race or ethnicity on the jury questionnaire, leaving jury data incomplete? How do you factor them into the equation, or does one disregard them and only count those who responded?

*Plain* also raised and did not resolve questions pertaining to *Duren*'s third prong. What exactly is necessary or sufficient to show that a distinctive group has been “systematically excluded” from jury lists, pools, or panels in violation of fair cross-section principles?<sup>91</sup> There was suggestion in the *Plain* opinion that sufficient underrepresentation over time, such as a year or even the eight months utilized in *Duren*, would in and of itself establish systematic exclusion.<sup>92</sup> And who has, or should have, the burden of proof, on this last prong of *Duren*, particularly when the underrepresentation has lasted for eight months or a year or more, and the court system's jury data

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91. *Plain*, 898 N.W.2d at 823–24 n.9. (“[Systematic exclusion] ‘distinguishes between situations where a particular jury venire is nonrepresentative and those situations where the jury venires in a district are continuously nonrepresentative of the community.’ To establish systematic exclusion, a defendant must establish the exclusion is ‘inherent in the particular jury-selection process utilized’ but need not show intent. In other words, the defendant must show evidence of a statistical disparity over time that is attributable to the system for compiling jury pools. ‘If there is a pattern of underrepresentation of certain groups on jury venires, it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation.’”) (citations omitted).

92. *Id.* (citing David M. Coriell, Note, *An (Un)Fair Cross Section: How the Application of Duren Undermines the Jury*, 100 CORNELL L. REV. 463, 481 (2015) (“[T]he third prong of the *Duren* test ensures that a particular nonrepresentative jury venire is not a statistical anomaly, but rather that there is a repeated pattern of exclusion of certain groups within a jurisdiction.” Systematic exclusion must be proved by the defendant, but “systematic exclusion” does not mean “intentional discrimination.”)).

recordkeeping is spotty and incomplete? A different question pertinent to this third prong has been raised because some segments of the population—notably segments with lower incomes, including people of color—do not own their homes, and census reports confirm these populations move more frequently than others, causing their addresses to be outdated and the summons not delivered. Moreover, a number of people—not an insignificant amount—do not respond to jury questionnaires or fail to appear even if they do respond. There may well be sufficient underrepresentation as a result, but is their absence from the jury pool or jury panel attributable to the State? If there are known jury management and selection practices that state courts, court administrators, and jury managers might take that would mitigate failures to respond and failures to appear or underrepresentation that will otherwise occur, is the failure to follow jury management practices that would address those problems neglect on the part of the court system? More particularly, does that neglect constitute systematic exclusion, satisfying *Duren's* third prong?<sup>93</sup>

Finally, Justice Hecht in the *Plain* opinion noted that like the Sixth Amendment, article I, section 10 of the Iowa constitution guarantees a criminally accused an impartial trial, but he said the court had no occasion to consider whether the protection afforded by the Iowa constitution was identical to that provided under the Sixth Amendment.<sup>94</sup> As is well known, in notable cases, the Iowa Supreme Court has interpreted language in the Iowa constitution identical to that in the U.S. Constitution more broadly than the U.S. Supreme Court.<sup>95</sup> Might it do so again in regard to the fair cross-section principles that inform the right to an impartial jury?

Not quite two years after the court's opinion in *Plain*, the Iowa Supreme Court handed down opinions in a trilogy of cases that addressed a number of these issues, especially the test to be applied to determine underrepresentation of a distinctive group under *Duren's* second prong and the evidence needed to establish systematic exclusion under *Duren's* third

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93. The most forceful advocate and clearest voice for this view is Paula Hannaford-Agor, Director of the Center for Juries Studies at the National Center for State Courts, and author of an article we regard as pathbreaking. See Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761 (2011).

94. *Plain*, 898 N.W.2d at 821 n.6.

95. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Clark v. Bd. of Sch. Dirs.*, 24 Iowa 266 (1868).

prong: *State v. Lilly*, *State v. Veal*, and *State v. Williams*.<sup>96</sup> Unlike *Plain*, which was unanimous on the Sixth Amendment issue in the case, *Lilly*, *Veal*, and *Williams* were decided by a divided court. In the years following the *Plain* decision, Justice Bruce Zager resigned, and truly sadly, Justice Hecht became ill, resigned, and passed away, and two new justices joined the court. Each of the three opinions were decided by a 4–3 split in the court with Justice Edward Mansfield writing the majority opinion for himself, Chief Justice Cady, Justice Brent Appel, and Justice David Wiggins; in dissent, Justice Christopher McDonald was joined by now Chief Justice Susan Christensen and Justice Thomas Waterman. In terms of resolving issues and charting the path ahead, *Lilly* is the most significant in its disposition of the fair cross-section issues that were presented. In part, that is true because it was the only one of the three to address the fair cross-section issues both under the U.S. Constitution’s Sixth Amendment and under article 1, section 10 of the Iowa constitution.<sup>97</sup>

In a closely divided case, *Lilly* affirms the analytical framework of *Duren* and *Plain*, and together with other initiatives by the court, heralds a bright future for defendants’ rights in Iowa to an impartial jury drawn from a fair cross-section of the community. Concomitantly, it also argues well for the right of racial and ethnic minority group members to participate in the jury-selection process, a right specifically recognized in Iowa Code 607A.<sup>98</sup> Briefly, *Lilly* rejects both the absolute disparity and comparative disparity tests and chooses, instead, to rely exclusively upon standard deviation analysis to assess underrepresentation of a distinctive group; it interprets fair cross-section principles under the Iowa constitution more broadly than the U.S. Supreme Court has interpreted those principles under the Sixth Amendment. In addressing the issue of systematic exclusion, it required the defendant prove “some aspect of the system” produced the underrepresentation. But unlike much federal law interpreting the Sixth Amendment,<sup>99</sup> the *Lilly* majority held that in a challenge based on the Iowa constitution, a defendant could satisfy *Duren*’s third prong by showing that

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96. *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019); *State v. Veal*, 930 N.W.2d 319 (Iowa 2019); *State v. Williams*, 929 N.W.2d 621 (Iowa 2019).

97. *Lilly*, 930 N.W.2d at 298; *Veal*, 930 N.W.2d at 328 n.5.

98. IOWA CODE § 607A.1 (2019).

99. See *Berghuis v. Smith*, 559 U.S. 314, 332 (2010). The Authors regard the statements in *Berghuis* as necessitated by federal law confining habeas corpus relief and primarily reflecting federalism concerns. See *infra*, notes 290–91. However, other cases have followed *Berghuis*’ seeming dismissal of this ground for establishing systematic exclusion.

a state's jury management practices caused systematic underrepresentation. The court disagreed with the U.S. Supreme Court and "adopt[ed] instead the approach of Paula Hannaford-Agor," the long-time Director of Jury Studies for the National Center on State Courts, which it quoted at length.<sup>100</sup> In this Article, we will focus on the opinion in *Lilly* with special examination of its application to the facts in *Veal*, and we will further examine the dissenting opinions of Justice McDonald in the *Lilly* and *Veal* cases.

Before doing so, however, we turn to developments within the last six years, including important steps taken both by the Governor of Iowa and initiatives taken by the Iowa Supreme Court apart from opinions in specific cases that provide a valuable context in which to examine the *Lilly-Veal-Williams* trilogy (*Lilly* trilogy) and dissenting opinions. The background is important to recognize because the Iowa constitution vests in the Iowa Supreme Court the power to "exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state."<sup>101</sup> That assignment of "supervisory and administrative control" requires it to administer the judicial branch and enables it to fashion rules, such as the rules of civil and criminal procedure, and require practices calculated to secure and protect constitutional rights, including the right to an impartial jury drawn from a fair cross-section of the community served by the trial court.<sup>102</sup> This is akin to a supervisory power the U.S. Supreme Court has long claimed for itself under *McNabb v. United States* in matters affecting the administration of justice in the federal system.<sup>103</sup> Indeed, two of the U.S. Supreme Court's celebrated cases delineating and applying fair cross-section principles necessary to ensure an impartial jury relied upon *McNabb* for authority.<sup>104</sup> In exercising its supervisory power over the judicial branch, moreover, the Iowa Supreme Court can and should work with other branches, the Iowa bar, and its own personnel to respond to problems and challenges in the administration of justice.

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100. *Lilly*, 930 N.W.2d at 307; see Hannaford-Agor, *supra* note 93.

101. IOWA CONST. art. V, § 4.

102. *See id.*

103. *McNabb v. United States*, 318 U.S. 332, 340–41 (1943); *see also* *Glasser v. United States*, 315 U.S. 60 (1942).

104. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 225 (1946); *Ballard v. United States*, 329 U.S. 187, 192–93 (1946).

## II. IT TAKES A VILLAGE: COLLECTIVE ENGAGEMENT, DIALOGUE, COLLABORATION, AND PROGRESS

After receiving expressions of concern and complaints from its branches across the state, the Iowa-Nebraska NAACP became concerned about the prevalence of all-white juries, even in Iowa's most diverse cities. Research initially identified peremptory challenges or discretionary strikes of African Americans, especially by prosecutors, as a likely cause. A 350-page, 13-author symposium published in the *Iowa Law Review* in July 2012 suggested there was a national consensus that the procedural protections against racially discriminatory peremptory challenges, as fashioned by the U.S. Supreme Court in *Batson v. Kentucky*, had proved ineffective.<sup>105</sup> Both having first agreed, the Iowa NAACP leadership began to meet regularly, in separate meetings, with the governor and the chief justice; and in 2014, the NAACP brought its concerns about the lack of jury diversity to the attention of each of them. The chief justice included an hour-long presentation by NAACP legal counsel and its state president on the need for reform of the *Batson* protections at the annual Judges Conference in November 2014.

As the NAACP research progressed, concerns emerged that the problem was much broader than peremptory challenges—the jury pools and jury panels at the front end of the jury selection process simply had too few, if any, African Americans and other people of color. This latter concern was confirmed when a successful fair cross-section claim was upheld by District Court Judge Colleen Weiland in May 2015 in a murder trial in Webster County.<sup>106</sup> A fair takeaway from the testimony of the District Court Clerk in Webster County and staff of the Office of State Court Administration was that there was a lack of coordination between those entities. The absence of *any* African American in a jury pool of 117 was noted, but court personnel and prosecutors did not see any problem—that is, any discrimination or

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105. James J. Tomkovicz, *Twenty-Five Years of Batson: Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 IOWA L. REV. 1393, 1416–23 (2012).

106. The case was *State v. Washington*. 888 N.W.2d 902 (Iowa Ct. App. 2016). In 2015, Public Defender Chuck Kenville had the courage to raise a fair cross-section claim in the case when it became apparent there were no African Americans on the jury pool of 117 assigned to hear the case. Kenville proceeded to develop an extensive record at the hearing, establishing that neither State Court Administration in Des Moines nor the jury manager in Fort Dodge were monitoring the racial composition of juries in any meaningful way—and each thought it was the other's responsibility to create a master juror list that was representative of the community. The record suggested the problem was not limited to Webster County, but was very likely statewide.

exclusion—because the names of persons in the jury pool were generated by computer without regard to the race of jurors. In her order, Judge Weiland candidly recognized the 10 percent absolute disparity *Jones* test could never be met in Iowa, and she instead based her ruling on “material noncompliance” with Iowa Code 607A’s fair cross-section requirements.<sup>107</sup>

The NAACP communicated to both Governor Branstad and Chief Justice Cady the systemic jury selection problems that occurred in *State v. Washington*, and if it were happening elsewhere in Iowa as the NAACP had reason to believe, the likely impact on jury outcomes, plea bargains influenced by the apprehension of prejudice, and the appearance of fairness in the criminal justice system. In late August 2015, at the urging of the NAACP, Governor Branstad appointed a Criminal Justice Working Group Committee (the Branstad Committee) that was tasked to research four priority criminal justice issues and report its recommendations within sixty days.<sup>108</sup> One of the priority issues was the representation of African Americans and other racial minorities on Iowa’s juries. The Branstad Committee held hearings, conducted research, and issued its unanimous report on November 6, 2015. The Branstad Committee’s findings and recommendations called for the following systemic reforms of the jury selection process:

Increasing the Diversity of Jury Pools:<sup>109</sup>

*The Judicial Branch should consider adopting new jury management software which will be more likely to generate jury pools which reflect a fair cross-section of the community.*

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107. Order Granting Motion to Strike Jury Panel, *State v. Washington*, FECR009623 (Dist. Ct. Worth County, May 14, 2015). “Primarily, the system of jury impaneling has drifted from the provisions of Chapter 607A because reliance on centralized electronic control of source lists and production of master lists has led to a corresponding deterioration of local and particularized oversight over time.” A new panel was drawn, and it included one African American juror.

108. See *Governor’s Working Group on Criminal Justice Policy Reform Submits Final Strategy Recommendations*, OFFICE OF THE CIO (Nov. 6, 2015), <https://comment.iowa.gov/Notice/Details/JusticePolicyReform> [<https://perma.cc/ZCV2-UGW6>] (listing the following members: “State Court Administration: David Boyd; Iowa Attorney General’s Office: Kevin McCarthy; State Public Defender: Adam Gregg; Iowa Department of Public Safety: Dr. Roxann Ryan; National Association for the Advancement of Colored People: Betty Andrews; Department of Corrections: Jerry Bartruff; Iowa Board of Parole: John Hodges; Iowa County Attorney’s Association: Alan Ostergren.”).

109. *Id.*

- A unanimous Supreme Court stated in *Smith v. Texas*, 311 U.S. 128, 130 (1940), that “[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.” To exclude racial groups from jury service was said to be “at war with our basic concepts of a democratic society and a representative government.” This harm impacts minority defendants not only in cases that go to trial, but also in cases in which minority defendants enter guilty pleas out of fear they will be treated harshly by an all-white jury. Additionally, the scope of the Iowa statutory policy extends beyond accused individuals, as the Iowa Code 607A.1 declares that “a person shall have both the opportunity in accordance with the provisions of law to be considered for jury service in this state and the obligation to serve as a juror when selected.”
- Current Iowa Code 607A.1 embraces this fair cross section requirement: “It is the policy of this state that all persons be selected at random from a fair cross section of the population of the area served by the court . . . .”
- Current Iowa Code 607A.22 seeks to fulfill the fair cross section requirement by mandating that both drivers’ license and voter registration lists are used to compile the master jury list pool and by authorizing the use of “any other current comprehensive list of persons residing in the county, including but not limited to the lists of public utility customers. . . .” No change of Iowa law would be necessary should the Judicial Branch determine that expanding the existing master jury pool with addition of names from other source lists will achieve the ultimate goal of increasing diversity in jury pools.
- The Judicial Branch’s current software is out-of-date and limited at meeting the legal requirements for the creation of jury pools. In the past year, anecdotal information has brought light to the software program’s limitations as it currently can accept only lists provided by the Department of Transportation—both driver’s licenses and state issued identification cards—and the list of eligible voters provided by the Secretary of State, and does not have the capability to accept additional source lists.
- The Judicial Branch should consider replacing the current jury management software with a program that has the capability to accept and merge multiple source lists. In addition, such software

should have the capabilities to utilize a variety of appropriate statistical methods to measure any potential underrepresentation in jury pools.

*The Judicial Branch should study the use of additional source lists to create jury pools in order to ensure greater diversity.*

- Additional source lists, such as utility customers, unemployment compensation and public welfare benefit recipients, should be researched by the Judicial Branch in an effort to find the best possible means to meet the goal of greater diversity.
- The Judicial Branch should be cognizant of the possibility that additional source lists could create duplication of names and, through investment in contemporary software and other means, should take steps to prevent such unintended consequences.

*The Judicial Branch should begin collecting and maintaining statistics regarding the racial composition of jury pools.*

- There currently is not a reliable mechanism to measure the racial composition of jury pools. Efforts should be made to collect this information, including requiring responses to racial demographic questions on the juror questionnaire.

*Jury pool lists should be updated at least annually.*

- Iowa Code Section 607A.20 currently requires the master jury pool list be updated every two years. The Code should be updated to reflect the current practice of updating the list annually.

*The Judicial Branch should study ways to improve response rates to jury summonses and evaluate juror terms of service.*

- Once a jury summons has been delivered to a prospective juror, it is that individual's responsibility to appear for jury service. A notable number of individuals summoned fail to respond or fail to appear.
- In an effort to increase responsiveness, the Judicial Branch should consider and evaluate:
  - The issuance of a second summons.
  - Flexibility in length and terms of juror service such as limitations on the number of days or the number of trials. For example, some counties utilize a "one-week-one-trial," method.



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- An increase in juror compensation.
- Public education and awareness campaigns targeting citizens and employers.

*Oversight and accountability should be restored to the jury selection process.*

- Iowa Code Chapter 607A requires local oversight of jury lists, including the appointment of jury managers.
- Though perhaps Chapter 607A has not been strictly interpreted in order to allow for technological advances since its adoption, Chapter 607A should be updated to allow for the use of current technology and to clarify the responsibilities of the State Judicial Branch and each Judicial District as to oversight and accountability for the jury selection process. The responsibility of each to take affirmative steps to ensure jury pools that truly reflect a fair cross section of the community will require ongoing monitoring and coordination at both the State and District Court levels.<sup>110</sup>

The Branstad Committee found there was uncertainty among jury managers, district judges, and the Office of the State Court Administrator (OSCA) about responsibilities for implementation of fair cross-section principles within the court system. The Branstad Committee chose its words carefully, never using either the word “inattention” or “indifference,” but it expressly recognized the necessity that the judicial branch reform the jury selection system to fulfill its constitutional and statutory fair cross-section mandate.<sup>111</sup> This would, in part, require new legislation to clarify the relationship between the OSCA and local district court administration and the responsibilities of each, as well as strong leadership throughout the judicial branch to lead implementation.<sup>112</sup> The Committee stated expressly it would require a proactive role for the courts, jury managers, and OSCA to change the culture, improve recordkeeping, and commence monitoring the courts’ compliance with the fair cross-section requirements.<sup>113</sup>

Chronologically, the next major step was the misdemeanor trial of Kelvin Plain in Waterloo in October 2015.<sup>114</sup> State public defender Nichole Watt filed a motion asserting that Plain’s Sixth Amendment right to a jury

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110. *Id.*

111. *See id.*

112. *See id.*

113. *Id.*

114. *See State v. Plain*, 898 N.W.2d 801, 809 (Iowa 2017).

drawn from a fair cross-section of the community was violated as his jury pool had only 1 African American among 56 prospective jurors, or 1.8 percent of the pool compared to approximately 9 percent of the general population.<sup>115</sup> The district court summarily rejected Plain's claim, and an all-white jury convicted him.<sup>116</sup> His case was appealed, and the Iowa Supreme Court accepted the case for direct review, something uncommon for a case involving a misdemeanor conviction.<sup>117</sup>

In response to the Branstad Committee's report, and to the Author's knowledge unrelated to Plain's appeal, the judicial branch proposed amendments to the chapter in the Iowa Code dealing with juries, Chapter 607A.<sup>118</sup> The Iowa legislature enacted the judicial branch's amendments to Chapter 607A in two consecutive sessions, in the spring of 2017 and 2018. Several obsolete sections were repealed, such as "jury commissions" authorized by 607A.19.<sup>119</sup> Section 607A was amended (1) to require the chief judge of each judicial district to appoint a jury manager; (2) to require the jury manager to "assist the state court administrator in implementing this chapter;" (3) to require updating of the master jury list "at least once a year;" (4) to clarify the relationship of the jury managers and the state court administrator; and (5) to address the jury manager's recordkeeping responsibility: "A jury manager shall retain proper records to document, as directed by the chief judge or state court administrator, that the procedures used to randomly identify prospective jurors meet the requirements of this chapter."<sup>120</sup>

On June 30, 2017, the Iowa Supreme Court issued its landmark decision in *Plain*.<sup>121</sup> In an opinion by Justice Hecht, the court unanimously overruled *Jones* and reinvigorated the impartial jury guarantee of the Sixth

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115. *Id.* at 810.

116. *Id.*

117. *Id.*

118. See IOWA CODE § 607A (2019) ("It is the policy of this state that all persons be selected at random from a fair cross section of the population of the area served by the court, and that a person shall have both the opportunity in accordance with the provisions of law to be considered for jury service in this state and the obligation to serve as a juror when selected."); *Governor's Working Group on Criminal Justice Policy Reform Submits Final Strategy Recommendations*, *supra* note 108.

119. See IOWA CODE § 607A (2019).

120. *Id.* § 607A.20–21.

121. *Plain*, 898 N.W.2d at 801.

Amendment in Iowa and the fair cross-section principles that lie at the core of the Amendment.<sup>122</sup>

Chief Justice Cady was one who well understood the court's appellate adjudicatory authority enabled it to paint with a broad brush, and it is also apparent he understood the court had supervisory power over the district courts and the entire judicial branch to improve jury management. But the sparse record made in *Plain* likely reminded him of the vagaries of the appellate process and the difficulties of achieving systemic reform solely through appellate adjudication.<sup>123</sup> Other steps, taken by the court in exercise of its supervisory role, were necessary. The issue in *Plain* concerning the propriety of a requested jury instruction on implicit bias and whether it was error not to give it provides an example.<sup>124</sup> In a brief special concurrence, the chief justice stated succinctly, "It is as important to address implicit bias in jury deliberations as it is to address racial diversity in jury selection. . . . Today's decision identifies several ways for our justice system to improve. We should never stop looking for others."<sup>125</sup>

Barely three months later, on October 5, 2017, the Iowa Supreme Court, under Chief Justice Cady's leadership, announced the formation of, and appointments to, a Supreme Court Advisory Committee on Jury Selection, chaired by Justice Wiggins.<sup>126</sup> The Chief's order stated: "The purpose of the committee is to make sure the makeup of jury pools *and jurors* represent a fair cross-section of the community."<sup>127</sup> The Chief recognized early on that while the constitutional command did not require trial juries to mirror the community, the public would measure the representativeness of Iowa's juries by whether the trial juries were representative.<sup>128</sup> It would not be enough to point to more diverse jury pools at the front end if the 12-person juries that decided the cases still did not reflect the community. And—not long after—the Chief committed the entire

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122. *Id.* at 825.

123. *See id.* at 809–10.

124. *See id.* at 816–17.

125. *Id.* at 829 (Cady, C.J., concurring).

126. *See* Order in the Matter of the Establishment of the Supreme Court Advisory Committee on Jury Selection and Appointment of Members to the Committee, <https://www.iowacourts.gov/collections/41/files/38/embedDocument/> [<https://perma.cc/LA44-ZT7L>].

127. *Id.* (emphasis added).

128. *See Plain*, 898 N.W.2d at 821.

judicial branch to implicit bias training.<sup>129</sup> Appointment of the Advisory Committee on Jury Selection and the order requiring all judicial branch employees to participate in implicit bias training further demonstrate the capacity of the Iowa Supreme Court to listen, engage in dialogue, deliberate, and take important steps to ensure an accused's or any party's constitutional rights are observed and that the justice system is fair and unbiased both in appearance and fact, and to improve the administration of the criminal justice system.<sup>130</sup>

In January 2018, Chief Justice Cady made the Sesquicentennial Celebration of the court's landmark 1868 civil rights decision in *Clark v. Board of Directors*, a central focus of his State of the Judiciary Address.<sup>131</sup> The Chief called the *Clark* decision "a defining moment" for the court, and he spoke of the court's renewed commitment to achieving juries that reflect a fair cross-section of their community, along with its new requirement of implicit bias training for all judges and court personnel.<sup>132</sup>

In March 2018, the Jury Selection Committee issued its Report of Recommendations.<sup>133</sup> The report was comprehensive and proposed both structural and procedural reforms. Recommendations IV, V, and IX addressed the need to clarify the roles and relationships of the jury manager and the state court administrator and to adopt and implement good jury management practices, and Recommendation XII directed the court to develop enforcement policies that will increase appearance rates of those who fail to appear.<sup>134</sup> Recommendation III called for securing additional source lists to enhance the jury pools. Recommendations VI—asking the court to review Rule 2.18(5)(a) providing for felon disqualification—and

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129. Sarah Boden, *Iowa's Chief Justice Wants to End Racial Disparity*, IOWA PUB. RADIO (Jan. 14, 2015), <https://www.iowapublicradio.org/post/iowas-chief-justice-wants-end-racial-disparity#stream/0> [<https://perma.cc/M8LN-5GJT>].

130. See Order in the Matter of the Establishment of the Supreme Court Advisory Committee on Jury Selection and Appointment of Members to the Committee, *supra* note 126.

131. Mark S. Cady, *2018 State of the Judiciary*, IOWA CTS., 10 (Jan. 10, 2018), [https://www.iowacourts.gov/media/cms/Final\\_2018\\_speech\\_with\\_cover\\_B650B18F74A4B.pdf](https://www.iowacourts.gov/media/cms/Final_2018_speech_with_cover_B650B18F74A4B.pdf) [<https://perma.cc/L5YR-RB8D>]; see also Mark S. Cady, *Reflection on Clark v. Board of School Directors, 150 Years Later*, 67 DRAKE L. REV. 233 (2019).

132. *Id.* at 6–10.

133. *Recommendations of the Committee on Jury Selection*, IOWA CTS. (March 2018), <https://www.iowacourts.gov/collections/41/files/499/embedDocument/> [<https://perma.cc/YT7F-3JYH>].

134. *Id.*

Recommendation VII—recommending reduction in the number of peremptory strikes—addressed two factors in the selection process that historically have significantly reduced the diversity of the jury pool.<sup>135</sup> Recommendation VIII called on the court to develop methods to “Reduce Implicit Bias in Jury Selection and Throughout the Course of the Trial.”<sup>136</sup> Recommendation X encouraged more latitude for trial judges in rural counties to move trials involving defendants of color to counties that can better ensure a diverse jury, and Recommendation XI directed the court to “ensure that as much comprehensive data as possible—from pools to panels to tracking strikes in voir dire—is maintained and available to the public.”<sup>137</sup>

Some reports, we know, sit on a desk or shelf, and little is done afterward. That was not the case with the Jury Selection Committee’s report. Through a letter from the chief justice, dated August 10, 2018, to Committee Chair Justice Wiggins, the court referred Recommendations VI, VII, and IX of the Jury Selection Committee Recommendations to the court’s Criminal Rules Review Committee (CRRC), chaired by Justice Mansfield, and tasked the OSCA to take the lead on implementation of the other Recommendations.<sup>138</sup> OSCA had already begun drafting a new Jury Management Policy for Iowa, and the new policy was published and became effective January 1, 2019.<sup>139</sup> Further, in January 2019, NAACP lawyers made a 90-minute presentation to the CRRC on Recommendations VI, VII, and IX, recommendations concerning the felon-exclusion, peremptory challenges, and motion to transfer issues.<sup>140</sup>

In January 2020, the judicial branch reintroduced a bill that would provide statutory authorization to the Department of Revenue to release the names and addresses (but no tax or financial information) of Iowa taxpayers on record with the Department to the OSCA to both enlarge its jury pools and ensure the accuracy of addresses for almost all in its jury pools.<sup>141</sup> The addresses from drivers’ license and voter registration lists become quickly outdated, contributing to high undeliverable and “failure to respond” rates.

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135. *Id.*

136. *Id.*

137. *Id.*

138. *See id.*

139. Iowa Judicial Branch, Jury Management Policy 1–7 (July 31, 2019) (on file with the Drake Law Review).

140. *See id.*

141. H.F. 662, 88th Gen. Assemb., Reg. Sess. (Iowa 2020); S.F. 375, 88th Gen. Assemb., Reg. Sess. (Iowa 2020).

The bill was an outgrowth of the deliberations of the Jury Selection Committee, and it was drafted for the judicial branch with the participation of the OSCA, the Department of Revenue, the Attorney General's Office, and the NAACP.<sup>142</sup> The bill stalled in 2019 but was reintroduced in 2020 and passed the house of representatives unanimously in March 2020; it was awaiting senate action when, on account of the COVID-19 pandemic, the general assembly suspended all actions and did not, upon reconvening, take up the bill before adjourning.<sup>143</sup>

On March 30, 2020, the Criminal Rules Review Committee issued its report, setting forth numerous proposed amendments to the Iowa Rules of Criminal Procedure.<sup>144</sup> Several amendments have direct relevance to the jury selection process. There is an important proposed amendment to Rule 2.18(5)(a) that would modify the lifetime exclusion of persons previously convicted of a felony from jury service.<sup>145</sup> Proposed Rule 2.18(5)(o) would allow a challenge for cause "where the circumstances indicate the juror would have an actual bias for or against a party." Proposed Rule 2.18(6) provides for an individualized voir dire of a potential juror in a location other than the courtroom when "a potential juror expresses actual bias relevant to the case, including but not limited to bias based on . . . race, creed, color."<sup>146</sup> It also makes clear that judges shall not engage in easy rehabilitation when a juror has expressed bias, stating: "[T]he court may clarify the juror's position but shall not attempt to rehabilitate the juror by its own questioning."<sup>147</sup> These proposed 2.18(6) changes would strengthen the voir dire protections against juror bias that were the focus of *State v. Jonas* and *State v. Williams*.<sup>148</sup>

There is a proposed amendment to Rule 2.11(10) that would give trial judges more latitude to change the venue when a defendant of color is

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142. H.F. 662; S.F. 375.

143. H.F. 662; S.F. 375. The Iowa House of Representatives passed H.F. 662 by a vote of 100–0 on March 10, 2020. There is no known opposition to the bill, and it will be reintroduced in January 2021.

144. *Request for Public Comment on Proposed Amendments to Chapter 2, IOWA RULES OF CRIMINAL PROCEDURE* (March 30, 2020), <https://www.iowacourts.gov/collections/483/files/1062/embedDocument/> [<https://perma.cc/VC7U-F77M>].

145. Persons whose rights have been restored would qualify for jury service.

146. *Request for Public Comment on Proposed Amendments to Chapter 2, supra* note 144.

147. *Id.*

148. See *State v. Williams*, 929 N.W.2d 621 (Iowa 2019); *State v. Jonas*, 904 N.W.2d 566 (Iowa 2017).

charged with a crime in a county in which very few residents are persons of color.<sup>149</sup> There is no proposed change to Rule 2.18(10) governing peremptory challenges/strikes, despite the Supreme Court Committee on Jury Selection's recommendation that the number of peremptory challenges/strikes be reduced.<sup>150</sup> However, a helpful procedural change is proposed to Rule 2.19(3): "[R]eporting may not be waived except voir dire in misdemeanor cases."<sup>151</sup> This will ensure appellate courts have a full transcript of the voir dire, which is critical to proving race bias on the part of the prosecutor or defense counsel when a peremptory challenge excluding a person of color from the jury is alleged to be discriminatory.<sup>152</sup>

The proposed amendments maintained the momentum of the continued comprehensive jury trial reform effort whose catalyst was *Plain*, and no doubt in some measure, the efforts and actions outlined in Part II.<sup>153</sup> Public comments have been invited and received, and the Iowa Supreme Court will publish the rules as amended at a subsequent date.<sup>154</sup> Necessarily they remain subject to change, but the proposed amendments, if adopted, will further advance the fair cross-section principles reinvigorated by *Plain* and the *Lilly* trilogy.<sup>155</sup>

### III. *LILLY*: INDEPENDENT CONSTITUTIONAL AUTHORITY IS BASIS FOR NEW PRONG TWO AND PRONG THREE TESTS

Two years after *Plain*, the Iowa Supreme Court decided a trilogy of cases, each involving an African American defendant who raised constitutional questions about whether the racial composition of the jury pool or jury panel from which his trial jury was selected reflected a fair cross-section of the community, as well as a number of other jury trial issues that implicate racial justice fairness concerns.<sup>156</sup> Because of the similarity of the

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149. See *Request for Public Comment on Proposed Amendments to Chapter 2*, *supra* note 144.

150. *Id.*

151. See *id.* The Authors' publicly filed comments objected to this exception.

152. Compare *id.* with IOWA R. CRIM. P. 2.18(10).

153. See *State v. Plain*, 898 N.W.2d 801 (Iowa 2017); *supra* Part II.

154. See *Request for Public Comment on Proposed Amendments to Chapter 2*, *supra* note 144. Public comments include ones submitted by the Authors.

155. See *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019); *Plain*, 898 N.W.2d at 801.

156. Professor Nina Chernoff, one of two commentators heavily relied upon by the court, has succinctly described the scope of the fair cross-section right:

issues presented, the court treated the cases, *Lilly*, *Veal*, and *Williams*, as companion cases.<sup>157</sup> None of the trial jurors who decided the three cases were African American; each of the trial juries were all-white.<sup>158</sup> Each defendant was convicted of a serious felony offense: first-degree robbery (*Lilly*), first-degree murder (*Veal*), and second-degree murder (*Williams*).<sup>159</sup> The fair cross-section rulings of the *Lilly* trilogy are properly seen as a sequel to *Plain*; but they did entail a review of *Plain* insofar as there were challenges to it, and going beyond it, they represent powerful second-generation rulings in their own right.<sup>160</sup>

#### A. Affirming and Advancing Plain

Unlike the fair cross-section rulings in the unanimous *Plain* decision, the fair cross-section components of each of the *Lilly* trilogy cases were decided on a 4–3 vote, in opinions written by Justice Mansfield and joined by Chief Justice Cady and Justices Wiggins and Appel.<sup>161</sup> In each, the court followed the same dispositional format as in *Plain*, conditionally affirming the convictions but remanding each case “for further consideration of [Defendant’s] claim that his jury was not drawn from a fair cross section of the community in violation of the Sixth Amendment.”<sup>162</sup> In *Lilly* the remand

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The fair cross-section right applies to the first three stages of the four-step jury selection process: (1) assembling a pool of potential jurors from source lists, such as the list of registered voters; (2) assembling a pool of qualified jurors (by identifying members of the pool of potential jurors who are eligible for jury service); and (3) assembling the jury venires (made up of members of the pool of qualified jurors who are summoned and arrive at the courthouse) from which twelve-person panels are selected. But it does not apply to the final steps in the process, that is, the creation of twelve-person panels through the voir dire process. In sum, the Sixth Amendment guarantees a defendant the next best thing to a petit jury that represents a cross-section: a “fair possibility for obtaining a representative cross-section of the community.”

Chernoff, Hastings, *supra* note 73, at 157 (footnotes omitted).

157. *Lilly*, 930 N.W.2d at 293; *State v. Veal*, 930 N.W.2d 319 (Iowa 2019); *State v. Williams*, 929 N.W.2d 621 (Iowa 2019).

158. *Lilly*, 930 N.W.2d at 296; *Veal*, 930 N.W.2d at 324; *Williams*, 929 N.W.2d at 623.

159. *Lilly*, 930 N.W.2d at 296; *Veal*, 930 N.W.2d at 323; *Williams*, 929 N.W.2d at 622.

160. *See Lilly*, 930 N.W.2d at 301; *Veal*, 930 N.W.2d at 330; *Williams*, 929 N.W.2d at 633.

161. *See Lilly*, 930 N.W.2d at 296; *Veal*, 930 N.W.2d at 324; *Williams*, 929 N.W.2d at 623.

162. *Williams*, 929 N.W.2d at 638.



also included review of the additional fair cross-section protections afforded defendants by article I, section 10 of the Iowa constitution.<sup>163</sup>

The court's most comprehensive articulation of the developing fair cross-section law was crafted in *Lilly*, as there the challenge was raised under the impartial jury protection of not only the Sixth Amendment to the U.S. Constitution but also article I, section 10 of the Iowa constitution.<sup>164</sup> Invoking its independent decisional authority under the Iowa constitution, the court went on to craft fair cross-section rulings to provide guidance as to proving underrepresentation on the *Duren/Plain* second prong and systematic exclusion on the *Duren-Plain* third prong.<sup>165</sup> The court found persuasive the arguments of the defendant and amicus NAACP that the impartial jury provision of the Iowa constitution provides greater protection in these respects than its counterpart in the U.S. Constitution.<sup>166</sup>

The court's most comprehensive analysis applying the *Lilly* holdings to the jury data and the statistical facts that are the essence of a fair cross-section claim was in *Veal*.<sup>167</sup> This is because *Veal* had the most complete factual record of the three cases, and the record allowed the court to apply the new *Lilly* principles by application to the relevant fair cross-section statistical facts.<sup>168</sup> *Veal* put flesh on the *Lilly* fair cross-section bone.<sup>169</sup> *Veal* also upheld the district court's rejection of a *Batson* challenge, but there were three justices who voiced their view that *Batson* procedures are ineffective and worthy of consideration for reform under the court's supervisory authority over the trial courts.<sup>170</sup>

From the standpoint of precedent as a fair cross-section case, *Williams* rode on the coattails of *Lilly* and *Veal*.<sup>171</sup> It had only one ruling on the subject of determining whether the defendant had been denied the right to an impartial jury drawn from a fair cross-section of the community, but it is an

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163. *Lilly*, 930 N.W.2d at 296.

164. The court concluded defense counsel for *Veal* and *Williams* raised their fair cross-section challenges only under the Sixth Amendment, and both defendants waived any article I, section 10 challenge. See *Veal*, 930 N.W.2d at 328; *Williams*, 929 N.W.2d at 630.

165. *Lilly*, 930 N.W.2d at 301–05.

166. *Id.* at 304.

167. See *Veal*, 930 N.W.2d at 328–30.

168. See *id.*

169. See *id.*

170. *Id.* at 334, 340, 341.

171. See *State v. Williams*, 929 N.W.2d 621, 630 (Iowa 2019).

important one.<sup>172</sup> It recognized that some claims of systematic exclusion under *Duren/Plain* prong three can interrelate with underrepresentation and the jury pool count under prong two.<sup>173</sup> The *Williams* case also presented important issues about individualized voir dire of prospective jurors to better detect potential racial bias when the defendant is African American and the specificity required of jury instructions that address implicit bias, including a new jury instruction developed by the American Bar Association.<sup>174</sup> Again, there were three dissenting justices who suggested reform through exercise of the court's supervisory authority.<sup>175</sup>

### B. Proving Underrepresentation

Among the grounds Lilly raised on his appeal, denial of his right to a jury drawn from a fair cross-section of the community was one of them, relying upon *Plain*.<sup>176</sup> On the appeal, the State (1) effectively pressed for reconsideration of *Plain*'s ruling that discriminatory intent was not an element of the fair cross-section prima facie case; (2) urged approval of a new preliminary absolute disparity test; and (3) argued that before a constitutional violation could be found, any underrepresentation had to be "substantial."<sup>177</sup> The court reaffirmed the *Plain* holding that the Sixth Amendment fair cross-section claim does not require proof of intentional discrimination.<sup>178</sup> The court rejected the State's renewed call for an absolute disparity test, and it also rejected the State's argument that defendants must prove "substantial underrepresentation" to make out a prima facie case.<sup>179</sup> That terminology, *Lilly* observed, "comes from [the] pre-*Duren* Fourteenth Amendment equal protection" case of *Castaneda*, which set a higher

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172. *See id.* at 629–30.

173. *Id.*

174. *Id.* at 630–32.

175. *Id.* at 638, 641.

176. *State v. Lilly*, 930 N.W.2d 293, 296 (Iowa 2019). Both because the record regarding the fair cross-section claim was sketchy and sui generis (Lee County is the only county split into two judicial divisions), the facts in *Lilly* were incidental to the supreme court's watershed decision. On remand, the district court refined its analysis of the Lee County jury-eligible population, with adjustments, not only to delete the state prison population but also to fit the North Lee County judicial division, and concluded the underrepresentation did not exceed *Lilly*'s two standard deviation threshold for Sixth Amendment claims. That decision is on appeal.

177. *Id.* at 299–302.

178. *Id.* at 307.

179. *Id.* at 302.

standard than required by the Sixth Amendment.<sup>180</sup> *Lilly* reaffirmed it would follow the standard approved in *Plain* that defendants need only to prove “representation of the group in the jury pool was not ‘fair and reasonable.’”<sup>181</sup>

*Lilly* principally focused on providing the trial courts and counsel with specific guidance on the proof and analysis it expects on *Duren/Plain* prongs two and three of a defendant’s prima facie case.<sup>182</sup> This was much needed as the U.S. Supreme Court has declined to prescribe a clear test for either underrepresentation under prong two or for systematic exclusion under prong three, nor had the Iowa Supreme Court been specific on these issues in *Plain*.<sup>183</sup>

*Plain* did not say how underrepresentation under the second prong of the *Duren/Plain* test should be determined, simply that trial courts had discretion to choose which test or combination of them was appropriate in the circumstances of each case and that a 10 percent absolute disparity threshold was too high.<sup>184</sup> *Lilly* explains there are two components to ascertaining whether prong two underrepresentation has been established.<sup>185</sup> One requires that a defendant must demonstrate that he himself has “suffered a constitutional wrong,” and actually seems like a matter of standing.<sup>186</sup> For ease of reference, the Authors will refer to it throughout as the “standing” component. Justice Mansfield explained the necessary showing:

A defendant whose jury pool has a percentage of the distinctive group at least as large as the percentage of that group in the jury-eligible population has not had his or her right to a fair cross section infringed, and there would be no reason to aggregate data in that event.<sup>187</sup>

*Lilly* thus provides a bright-line comparison test, simple to administer, in contrast to the standard deviation analysis it required to test aggregate jury pool data.

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180. *Id.* at 302 n.6, 303.

181. *Id.*

182. *See id.* at 302–08.

183. *See State v. Plain*, 898 N.W.2d 801 (Iowa 2017).

184. *See id.* at 822.

185. *Lilly*, 930 N.W.2d at 303, 305.

186. *Id.* at 305.

187. *Id.* The standard deviation test does not apply to this first component.

The second component requires proof that aggregated jury data demonstrate statistically significant underrepresentation of the distinctive group in question.<sup>188</sup>

The Authors note that while there is language in *Duren* which is consistent with a standing requirement,<sup>189</sup> *Duren* did not expressly embrace such a requirement.<sup>190</sup> One hesitation the Authors have about characterizing this *Lilly* requirement as standing is courts typically determine standing as a prerequisite to determination of the merits of a party's claim, and as a practical matter, that cannot be the case with fair cross-section claims.<sup>191</sup> The litigation reality is that the parties and the judge will not know the racial composition of a defendant's own jury panel until jury service day. If defense counsel waits until the morning of the day of trial to determine whether there is a fair cross-section issue, it will almost always be too late to do the necessary discovery and be prepared to make an informed presentation.<sup>192</sup> As a result, defense counsel must prepare the merits of the fair cross-section claim as to the aggregate date *before* seeing the jury panel in their client's case.

If the Authors might suggest two shortcomings in the *Lilly* opinion, the first is the court does not expressly instruct that fair cross-section protocol

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188. *Id.* at 301–05.

189. “[I]n order to establish a prima facie case, it was necessary for petitioner to show that the underrepresentation of women, generally *and on his venire*, was due to their systematic exclusion in the jury-selection process.” *United States v. Osorio*, 801 F. Supp. 966, 976 (D. Conn. 1992) (quoting *Duren v. Missouri*, 439 U.S. 357, 366 (1979)) (emphasis added by district court in *Osorio*).

190. There is case law from the Second Circuit that disagrees. “The Court finds the government’s proposed ‘no harm, no foul’ rule particularly inappropriate, however, since the Supreme Court has recognized that more than just the defendant’s interest is at stake in a fair-cross-section claim. ‘[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.’” *Id.* at 975 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975)). A jury selection process that systematically and substantially underrepresents blacks and Hispanics yet unexpectedly yields a representative venire by mere happenstance in this case can hardly be said to promote that public confidence.” *Id.* at 975–76. In *United States v. Jackman*, the Second Circuit analyzed the aggregate jury pool data and found a Sixth Amendment fair cross-section violation, even though the “[d]istrict [j]udge has ruled that the procedure, as applied in [defendant’s] case, yielded an adequate result.” 46 F.3d 1240, 1248 (2d Cir. 1995).

191. *See Lilly*, 930 N.W.2d at 299.

192. *See id.* at 317–18.

calls for defense counsel to commence research, discovery, retention of an expert, as need be, on proof of underrepresentation on the aggregated component of the fair cross-section claim well in advance of the trial date, and when warranted, to file defendant's motion claiming a fair cross-section violation and requesting a pre-trial evidentiary hearing.<sup>193</sup> Courts are authorized to use the most recent six-month jury data and census data that is *available*, so there is no reason to delay an evidentiary hearing until after the racial composition of defendant's own jury panel is known.<sup>194</sup> Perhaps the *Lilly* court did not think it necessary to discuss pre-trial fair cross-section procedure because defense counsel in *Lilly* and *Williams* conducted some discovery and filed their motions before seeing the jury panel, and pre-trial hearings had been held.<sup>195</sup> If so, the Authors believe that the assumption that defense counsel will or should file their fair cross-section motion on the day the jury is selected is flawed as many Iowa lawyers are just beginning to gain familiarity with fair cross-section law, statistical facts, and census data due to the desert *Jones* created for a quarter of a century.<sup>196</sup>

The Authors are concerned the standing component of *Lilly* can lull unsuspecting counsel and the trial judge into delaying serious consideration of the fair cross-section issues until jury service day on the rationale that the claim can be taken up before voir dire begins if the facts bear out that the defendant's own jury panel lacks the required diversity.<sup>197</sup> When that happens, defense counsel who has not already done so will have to sprint to obtain and assess the relevant aggregate jury data, access jury-eligible population census data, and apply standard deviation analysis to the facts, let alone retain an expert if one is needed; and the time required, if allowed, may jeopardize a "speedy trial" or the court's trial calendar, or both.<sup>198</sup> Moreover, the judge would have to hold a hearing and would be doing so

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193. *See id.* at 305.

194. *See id.* at 303.

195. *Id.* at 297; *State v. Williams*, 929 N.W.2d 621, 625 (Iowa 2019).

196. *See State v. Jones*, 490 N.W.2d 787, 795 (Iowa 1992).

197. Professor Chernoff has co-authored a litigation-oriented article: Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, December 2013, at 14. The very first point Chernoff and Kadane make is "[a] defense attorney does not need to see the jury before raising a cross-section challenge" and the same advice holds true as to the jury panel. The article also provides very helpful suggestions regarding discovery of jury selection materials. *Id.* at 14; *see also Lilly*, 930 N.W.2d at 299.

198. *See Lilly*, 930 N.W.2d at 299.

under the very substantial pressure of having 35 to 150 jurors in waiting.<sup>199</sup> There may be little time, as a result, to carefully consider the evidence, make an informed decision and record for appeal, and think of a remedy if one is needed.<sup>200</sup> The Authors cannot emphasize enough that the standing or “individual injury” component of underrepresentation cannot be the basis for defense counsel not to proceed full speed ahead on the second component of underrepresentation, with prompt and timely research and presentation for a pre-trial hearing well in advance of jury service day. The Authors recommend the thoughtful approach defense counsel took in *State v. Cody Stevenson*.<sup>201</sup> Recognizing they would not know the racial or ethnic make-up of the defendant’s jury panel until jury service day, defense counsel

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199. *See id.* The grand jury setting is quite different from the trial jury setting and voir dire, but the court came down on the side of allowing careful consideration of a fair cross-section challenge rather than rushing the decision—even if that meant the grand jury would have to restart anew if the *Plain* challenge was ultimately sustained. *In re Grand Jury of Dallas County* held that *Plain*’s fair cross-section principles also apply to the composition of a grand jury and that it was permissible for the grand jury to be sworn and proceed while the district court had under consideration a *Plain* challenge—at least where the witnesses had already reported to the courthouse to testify. *See* 939 N.W.2d 50 (Iowa 2020). The court, relying upon the text of Iowa Rule of Criminal Procedure 2.3(2)(a) held, “[I]f the challenge is sustained, the court shall take appropriate action to compose a proper grand jury panel or proceeding, but that can occur after a grand jury is sworn.” *Id.* at 66. The court acknowledged:

[T]he proceedings may ultimately be for naught if [Doe] prevails on his *Plain* claim. But he is not harmed by the grand jury receiving his testimony. He is harmed by the grand jury action. The district court and the parties should expeditiously resolve the issue, but allowing the grand jury to sit and receive previously scheduled testimony while the *Plain* challenge is developed by the parties is not a substantial injustice.

*Id.*

200. The second shortcoming of *Lilly* is its lengthy quotation of the district court’s lament, without response from Justice Mansfield, that there is nothing the court can do to correct the problem if the trial judge were to find a fair cross-section violation, stating, “[T]here’s little likelihood that a newly-drawn jury panel would include” any more African Americans than the present panel. *Lilly*, 930 N.W.2d at 301. Unfortunately, the supreme court missed an opportunity to correct this misperception and instruct that while courts should use random selection procedures generally, there is an “except[ion] when a court orders an adjustment for underrepresented populations.” PRINCIPLES FOR JURORS AND JURY TRIALS 11 (AM. BAR ASS’N); *see generally* Hannaford-Agor, *supra*, note 93, at 793–96 for possible remedial approaches.

201. *State v. Stevenson*, No. FECR011831 (Peter Persaud and Rachel Antonuccio, Defense Counsel).

completed their discovery and research on the aggregate jury data, complete with an expert's statistical analysis, in preparation for defendant's anticipated fair cross-section motion and filed their pretrial "Notice of Challenge to Jury Composition Pursuant to *State v. Plain*."<sup>202</sup> Their notice set forth their proof and argument as to underrepresentation, based on the aggregate jury data, and systematic exclusion enabling a pre-trial evidentiary hearing well in advance of the day of trial.<sup>203</sup>

The aggregated jury data component of *Duren/Plain* prong two requires proof of statistically significant underrepresentation of a distinctive group in the jury pools or jury panels of the county in which the trial is to take place—over time. It requires analysis of aggregate jury data and is systemic in its focus. In contrast to the *Lilly* court's one-paragraph discussion of standing, the court's extensive coverage of the aggregate data component covers nearly seven pages. The court rejected the State's argument that review should be limited "to the pool from which the trial jurors were drawn, without considering other, earlier pools."<sup>204</sup> The court agreed with the NAACP on the importance of aggregate jury data, observing: "It is unfair to restrict the defendant to the current jury pool that may have as few as seventy-five persons, and then at the same time require the defendant to furnish results that have a certain degree of statistical significance."<sup>205</sup> This same reasoning undoubtedly explains why the court did not require a showing of statistically significant underrepresentation to establish standing, because the numbers in a defendant's jury panel will often be small and would preclude a showing of statistical significance.<sup>206</sup>

With regard to evaluating the aggregate jury data, the *Lilly* court rejected both the absolute and comparative disparity methodologies.<sup>207</sup> *Plain* left the question open; *Lilly* answers it. Both of those tests had recognized flaws.<sup>208</sup> The majority in *Lilly* also rejected the State's argument for "an initial screen of a 3% absolute disparity before resorting to accepted statistical methods" because the State's argument "gives a free pass to systematic underrepresentation so long as the absolute underrepresentation

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202. *Id.*

203. *Id.*

204. *Lilly*, 930 N.W.2d at 305.

205. *Id.*

206. *See id.*

207. *Id.* at 302.

208. *See State v. Plain*, 898 N.W.2d 801, 823 (Iowa 2017).

that the system produces falls below a certain threshold.”<sup>209</sup> Instead, *Lilly* embraced a methodology from “an academic discipline that separates random occurrence from systematic underrepresentation; that discipline is statistics.”<sup>210</sup> Accordingly, under article I, section 10, the court believed “the second *Duren/Plain* factor should instead focus on whether there has been a statistically significant underrepresentation of the minority in a jury pool or pools.”<sup>211</sup> The court adopted the standard deviation approach, which it found to be a statistically recognized methodology that “presume[s] randomness.”<sup>212</sup>

Having settled on a test, what degree of underrepresentation needed to be established in order for defendant to satisfy *Duren/Plain*’s second prong? The State urged the court to set an underrepresentation threshold of 1.64 standard deviations in order for defendants to make out a prima facie fair cross-section claim.<sup>213</sup> The NAACP urged that the two or three standard deviation thresholds set by the U.S. Supreme Court in *Castaneda* were set high precisely because *Castaneda* was an Equal Protection case requiring proof of intentional discrimination.<sup>214</sup> In contrast, as *Plain* held, a case based upon fair cross-section principles under the Sixth Amendment does not require proof of intentional discrimination.<sup>215</sup> With regard to claims arising under the Iowa constitution’s impartial jury clause, *Lilly* agreed that a lower threshold was warranted:

[W]e conclude the threshold should be one standard deviation—in other words, the percentage of the group in the jury pool must be one standard deviation or more below its percentage in the overall population of eligible jurors. As we understand it, when the variance is one standard deviation, there remains a 32% probability that we are seeing a random event. But if we are looking in only one direction, as we are in these cases, the probability would be 16% that the departure is a random event and 84% that it is not.<sup>216</sup>

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209. *Lilly*, 930 N.W.2d at 302–03.

210. *Id.* at 303.

211. *Id.*

212. *Id.* at 300 (quoting *Plain*, 898 N.W.2d at 823).

213. *Id.* at 304.

214. *Id.*; see *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17 (1977).

215. See *Plain*, 898 N.W.2d at 824 n. 9.

216. *Lilly*, 930 N.W.2d at 304.



But for claims invoking only the Sixth Amendment, *Lilly* held that a higher two standard deviation threshold was required by decisions of the U.S. Supreme Court.<sup>217</sup> It also explained the two standard deviation test in terms of probability: “Social scientists typically consider two standard deviations in either direction to be statistically significant, a level at which there is a 95% probability the discrepancy cannot be due to chance.”<sup>218</sup> Thus, for example, proof that the African American percentage of the jury panel is one standard deviation or more than expected in a random process means there is a 16 percent or less probability that it occurred randomly.<sup>219</sup> A showing at the two standard deviation level means the probability that it occurred randomly was 2.5 percent or less.<sup>220</sup>

In sum, *Lilly* requires under the *Duren/Plain* prong two that a defendant is required to demonstrate (1) some underrepresentation in their own jury pool or panel in order to confirm standing, and (2) statistically significant underrepresentation in the most recent six-month jury pools or panels that preceded the trial to confirm that the underrepresentation on defendant’s jury panel was not aberrational. The court did not specify how much aggregated jury data should be examined, but courts generally have looked to the most recent six months’ data that is available (except perhaps in a small rural county, such as Lee County, where jury trials are infrequent).<sup>221</sup>

While Justice Mansfield was charitably silent in *Lilly* regarding the inadequacy of the North Lee County jury data, leaving key determinations to be made on remand, he did clarify the court’s expectations regarding census data.<sup>222</sup> The court instructed the most current census data available at

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217. *Id.* at 328–29.

218. *Id.* at 304. The binomial distribution statistical formula was the specific methodology approved by the U.S. Supreme Court in *Castaneda* for use in determining standard deviations and probability. As the Authors will demonstrate in the Addendum, using the Excel binomial distribution software function, Excel helpfully calculates probabilities, rather than standard deviations (whose probability must be looked up on a Z-Chart).

219. *See id.*

220. *See id.*

221. *See, e.g., Duren v. Missouri*, 439 U.S. 357 (1979) (8 months data); *Taylor v. Louisiana*, 419 U.S. 522, 536–38 (1975) (6 months data).

222. *See Lilly*, 930 N.W.2d at 309. On April 7, 2020, the district court issued its ruling on remand that defendant failed to make out a prima facie case of underrepresentation. A notice of appeal has been filed. The Authors discuss the district court’s ruling in their Addendum.

the time of trial should be used, and the general population census data should be adjusted to reflect the population that would actually be eligible for jury service.<sup>223</sup> The court specifically referenced the “eighteen-or-older population” requirement to serve on a jury.<sup>224</sup> The record was so limited the court elected to not demonstrate the application of its new underrepresentation principles to the sketchy facts but instead did so in *Veal* where the factual record was more complete.<sup>225</sup> The court’s major contribution to fleshing out the *Lilly* prong two principles occurred in *Veal*, and that is the focus of Part IV.

Although the court did not mention it, its requirement that jury-eligible population census data be used also broke new ground, establishing a more refined census data showing at the prima facie case stage than has been required of defendants by the U.S. Supreme Court. *Castaneda* and its progeny have allowed defendants to make out a prima facie case based on general population census data, which the State could rebut if it was able to develop jury-eligible census data.<sup>226</sup> *Lilly* now requires defendants to use current jury-eligible population data.<sup>227</sup> The Authors believe it is appropriate to use only the jury-eligible population in ascertaining whether a distinctive group is underrepresented in jury pools or jury panels. The Authors submit the *Lilly* court was just a step ahead, and the U.S. Supreme Court will likewise require defendants to prove their prima facie case based on jury-eligible census data too once it is more widely understood that census data regarding U.S. citizens 18 years of age and over is readily available for every county in the United States.<sup>228</sup>

Procedurally, as noted above, an evidentiary pre-trial hearing on the aggregate data component of *Duren/Plain* prong two should be held,<sup>229</sup> and,

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223. *Id.* at 304.

224. *Id.*

225. *Id.* at 305.

226. *Castaneda v. Partida*, 430 U.S. 482, 500–01 (1977).

227. *Lilly*, 930 N.W.2d at 305.

228. *See e.g.*, *United States v. Rodriguez-Lara*, 421 F.3d 932, 942 (9th Cir. 2005). *Lilly* also noted—as the NAACP pointed out—that “in a county where the inmates of a state prison make up a significant portion of the population, those inmates should be removed from the [jury-eligible census population] calculation, because state prisoners are not eligible for jury service.” *Lilly*, 930 N.W.2d at 304–05. The state prison in Fort Madison is located in Lee County.

229. It occurs to the Authors that while there could be several cases raising fair cross-section claims pending in a particular county at the same time, the aggregate six-month jury data for the county would be identical in each case. Indeed, interrogatories

if one standard deviation underrepresentation is proven, then the court should consider defendant's proof on systematic exclusion under prong three; if defendant has met the burden of proof on these systemic factors, one final prima facie hurdle remains—a showing of some underrepresentation on his or her jury panel.<sup>230</sup> This procedural approach provides much greater assurance of fairer, much more thoughtful consideration of defendant's claim than leaving everything for disposition on jury service day.<sup>231</sup> If defendant's proof demonstrates there is a systemic problem, the court has time to consult with OSCA and to research and develop remedial options in an orderly way, within the speedy trial constraints and without disruption of the trial schedule.<sup>232</sup> If the six-month aggregated jury pool and panel data do not show any, or sufficient, underrepresentation, defendant has failed to prove underrepresentation under *Lilly* and defendant's fair cross-section claim will be denied regardless of the composition of his or her own panel.<sup>233</sup>

### *C. Proving Systematic Exclusion*

Under the *Duren/Plain* three-prong test, after the defendant has established that the requisite underrepresentation has occurred, the defendant must still establish that the underrepresentation is due to the “systematic exclusion of the group in the jury selection process.”<sup>234</sup> Defendant Lilly's systematic exclusion argument was based on the court system's failure to use “other lists [that] could be used—such as income tax filers, persons receiving unemployment, and persons on housing authority and child support recovery lists.”<sup>235</sup> Justice Mansfield rejected Lilly's argument, reasoning, “Lilly does not explain how failure to use such lists in

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and depositions by members of court administration, local or OSCA, should likewise cover the same issues and processes. One would think there should be ways to use transcripts developed in one case in other cases, with only minor supplementation of the record. Perhaps there might be a way in which the cases involving the same county could be consolidated so that only one pre-trial hearing would be necessary.

230. See *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *State v. Plain*, 898 N.W.2d 801, 821–24 (Iowa 2017).

231. See *supra* Part III.C.

232. See *supra* Part II.

233. See *Lilly*, 930 N.W.2d at 305; see also *Duren*, 439 U.S. at 364; *Plain*, 898 N.W.2d at 821–24.

234. *Duren*, 439 U.S. at 364.

235. *Lilly*, 930 N.W.2d at 305. Lilly argued “[T]hey may have more up-to-date addresses,” but it appears he did not introduce into the record any evidence of the impact of not having up-to-date addresses in his jury pool or panel. *Id.*

itself amounts to ‘systematic exclusion’ within the meaning of *Duren/Plain*.<sup>236</sup>

### 1. *Defendant Has the Burden of Proof*

The NAACP argued *Plain* had approved a different burden-shifting approach:<sup>237</sup>

[W]hen the underrepresentation is severe enough, the court should relieve the defendant from proving the third *Duren/Plain* factor [systematic exclusion] and instead shift the burden “to the State to establish that its jury management practices have been reasonably calculated, in light of known best practices and available technology, to secure an impartial jury.”<sup>238</sup>

The NAACP pointed out the court system kept and controlled all the jury selection process records.<sup>239</sup> It contended that, to the extent the court system’s records were inadequate to identify the cause or causes of underrepresentation, that was a system failure and should relieve defendants of the burden of proving which step or steps in the process caused the underrepresentation.<sup>240</sup> Under those circumstances, the NAACP reasoned there was precedent and language in *Plain* for placing the burden on the court system to demonstrate that its jury management practices were reasonably calculated in light of known best practices and available technology to secure representative juries and that any failure to secure such a jury was attributable to other reasons.<sup>241</sup>

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236. *Id.*

237. *Plain*, 898 N.W.2d at 824 (citing *Duren*, 439 U.S. at 366 (“[*Duren*’s] undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized.”)). The NAACP in its amicus brief cited *Gomez v. Toledo*, 446 U.S. 635 (1980) (holding, in a § 1983 action, good faith would be an affirmative defense, with the burden of proof allocated to government defendants because information as to good faith was peculiarly within the knowledge and control of government defendants).

238. *Lilly*, 930 N.W.2d at 305–06. See Amicus Curiae Brief in Support of Defendant-Appellant Peter Leroy Veal, filed on behalf of the National Association for the Advancement of Colored People at 31–32, *State v. Veal*, 930 N.W.2d 319 (Iowa 2019) (No. 17-1453). The Iowa Supreme Court drew on the NAACP’s amicus brief in *Veal* in addressing the same issues as they arose in *Lilly*.

239. Amicus Curiae Brief for Defendant-Appellant, *supra* note 238, at 31–33.

240. *Id.* at 31.

241. *Id.*

The court in *Lilly* stated, “[W]e are not convinced.”<sup>242</sup> It relied upon the following text in *Plain*: “[T]he defendant must show evidence of a statistical disparity over time *that is attributable to the system for compiling jury pools.*”<sup>243</sup> The court pointed to federal court case law, including the U.S. Supreme Court decision in *Berghuis v. Smith*, that require the defendant to show causation in fair cross-section cases, and, by analogy, to the Iowa Supreme Court’s decision in *Pippen v. State* requiring similar proof of causation in employment disparate impact cases.<sup>244</sup> The *Lilly* court held: “[A]t this time, we are not prepared to embrace the NAACP’s proposal. . . . We may be willing to impose such an obligation in the future when we have more data about what those [best] practices are and their effectiveness.”<sup>245</sup>

## 2. Judicial Interpretations of Systematic Exclusion

*Duren* explained systematic exclusion as something “inherent in the particular jury-selection process utilized.”<sup>246</sup> In *Taylor* and *Duren* this could fairly easily be seen—state law either exempting women from jury service unless they affirmatively and in writing volunteered for it, or state law making women eligible for jury service but exempting them from service upon request, indeed, assumed they asked for an exemption even if they did not affirmatively seek the exemption.<sup>247</sup> The exclusion of African Americans from grand juries in *Smith* or daily wage earners from the jury pools in *Thiel* was similar in that each group had been excluded by jury selection officials.<sup>248</sup> Different from the causes of underrepresentation in *Smith*, *Thiel*, *Taylor*, and *Duren* was an inadvertent computer-programming error in *United States v. Osorio*, the effect of which significantly excluded from the qualified jury wheel black and Hispanic residents of the two cities in the judicial division

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242. *Lilly*, 930 N.W.2d at 306.

243. *Id.* (emphasis added by the court) (quoting *State v. Plain*, 898 N.W.2d 801, 834 (Iowa 2017)).

244. *Berghuis v. Smith*, 559 U.S. 314, 332 (2010); see discussion of *Berghuis*, *infra*, at text accompanying notes 290–91; *Lilly*, 930 N.W.2d at 306–07; *Pippen v. State*, 854 N.W.2d 1 (Iowa 2014).

245. *Lilly*, 930 N.W.2d at 307 (emphasis added).

246. *Duren v. Missouri*, 439 U.S. 357, 366 (1979).

247. See *id.* at 360; *Taylor v. Louisiana*, 419 U.S. 522, 524 (1975).

248. See *Duren*, 439 U.S. at 360; *Taylor*, 419 U.S. at 524; *Thiel v. S. Pac. Co.*, 328 U.S. 217, 219 (1946); *Smith v. State of Texas*, 311 U.S. 128, 129 (1940).

with the largest minority populations.<sup>249</sup> That the exclusion was attributable to a programming error and was unintentional made no difference since the Sixth Amendment does not require intentionality for violation, and exclusion was the inevitable effect of the court system's jury-selection process. The court in *Osorio* therefore held blacks and Hispanics had been systematically excluded from the jury pool, and the defendant had been denied a jury drawn from a fair cross-section of the community.

The sources of significant underrepresentation of distinctive groups in jury pools and jury panels, however, are quite often prosaic. Summons are issued but are undeliverable because of bad addresses. People move, especially people in lower-economic groups as minority group members disproportionately are, and voter registration lists and Department of Transportation records are not updated regularly.<sup>250</sup> Moreover, people who receive a summons fail to respond, partly because there will always be people who fail to respond, but significantly because the person summoned has moved, there is no forwarding address, and the person receiving the summons simply discards it.<sup>251</sup> Or, for whatever reasons, even those who do respond to the jury questionnaire fail to appear; and there is no judicial

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249. *United States v. Osorio*, 801 F.Supp. 966 (D. Conn. 1992). Despite an effort to solve this problem by supplementing the deficient list with names from a representative list of residents, the court clerk's decision to "mak[e] minimal use of the new list . . . assured that the underrepresentativeness of the old list would significantly taint [the combined new jury pool]" and constituted "systematic exclusion in the jury-selection process." *United States v. Jackman*, 46 F.3d 1240, 1245, 1248 (2d Cir. 1995). Similarly, in *Washington v. People*, the Supreme Court of Colorado held a jury-selection system giving double credit to prospective jurors for service in the municipal court of the area of the county in which African American and Hispanic populations are concentrated, "making it less likely that they would be selected for jury service in the Arapahoe district and county courts," constituted systematic exclusion under *Duren*. 186 P.3d 594, 601 (Colo. 2008) (en banc). Nonetheless, the court rejected defendant's fair cross-section claim on grounds that his proof of underrepresentation was insufficient. *Id.* at 606.

250. *See Iowa Driver's License Renewal and Extensions*, IOWA DOT, <https://iowadot.gov/mvd/driverslicense/renew> [<https://perma.cc/V9LE-6BT7>]. In Iowa, drivers' licenses and non-operator IDs are only renewed every six to eight years, depending upon an individual's age. *Id.*

251. Court-appointed expert, Hannaford-Agor, testified during the *Plain* remand hearing: "[T]he single biggest predictor of whether or not a person failed to respond or failed to appear for jury service was their expectation about what would happen if they didn't." Transcript of Hearing on Motion for New Trial at 44, *State v. Plain*, 898 N.W. 801 (Iowa 2017), No. AGCR207343 (Iowa Dist. Ct. Nov. 1, 2019). *See infra*, text accompanying n. 301.

enforcement of the summons and no consequence to disregard of the court's order which comes to be widely understood. Lower socio-economic group members, including African Americans and members of minority populations, tend to present these problems disproportionately, accounting for underrepresentation in jury pools and panels.<sup>252</sup>

Several courts have found interpreted *Taylor* and *Duren* to condemn "active discrimination," where the court system actively prevented or excluded some distinctive group from serving on juries, albeit without the intention to discriminate.<sup>253</sup> Accordingly, several courts have required "affirmative governmental action" and held that systematic exclusion has not been proven simply because the government fails to counteract or compensate for the effect of private choices.<sup>254</sup> For example, the fact that a state has chosen to use a voter registration list as the source of its prospective jurors, and on which defendants have contended that a distinctive group was underrepresented, has been held not to constitute systematic exclusion.<sup>255</sup> The voter registration list does not exclude any eligible voter from registering, and it is not within the court's control to require anyone to

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252. See, e.g., Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, ABA (Sept. 1, 2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/> [<https://perma.cc/AZ4M-WSK3>].

253. *Polk v. Hunt*, No. 95-5323, 1996 WL 47110 at \*2 (6th Cir. Feb. 5, 1996); *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985) (Torruella J., dissenting) ("[C]ourts have tended to allow a fair degree of leeway in designating jurors so long as the state or community does not actively prevent people from serving or actively discriminate.").

254. See e.g., *Bates v. United States*, 473 Fed. App'x 446, 451 (6th Cir. 2012) (holding that underrepresentation that results from individual choices is not attributable to the jury-selection process); *United States v. Purdy*, 946 F. Supp. 1094, 1103 (D. Conn. 1996) (holding that a county does not have an obligation under the Sixth Amendment to affirmatively counteract private sector influences); *United States v. Rioux*, 930 F. Supp. 1558, 1572 (D. Conn., 1995), *aff'd*, 97 F.3d 648 (2d Cir. 1996) ("Discrepancies resulting from private sector influences rather than affirmative governmental action do not reflect the constitutional infirmities contemplated by the systematic exclusion prong of *Duren*"); *People v. Smith*, 615 N.W.2d 1, 13 (Mich. 2000) (Cavanagh, J., concurring) (citing *Purdy*, 946 F. Supp. at 1104 with approval).

255. See, e.g., *United States v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008); *United States v. Garcia*, 991 F.2d 489, 492 (8th Cir. 1993); *United States v. Clifford*, 640 F.2d 150, 156 (8th Cir. 1981); *Omotosho v. Giant Eagle, Inc.*, 997 F. Supp. 2d 792, 805 (N.D. Ohio 2014); *Primeaux v. Dooley*, 747 N.W.2d 137, 141 (S.D. 2008).

register.<sup>256</sup> If people move and leave no forwarding address, or they ignore a summons and fail to respond, or simply choose not to appear because either they cannot afford to be away from work, or they are lower-income, have family to watch and cannot afford child care, or they dislike courts and what they hear about jury service, those are private predilections, personal choices, which these courts hold is not the responsibility of the court system to counteract.<sup>257</sup>

Thus, courts have determined that jury management practices—for example, the failure of the jury-selection process regularly to update addresses of persons to be summoned; the failure to make an effort to locate persons whose summons were returned as undeliverable; the failure to follow up on those who fail to respond to the jury summons and questionnaire; and the failure to enforce the summons when those who do respond nevertheless fail to appear in court for jury selection—do not constitute a basis for finding systematic exclusion.<sup>258</sup> They may note and even lament the consequence, namely, that there has been underrepresentation of racial and ethnic minorities in the jury pools and panels from which a defendant's jury was drawn; but as indicated above, courts have continued to hold these are matters of private or personal choice, not governmental action, and therefore not a Sixth Amendment violation.<sup>259</sup>

One reason for this position is that courts erroneously continue to draw significantly upon equal protection analysis under the Fourteenth Amendment in their determination of whether defendant has been denied their right under the Sixth Amendment to a representative cross-section from which to select a jury.<sup>260</sup> Indeed, the State in *Lilly* and *Veal* called for a showing of substantial underrepresentation and cited *Castaneda* as a

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256. *Clifford*, 640 F.2d at 156 (citing *United States v. Hanson*, 618 F.2d 1261, 1267 (8th Cir. 1980)).

257. *See, e.g.*, *United States v. Orange*, 447 F.3d 792, 799–800 (10th Cir. 2006).

258. *Id.*; *Otomosho v. Giant Eagle, Inc.*, 997 F. Supp. 2d 792, 805–06 (N.D. Ohio 2014); *Smith*, 615 N.W.2d at 3–4.

259. *See, e.g.*, *Otomosho*, 997 F. Supp. 2d at 806 (“That is *not* to say that proactive measures [that “counteract the effects of the group’s comparably higher rate of mobility”] should not be taken. Emphatically, they should. . . .”); *Ambrose v. Booker*, 684 F.3d 638, 652 n.4 (6th Cir. 2012); *Orange*, 447 F.3d at 799–800; *United States v. Green*, 389 F. Supp. 2d 29, 80 (D. Mass. 2005) (ordering remedial measures before trial and saying, “One thing is clear: This Court cannot—yet again—return to business as usual and cast a blind eye to real problems with the representation of African-Americans on our juries, and the crisis of legitimacy it creates.”).

260. *See, e.g.*, *Green*, 389 F. Supp. 2d at 51.



persuasive opinion of the U.S. Supreme Court applying equal protection principles.<sup>261</sup> However, the comprehensive and incisive scholarship of Professor Chernoff, upon which the Iowa Supreme Court relied in *Plain*, conclusively demonstrates that equal protection analysis is wrong when the question is one of the representativeness of the jury under the Sixth Amendment.<sup>262</sup> It undermines critical protections that the Sixth Amendment's impartial jury guarantee was intended to secure for the criminally accused, she observes, diminishing the quality of jury deliberations, perhaps, therefore, unjustly enhancing the likelihood of a conviction, and undermining the public's confidence in juries and the criminal justice system in the process.<sup>263</sup> It may be that courts' continuing to draw upon equal protection analysis or terminology and their insistence that active discrimination or affirmative governmental action must be demonstrated reflects a sense that defendant is not denied the Sixth Amendment guarantee unless the government is identifiably at fault.<sup>264</sup> Unless the court system is responsible—at fault—for the underrepresentation, this argument assumes the government cannot do anything about it and there is no exclusion.<sup>265</sup> The assumption and the argument are mistaken, but they have prevailed. Or perhaps these courts' position is driven by a belief that imposing an obligation upon the court system to act would be too administratively burdensome.<sup>266</sup> Whatever the reason, it is clear the defendant has personally done nothing to forfeit the intended protections of a representative jury guaranteed by the Sixth Amendment, yet the deprivation of those protections may be undeniable and costly to all.<sup>267</sup> As the Supreme Court stated in *Ballard v. United States*,

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261. *State v. Lilly*, 930 N.W.2d 293, 303–04 (Iowa 2019) (citing *Castaneda v. Partida*, 430 U.S. 482, 501 (1977)); *State v. Veal*, 930 N.W.2d 319, 328–29 (Iowa 2019) (citing *Castaneda*, 430 U.S. at 501).

262. *State v. Plain*, 898 N.W.2d 801, 824 n.9 (Iowa 2017), *amended by Lilly*, 930 N.W.2d at 293; Chernoff, Hastings, *supra* note 73.

263. Chernoff, Hastings, *supra* note 73, at 185, 186. Writing for the court in *Plain*, Justice Hecht cited scholarly research strongly indicating dramatic impact upon jury deliberations. “Empirical evidence overwhelmingly shows that having just one person of color on an otherwise all-white jury can reduce the disparate rates of convictions between black and white defendants.” *Plain*, 898 N.W.2d at 825–26. *accord*, *Huffman v. Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981). *See also* *Hollis v. Davis*, 941 F.2d 1471, 1482 (11th Cir.).

264. *See* Chernoff, Hastings, *supra* note 73, at 185.

265. *Id.* at 198–99.

266. *Id.* at 197–98.

267. *See generally* *Ballard v. United States*, 329 U.S. 187 (1946).

“The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.”<sup>268</sup>

### 3. *The Lilly Court Breaks New Ground*

In a precedent-setting opinion, breaking ground nationally, the court in *Lilly* found persuasive the pioneering research and approach of Hannaford-Agor that ineffective jury management practices could be shown to have caused underrepresentation of a distinctive group and therefore to constitute systematic exclusion of the group from jury pools and panels.<sup>269</sup> That approach, which the NAACP urged in its amicus brief, was developed in a path-breaking 2011 *Drake Law Review* article.<sup>270</sup> In that article, Hannaford-Agor reported how good jury management practices regularly result in jury pools and panels that are representative of the community, and failure to adhere to such practices should be regarded as “systematic negligence” sufficient to satisfy *Duren*’s third prong.<sup>271</sup> On account of the U.S. Supreme Court’s opinion in *Berghuis*, which has been read to reject the view that systemic exclusion can be proven based on ineffective jury management practices, the court in *Lilly* did not believe it could take the position that Hannaford-Agor and the NAACP advocated in a fair cross-section case relying only upon the Sixth Amendment. However, “For article I, section 10 purposes,” the court forthrightly declared, “we disagree.” Invoking its independent authority under the Iowa constitution’s impartial jury clause, the Iowa Supreme Court held:

[W]e do hold today that jury management practices can amount to systematic exclusion for purposes of article I, section 10 . . . .

. . . .

. . . *If a practice that leads to systematic underrepresentation of a distinctive group in jury pools can be identified and corrected, there is no reason to shield that practice from scrutiny just because it is relatively commonplace. At the same time, the defendant must prove that the practice has caused systematic underrepresentation.*

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268. *Id.* at 195.

269. *See* Hannaford-Agor, *supra* note 93, at 793–94.

270. *See generally id.*

271. *Id.* at 791.

In sum, we hold today that run-of-the-mill jury management practices such as the updating of address lists, the granting of excuses, and the enforcement of jury summonses can support a systematic exclusion claim where the evidence shows one or more of those practices have produced underrepresentation of a minority group.<sup>272</sup>

*Lilly*'s discussion of the California Supreme Court's decision in *People v. Henriquez* indicates systematic exclusion can be "based on a county's decision not to adopt a list of practices alleged to improve minority juror representation . . . [when there is] proof that they actually would improve minority representation."<sup>273</sup> This holding will allow admission of evidence that the court system and its jury managers failed to implement good jury management practices, the cumulative effect of which caused the underrepresentation of African Americans in the jury pools.<sup>274</sup>

Justice Mansfield relied heavily upon the experience and expertise of Hannaford-Agor, quoting extensively from her article:

Although the socioeconomic factors that contribute to minority underrepresentation in the jury pool do not systematically exclude distinctive groups, the failure of courts to mitigate the underrepresentation through effective jury system practices is itself a form of systematic exclusion.

Litigants alleging a violation of the fair cross section requirement would still have to demonstrate that the underrepresentation was the result of the court's failure to practice effective jury system management. This would almost always require expert testimony concerning the precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and a plausible explanation of how the operation of the jury system resulted in their exclusion. Mere speculation about the possible causes of underrepresentation will not substitute for a credible showing of evidence supporting those allegations.<sup>275</sup>

Justice Mansfield did not fully explain his reasoning as to why the court was providing Iowa defendants greater protection under the Iowa constitution's impartial jury guarantee than is available under the Sixth

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272. *State v. Lilly*, 930 N.W.2d 293, 307–08 (Iowa 2019) (emphasis added).

273. *Id.* at 306 (quoting *People v. Henriquez*, 406 P.3d 748, 763–64 (Cal. 2017)).

274. *See id.*

275. *Id.* at 307 (quoting Hannaford-Agor, *supra* note 93, at 790–91).

Amendment.<sup>276</sup> The Authors submit such a step followed from awareness and concern the court expressed in *Plain* about the severe and longstanding racial disparities in the Iowa criminal justice system, and the central role the jury trial plays in the Anglo-American judicial system.<sup>277</sup> The right to an impartial jury is critically important to an accused and is the accused's constitutional right—a right so fundamental its lineage traces back over 800 years to the Magna Carta.<sup>278</sup> The Branstad Committee found that lack of representative juries, especially all-white juries, not only put in question the fairness of the trial they decide but also skew plea negotiations involving persons of color in favor of the prosecution because of fear their cases will be decided by juries that are not representative and the apprehension of prejudice.<sup>279</sup>

In *Plain*, and again in the *Lilly* trilogy, the Iowa Supreme Court unquestionably recognized its historic leadership on equality and civil rights and renewed its commitment to play a leadership role in ameliorating the evident racial disparities in the criminal justice system.<sup>280</sup> The court need look no further than Justice Anthony Kennedy's powerful words in *Peña-Rodriguez v. Colorado*, which recognized race discrimination has worked historical aggravated wrongs in the United States and that courts have a charge of the highest magnitude to ferret out discrimination wherever it may lurk in the judicial system.<sup>281</sup> Justice Kennedy, writing for the Court in *Peña-Rodriguez*, emphasized the principle “that discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’”<sup>282</sup> As the Iowa Supreme Court did in *Plain*, Justice Kennedy recognized, “The jury is to be a criminal defendant's fundamental ‘protection of life and liberty against race or color prejudice.’”<sup>283</sup> Permitting racial prejudice in the jury system damages “both the fact and the

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276. *See id.*

277. *State v. Plain*, 898 N.W.2d 801, 825–26 (Iowa 2017).

278. *See Magna Carta: Muse and Mentor*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/trial-by-jury.html> [<https://perma.cc/FU6B-56KT>].

279. *See Governor's Working Group on Criminal Justice Policy Reform Submits Final Strategy Recommendations*, *supra* note 108.

280. *See Lilly*, 930 N.W.2d at 307–08; *Plain*, 898 N.W.2d at 825–26.

281. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

282. *Id.* (quoting *Rose*, 443 U.S. at 545).

283. *Id.* (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987)); *see Plain*, 898 N.W.2d at 825–26.

perception” of the jury’s role as “a vital check against the wrongful exercise of power by the State.”<sup>284</sup>

In truth, the reasoning and the holdings of the courts whose decisions we summarized in Part III.C.2 ring false.<sup>285</sup> *Lilly* provides much needed clarity.<sup>286</sup> Constitutionally, it is the right of a criminally accused individual to have an impartial jury drawn from a fair cross-section of the community served by the trial court; and it is not the accused’s fault or waiver that causes a defendant to be denied that right.<sup>287</sup> Further, the individuals summoned to appear for jury service have a statutory *duty* as well as civic and moral obligation to respond, to appear, and to serve, if impaneled. The court has the power to enforce that duty, and as the branch of government expressly charged with supervising the administration of justice in the state, including in the trial courts, the court and the judicial branch have a *duty* to enforce that obligation.<sup>288</sup> In that regard, it should simply be inadmissible and unacceptable to think, let alone conclude, the judicial branch and any part of its operations do not have to do so competently, fashioning, following, and continually improving management practices that observe and secure the rights of an accused or any party and that further the rule of law by enforcing indisputable obligations.<sup>289</sup> Certainly, the Supreme Court—whether in enforcing the Constitution or securing justice through its supervisory power over the criminal justice system—should so hold.

In *Berghuis*, as Justice Mansfield noted, the U.S. Supreme Court appeared to dismiss the argument that jury management practices could qualify as “‘systematic’ causes of underrepresentation of African Americans,” and it thus appeared to foreclose examination of them in the course of hearing a fair cross-section claim.<sup>290</sup> But contrary to common argument, the Supreme Court in *Berghuis* did not hold, and has never held, systematic exclusion could not be established based on (1) the jury management system’s failure to use jury management practices that are not only known and reasonable but within the state and court’s control; and (2)

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284. *Peña-Rodriguez*, 137 S. Ct. at 868 (citations omitted).

285. *Supra* Part III.C.2.

286. *See generally* *State v. Lilly*, 930 N.W.2d 293 (2019).

287. *Duren v. Missouri*, 439 U.S. 357, 371 (citing *Taylor v. Louisiana*, 419 U.S. 522, 533–35 (1975)).

288. IOWA CONST. art. V, § 4.

289. *See Lilly*, 930 N.W.2d at 307–08; *State v. Plain*, 898 N.W.2d 801, 825–26 (Iowa 2017).

290. *Berghuis v. Smith*, 559 U.S. 314, 332–33 (2010).

where it is foreseeable that such failure will cause underrepresentation of a distinctive group in the jury pool or panel from which a defendant's jury will be drawn.<sup>291</sup>

Several examples can be given.<sup>292</sup> The U.S. Postal Service maintains a National Change of Address System (NCOA), and recommended practice is to update source lists using the NCOA regularly and when a jury pool is being developed.<sup>293</sup> If “undeliverables”—which average 12 percent of the summoned pool nationally—can be connected particularly to zip codes with a known high percentage of a distinctive group like African Americans, the failure to use the NCOA would be telling: underrepresentation of African

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291. See *id.* The Authors view *Berghuis* as principally a case about federalism principles that happened to arise in the context of fair cross-section law. *Id.* at 314–18. Three points need to be recognized about *Berghuis*. First, the case involved a federal court of appeals in a habeas proceeding overruling the district court and setting aside the Michigan Supreme Court's affirmation of a second-degree murder conviction. *Id.* As such, the context of federalism was a profoundly sensitive one. In fact, federal court review, including by the Supreme Court, was subject to the Antiterrorism and Effective Death Penalty Act (“AEDPA”). 28 U.S.C. § 2254(d)(1) (2018). That Act provides in part that a prisoner's habeas application may not be granted as to “any claim . . . adjudicated . . . in State court” unless the state court's adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” *Id.* In reviewing and overturning the Sixth Circuit Court of Appeals' decision, the U.S. Supreme Court was thus applying a statute that narrowly constricted federal courts' habeas jurisdiction over state court convictions to those circumstances where there has been a violation of a “clearly established Federal law, as determined by the Supreme Court of the United States.” *Id.*; *Berghuis*, 559 U.S. at 320. “Clearly established law” has been construed by the Supreme Court to “refer[] to other holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 365 (2000). Concurring in *Williams*, Justice Sandra Day O'Connor wrote it was not enough that a federal court, in the exercise of its own “independent judgment,” concluded a state court had “erroneously or incorrectly” decided a federal constitutional claim. *Id.* at 411. Second, writing for the Court, Justice Ruth Bader Ginsburg quoted the jury management practices applicant for habeas had listed, but expressly noted that he had failed to prove the underrepresentation alleged was due to those practices, as was his burden to do. *Berghuis*, 559 U.S. at 332–33. Finally, adhering to and applying the AEDPA, Justice Ginsburg stated, “This Court, furthermore, has never ‘clearly established that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross section-claim.’” *Id.* at 333.

292. For the examples given in this paragraph, see *Jury Manager's Toolbox: Characteristics of an Effective Master Jury List*, NAT'L CTR. FOR ST. CTS. (2009), [http://www.ncsc-jurystudies.org/\\_data/assets/pdf\\_file/0025/7477/characteristics-of-effective-mjl.pdf](http://www.ncsc-jurystudies.org/_data/assets/pdf_file/0025/7477/characteristics-of-effective-mjl.pdf) [<https://perma.cc/SQ8N-KRVV>].

293. *Id.* at 4.

Americans could be attributed to the court system's failure to follow that recommended jury management practice.<sup>294</sup> Further, it has been estimated that half of the so-called "failure to respond" group are actually persons who have moved; they are undeliverables.<sup>295</sup> If a disproportionate number of these are in zip codes with high minority populations, it seems incumbent upon those managing a system and obligated to secure the defendant his or her right to an impartial jury drawn from a fair cross-section of the community to do more if known best practices, within their control, would improve the result.<sup>296</sup> Underrepresentation of African Americans could be attributed to the court system's failure to follow jury management practices that are known, recommended, and within the court system's control.<sup>297</sup> Follow-up by the sheriff, a second summons, and use of the NCOA come to mind.<sup>298</sup> Last, but not finally, lack of judicial enforcement when there is a failure to appear—which of course is a failure to obey a court order—is common.<sup>299</sup>

The hearing on remand in *Plain*, held on November 1, 2019, illustrated several of these issues and consequences. One issue, clearly, was whether African Americans had been systematically excluded from the jury pool from which Plain's jury was drawn. More specifically, counsel for Plain argued the State failed to pursue known, reasonable jury management practices and utilize available technology and that as a result, Plain's jury had not been drawn from a fair cross-section of the county. Serving as a court-appointed expert during the hearing on remand, Hannaford-Agor's testimony was telling.

In preparation, Hannaford-Agor obtained and reported on the aggregate jury data as to "undeliverables," failures to respond, and failures to appear, and analyzed this data through a geocoding process.<sup>300</sup> From the

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294. *Jury Manager's Toolbox: Best Practices to Decrease Undeliverable Rates*, Nat'l CTR. FOR ST. CTS. 1 (2009), [www.ncsc-jurystudies.org/\\_data/assets/pdf\\_file/0020/6806/undeliverable-best-practices.pdf](http://www.ncsc-jurystudies.org/_data/assets/pdf_file/0020/6806/undeliverable-best-practices.pdf) [<https://perma.cc/W5WH-TPTW>].

295. *Id.*

296. *Jury Manager's Toolbox: Characteristics of an Effective Master Jury List*, *supra* note 292, at 4.

297. *See id.* at 4–5.

298. *See id.*

299. *See supra* Part II.

300. Hannaford-Agor's report and her testimony distinguished between "failures to respond" and "failures to appear" and provided data on both. The former are persons who were summoned but never replied; the latter are persons who did answer the questionnaire but failed to appear on jury service day. It is the Authors' understanding

addresses, she identified the zip code area in Black Hawk County in which each prospective juror lived who had been summoned for trials in the six months prior to Plain's trial; and then, by reference to census data, she correlated that information to Zip Code Tabulation Area (ZCTA) and was able to project the race of the non-respondents. More than half of the African Americans in Black Hawk County reside in zip code 50703 (Waterloo)—the zip code where the largest failure to respond rate occurred. Hannaford-Agor reported the overall Black Hawk County failure to respond rate was 8.9 percent; in contrast, the failure to respond rate for the 50703 zip code was 17.2 percent, nearly double. She concluded, both in her testimony and in her written report, that "it was the failure to respond rates specifically from 50703 that was likely contributing to the underrepresentation of African-Americans in the jury pool."<sup>301</sup> She further reported, of the 1,591 jurors who *did* respond from zip code 50703, only 900 actually appeared; 691 of those 1,591 prospective jurors who had responded to the summons and jury questionnaire, or 43 percent, *failed to appear*. Yet enforcement proceedings against those who failed to respond and failed to appear were practically nonexistent and had been for years.<sup>302</sup>

Where enforcement is sure to happen, people do comply.<sup>303</sup> In her deposition taken in preparation for the hearing on remand in *Plain*, the

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that, in 2015, jury managers lumped "failures to respond" and "failures to appear" under one category: failure to appear. Upon request, OSCA provided Hannaford-Agor with data "that documented the status (e.g., non-response, undeliverable, disqualified, excused, deferred/reassigned to a new term, or qualified) of each individual in the Jury Pool Dataset." Paula Hannaford-Agor, *Nat'l Ctr. for State Courts Geocoding Report 1* (Oct. 8, 2018) (on file with the Drake Law Review) [hereinafter Hannaford-Agor, *Geocoding Report*].

301. Exhibit 109 at p. 45; Transcript of Hearing on Motion for New Trial, *supra* note 251, at 45.

302. See *supra* note 259 and accompanying text. Transcript of Hearing on Motion for New Trial, *supra* note 251, at 44.

303. Hannaford-Agor testified during the *Plain* remand hearing: "[T]he single biggest predictor of whether or not a person failed to respond or failed to appear for jury service was their expectation about what would happen if they didn't. People who believe that something bad will happen, they'll get arrested, they'll get fined, they'll get called into court and yelled at by someone, are significantly more likely to appear and to respond to a jury summons than people who believe that nothing will happen if they don't appear or if they don't respond." Transcript of Hearing on Motion for New Trial, *supra* note 251, at 44. For example, there are known consequences to failure to file an income tax return, including interest and penalties plus criminal prosecution. A 2019 U.S. Treasury report indicated the IRS reported 10.6 million individual taxpayers failed to file a tax return in 2018 compared to 152,937,949 individual tax returns that *were* filed. *Trends in Compliance Activities Through Fiscal Year 2018*, TREASURY INSPECTOR GEN.



Black Hawk County Jury Manager testified that a summoned juror who *twice* failed to appear was simply rescheduled for another jury and no contempt or other enforcement hearing would be scheduled until the individual failed to appear a *third* time, but not even then if, on one or more of the times the juror failed to appear, the case settled or was resolved without a jury actually being impaneled. She estimated that “approximately 10 people every six months” were actually being brought in before a judge for a contempt hearing—“That’s a guess. Ten might be high.” Even that minimal enforcement beginning in early 2015 when she took overrepresented an improvement over prior practice. She testified that her predecessor “stopped doing this [sending failure to appear letters to jurors who responded but failed to appear] at some point.” Plain’s attorney asked, “[Your predecessor] was not getting anybody for failure to appear?” The Jury Manager answered, “Not in the couple of years prior to me taking over.”

The above testimony again is drawn from the remand hearing in *Plain*, and a decision is still under consideration. The district court, nonetheless, found systematic exclusion had not been proven. The ruling came down while this Article was in the final stages of publication, precluding its review herein. It has been appealed. Simply put, jury management practices *matter*, and Justice Mansfield and the majority in *Lilly* were absolutely right to so hold under the Iowa constitution.

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FOR TAX ADMIN. (Sept. 9, 2019), <https://www.treasury.gov/tigta/auditreports/2019reports/201930063fr.pdf> [<https://perma.cc/38U5-MFPW>]. See Table 2. *Number of Returns and Other Forms Filed, by Type, Fiscal Years 2017 and 2018*, IRS, <https://www.irs.gov/pub/irs-soi/18db02nr.xls> [<https://perma.cc/WKA2-HUAX>]. In other words, 94 percent of taxpayers were compliant in filing in 2018 and 6 percent were not. Similarly, with known consequences to failure to register for the draft when one comes of age, compliance with the draft registration mandate is high. According to a 2019 Congressional Research Service report titled *The Selective Service System and Draft Registration: Issues for Congress*, the compliance rate in 2016 was 92 percent. *The Selective Service System and Draft Registration: Issues for Congress*, CONGR. RES. SERV. (May 1, 2020) <https://crsreports.congress.gov/product/pdf/R/R44452> [<https://perma.cc/4UP8-7DVD>]. The most recent Selective Service System Annual Report indicates the 92 percent compliance rate holds steady. *Selective Service System Annual Report*, OFF. PUB. & INTERGOVERNMENTAL AFF. (2019), <https://www.sss.gov/wp-content/uploads/2020/03/Annual-Report-FY2019.pdf> [<https://perma.cc/K9CS-RZ7R>]. In terms of getting summoned jurors to respond and appear, Hannaford-Agor reports that known judicial enforcement of the court’s order, for example by contempt hearing, fine, and even incarceration, is demonstrably the best strategy.

#### IV. *VEAL*: APPLYING *LILLY* PRINCIPLES TO STATISTICAL FACTS

*Veal* presents a much fuller factual picture than *Lilly* and is a full-fledged companion case to it.<sup>304</sup> The majority opinion in *Veal* takes the *Lilly* principles and demonstrates their application to the statistical determination of underrepresentation under prong two of *Duren/Plain*.<sup>305</sup> This required not only examination of census data but also utilization of the binomial distribution statistical methodology to calculate probabilities and standard deviations.<sup>306</sup> Both aspects will be explored in depth, as this provides helpful guidance to the full meaning and scope of *Lilly*.

In addition, *Veal* also presented an occasion to examine the current law's ineffectiveness in protecting against explicit and implicit bias in the prosecution's exercise of peremptory challenges.<sup>307</sup> The NAACP urged the court to more closely scrutinize a prosecutor's peremptory strike of the final African American in the jury venire, citing *Seattle v. Erickson*.<sup>308</sup> Although the majority rejected defendant *Veal*'s claim, three justices wrote opinions calling for reform of *Batson* procedure, and two called for abolition of peremptory challenges.<sup>309</sup>

*Veal*'s trial was moved from Cerro Gordo County to Webster County out of concerns that extensive publicity might jeopardize defendant's right to a fair trial.<sup>310</sup> The record was unclear how many persons were summoned.<sup>311</sup> One hundred persons returned questionnaires, one of whom self-identified as African American.<sup>312</sup> When 87 potential jurors appeared on the day of trial, July 10, 2017,<sup>313</sup> and none were African American (the one

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304. Compare *State v. Veal*, 930 N.W.2d 319, 323–28 (Iowa 2019), with *State v. Lilly*, 930 N.W.2d 293, 296–98 (Iowa 2019).

305. *Veal*, 930 N.W.2d at 328–30.

306. *Id.*

307. *Id.* at 332–34.

308. Amicus Curiae Brief in Support of Defendant-Appellant *supra* note 238 (citing *Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017)).

309. *Veal*, 930 N.W.2d at 334, 340–41.

310. *Id.* at 326.

311. *Id.*

312. *Id.*

313. It may be noted that the Iowa Supreme Court had published its opinion in *Plain* just ten days earlier.

African American who returned her questionnaire failed to appear), Veal objected to the jury panel on Sixth Amendment fair cross-section grounds.<sup>314</sup>

The district court took affirmative steps in response, summoning an additional jury pool and ordering the sheriff to contact jurors who had been summoned but had not appeared.<sup>315</sup> As a result of this effort, 153 jurors appeared on July 11.<sup>316</sup> Of the 153 jurors, five were African American—two of whom, it should be noted, were bi-racial African Americans.<sup>317</sup> Defense counsel was provided the juror questionnaires for 2016, and submitted a report that of the 2,637 jurors who indicated their race, only 35 were African American.<sup>318</sup> Defendant moved to strike the jury panel, but the district court denied the motion, concluding that the defendant failed to prove both underrepresentation under prong two and systematic exclusion under prong three.<sup>319</sup>

The initial voir dire panel was comprised of 34 potential jurors who included 3 African Americans.<sup>320</sup> Three panel members had felony convictions, including two of the three African Americans.<sup>321</sup> All three with past felony convictions were disqualified for cause.<sup>322</sup> When the third and final African American juror was struck by the prosecution, defense counsel made a *Batson* claim seeking to prevent the peremptory challenge; but the district court overruled the *Batson* claim.<sup>323</sup> All 12 members of the jury were white.<sup>324</sup>

The Iowa Supreme Court's decision in *Veal* is especially important because the factual record, although incomplete, contained enough Webster County jury data and census data for the court to demonstrate the

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314. *Veal*, 930 N.W.2d at 326.

315. *Id.*

316. *Id.*

317. *Id.*

318. *See id.*

319. *Id.* at 327.

320. *Id.*

321. *Id.*

322. *Id.*; IOWA R. CRIM. P. 2.18(5)(a) (providing, “A challenge for cause may be made by the state or defendant, and must distinctly specify the facts constituting the causes thereof. It may be made for any of the following causes: a. A previous conviction of the juror of a felony”).

323. *Veal*, 930 N.W.2d at 327.

324. *See id.*

application of the *Lilly* principles in practice.<sup>325</sup> However, there were sufficient data uncertainties that the court could only make a preliminary determination, and it therefore remanded the case for further findings and application of *Lilly*.<sup>326</sup> In doing so, Justice Mansfield helped clarify the statistical calculations the court envisioned trial judges, lawyers, and court personnel will need to understand and regularly apply in implementing the fair cross-section rulings of *Plain* and the *Lilly* trilogy.<sup>327</sup>

At the outset of his *Veal* analysis, Justice Mansfield provided a succinct summary of the court's fair cross-section holdings in *Lilly*:

In *Lilly*, the defendant raised both the Sixth Amendment and article I, section 10 [of the Iowa constitution]. We applied the *Duren/Plain* framework to these issues. We held that under article I, section 10, a defendant establishes the underrepresentation prong of the *Duren/Plain* framework by showing that the representation of a distinctive group in the jury pool falls below the representation in the eligible juror population by more than one standard deviation. We held that the representation of the group in the eligible juror population should be assessed using the most current census data, adjusted for any reliable data that might affect eligibility, such as the numbers of persons under the age of eighteen. *Lilly* also held that aggregated data on multiple jury pools could be used, so long as the data were not selective. Additionally, *Lilly* held that a defendant whose jury pool contains at least as high a percentage of the distinctive group as the eligible population has not been aggrieved under the *Duren/Plain* framework.

Turning to the systematic-exclusion prong of *Duren/Plain*, we reiterated in *Lilly* that the defendant must prove "causation," that is, that the underrepresentation actually resulted from a particular feature or features of the jury selection system. However, we held that "run-of-the-mill jury management practices" can, under appropriate circumstances, constitute systematic exclusion.<sup>328</sup>

In contrast to *Lilly*, the *Veal* court found the defendant's fair cross-section claim only arose under the Sixth Amendment, and by not invoking article 1, section 10 of the Iowa constitution, the defendant waived any fair

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325. *See id.* at 326–28.

326. *Id.* at 330.

327. *Id.* at 328–30.

328. *Id.* at 328 (citations omitted).

cross-section claim under the Iowa constitution.<sup>329</sup> *Lilly* held that, under article I, section 10, the impartial trial clause of the Iowa constitution, underrepresentation at the one standard deviation level can satisfy the *Duren/Plain* prong two aggregate data component, and flawed jury management practices can constitute systematic exclusion under *Duren/Plain* prong three.<sup>330</sup> However, Justice Mansfield stated there is a big difference on both accounts if defendant's claim is brought only under the Sixth Amendment:

We believe that *Lilly*'s holdings are equally valid when a case is decided under the Sixth Amendment, with two exceptions. We are not persuaded that one standard deviation would be enough to establish the underrepresentation prong for federal constitutional purposes. In *Castaneda*, the U.S. Supreme Court seemingly endorsed two to three standard deviations as an appropriate threshold under the Fourteenth Amendment, and we are not persuaded the Supreme Court would adopt a more lenient standard under the Sixth Amendment. We believe a downward variance of two standard deviations must be shown under the Sixth Amendment.

We also are not persuaded that run-of-the-mill jury management practices can constitute systematic exclusion under the Sixth Amendment.<sup>331</sup>

Clearly it behooves defendants to invoke their right to an impartial jury under article I, section 10 of the Iowa constitution in order to secure its broader protection.<sup>332</sup> Because Iowa defense counsel will therefore likely begin regularly to assert fair cross-section claims under the Iowa constitution in addition to the Sixth Amendment, the Authors believe the court's narrower view of defendants' protections under the Sixth Amendment will not have a large impact going forward.

#### A. *Veal's Duren/Plain Prong Two Determinations*

The *Veal* court sought to provide guidance as to the application of *Lilly*'s required statistical showings on both components of the prong two

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329. Compare *State v. Lilly*, 930 N.W.2d 293, 300 (Iowa 2019), with *Veal*, 930 N.W.2d at 328–30.

330. *Lilly*, 930 N.W.2d at 304, 306–08.

331. *Veal*, 930 N.W.2d at 328–29 (citations omitted).

332. *Lilly*, 930 N.W.2d at 304, 306–08.

*Duren/Plain* underrepresentation tests.<sup>333</sup> But it recognized that, due to the incompleteness of both the aggregate jury data and the need to fine tune the calculation of the Webster County jury-eligible census population, its calculations could only be considered preliminary and remanded to the district court for further proceedings and final determination of defendant Veal's fair cross-section claim.<sup>334</sup>

In one paragraph the court summarized both of its *Duren/Plain* prong two determinations:

Veal's pool contained only five African-Americans out of 153 potential jurors. This 3.27% figure is below the percentage of African-Americans in Webster County (4.6%) and also below the percentage of eighteen-and-over African-Americans in Webster County (3.9%). Turning to the aggregate data, they show only thirty-five self-identifying African-Americans out of 2637 persons who responded to the juror questionnaire in Webster County in 2016. This is statistically significant even under the higher *Castaneda* threshold. The odds of getting only thirty-five successes out of 2637 trials with p of .046 are  $4.05 \times 10^{-21}$ . As the State concedes in its brief, "The odds of that occurring randomly . . . are very low." This remains true even if the overall percentage of African-Americans living in Webster County is adjusted to account for the fact that a higher percentage of African-Americans living in Iowa are under eighteen and cannot serve on juries. \* \* \* The odds of getting only thirty-five successes out of 2637 trials with p of .039 in that case are  $2.29 \times 10^{-15}$ . Other adjustments, such as for the Fort Dodge prison population or for individuals of mixed race, likely would not alter the bottom line revealed by the aggregate data.<sup>335</sup>

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333. *Id.*

334. *Veal*, 930 N.W.2d at 330.

335. *Id.* at 329 (footnote and citation omitted). Justice Mansfield based his calculation on the jurors who "self-identified" by answering the "race" question on the juror questionnaire. *See id.* This pragmatic approach excludes those who did not respond from the total count. *See United States v. Hernandez-Estrada*, 749 F.3d 1154, 1161 (9th Cir. 2014) (en banc) ("In determining the percentage of a distinctive group in the qualified jury wheel, the [statistical] analysis excludes those jurors who did not identify their race or ethnicity on their jury questionnaire."). The court reasoned it would distort the numbers if it were assumed that none of the jurors who did not indicate their ethnicity were Hispanic. *Id.* Hannaford-Agor was the court-appointed expert in the district court on remand from the supreme court in *Plain*. Because the percentage of jurors who did not respond to the race question in *Plain* was approximately 40 percent, Hannaford-Agor had concerns about the statistical reliability of basing the fair cross-

There is a lot to unpack in this one paragraph. In two short sentences at the outset, the court summarized its statistical comparison relevant to defendant's standing, and then, in the bulk of the paragraph, summarized the statistical significance of aggregated Webster County jury pool data for calendar year 2016, the year preceding Veal's trial.<sup>336</sup> Although the court did not make an express finding, it is evident that, based on this preliminary data, defendant Veal would be found to have made out a prima facie case of underrepresentation on both components of *Duren/Plain* prong two.<sup>337</sup> However, the court identified several issues that it instructed needed to be addressed on remand that would be relevant to determination of both underrepresentation components.<sup>338</sup> The following Parts will examine these issues and suggest ways these statistical facts might be resolved on remand.

*B. Three Adjustments to Determine Jury-Eligible Population Census Data Percentages*

*Lilly* instructed that fair cross-section decisions should be based on jury-eligible census population figures rather than general population census figures because the latter are over-inclusive since they include persons *not* eligible for jury duty.<sup>339</sup> For example, general population census figures include persons under the age of 18, persons who are non-citizens, and persons who are in prison; and none of these are eligible for service.<sup>340</sup> Following *Lilly's* lead, Justice Mansfield in *Veal* sought to adjust the Webster County general population census data so it would closely reflect the jury-eligible population.<sup>341</sup> That meant three adjustments were necessary to the "African American alone" percentage of the census general population in Webster County to obtain the African Americans' percentage of the jury-

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section calculations on the 60 percent who did respond; as a consequence, she did a geocoding study that sought to project the likely race of the non-respondents. *See generally*, Hannaford-Agor, *Geocoding Report*, *supra* note 300. Answering the race question is now required in Iowa by OSCA and jury managers, and the response rate exceeded 90 percent in the 2019 Iowa jury data. Accordingly, it appears unlikely the court system will have any reason to retain an expert to do a geocoding study in the future.

336. *Veal*, 930 N.W.2d at 329.

337. *See id.*

338. *Id.* at 329–30.

339. *State v. Lilly*, 930 N.W.2d 293, 302–05 (Iowa 2019).

340. *The Importance of the American Community Survey and the 2020 Census*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs/about/acs-and-census.html> [<https://perma.cc/TE2Y-SS9Q>].

341. *Veal*, 930 N.W.2d at 329.

eligible census population in Webster County: (1) excluding those under 18 years of age; (2) including the percentage of the census “Two or More Races” category who are multi-race African American; and (3) excluding all inmates in the state correctional facility located in Webster County.<sup>342</sup>

### 1. *Counting Only Those 18 Years and Over*

The first adjustment made by Justice Mansfield was to remove those who were under age 18 from the most recent Webster County census count of African Americans and non-African Americans, and the court determined the resulting “African American alone” 18 years and older jury-eligible census population was 3.9 percent.<sup>343</sup> Since 3.9 percent also exceeded the 3.27 percent which the court had calculated to be the African American percentage of Veal’s jury pool, Justice Mansfield concluded that African Americans were underrepresented in the defendant’s own jury pool, whether measured by general population or jury-eligible population census data.<sup>344</sup> Both comparisons showed Veal personally suffered injury that gave him standing, under the bright line test of the standing component of prong two of the *Duren/Plain* test, to raise a fair cross-section claim.<sup>345</sup>

There is a simpler and more accurate way than the formula the court used to ascertain those who are 18 years and older in the U.S. Census report for Webster County, and that is by referencing American Community Survey (ACS) reports, which are accessible online.<sup>346</sup> Each year the ACS component of the Census Bureau produces a report for every county in the nation that shows the number of persons who are U.S. citizens and 18 and older, and breaks the population down by race.<sup>347</sup> This population report so closely mirrors the basic juror requirements in Iowa that, the Authors submit, these numbers, when converted to a percentage, can be viewed as the presumptive jury-eligible population for the total population broken

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342. *See id.*

343. *Id.* The court based its adjustment on a formula suggested by the State: “The State proposed an age-related adjustment of .8559, because 77.7 [percent] of all Iowans are eighteen and over (and thus eligible to serve on juries) but only 66.5 [percent] of Iowan African-Americans are eighteen and over. Doing the math, 66.5 divided by 77.7 is .8559.” *Id.* at 329 n.7.

344. *Id.*

345. *See supra* notes 185–87 and accompanying text.

346. *American Community Survey*, U.S. CENSUS BUREAU, <https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/> [<https://perma.cc/XKLL8-EP88>].

347. *See id.*



down by each race.<sup>348</sup> The ACS reports that are necessary for this calculation in *Veal* are B05003 (Total Population), B05003B (African Americans alone) and B05003I (Two or More Races).<sup>349</sup> The latter table also enables determination of the African American component of the multi-racial group data, which, as stated above, was also an issue in *Veal*.<sup>350</sup> These ACS reports enable accurate determination not only of those 18 and over but also an even more fine-tuned jury-eligible population determination by counting only those who are U.S. citizens 18 years of age and over.<sup>351</sup>

These reports have been available online from the Census Bureau, but the reports appear to have escaped the notice of courts, likely because until recently they have not been easy to extract from the Bureau's web page.<sup>352</sup> The NAACP filed a Request to Take Judicial Notice of them in *Veal*, during the pendency of the State's Petition for Rehearing, and it provided a step-by-step guide to the 2017 ACS Reports for Webster County so these valuable reports would be accessible to the parties and the court.<sup>353</sup> The 2020 updates to the Census ACS online web page have made it more user friendly, and the B05003 et sequence reports are now much easier to access.<sup>354</sup> The Authors are pleased to report that, thanks to State Data Coordinator Gary Krob's creativity, the State's Data Center has developed a truly user-friendly web page that makes the B05003 data accessible for every county in Iowa, beginning with the 2017 ACS Report data,<sup>355</sup> thus providing counsel and

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348. Go to <https://www.census.gov/> and click on "Explore Data" and choose the tab, "Explore Data Main." Enter "B05003 Webster County, Iowa" in the census search box, and the B05003 tables will appear. The ACS reports eliminate the need to make approximations like the State proposed in *Veal* and the court utilized in footnote 7. *Veal*, 930 N.W.2d at 329 n.7. The ACS also reports this data for Hispanics and other racial minorities. See *American Community Survey*, *supra* note 346.

349. See *Veal*, 930 N.W.2d at 329; *American Community Survey*, *supra* note 346.

350. See *supra* note 335 and accompanying text.

351. See *American Community Survey*, *supra* note 346.

352. See *id.*

353. *Veal*, 930 N.W.2d at 348–49 (denying the State's petition and also declining the NAACP's request).

354. See *American Community Survey*, *supra* note 346.

355. *Nativity and Citizenship Status by Race and Ethnicity*, ST. DATA CTR., <https://www.iowadatacenter.org/data/acs/social/citizenship/18over-nativity> [<https://perma.cc/XU4B-BP94>]. To facilitate access to this data by judges, lawyers, jury managers, and the public, the Authors requested that the State Data Center create a web page that reports for all 99 Iowa counties the racial composition of each county for persons who are 18 years of age and over. *Id.* The State Data Center created such a web page in 2019,

courts with the jury-eligible census population figure they need in determining representation of a distinctive group under *Duren/Plain* prong two.<sup>356</sup>

Let us now go online to the Iowa State Data Center web page, Nativity and Citizenship Status by Race and Ethnicity.<sup>357</sup> In the upper right-hand corner under “Year” we will click on the box for 2013-2017 ACS 5-year average data because Veal’s trial was in July 2017.<sup>358</sup> The most recent census data is the ACS 2014–2018 data, which was released in December 2019.<sup>359</sup> It is the option to use for any trials that occurred in 2018 and should be used for post-2018 trials until the ACS data becomes available for 2019.<sup>360</sup> Returning to the Data Center web page, find the drop-down menu under “Geography” and click on Webster County.<sup>361</sup> The first table that comes up provides the 2017 Webster County ACS Census data for all races and Hispanic/Latino ethnicity *who are 18 years and over*.<sup>362</sup> It also breaks down the data by those who are “naturalized U.S. citizen” and “Native” (meaning “born in the United States”), enabling calculation of those who are U.S. citizens, by race.<sup>363</sup> Krob has used Excel software technology to make that calculation for each of Iowa’s 99 counties, and he reports in Table 2 those who are U.S. citizens 18 years and over.<sup>364</sup> The “Geography” drop-down menu allows one to obtain this information on each of Iowa’s 99 counties.<sup>365</sup>

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and it went one step further in refining the jury-eligible population. *See id.* It limits its population count to those who not only are 18 and over but also to those who are also U.S. citizens. *See id.* Gary Krob has agreed to update the web page annually following release of the latest Census or American Community Survey data. At the bottom of the web page is a link, “Documentation,” that explains the simple arithmetic calculations made to identify those who are U.S. citizens (adding those who are “Native” to those who are “Naturalized Citizens”). *See id.*

356. *See Duren v. Missouri*, 439 U.S. 357, 364–66 (1979); *Veal*, 930 N.W.2d at 328; *State v. Plain*, 898 N.W.2d 801, 822–23 (Iowa 2017).

357. *Nativity and Citizenship Status by Race and Ethnicity*, *supra* note 355.

358. *Id.* (click box for 2013-2017).

359. *See id.*

360. *See State v. Lilly*, 930 N.W.2d 293, 304 (Iowa 2019).

361. *Nativity and Citizenship Status by Race and Ethnicity*, *supra* note 355 (click on Webster County under “Geography” drop-down menu).

362. *Id.*

363. *Id.*

364. *See id.*

365. *Id.*

Turning to Webster County Table 2, we find “Black/African American alone” comprise 3.8 percent of the Webster County U.S. citizen 18 years and over population.<sup>366</sup> As it turns out, despite concerns the “averaging” formula adopted by the court to exclude those under 18 from the general population might not accurately reflect Webster County, the ACS B05003 data as reported confirms the accuracy of the court’s 3.9 percent calculation for those 18 and over.<sup>367</sup> Going forward, use of the ACS data, as reported by the State Data Center, is the preferable approach because of its clear grounding in U.S. Census Bureau reporting and because of its further jury-eligible population refinement in reporting U.S. citizens who are 18 and over.<sup>368</sup>

## 2. *Multi-racial and Prisoner Adjustments*

Justice Mansfield identified two other adjustments that would be needed in order to calculate the jury-eligible population—an upward adjustment “for individuals of mixed race” and a downward adjustment to exclude prisoners.<sup>369</sup> Justice Mansfield followed the lead of the district court and included the two bi-racial African American jurors in the 5-person African American juror pool count; this resulted in an increase in the African American juror percentage in Veal’s jury pool from 2 percent ( $3/151 = 0.0199$ ) to 3.27 percent ( $5/153 = 0.0327$ ).<sup>370</sup> Thus, to make a comparison to census data that would be comparable, a “mixed race” adjustment was necessary: adding the percentage that multi-racial African Americans comprise of the “Two or More Races” census category for Webster County to the percentage of the “African Americans alone” census category.<sup>371</sup> The *Veal* court observed the downward prisoner population and the upward multi-racial African Americans population would be offsetting, at least in part—and unlikely to significantly change the 3.9 percent percentage of the jury-eligible African American census population.<sup>372</sup>

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366. *Id.*

367. *See* State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019); *Nativity and Citizenship by Race and Ethnicity*, *supra* note 355.

368. *See Nativity and Citizenship by Race and Ethnicity*, *supra* note 355.

369. *Veal*, 930 N.W.2d at 329 n.8.

370. *Id.* at 329.

371. *Nativity and Citizenship by Race and Ethnicity*, *supra* note 355.

372. *Veal*, 930 N.W.2d at 329 (“Other adjustments, such as for the Fort Dodge prison population or for individuals of mixed race, likely would not alter the bottom line revealed by the aggregate data.”).

Given the nation's historical experience that has routinely counted multi-racial blacks as "blacks," the NAACP contends a multi-racial adjustment should routinely be considered when African Americans are the distinctive group.<sup>373</sup> In *Veal*, it is a factor first, in the court system's count of African Americans in *Veal*'s own jury pool<sup>374</sup> and in the aggregate Webster County jury pool data, and second, in the count of African Americans in the Webster County's jury-eligible census population.<sup>375</sup> Let us take a closer look.

In making its head count of jurors in the *Veal* jury pool, the district court counted three African Americans and two biracial African Americans,

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373. NAACP Amicus Curiae Brief, *State v. Kenneth Lee Lilly*, No. 20-0617 (Iowa Supreme Court 2020) at 21–23.

374. See *Veal*, 930 N.W.2d at 329. The questionnaire categories are narrower than the census categories, but it is a step forward as it now allows "multiracial" as an answer that was not available in 2017. See *id.* The new questionnaire does not appear to restrict one's answer to the race question to one box, but it unfortunately does not explain that if one checks the "multiracial" box, he or she should also indicate which races. See *id.* This is an improvement that will ensure better racial data. The multi-racial issue that arose in *Veal* will need to be revisited often in future cases. See *id.* at 329 n.8. In addition, the OSCA has informed the Authors that the online E-Juror version of the questionnaire will not allow the jurors to submit their answered questionnaire unless the race question is answered. This is a very important step in reducing the large nonresponse rates of prior years, and the 2019 Iowa jury data confirms response rates to the "race" question in the E-Juror version regularly exceeded 90 percent.

375. The 2020 Census and its annual American Community Survey (ACS) allows respondents to choose from 14 different races and also allow a respondent to check more than one "race" box; there is also a "some other race" box (which one can complete and write in a specific race). See *Questions Asked on the Form*, U.S. CENSUS 2020, <https://2020census.gov/en/about-questions.html> [<https://perma.cc/94X2-U4BB>]; *Why We Ask Questions About . . .*, U.S. CENSUS 2020, <https://www.census.gov/acs/www/about/why-we-ask-each-question/race/> [<https://perma.cc/2ZCT-5AQA>]. It should be noted that census and ACS reports Latino/Hispanic as an ethnicity and not as a race; thus, one can check the Hispanic box and also check "white" or "black" or another race. *Questions Asked on the Form, supra*; *Why We Ask Questions About . . ., supra*. The Iowa jury questionnaire handles Hispanics differently, listing "Hispanic/Latino" as one of the race options rather than as an ethnicity option. *Juror Questionnaire*, IOWA JUD. BRANCH, <https://www.iowacourts.gov/juror/juror-questionnaire> [<https://perma.cc/5VX9-4G5E>]. This does create a problem. See *Questions Asked on the Form, supra*; *Why We Ask Questions About . . ., supra*; *Juror Questionnaire, supra*. When the Authors inquired of State Data Coordinator Gary Krob how this discrepancy might be resolved when a fair cross-section claim was based on whether Hispanics were underrepresented, Krob saw no obvious solution.

concluding there were five with African American lineage out of 153, or 3.27 percent.<sup>376</sup> The NAACP applauded the district court's proactive, affirmative steps—namely, summoning an additional jury pool and having the sheriff contact summoned jurors who failed to respond—as appropriate remedial measures, but it argued the district court had erred because it had failed to include multiracial African Americans from the “Two or More Races” census category on the census data count/jury-eligible population percentage side of the equation.<sup>377</sup> The court in *Veal* agreed.<sup>378</sup>

Justice Mansfield did not explore how this might be done.<sup>379</sup> However, the same census data that identifies those who are U.S. citizens 18 years of age and older also helps answer the multi-racial issue.<sup>380</sup> The ACS Table B05003 et sequence provides a complete racial breakdown, by county, for persons “18 years and over” and U.S. citizens (the latter information requires a simple arithmetic calculation), and also reports “Two or More Races” category data.<sup>381</sup> The decennial census reports data on many multi-race combinations in Table P10, which provides a complete racial breakdown, by county, for persons “18 years and over.”<sup>382</sup> The data in the ACS B05003 Tables and the Census Table P10 correlate with the jury-eligible population requirement *Lilly* added to *Duren* and *Plain*.<sup>383</sup> ACS Table B05003's ability to refine the data to those who are U.S. citizens will generally make it the top choice except perhaps in the year of the decennial census or in years soon thereafter.<sup>384</sup> The B05003 tables remove concerns about citizenship from a county's data, and this enables more confidence in fair cross-section claims concerning underrepresentation of Hispanics and Latinos.<sup>385</sup>

Let's return again to the online State Data Center web page, select Nativity and Citizenship Status by Race and Ethnicity and again click on the

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376. *Veal*, 930 N.W.2d at 329.

377. See Amicus Curiae Brief in Support of Defendant-Appellant, *supra* note 238.

378. *Veal*, 930 N.W.2d at 326 n.2.

379. See *id.* at 328–30.

380. See *American Community Survey*, *supra* note 346.

381. *Id.* See Table B05003G.

382. *2010 Census Summary File 1*, U.S. CENSUS BUREAU, <https://www.census.gov/prod/cen2010/doc/sf1.pdf> [<https://perma.cc/KQR5-ANCU>].

383. *State v. Lilly*, 930 N.W.2d 293, 305 (Iowa 2019); *Nativity and Citizenship Status by Race and Ethnicity*, *supra* note 355; *2010 Census Summary File 1*, *supra* note 382.

384. *Nativity and Citizenship Status by Race and Ethnicity*, *supra* note 355.

385. See *id.*

Webster County ACS 2017 (5-year average) for U.S. Citizens 18 years and over.<sup>386</sup> Table 2, “Black/African Americans alone,” comprise 3.9 percent of the population; “Two or More Races” comprise 1.1 percent. To calculate the portion of the “Two or More Races” category that has African American lineage one can do a pro-rata calculation based on the percentage of each of the non-white racial groups “alone” in the census;<sup>387</sup> this calculation finds that “Blacks/African Americans alone” comprise 0.775 of the people of color in Webster County.<sup>388</sup> Using the State’s pro-rata 0.70 factor, African

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386. *Id.*

387. Rather than calculating a pro-rata percentage of the “Two or More Races” that those of African American lineage comprise, as proposed by the State in *Veal*, another alternative can be found in Table P10 of the 2010 Decennial Census. *See Race for the Population 18 Years and Over: Decennial Census*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=iowa%202010%20decennial%20p10&tid=DECENNIALSF12010.P10&hidePreview=false> [https://perma.cc/KHM9-JDPS]. Because Table P10 is reported in the 2010 census, its reported data does reflect an actual count of all persons of African American descent who are multi-racial in Webster County in 2010. *See id.* The 2010 Decennial Census gathered more detailed data on multi-racial persons than is reported in the ACS data. *See id.*

The 2010 census actually gives a county-by-county breakdown of multi-racial persons, such that one can determine precisely the number of multi-racial persons who have African American lineage—all one needs to do is count. *See id.* With the 2010 census’s detailed multi-racial data, there is no need to do a pro rata calculation. *See id.* In 2010, there were 229 persons in Webster County who were multi-racial. *Id.* Of those, the census data detailed that 95 had some African American lineage, or 41.5 percent. *Id.* This is well below the 77.5 percent of the pro rata calculation. However, there had been a 30 percent increase in the number of multi-racial persons between 2010 and 2017, which would have made use of the 2010 census data highly questionable because it was so out of date.

Any doubt as to which census data to use has been resolved by *Lilly*, which requires calculations to be based on the most current data available, which would be the ACS tables that are updated annually. 930 N.W.2d at 304. Looking ahead, the 2020 Decennial Census occurs this year, and it should provide data with sufficient currency for these multi-racial lineage determinations in cases where the fair cross-section claim arises in 2021.

388. The proposed pro-rata methodology suggested by the State is a reasonable one. Using the State Data Center Table 2, we calculate a 0.775 pro-rata factor for multi-racial blacks: Black/African American alone, 1,098/1,416 Total People of Color alone = 0.775. Total People of Color alone includes: Black/African American alone, 1,098; American Indian alone, 104; Asian alone, 145; Native Hawaiian alone, 2; Some other race alone, 67; for a Total People of Color alone, 1,416. The Authors note that this approach was suggested by the State in its Appellees’ Brief in *State v. Veal*, and we also believe this approach provides a reasonable estimate. Brief for Appellee at 31, *State v. Veal*, 930 N.W.2d 319 (Iowa 2019) (No.17-1453).

American multi-racial percentage would be pro-rated to 0.0077 ( $0.011 \times 0.7 = 0.0077$ ).<sup>389</sup> Adding 0.77 percent to 3.9 percent results in a 4.67 percent jury-eligible combined African American population for Webster County—before making the final adjustment to exclude all prisoners.

The prisoner adjustment was necessary because census data counts prisoners as residing in the county in which they are imprisoned, and a major Iowa Department of Corrections prison facility is located within Webster County.<sup>390</sup> Since prisoners are ineligible to serve on juries, *Lilly* advised it was necessary to exclude all prisoners from the general population census count in order to recalculate the jury-eligible population percentage for the county.<sup>391</sup> Given the racial disparities in the Iowa prison system, with African Americans accounting for 25 percent of the state's inmates while constituting only 3 percent of the state's population, it appeared likely that the high percentage of the African American prison population increased the African American census general population percentage in Webster County.<sup>392</sup> Thus, the necessary adjustment—subtracting all prisoners—would likely reduce the African American percentage of the 18 years and older jury-eligible census population in Webster County.<sup>393</sup>

At the 2020 *Veal* remand hearing, the Iowa Department of Corrections report on the racial composition of inmates at its Fort Dodge Correctional Facility showed that, on July 11, 2017, blacks numbered 450 of 1,316 prisoners.<sup>394</sup> Subtracting 450 black prisoners from the 1,329 jury-eligible African American population<sup>395</sup> of Webster County gives a jury-eligible

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389. *Id.* “The State proposed a pro-rata formula based on Webster County Census data showing “[a]pproximately 70% percent of all non-white, single-race respondents were African-American.” *Id.* The State proposed to multiply the “Two or More Races” category by 70 percent and add the resulting percentage to the “African Americans alone” category percentage. *Id.*

390. *State v. Lilly*, 930 N.W.2d 293, 305 (Iowa 2019).

391. *Id.*

392. *Id.*; see *State v. Veal*, 930 N.W.2d 319, 329 n.8 (Iowa 2019).

393. See *Lilly*, 930 N.W.2d at 305; *Veal*, 930 N.W.2d at 329 n.8.

394. Remand Exhibit C, Sondra Holck, Reporting Fort Dodge Correctional Facility Population as of July 11, 2017; State's Pre-Hearing Brief, at 6, ¶15, *State v. Veal*, 930 N.W.2d 319 (FECR025750).

395. See *supra* note 388 for explanation of the .775 multi-racial blacks pro-rata factor to be applied to the 298 persons included in Webster County's “Two or More Races” population, resulting in a multi-racial blacks estimate of 231 ( $298 \times .775 = 230.95$ ). When 231 multi-racial blacks are added to the 1,098 “blacks alone,” a “combined blacks” total of 1,329 is derived.

African American population of 879. Subtracting 1,316 prisoners from the total jury-eligible population of 28,358 results in a revised jury-eligible Webster County population total of 27,042.<sup>396</sup> The combined African American jury-eligible census population percentage, after all three adjustments, is 3.25 percent:  $879/27,042 = 0.0325$ . However, this calculation very likely understates the number and percentage of African Americans because the Fort Dodge prisoner data “does not specify how many of those people were not U.S. citizens. . . . [And] every person who is an inmate *and* not a U.S. citizen was subtracted from the total population *twice*.”<sup>397</sup>

Those inmates who were not U.S. citizens were already eliminated in the State Data Center calculations that were the basis for Table 2. Therefore, as the State correctly pointed out, they must be subtracted from the total prisoner count and the black prisoner count in order to prevent them from being subtracted twice. The State’s pre-trial brief provided a reasonable way to estimate the number of non-citizen prisoners and proposed to reduce the African American jury-eligible prisoner population by 38, from 450 to 412, and to reduce the overall jury-eligible prisoner population by 242, from 1,316 to 1,074.<sup>398</sup> Then, by subtracting 412 black citizen prisoners from the 1,329 combined black citizen population 18 and over, we are able to determine the black jury-eligible population was 917 ( $1,329 - 412 = 917$ ).<sup>399</sup> Similarly, by subtracting 1,072 citizen prisoners from the 28,358 overall citizen population 18 and over, we are able to determine the overall jury-eligible population was 27,284 ( $28,358 - 1,072 = 27,284$ ). The combined African American jury-

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396. Remand Exhibit C, *supra* note 394; *see also* State’s Pre-Hearing Brief, *supra* note 394 at 6, ¶ 16.

397. State’s Pre-Trial Brief at ¶ 16, *State v. Veal*, 930 N.W.2d 319 (Iowa 2019) (No. FECR025750).

398. “The State’s best solution is to suggest that there are likely to be about as many *male* non-citizens as *female* non-citizens living in Webster County—and that the larger number of male non-citizens likely represent inmates in Fort Dodge (who are exclusively male). Remand Exhibit B shows there were 434 non-citizen males and only 192 non-citizen females in Webster County. This suggests that about 242 of the inmates in Fort Dodge are not citizens—which would mean 1,074 of them *are* citizens (and need to be removed from the total population figure, because they have not already been removed). As for African-Americans in Webster County, Remand Exhibit A estimated 60 non-citizen males and 22 non-citizen females, which suggests approximately 38 of the African-American inmates at Fort Dodge were not U.S. citizens (and the other 412 *were* citizens).” *Id.* at ¶17.

399. The State’s calculation parts ways with the Authors at this point as the State forgets to make the upward adjustment the Iowa Supreme Court held was necessary to include multi-racial blacks in the jury-eligible census population count.



eligible census population percentage after all three adjustments have been made—18 Years & Over and U.S. Citizen; pro-rata “Two or More Races”; and elimination of prisoners— is 3.36 percent ( $917/27,284 = 0.0336$ ).

Based on the district court’s finding that African Americans comprised of 3.27 percent of Veal’s jury panel (5/153), Veal should be found to have standing to raise his fair cross-section claim per *Lilly*, as 3.27 percent is less than the 3.36 percent combined black jury-eligible census population for Webster County.<sup>400</sup> Instructed by the Iowa Supreme Court in *Veal*, we have engaged in an intensive statistical fact analysis of the jury-eligible combined African American census population percentage—the right side of the equation.<sup>401</sup> Thus far, we have not closely examined the left side of the equation, the *Veal* African American jury pool and jury panel counts, other than to approve as appropriate the district court’s decision to include multi-racial African Americans in its jury pool and jury panel counts.<sup>402</sup> *Williams* informs us that there is another consideration that will often need to be factored into the jury pool and jury panel counts on the left side of the equation.<sup>403</sup>

### *3. How Defendant’s Allegations of Prong Three Systematic Exclusion Impact the Prong Two Determination of the Jury-Eligible Jury Pool Count*

*Williams* was the third case of the *Lilly* trilogy. It had only one fair cross-section ruling that was independent of those in *Lilly* and *Veal*, but it is a ruling that will come into play often when a defendant is challenging jury management practices, or a policy such as felon-exclusion, as constituting systematic exclusion under *Duren/Plain* prong three.<sup>404</sup> *Williams* recognized an intertwined relationship between prongs two and three of the *Duren/Plain* analyses.<sup>405</sup>

In *Williams*, there were two African Americans in the combined jury pool of 138, and one of the two was excused because she was a college student.<sup>406</sup> The State wanted the excused college student counted as a member of the pool, while defendant argued, “[S]he and other pre-excused

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400. *State v. Veal*, 930 N.W.2d 319, 329 (Iowa 2019); *see State v. Lilly*, 930 N.W.2d 293, 300 (Iowa 2019).

401. *See Veal*, 930 N.W.2d at 330.

402. *See id.*

403. *State v. Williams*, 929 N.W.2d 621, 629–30 (Iowa 2019).

404. *Id.* at 630.

405. *Id.*

406. *Id.* at 625.

jurors should not be counted in determining the percentage of the distinctive group in the jury pool, making the ratio 1/130 rather than 2/138.”<sup>407</sup> The district court adopted the State’s position, and Justice Mansfield approved the trial court’s reasoning: “[T]here is no reason to omit persons who received a juror summons from the statistics, ‘*especially in the absence of any allegation that hardship excusals are granted in patterns that contribute to underrepresentation or exclusion.*’”<sup>408</sup> However, Justice Mansfield determined that a practice of excusing jurors amounting to systematic exclusion would warrant an exception to the rule stated in *Williams* that would otherwise include those excused from service as “in” the jury pool:

There is a potential problem with the State and the district court’s position, at least under article I, section 10 of the Iowa Constitution. A policy or practice relating to excusing jurors might amount to systematic exclusion. \* \* \* If a defendant wishes to try to prove that it does, the defendant should not be foreclosed from doing so by a rigid rule that calculates the pool based on who was summoned, rather than who actually appeared.<sup>409</sup>

*Williams* held that if the “excusal” practice or policy is found to have been credibly alleged to constitute systematic exclusion for purposes of the *Duren/Plain* third prong, the court cannot include those persons who were excused when the court determines standing.<sup>410</sup> To do so, in the context of the *Williams* facts, would incorrectly and misleadingly result in inflating the distinctive group’s representation in the jury pool, from 1/130 (0.008) to 2/138 (0.014).<sup>411</sup>

Let us now examine how the *Williams* holding may apply in the *Veal* remand.<sup>412</sup> An issue that was not before the court in *Veal*, but which the Authors understand will be a central factor in the resolution of *Veal*’s fair cross-section claim on remand, is whether Rule 2.18(5)(a), the juror felon-exclusion rule, constitutes systematic exclusion.<sup>413</sup> How might this issue affect calculation of the juror count in the standing step?<sup>414</sup> *Veal* will contend his credible allegations of systematic exclusion of a person with a felony

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407. *Id.* at 630.

408. *Id.* (emphasis added).

409. *Id.* (citation omitted).

410. *Id.*

411. *Id.*

412. *See id.*

413. IOWA R. CRIM. P. 2.18(5)(a).

414. IOWA R. CRIM. P. 2.18(5)(a); *see* *State v. Veal*, 930 N.W.2d 319, 329 (Iowa 2019).

conviction from jury service forecloses the court system from including those persons in its jury pool count as it determines standing under *Duren/Plain* prong two.<sup>415</sup> Specifically, it puts at issue whether the three persons with a felony conviction on the Veal voir dire panel, two of whom were African American, were properly included in the district court's jury pool count when they were struck for cause based on their felony convictions shortly thereafter.<sup>416</sup>

During voir dire, the district judge still had under consideration both the defendant's fair cross-section motion and the State's motion to disqualify each of the three panel members who had a felony conviction.<sup>417</sup> The judge rejected the defense objection that the two African Americans who were struck should not be included in the jury pool count.<sup>418</sup> The judge reasoned, in his view, "[T]he idea of a jury pool is to cast a wide net."<sup>419</sup>

*Williams* of course had not yet been decided, but the Authors submit *Williams* provides the guiding principle on remand.<sup>420</sup> When the exclusion of persons with a felony conviction is credibly alleged to be systematic, the district court cannot count those "excluded" as "in the jury pool" for purpose of its fair cross-section standing determination on underrepresentation.<sup>421</sup> For the district court, in *Veal*, to count as jurors in the pool persons with a felony conviction when it automatically strikes them a few minutes later

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415. *Veal*, 930 N.W.2d at 329–30; *Williams*, 929 N.W.2d at 629–30. The Authors note the *Williams* holding, although only indirectly raised, was implicated in the facts on the remand in *Plain*. State's Exhibit AAA identified seven African Americans who were summoned in Plain's case, four of whom failed to appear (and each of the four had a criminal conviction). The defendant alleged systematic exclusion based on jury management practices, including the court system's inadequate enforcement of failures to respond; in consequence, the defendant argued that the African Americans who did not respond or appear should not be counted as "in" the jury pool for purposes of determining the standing component of the second prong of *Duren/Plain*. *Williams* is clear precedent for Plain's position. The defendant also correctly contended that, with regard to standing, the decision should be based on the African American percentage on Plain's jury *panel*, rather than be based on summoned jurors, which is just the first step in the jury selection process.

416. *See supra* note 320–22, and accompanying text.

417. *See Veal*, 930 N.W.2d at 326–27.

418. *See id.*

419. Transcript II at 43, State v. Veal, FECR925750. The judge stated he would count felons "even if the State has the right to strike them for cause because of their felony conviction." *Id.* at 43.

420. *Williams*, 929 N.W.2d at 629–30.

421. *Id.*

under Rule 2.18(5)(a) directly conflicts with the *Williams* holding and clearly distorts real underrepresentation.<sup>422</sup>

If, as the Authors propose, the *Veal* jury pool count does not include the three jurors struck because of their felony convictions, the African American percentage of the pool falls from 3.27 percent ( $5/153 = 0.0327$ ) to 2 percent ( $3/150 = 0.020$ ).<sup>423</sup> The combined African American jury-eligible census population of 3.36 percent (as calculated after all three adjustments) exceeds the 2 percent *Veal* jury pool, satisfying the standing component of the *Duren/Plain* prong two.<sup>424</sup> This same adjustment must be made on remand, of course, regarding the aggregate six-month Webster County jury pool count from January to June 2017; all felons should be eliminated.<sup>425</sup> Both of these adjustments are required by *Williams*.<sup>426</sup>

The Authors submit the *Williams* holding has broad implications and suggest the *Lilly* standing requirement generally should not be viewed as an inflexible bright line rule or cut-off but, rather, requires a balancing of interests.<sup>427</sup> If defense counsel follow the Authors' recommendation, and in most cases defendants will have put on their proof as to aggregate underrepresentation, it would be contrary to the interests of justice for the trial court to ignore this systemic proof.<sup>428</sup> Certainly, in a case like *Veal* where the one-year aggregate data showed very substantial underrepresentation of African Americans, the Authors submit the determination of defendant *Veal*'s standing should not be done with tunnel vision.<sup>429</sup> The inescapable fact remains that two of the five African Americans counted as "in" defendant's jury pool were essentially phantoms who were abruptly, and without any inquiry into eligibility to serve, struck within hours, perhaps

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422. *Veal*, 930 N.W.2d at 326–27; *Williams*, 929 N.W.2d at 629–30. *Lilly* required the focus to be on the jury-eligible census population, and thus *Lilly* likewise is consistent with the ruling in *Williams* that persons who are ineligible for jury service should not be included in the count of a distinctive group in the pool. *State v. Lilly*, 930 N.W.2d 293, 305. *Lilly* and *Veal* held that prisoners must be excluded from the district court's determination of the community's jury-eligible census population. *Id.*, *Veal*, 930 N.W.2d at 326–27.

423. *Veal*, 930 N.W.2d at 326–27.

424. *Id.* See *supra* text accompanying note 187.

425. See *id.*

426. *Williams*, 929 N.W.2d at 629–30.

427. *Id.*

428. See *supra* notes 197–233 and *infra* notes 445–78 and accompanying text.

429. *Veal*, 930 N.W.2d at 329–30.

minutes, after the court made its jury pool count.<sup>430</sup> Under such circumstances, due regard for the constitutional right at stake and its importance to the defendant, not to mention “to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts,”<sup>431</sup> demands careful consideration be given to the aggregate Webster County jury pool and panel data for January–June 2017. If the 2017 data even roughly approximates the 2016 Webster County aggregate jury pool data that showed racial disparities far, far greater than two standard deviations, the Authors submit the public interest counsels the court to weigh the statistical significance of the aggregate data and find it overrides any minor shortcoming as to standing.<sup>432</sup>

A fitting close to this subsection is to acknowledge that the user-friendliness of the State Data Center’s exceptional web page, probably unique among all the states, makes it fairly easy to obtain accurate and the most currently available jury-eligible census data for each of Iowa’s 99 counties.<sup>433</sup> Resolution of all three of the census jury-eligible population adjustment issues was made much easier through use of the Webster County data on the State Data Center web page, and we have confidence in the results.<sup>434</sup> One of the Authors, based on his experience not only with statistical presentations in fair cross-section cases but also with the binomial calculations that go into pattern and practice employment discrimination cases, strongly recommends that counsel develop charts or tables to visually summarize and demonstrate the calculations in addition to the textual explanation of each step in the calculations.<sup>435</sup> Explain each assumption.

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430. *Id.*

431. *Ballard v. United States*, 329 U.S. 187, 195 (1946). *See Veal*, 930 N.W.2d at 329–30; *supra* notes 333–36 and accompanying text.

432. “A jury selection process that systematically and substantially underrepresents blacks and Hispanics yet unexpectedly yields a representative venire by mere happenstance in this case can hardly be said to promote the public confidence.” *United States v. Osorio*, 801 F. Supp. 966, 976 (D. Conn. 1992). On “close calls” consideration should be given to the reality that the U.S. Census Bureau has acknowledged an undercount of blacks of 2.1 percent in the 2010 census and 1.8 percent in the 2000 census. U.S. Census Bureau, *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census* (May 22, 2012) [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-95.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html) [<https://perma.cc/CTJ9-D52Y>].

433. *Annual Population Estimates: Vintage 2019*, ST. DATA CTR., <https://www.iowa.datacenter.org/data/estimates/2019/pop-est-2019> [<https://perma.cc/Y9CP-SFFS>].

434. *Id.*

435. Space did not permit inclusion of tables and charts in this Article demonstrating the various calculations, but the Authors will do so in the Addendum on

Often, we can get so deeply into the data and calculations that we think our assumptions are obvious; be assured it is wiser to assume the judge is both busy and not always adept at such computations. Make it easy, so that if the judge adopts your analysis, he or she can cut and paste your calculations *directly* into the ruling. It is also a very good idea to have your staff double-check your math.<sup>436</sup>

One final observation: know your judge. While the Authors are confident Justice Mansfield would want to consider all the various statistical permutations that are conceivably relevant based on the statistical facts, other judges would prefer counsel make their best case, but keep it simple. The wiser course then is to do so, and avoid overwhelming the judge with too many statistical alternatives, even if each is viable depending on the statistical fact determinations that the judge makes.

### C. *The Veal Standing or “Individual Injury” Determination*

In contrast to the binomial distribution statistics he used to determine underrepresentation based on the aggregate jury data, to determine standing, Justice Mansfield made a simple bright line comparison of the percentage of African Americans in Veal’s jury pool to the percentage of African Americans in the jury-eligible census population of Webster County.<sup>437</sup> He concluded the percentage of African Americans in defendant Veal’s jury pool (3.27 percent)—from the court system’s jury data reports—was less than the percentage of the African Americans in the Webster County census general population (4.6 percent) or the 18-and-over jury-eligible population (3.9 percent).<sup>438</sup> Note Justice Mansfield merely made a straight-forward comparison of the African American percentages—Veal’s own jury pool to the jury-eligible population—and only applied standard deviation analysis when he considered the aggregate 2016 jury pool data.

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Drake Law Review’s Online Discourse. The State’s counsel effectively utilized such tables and charts in the Appellees’ Brief. *See generally* Brief for Appellee, State v. Veal, 930 N.W.2d 319 (Iowa 2019) (No. 17-1453), Brief for Appellee, State v. Lilly, 930 N.W.2d 293 (Iowa 2019) (No. 17-1901), Brief for Appellee, State v. Plain, 898 N.W.2d (Iowa 2017) (No. 16-0061).

436. The remand ruling in *Lilly* is a case in point. A copy of the ruling is on file with the Authors. On page 5, it states there were 313 African Americans in Keokuk, but on page 6 it states there were 343 African Americans in Keokuk. On page 5, it states there were 283 African American inmates, but it subtracted 285. These discrepancies, which upon review appear to be typographical errors, nonetheless cause concern about the accuracy of factual determinations central to the court’s decision.

437. State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019).

438. *Id.*

This was the showing *Lilly* required to establish that Veal experienced individual injury, satisfying the standing component.<sup>439</sup> The court instructed there were additional adjustments to be considered on remand, and those were examined in Part III.B.2.<sup>440</sup>

The Authors acknowledge Justice Mansfield's statistical findings paragraph began by summarizing the facts relevant to *Veal's* standing.<sup>441</sup> Because that was the order it was presented in *Veal*, the Authors have followed that ordering in their discussion of the *Veal* court's analysis of the *Duren/Plain* prong two determinations—that is, examining the standing component prior to examination of the aggregate data component.<sup>442</sup> However, as we emphasized above in our overview discussion of the litigation of fair cross-section claims, defendant's counsel's focus pre-trial should be on whether underrepresentation significant at the one standard

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439. See *State v. Lilly*, 930 N.W.2d 293, 305 (Iowa 2019) (holding the defendant has standing if the percentage of the distinctive group in the defendant's jury pool is *less* than the percentage of that group in the jury-eligible census population) (“A defendant whose jury pool has a percentage of the distinctive group at least as large as the percentage of that group in the jury-eligible population has not had his or her right to a fair cross section infringed, and there would be no reason to aggregate data in that event.”).

440. The district court considered whether the two African Americans jurors with felony convictions should be included in the jury pool count, and held they would be counted “even if the State has the right to strike them for cause because of that felony conviction.” Transcript of Record, Volume II, at 43, *State v. Veal*, FECR925750. The Authors, in their NAACP Public Comments on the proposed amendments to the Iowa Rules of Criminal Procedure, contend Iowa's felon-exclusion rule, 2.18(5)(a) constitutes systematic exclusion under *Duren/Plain* prong three due to its huge adverse racial impact on African Americans. IOWA R. CRIM. P. 2.18(5)(a); see *Lilly*, 930 N.W.2d at 305–06. Given the Rule and the holding in *Williams*, the two African American jurors and the one white juror who were struck should not have been included in the jury pool count because they were not part of the “jury-eligible population.”

441. *Veal*, 930 N.W.2d at 329.

442. *Id.* The Authors have misgivings about this ordering, as it conflicts with the ordering that is necessary for resolution of fair cross-section issues at the *trial court level*, which should commence with resolution of the aggregation data component of *Duren/Plain* prong two—prior to the assignment of jurors to the panel for defendant's case. See *id.* It should be apparent that an appellate court reviewing the statistical facts in a fair cross-section appeal is in quite a different position than the trial court. The appellate court has a record that includes the aggregate jury data and the jury panel and pool data for the defendant's case, full briefing, and it has the luxury of much more time to make its ruling than the trial court. In sum, the Authors submit that the ordering of the discussion in Justice Mansfield's summary paragraph in no way suggests the ordering the district court should follow in resolving a defendant's fair cross-section claim. See *id.*

deviation level, or 0.16 probability level, can be demonstrated *based on the court system's aggregate data* for the preceding six months.<sup>443</sup>

D. *Binomial Distribution Calculation of Aggregate Data Component of Duren/Plain Prong Two, Applied to Veal Facts*

The aggregate data component of prong two determines whether the underrepresentation Veal personally experienced was also true over time: whether the Webster County 2016 aggregate jury data proof established underrepresentation of African Americans significant at two standard deviations or more.<sup>444</sup> In making this determination, *Lilly* held Iowa courts should not employ either the absolute or comparative disparity tests because these court-created measures were not rooted in the academic discipline of statistics, and directed judges instead to use “standard deviation analysis.”<sup>445</sup> Justice Mansfield did not deny most courts have employed their own court-created arithmetic formulas, but he was persuaded by the Supreme Court’s embrace of standard deviation analysis as computed on the binomial distribution model.<sup>446</sup> It was the gold standard in 1977 when *Duren* and *Castaneda* were decided, and it continues as to be the gold standard today, only now the calculations are greatly facilitated by computers and modern computer software.<sup>447</sup>

The court quoted *Castaneda*’s explanation of standard deviation analysis, as it helpfully synthesized the statistical proof in terms that those who are not statisticians can grasp:

If the jurors were drawn randomly from the general population, then the number of Mexican-Americans in the sample could be modeled by a binomial distribution. Given that 79.1% of the population is Mexican-American, the expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately 688. The observed number is 339. Of course, in any given drawing some fluctuation from the expected number is predicted. The important point, however, is that the statistical model shows that the results of a random drawing are likely to fall in the vicinity of the expected value. The measure of the predicted fluctuations from the

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443. See *supra* Part IV.B.3.

444. *Veal*, 930 N.W.2d at 328–29.

445. *Lilly*, 930 N.W.2d at 302–03.

446. *Id.* at 300.

447. *Duren v. Missouri*, 439 U.S. 357, 364–65 (1979); *Castaneda v. Partida*, 430 U.S. 482, 494–95 (1977).



expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican-American (0.209). Thus, in this case the standard deviation is approximately 12. As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist. The 11-year data here reflect a difference between the expected and observed number of Mexican-Americans of approximately 29 standard deviations. A detailed calculation reveals that the likelihood that such a substantial departure from the expected value would occur by chance is less than 1 in 10140.<sup>448</sup>

A Z score is simply the number of standard deviations between the observed and the expected.<sup>449</sup> The binomial mathematical formula is:

$$Z = \frac{O - NP}{\sqrt{NP(1 - P)}}$$

Z = the number of standard deviations; O = the observed number of Mexican Americans in the sample (in *Castaneda*, 339 Mexican American grand jurors over the aggregate 11 years of jury data); N = the size of the sample (the 870 total number of persons summoned for grand jury service over the 11-year period); and P = the minority percentage of the underlying population (i.e., 0.791, the Mexican American percentage of the general population in the county in which the court was located). “In this formula, the top (or numerator) is the difference between the observed and the expected. The bottom (or denominator) is the formula for one standard deviation.”<sup>450</sup> The *Castaneda* statistical facts go into the formula as follows:

$$Z = \frac{339 - (870 \times .79)}{\sqrt{(870 \times .79)(1 - .79)}} = \frac{339 - 687}{\sqrt{687 \times .21}} = \frac{-348}{\sqrt{144}} = \frac{-348}{12} = -29$$

448. *Lilly*, 930 N.W.2d at 303–04 (quoting *Castaneda*, 430 U.S. at 496 n.17).

449. MICHAEL J. ZIMMER, CHARLES A. SULLIVAN, & REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 138 (8th ed. 2013).

450. *Castaneda*, 430 U.S. at 496 n.17.

As *Castaneda* explained, in a randomly selected jury, one would have expected approximately 688 Mexican Americans out of 870 grand jurors ( $870 \times 0.791 = 688$ ).<sup>451</sup> However, there were only 339 Mexican American grand jurors.<sup>452</sup> The binomial formula calculated the likelihood “that the jury drawing was random” at an astounding 29 standard deviations.<sup>453</sup> If the result is two or three standard deviations or greater, *Castaneda* holds “the hypothesis that the jury drawing was random would be suspect to a social scientist” and prove the basis for courts to infer intentional systemic racial discrimination in an Equal Protection case.<sup>454</sup> *Lilly* concluded the U.S. Supreme Court would likely apply the *Castaneda* two standard deviation threshold to Sixth Amendment fair cross-section claim, but *Lilly* invoked its independent authority under the Iowa constitution to hold that only a one standard deviation showing was required in fair cross-section cases arising under article I, section 10.<sup>455</sup>

As *Veal* explained, proof of underrepresentation over six months’ time would generally be sufficient to provide confidence that the underrepresentation in defendant’s own jury pool or panel was not an aberration.<sup>456</sup> Since the most recent six months data was not in the record, the court remanded determination of that issue to the district court.<sup>457</sup> However, in the interest of providing guidance, Justice Mansfield proceeded to make a preliminary calculation on the 2016 calendar year data that was in the record.<sup>458</sup>

In *Veal*, Justice Mansfield explained the results of the aggregate data component of *Duren/Plain* prong two by summarizing the binomial distribution statistical analysis of Webster County jury pool data aggregated from 2016.<sup>459</sup> He made two calculations: first, using the percentage African Americans in Webster County, 4.6 percent, and, second, using the percentage of 18-and-over African Americans in Webster County, 3.9 percent.<sup>460</sup>

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451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.*

455. *State v. Lilly*, 930 N.W.2d 293, 304 (Iowa 2019).

456. *State v. Veal*, 930 N.W.2d 319, 330 (Iowa 2019).

457. *Id.*

458. *Id.* at 329.

459. *Id.*

460. *Id.*

As explained above, *Lilly* bifurcated the statistical threshold required in aggregate data analyses by setting a one standard deviation—or 16 percent probability threshold—in cases arising under article I, section 10, of the Iowa constitution and a two standard deviation—or 2.5 percent probability threshold—in cases arising solely under the Sixth Amendment.<sup>461</sup> Justice Mansfield wrote the results in scientific notation but did not explain their decimal equivalents:  $4.05 \times 10^{-21} = 0.000000000405$ ;  $2.29 \times 10^{-15} = 0.0000000000000229$ .<sup>462</sup> As calculated, at -6.82 and -8.02 standard deviations, respectively, Defendant Veal made out an arguable prima facie fair cross-section claim under the Sixth Amendment constitutional standard and *a fortiori* under the Iowa article I, section 10 constitutional standard.<sup>463</sup>

There was a lot packed into Justice Mansfield's underrepresentation calculation summary for the aggregate data component of *Duren/Plain* prong two.<sup>464</sup> The Justice's report of the calculations was just that, a report, with no explanation of the binomial distribution calculation.<sup>465</sup> Had Justice Mansfield taken us step-by-step through his binomial distribution statistical calculations, that might have allayed predictable concerns of lawyers, judges, and court personnel for whom statistics is not a part of their daily endeavors and who are unfamiliar with the technology most commonly used to do this calculation.<sup>466</sup> But the Authors acknowledge they have yet to find any judicial opinion that does provide that guidance.<sup>467</sup> Justice Mansfield's quote of *Castaneda's* explanation is excellent, but *Castaneda* was written long before laptop computers and the Excel software existed.<sup>468</sup> Still, the summary in *Veal* provides just enough information that the Authors can reconstruct the Justice's thinking and demonstrate the binomial calculations he made.<sup>469</sup>

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461. *State v. Lilly*, 930 N.W.2d 293, 304 (Iowa 2019).

462. *See id.* For an explanation on how to convert scientific notation results to decimal numbers, *see* J.A. Koenig, *Math for Biologists Reference Materials*, CREATIVE COMMONS: ATTRIBUTION NON-COMMERCIAL SHARE ALIKE, <http://www.mathcentre.ac.uk/resources/uploaded/module1textbooklike.pdf> [<https://perma.cc/P5ML-EHSB>].

463. *See infra* note 473 regarding the need to re-do the calculation with 2017 juror data.

464. *Id.* at 328–30.

465. *Id.* at 329.

466. *Id.*

467. *See, e.g., id.*

468. *Id.*

469. *Id.*

Based on one of the Authors' experience teaching the binomial distribution formula as a central part of his Employment Discrimination class for thirty-five years, we can imagine there are many lawyers, judges, and jury managers who are apprehensive and hesitant about attempting to master the binomial calculation. However, we are confident that once instructed upon the Excel methodology available on a computer, lawyers, judges, and jury managers will find they can make these calculations with reasonable confidence. The Authors believe it is important they be able to do so, as such calculations are necessary for court administration and the public to monitor the court system's progress and compliance with the fair cross-section requirement, and for lawyers to evaluate the merit in a potential fair cross-section claim and gathering accurate statistical facts.<sup>470</sup> Most law firms and civil rights organizations do not have a statistician employed who is readily available to assist. The Authors certainly are not suggesting that defendants can establish their prima facie case without expert statistical evidence and testimony. Indeed, some cases have required experts in computer programming and jury system operations.<sup>471</sup> But the Authors do suggest that, with training, lawyers, judges, and jury managers can make preliminary calculations on Excel software to determine whether or not there is a likely claim of underrepresentation. Moreover, by gaining a more informed understanding of the Excel software binomial calculation, they can make a much more confident and effective presentation at the fair cross-section hearing through the testimony of defendant's statistics expert or with the expert's statistical report. Counsels' understanding of the statistics can help prepare them to present and explain the statistics for the court and for the record.

Before going online and using the Excel software to make the calculation, it is important to make clear Justice Mansfield laid the groundwork for the calculation through his detailed discussion of the statistical facts that are critical to the calculations.<sup>472</sup> Referencing the binomial formula above, the "O" will be the number of African Americans in the Webster County aggregate jury pools for calendar year 2016 (35); the "N" will be the total number of prospective jurors in the Webster County jury pools for calendar year 2016 (2,637);<sup>473</sup> and "P" will be the African

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470. *See id.*

471. Chernoff & Kadane, *supra* note 197, at 16.

472. *Veal*, 903 N.W.2d at 329.

473. *Veal* instructed that, on remand, the district court should base its decision on the number of African Americans in the aggregate jury pool data for the six months

American percentage of the Webster County jury-eligible census population (0.032) (after adjustments so it includes only those 18 and over and a pro-rata portion of the “Two or More Races” group, and excludes those who are prisoners).<sup>474</sup> These statistical facts are the key numbers ascertained from the research that was the focus of Part III.B, and they are numbers that go into the Excel software’s binomial distribution function.<sup>475</sup> It is in developing the statistical facts where the lawyer’s expertise and experience is critical, as it is there the judgment of the trial judge will always be invoked.<sup>476</sup> That is where the fighting issues will lie.<sup>477</sup> This is true even if counsel never feels completely confident about his or her ability to make the statistical calculations. But understanding the binomial distribution formula and utilizing the Excel software will help ensure counsel’s statistics compare apples to apples, and not apples to oranges.

The Authors have always found the best way to learn a new computer program was “hands on,” so we encourage the reader to go online and walk through the Excel software binomial distribution function as it calculates the probability of there being 35 African Americans in the 2016 aggregate Webster County jury pool of 2,637. The Authors are publishing an Addendum to this Article on the *Drake Law Review* Online Discourse that will introduce the reader to Excel and to the State Data Center’s web page on jury-eligible population data for each Iowa county.<sup>478</sup>

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preceding trial, January–June 2017. *Id.* at 330. The court will likely give the determination based on the more recent data greater weight than the calculation based on the 2016 jury data. *Id.*

474. *Id.* at 329–30.

475. *See supra* Part III.B.

476. *See, e.g., Veal*, 930 N.W.2d at 329–30.

477. There could be no better example than the district court’s ruling on the remand of *State v. Lilly*. There, the court was persuaded by the State that in determining the African American percentage of the jury-eligible census population to be used in the fair cross-section calculations, the court should not simply rely upon the readily accessible and accurate census data for Lee County 18 years-and-over—which would be the norm—but should engage in a number of assumptions and additional computations that it argued would more closely approximate the population of the North Lee judicial district for those 18-years-and-over. As will be explained in detail in our report on the *Lilly* remand decision in our online Addendum, the State’s argument proved decisive. *See Discourse*, DRAKE L. REV., <https://drakelawreview.org/discourse/> (containing an Addendum to this Article to be published in 2020). The district court ruling is on appeal.

478. *See Discourse*, DRAKE L. REV., <https://drakelawreview.org/discourse/> (containing an Addendum to this Article to be published in 2020).

V. STARE DECISIS AND JUSTICE McDONALD'S *LILLY* TRILOGY DISSENTSA. *Lilly and Plain: Precedents Worthy of Celebration*

These *Lilly* trilogy holdings may be the most progressive fair cross-section rulings by any court, state or federal, in the country.<sup>479</sup> The court majority rejected altogether the absolute disparity and comparative disparity tests for underrepresentation and definitively chose standard deviation analysis as the test to apply.<sup>480</sup> Reaffirming the importance of the impartial jury guarantee as delineated in *Plain* and recognizing the consequence of failing to ensure jury pools and panels representing a fair cross-section of the community, the court applied standards under the article I, section 10 of the Iowa constitution different from, broader and more protective than, standards applicable in a case arising only under the Sixth Amendment.<sup>481</sup> *Lilly* decided that one standard deviation, not two standard deviations or more as in *Castaneda*, would be the measure of underrepresentation under the Iowa constitution;<sup>482</sup> and for its part, Justice Mansfield's opinion in *Veal* nicely walks through an application of *Lilly*'s prong two holding to *Veal*'s statistical facts, illustrating the steps counsel must take in a fair cross-section case.<sup>483</sup>

And the court in *Lilly* recognized that the judicial branch—court administration, judges, and jury managers—can fashion policies and does have tools under its control regularly to use and thereby secure jury pools and panels representing a fair cross-section of the community.<sup>484</sup> Such judicial policies and the predictable use of the judicial system to enforce them are the “jury management practices” essential to securing the impartial jury guarantee.<sup>485</sup> Systematic neglect of these practices shown to cause underrepresentation should, as the *Lilly* trilogy held under the Iowa constitution, constitute “systematic exclusion” within the meaning of *Duren* and *Plain*.<sup>486</sup>

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479. See *supra* Parts I.C–D.

480. See *e.g.*, *State v. Lilly*, 930 N.W.2d 293, 299–302 (Iowa 2019).

481. *State v. Plain*, 898 N.W.2d 801, 809 (Iowa 2017), see *e.g.*, *State v. Lilly*, 930 N.W.2d 293, 299–302 (Iowa 2019).

482. *Lilly*, 930 N.W.2d at 304.

483. *State v. Veal*, 930 N.W.2d 319, 329–30 (Iowa 2019).

484. *Lilly*, 930 N.W.2d at 305.

485. *Id.* at 305–06.

486. See, *e.g.*, *id.* at 307.

The majority in *Lilly* was quite right in choosing a one standard deviation test of underrepresentation under the Iowa constitution and in holding that jury management practices and inaction that lead to systematic underrepresentation may constitute systematic exclusion.<sup>487</sup> The *Lilly* trilogy holdings should not in any way be regarded as too burdensome to state courts and administrators, particularly in light of the court's holding in *Thongvanh v. State* that *Plain* will not be retroactively applied on collateral review, at least not unless defendant raised a fair cross-section objection at the trial stage.<sup>488</sup> They secure the accused's right to an impartial jury drawn

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487. *Id.* at 304.

488. *Thongvanh v. State*, 938 N.W.2d 2, 6 (Iowa 2020). *Thongvanh's* conviction was affirmed by the court of appeals in 1986. *Id.* In 1993 the supreme court affirmed the denial of his post-conviction review raising a fair cross-section claim. *Id.* In 2017, *Plain* overruled *Jones's* holding that required a 10 percent absolute disparity threshold to make out a prima facie fair cross-section claim. *State v. Plain*, 898 N.W.2d 801, 824 (Iowa 2017). In January 2018, *Thongvanh* filed a new PCR application, relying upon *Plain. Thongvanh*, 938 N.W.2d at 7.

The Iowa Supreme Court, in an unanimous opinion by Chief Justice Wiggins, held that *Thongvanh's Plain* claims were not barred by Iowa Code § 822.3's three-year statute of limitations, as his claim presented "a new ground of law" that "could not have successfully argued that the jury pool in his criminal trial was not drawn from a fair cross section of the community" in the three-year period following rejection of his PCR claim in 1993 as *Jones* was the governing law throughout that period of time. *Id.* at 10. The court then addressed whether *Plain* would be applied retroactively. *Id.* The court first applied federal constitutional principles, which "give[] retroactive effect to only new 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding,'" and found *Duren's* new fair cross-section rule would not be retroactive to be on point. *Id.* at 11 (quoting *Brewer v. State*, 444 N.W.2d 77, 81–82 (Iowa 1989) (internal quotation omitted)). The court held *Brewer v. State* governed, as even if a fair cross-section violation was characterized as a "structural error," it "does not undermine the fundamental fairness of the trial or seriously diminish the likelihood of obtaining an accurate conviction." *Id.* at 12–13.

*Thongvanh* also urged the court "to adopt [its] own framework for retroactivity under the Iowa Constitution's due process and equal protection guarantees that provide for broader retroactivity than the Court's [federal] framework." *Id.* at 14. *Thongvanh* asked the court "to apply the same retroactivity rule for cases that are not final at the time the new rule is announced to cases that have become final at the time the new rule is announced." *Id.* at 15. In denying *Thongvanh's* claim, the court acknowledged its resolution required a balancing of important interests:

We recognize that the composition of jury pools can have real-world effects. That is why we changed the law in *Plain*. In fact, since 1984, when *Thongvanh* was tried and convicted, Iowa's criminal justice system has evolved in many ways—

from a fair cross-section; and, as illuminated by the U.S. Supreme Court over the course of 150 years, they significantly further the purposes intended to be served by the institution of the jury.<sup>489</sup> They should be celebrated for the vision of fairness and equality for which they stand, and for the commitment the court is necessarily making to take the administrative steps that effectuate these democratic reforms.<sup>490</sup>

In a special concurring opinion joined by Justice Wiggins, Justice Appel wrote, “[T]he right to a fair and impartial jury is critical to our criminal justice system,” and the fair cross-section principle involved in this case, “can only be understood in the larger context.”<sup>491</sup> To that end, they identified “four building blocks” the court system must embrace to accomplish its goal of securing racially impartial juries.<sup>492</sup> One is, as the court in *Plain* and *Lilly* required, achievement of representative jury pools drawn from a fair cross-section of the community.<sup>493</sup> “Second, the manner of selecting jurors that ultimately serve from the jury pool must promote achievement of a fair cross section” on the 12-person jury that hears the case.<sup>494</sup> Thus, “we must permit effective voir dire on express *and implicit bias*.”<sup>495</sup> That may require individualized voir dire in appropriate cases, a view explored in depth in *Williams*.<sup>496</sup> “Further, we must revise our reliance on *Batson v. Kentucky*. . . .”<sup>497</sup> Finally:

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hopefully for the better. We believe if Thongvanh were tried today, thirty-six years later, he would receive better procedural protections on the whole. But against this consideration, we have to weigh the need for finality of judgments when the issue does not bear directly on guilt or innocence and the impracticality of reconstructing events that occurred between three and four decades ago.

*Id.* at 15–16 (footnote omitted). The court did not totally close the door: *Id.* “Thongvanh, unlike . . . *Brewer*, did not raise any objection at trial to the composition of the jury pool or panel, even an objection under the then-existing law. \* \* \* We have no occasion to decide today how a ruling that *Plain* is retroactive would be applied to the case where the defendant made a contemporaneous objection.” *Id.* at 15 n.5.

489. See e.g., *Lilly*, 930 N.W.2d at 299–302.

490. See e.g., *id.*

491. *Id.* at 310.

492. *Id.*

493. *Id.*; see *Plain*, 898 N.W.2d at 825–27.

494. *Lilly*, 930 N.W.2d at 310.

495. *Id.* (emphasis in original).

496. *State v. Williams*, 929 N.W.2d 621, 641 (Iowa 2019) (Appel J., concurring in part and dissenting in part).

497. *Lilly*, 930 N.W.2d at 310.



Iowa juries should be instructed, preferably at the beginning of the case, on implicit bias. In my view, such an instruction fairly reflects the law and provides an important protection to ensure that juries decide cases based on the facts and law and not on preconceived, anchored notions of human behavior.<sup>498</sup>

The Authors unequivocally share Justice Appel's perspective.<sup>499</sup> A fully-comprehensive approach to all the issues Justice Appel identified is beyond the scope of this Article, the principal focus of which is the fair cross-section issues examined in *Plain* and the *Lilly* trilogy. But the *Lilly* trilogy had important rulings on several jury trial issues that critically interrelate with the fair cross-section issues and gave rise to a wide array of concurring and dissenting opinions in the *Lilly* trilogy that envisioned the full dimensions of issues that will come in the future.<sup>500</sup>

Justice Appel also forecast some of the likely issues that will need to be resolved regarding systematic exclusion: "Questions under step three include how multiple causation should be treated, whether self-exclusion of minority members impacts the analysis, and whether there should be a presumption of causation in fair-cross-section cases under some circumstances."<sup>501</sup> In truth, there will be some cases where it is clear that ineffective jury management practices clearly contributed to underrepresentation, but for which there were other causes, too.<sup>502</sup> Proof of causation is an element of the test under *Lilly*, but as Justice Appel cautioned, if Iowa courts set the standard of proof of "causation" too high, defendants will be unable to succeed on their fair cross-section challenges even when they have demonstrated clear and significant underrepresentation.<sup>503</sup> Necessarily, the court must appreciate that defendants' ability to prove causation is inextricably intertwined with the

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498. *Id.*

499. *See id.*

500. *See id.* at 313; *State v. Veal*, 930 N.W.2d 319, 340 (Iowa 2019); *Williams*, 929 N.W.2d at 638. In our online Addendum is a short piece the Authors have written, entitled, *A Fair and Impartial Trial Free from Racial Discrimination Will Require an Across-the-Board Approach: Systemic Reforms Still Needed in Light of the "Other" Racial Justice Jury Trial Rulings in State v. Veal and State v. Williams*. *See Discourse*, DRAKE L. REV., <https://drakelawreview.org/discourse/> (containing the Addendum to this Article to be published in 2020).

501. *Lilly*, 930 N.W.2d at 313.

502. *See id.*

503. *Id.* at 310 (Appel, J., concurring).

detail and accuracy of the court system's recordkeeping and reporting of jury data.<sup>504</sup>

Without question, the *Lilly* trilogy has given people of color hope that another major step has been taken on the long road to achieving Iowa trial juries that are truly representative of their communities served by the trial court.<sup>505</sup> At the same time, Justice Appel wisely cautioned in his concurrence in *Lilly* that these fair cross-section rulings, important as they are, are only the next step, and the progress they promise can still be washed away or nullified if further jury trial protections are not put in place.<sup>506</sup> As questions arise, however, and further jury trial protections are put in issue, *Plain* and the *Lilly* trilogy should be seen as lighting the way forward.

### B. Constitutional Text and History

Relying only on the dissent in *Duren* of Justice William Rehnquist over 40 years ago—and by necessary implication, his dissenting opinion in *Taylor* two years earlier—and an observation by Justice Clarence Thomas in his brief concurring opinion in *Berghuis*, Justice McDonald dissented.<sup>507</sup> Joined by Justice Waterman and now-Chief Justice Christensen, Justice McDonald contended *Duren* and its progeny of more than four decades were wrongly decided, having developed a “federal framework [that] is not supported by text or history.”<sup>508</sup> Justice Rehnquist's dissent in *Taylor* rejected the 8–1 majority's Sixth Amendment analysis reaffirmed in *Duren* and adopted in *Plain*: “Fairly read, the only ‘unmistakable import’ of those cases [like *Smith* and cases following it] is that due process and equal protection prohibit jury-selection systems which are likely to result in biased or partial juries.”<sup>509</sup> For

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504. *See id.* at 298–300.

505. *See id.* at 309; *Veal*, 930 N.W.2d at 330; *Williams*, 929 N.W.2d at 630.

506. *See Lilly*, 930 N.W.2d at 309.

507. *Berghuis v. Smith*, 559 U.S. 314, 334 (2010) (Thomas, J., concurring) (observing that historically “juries did not include a sampling of persons from all levels of society or even from both sexes,” citing states that variously limited juries to men, women, white people, property owners, and/or taxpayers and excluded women; and he said that in his view, the conclusion that a jury must represent a fair cross-section of the community “rests less on the Sixth Amendment than on an ‘amalgamation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment,” citing Justice Rehnquist's dissenting opinion in *Duren*); *Lilly*, 930 N.W.2d at 314 (McDonald, J., concurring in part).

508. *Lilly*, 930 N.W.2d at 314.

509. *Taylor v. Louisiana*, 491 U.S. 522, 539 (1975) (Rehnquist, J., dissenting).

him, it apparently must appear that no constitutional violation should be found unless it is “necessary to guard against arbitrary law enforcement, or to prevent miscarriages of justice and to assure fair trials.”<sup>510</sup> In that connection, he faulted the defendant for failing to claim, let alone prove, actual prejudice or bias in his trial.<sup>511</sup> And while acknowledging differences of opinion, Justice Rehnquist doubted that the presence of women was necessary for the jury to be fair and impartial; and he thought the notion that the presence of women might add “a flavor, a distinct quality” to the jury’s deliberations “smacks more of mysticism than of law.”<sup>512</sup> Today, it requires no citation to reject that position. Moreover, Justice Rehnquist’s dissent revealed no awareness of, or ignored, implicit bias.<sup>513</sup> In any event, Justice Rehnquist was not speaking of racial prejudice and exclusion, which the Supreme Court has long acknowledged and condemned.<sup>514</sup>

Justice McDonald, however, asserted these “older” federal precedents should have little or no application to Iowa as they involved court systems where there was “widespread and state-sponsored or state-approved sexism and racism. . . and the systematic exclusion of large percentages of the population from civic life was stark, palpable, and easily observed.”<sup>515</sup> He contended that the court should “maintain[] the absolute disparity test as a threshold test to differentiate cases presenting stark, palpable, and easily observed exclusion from cases that raise only question about the limits of our analysis and the limits of our data.”<sup>516</sup>

It is hard to take seriously Justice McDonald’s lead argument that *Duren* “is not supported by text or history” after reviewing the centrality

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510. *Id.* at 541.

511. *Id.* It should not be forgotten that under the Sixth Amendment every defendant is entitled to a fair cross-section of the community on his or her jury. U.S. CONST. amend. VI. *Duren* recognized that a defendant has standing to challenge exclusion in violation of his fair cross-section right, “whether or not he is a member of the excluded class.” *Duren v. Missouri*, 439 U.S. 357, 359 n.1 (1979). Although the focus of the Article has been on how critical a racially diverse jury is to defendants of color, the Authors are confident that there are many white defendants who prefer racially diverse juries that are representative of their communities.

512. *Taylor*, 419 U.S. at 541–42 (Rehnquist, J. dissenting).

513. *See id.* at 539–42 (Rehnquist, J. dissenting).

514. *See id.*

515. *State v. Lilly*, 930 N.W.2d 293, 315 (Iowa 2019) (McDonald, J., concurring in part and dissenting in part).

516. *Id.* at 315.

that representative juries hold in democratic values, the rich history of the constitutional guarantee of representative juries as reflected in the fair cross-section precedents from *Strauder* through *Smith*, the importance of representative juries in our founding documents,<sup>517</sup> and the three-part rationale for that understanding which the Supreme Court explained in *Taylor*,<sup>518</sup> approved unanimously by the Iowa Supreme Court in *Plain*.<sup>519</sup> The dissent engaged in major revisionism without acknowledging its implicit repudiation of the principle of stare decisis in disregarding its own unanimous decision in *Plain*. In contrast to Justice McDonald's proffered reliance on due process and equal protection, *Plain* held it was the Sixth Amendment that was the source of the guarantee of a jury drawn from a fair cross-section of the community and overruled *Jones*'s 10 percent absolute disparity test because it violated that guarantee.<sup>520</sup> It is true that *Jones* drew its 10 percent absolute disparity test from *Swain*, a 1965 jury case that reflected the stark, palpable exclusion to which the dissent refers.<sup>521</sup> However, *Swain* was a grudgingly decided Equal Protection case that declined to find intentional discrimination in the face of overwhelming evidence.<sup>522</sup>

In *Taylor* and *Duren*, the U.S. Supreme Court took a completely different tack under the Sixth Amendment's impartial jury clause and held that its scope was not narrowly limited by constitutional text or precedent to protecting only against purposeful discrimination.<sup>523</sup> In the Authors' judgment, the reasoning relied upon by the dissent was thoroughly discredited in *Duren* and again, by a *unanimous* court, in *Plain*.<sup>524</sup> Both cases clarified that the fair cross-section requirement is grounded in the Sixth Amendment's impartial jury requirement rather than the Fourteenth Amendment's Equal Protection Clause.<sup>525</sup> *Plain* made clear that the touchstone of the Sixth Amendment's fair cross-section requirement is the

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517. *Id.* at 314; *see supra* Part I.A, I.B.

518. *See generally Taylor*, 419 U.S. at 522.

519. *See State v. Plain*, 898 N.W.2d 801, 821–22 (Iowa 2017).

520. *Id.* at 825.

521. *Swain v. Alabama*, 380 U.S. 202 (1965); *see State v. Jones*, 490 N.W.2d 787, 793 (Iowa 1992).

522. *See generally Swain*, 380 U.S. at 202.

523. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Duren v. Missouri*, 439 U.S. 357, 369 (1979)

524. *See Duren*, 439 U.S. at 358–63 (1979); *Plain*, 898 N.W.2d at 821–29.

525. *See Duren*, 439 U.S. at 358–63; *Plain*, 898 N.W.2d at 821–29.

exclusion of a distinctive group in the community from jury pools and panels and that it does not require proof of intentional discrimination.<sup>526</sup> It is hard to conceive the dissenting justices want to return to the bleak era of *Swain* and shut the door on the progress that has been made toward achieving Iowa juries that are representative and do reflect a fair cross-section of the community served by the trial court, including the racial composition of their communities.<sup>527</sup>

*Plain* also recognized the insidious reality of implicit bias and encouraged trial judges to be pro-active in addressing it.<sup>528</sup> It is hard to think of a step that can better reduce the risk of implicit bias in a court system than ensuring that juries are drawn from pools and panels that reflect their community's diversity.<sup>529</sup> It was the apprehension of prejudice on the part of all-white juries that, in part, led the Supreme Court in *Strauder* to explain why the fair composition of juries was so important to a criminally accused and was constitutionally protected.<sup>530</sup> By an overwhelming consensus in courts' opinions, juries that truly reflect the community provide critical assurance against actual or implicit bias infiltrating jury deliberations,<sup>531</sup> a

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526. *Plain*, 898 N.W.2d at 823–24.

527. *See* State v. Lilly, 930 N.W.2d 293, 315 (McDonald, J., concurring in part and dissenting in part).

528. *Plain*, 898 N.W.2d at 817.

529. *See id.*

530. *See supra* text accompanying notes 7–13; *see also* Georgia v. McCollum, 505 U.S. 42, 60–62 (1992) (Thomas, J., concurring) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879) (approving *Strauder* and its basic premise that securing representation on the jury of a member of the defendant's race can overcome racial bias and help to assure a fair trial)).

531. *See e.g.*, Taylor v. Louisiana, 419 U.S. 522, 527 (1975); United States v. Grisham, 63 F.3d 1074, 1080 (11th Cir. 1995) (explaining that a representative jury serves the goal of assuring impartiality “because a diversity of viewpoints among the jury pool hedges against the possibility of a jury acting on prejudices shared by a homogenous group”); Commonwealth v. Arriaga, 781 N.E.2d 1253, 1262 (Mass. 2003) (citation omitted) (“The right to trial by a jury drawn fairly from a representative cross section of the community serves the critical purposes of guarding against the exercise of arbitrary power and making available the commonsense judgment of the community.”); State v. LaMere, 2 P.3d 204, 212 (Mont. 2000) (“Our jury system, no less than our system of representative government, is based upon a democratic ideal: that justice is best served by a broadly representative group of individuals ‘drawn from the various walks of life.’ In short, it is believed that diversity begets impartiality.”).

concern illustrated by and of heightened importance because of the U.S. Supreme Court's recent decision of *Peña-Rodriguez v. Colorado*.<sup>532</sup>

*C. Jury Management Practices, Administrative Burdens, and Good Faith*

The dissent also disagreed with the “majority’s conclusion that run-of-the-mill jury management practices can support a systematic exclusion claim.”<sup>533</sup> That conclusion is in tension with *Berghuis*.<sup>534</sup> *Berghuis* does not stand for the proposition that jury management practices do not matter in considering whether the right to an impartial jury has been denied.<sup>535</sup> Moreover, as we have expressed above,<sup>536</sup> the Authors view the reference to “run-of-the-mill” jury management practices as regrettably pejorative and disparaging and at odds with managers’ and the courts’ obligation to administer the judicial branch in the way that is reasonably but best calculated to secure justice.<sup>537</sup> Surely that means the judicial branch should follow what are known, effective, and reasonable practices, in conjunction with available technology, to secure a criminally accused’s right to an impartial jury drawn from a fair cross-section of the community.<sup>538</sup> Known problems exist and can be demonstrated throughout the jury selection process insofar as truly securing a jury drawn from a fair cross-section of the

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532. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 859 (2017). Because racial bias “if left unaddressed, would risk systemic injury to the administration of justice,” the Court was persuaded to overturn a longstanding tradition of not impeaching jury verdicts, and ordered trial judges to carefully examine evidence that racial bias by even one juror can “cast serious doubt of the fairness and impartiality of the jury’s deliberations and resulting verdict.” *Id.* at 869. The Court reasoned: “All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after a verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.” *Id.* The Authors submit that securing a representative jury during the trial juror selection process will significantly minimize the risk that jury verdicts involving defendants of color will be set aside because of the implicit or explicit bias of one or more jurors.

533. *State v. Lilly*, 930 N.W.2d 293, 318 (Iowa 2019) (McDonald, J., concurring in part and dissenting in part).

534. *Id.* (McDonald, J., concurring in part and dissenting in part).

535. *See Berghuis v. Smith*, 559 U.S. 314, 332–33 (2010); *see also supra* notes 290–91.

536. *See supra* notes 286–303 and accompanying text.

537. *Lilly*, 930 N.W.2d at 318 (McDonald, J., dissenting).

538. *See supra* notes 267–68 and accompanying text.

community is concerned.<sup>539</sup> What explanation, we would ask, warrants doing less when not just the appearance of justice but unacceptably differing results depending upon whether the jury is homogenously white or racially mixed is at stake?<sup>540</sup> It is also inconsistent with the aspiration and charge that was given to judges and judicial branch employees, members of the executive branch, and members of the bar and private sector participating in years of earnest efforts to improve the justice system, as outlined in Part II.<sup>541</sup>

In fact, in the summer of 2018, effective January 1, 2019, the OSCA published a jury management policy expressing comprehensive, reasonable, coherent jury management policies and practices which are already securing measurable improvements in jury pools.<sup>542</sup> This policy addresses updating of addresses on the master source list to address undeliverables, following up on failures to respond and failures to appear, holding proceedings to enforce failures to appear with consequences, among other matters.<sup>543</sup> That more may need to be done, of course, hardly means that it cannot be or will not. But it does underscore that these are matters within the control of the judicial branch and that failing or neglecting any such regard should be grounds for finding systematic exclusion if underrepresentation is shown to be the result.<sup>544</sup>

The dissent also believed the consequences of *Lilly* would be difficult to administer and administratively burdensome.<sup>545</sup> For example, Justice McDonald posed a hypothetical in *Lilly* and lamented that, under *Lilly*, “the defendant would be entitled to significant discovery regarding the history of jury pools in the county” if defendant’s jury pool was one person “short.”<sup>546</sup> This is the proverbial straw man.

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539. *See id.*

540. Writing for the Iowa Supreme Court in *Plain*, Justice Hecht cited research documenting different outcomes for African American defendants depending upon whether the jury was all-white or racially mixed; and other courts have noted the same possibility. *State v. Plain*, 898 N.W.2d 801, 825–26 (Iowa 2017).

541. *See* discussion *supra* Part II.

542. Iowa Judicial Branch Jury Management Policy (published Dec. 5, 2018) (copy on file with the Authors).

543. *See id.*

544. *See id.*

545. *See State v. Lilly*, 930 N.W.2d 293, 312 (Iowa 2019).

546. *Id.* at 315 (McDonald, J., concurring in part and dissenting in part).

*Plain* requires the jury data be provided to the defendant without *any* prerequisite showing of underrepresentation whatsoever.<sup>547</sup> *Plain* recognized the reality that no such showing by defendant would be possible because the court system has a monopoly on the jury data and it is not publicly available.<sup>548</sup> The defendant's discovery must necessarily be done well in advance of trial—long before the racial composition of the defendant's own jury panel or trial jury will be known.<sup>549</sup> The inadequacy of the jury data and statistics of which the dissent is so critical would become the norm in the future as well—if the parties and the trial judge were to wait until jury service day to explore whether the jury pool satisfies the standing component before inquiry into the aggregate data component.<sup>550</sup>

This is data that a transparent and efficient court system under good management would gather, maintain, update monthly, and post online, making it readily available to lawyers and the public alike. Obtaining and posting this data is absolutely within the control and reach of Iowa's judicial branch and state court administration; and the judicial branch is now collecting such data—with an understanding of its purpose and importance, with improved methodology, and with renewed, increased, and impressive attention.<sup>551</sup> Regularly posting its jury data online, such as the State Data Center has done with the jury-eligible census data, would be a good model to follow.<sup>552</sup> Such transparency would enable the judicial branch to meet its data collection and disclosure obligation by merely referring defense counsel to its web page. It would also ease pressure on busy trial judges because each judge could be monitoring the jury data for his or her district and, should problems arise, work with court administration in advance to address those problems.

The dissent also argued in Part C that the majority's new rules are “also impractical and burdensome”<sup>553</sup> and will lead to an increase in the number

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547. *State v. Plain*, 898 N.W.2d 801, 828 (Iowa 2017).

548. *See id.* at 827–28.

549. *See generally* Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1723–24 (2016).

550. *See Lilly*, 930 N.W.2d at 315 (McDonald, J., concurring in part and dissenting in part).

551. *See id.* at 300–01.

552. *See supra* notes 191–203 and accompanying text.

553. *See Lilly*, 930 N.W.2d at 316–17 (“The jury managers in our more congested district courts will now be subject to discovery and subpoenaed to testify regarding jury



of petitions to transfer criminal cases to counties with a larger percentage of African Americans in the population.<sup>554</sup> Government, and certainly the judicial branch, has limited resources, human and financial, and the burden on those resources is necessarily and legitimately a factor to consider in weighing decisions and revising and refining procedure, whether through constitutional adjudication or exercise of the court's supervisory power.<sup>555</sup> But the existence of prejudice, express, implied and in appearance, is a critical factor to consider in the course of administering justice and governing the judicial branch.<sup>556</sup> Accordingly, our rules of procedure, both criminal and civil, provide for a change of venue in appropriate circumstances, and in recent years, courts have in fact changed the venue in criminal cases on or at the behest of an African American facing the likelihood of an all-white jury, or by the court *sua sponte*.<sup>557</sup>

The circumstances in which a change of venue in a criminal case should be considered and ordered does not admit of easy solution, but undeniably it is an issue that needs to be addressed.<sup>558</sup> Current Iowa law, in the opinion of the Authors and the NAACP, has been too restrictive, and they urged the Supreme Court's Advisory Committee on Jury Selection and also the Criminal Rules Review Committee to revise the current formulation for change of venue.<sup>559</sup> In 2018, the Iowa Supreme Court's Advisory Committee on Jury Selection recommended,<sup>560</sup> and, in March 2020, the Court's Criminal

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management practices every time there is a small but immaterial variance in the racial composition of the jury pool.”).

554. *Id.* (arguing it “will increase the pressure to transfer venue of criminal cases with African-American defendants to urban counties to find more jury-eligible minorities”).

555. *See id.*

556. *Id.* at 310–13 (Appel, J., concurring).

557. *See State v. Rimmer*, 877 N.W.2d 652, 664–65 (Iowa 2016) (discussing history and purpose of the vicinage clause).

558. IOWA R. CRIM. P. 2.11(10).

559. Russell E. Lovell, II & David S. Walker, Co-Chairs, Iowa-Nebraska NAACP Legal Redress Committee, Jury Selection Advisory Committee Referrals, Address Before the Criminal Review Task Force (Jan. 25, 2019), at 5–6; NAACP Position Paper with Comments & Recommendations re Committee Staff Recommendations, at 9 (Iowa-Nebraska NAACP State Area Conference of Branches), filed with the Jury Selection Committee on January 23, 2018.

560. *Recommendations of the Committee on Jury Selection*, IOWA SUPREME COURT'S ADVISORY COMMITTEE, at 21, <https://www.iowacourts.gov/collections/41/files/499/embedDocument/> [<https://perma.cc/Q6S3-KUUU>].

Rules Review Committee proposed amendment of Rule 2.11(10) to provide a safety valve.<sup>561</sup> The Jury Selection Committee's comments explained: "A trial by one's peers is a fundamental principle of trial by jury. Some communities may not have the racial or ethnic population to ensure this fundamental principle."<sup>562</sup> These two committees necessarily weighed concerns related to feasibility and burden and came down on the side of providing defendants of color a jury of their peers.<sup>563</sup>

The dissenting justices acknowledged that "[o]f course, administrative burden alone is not a sufficient ground to ignore a constitutional command," but they concluded "[w]here, as here, however, the constitutional rule is of dubious provenance and without any identifiable benefit to the fair and impartial administration of justice, the administrative burden is and should be a consideration when extending a rule that will have significant impact in the day-to-day operation of the courts."<sup>564</sup> As stated above, while the Authors disagree with the dissent about the "provenance" of the *Duren/Plain/Lilly* rule and the importance of the benefits it secures, we recognize that most constitutional matters involve some balancing of interests.<sup>565</sup> The Authors are confident that neither *Plain* and the *Lilly* trilogy nor the supreme court committees disregarded the omnipresent concern about avoiding the imposition of undue burdens on the court system.<sup>566</sup> Just as advances in technology often make administrative concerns obsolete, the nationwide judicial experience that has been gained in improved jury management practices, coupled with the advent of inexpensive laptop computers, software developments, and other technology advances, have rendered obsolete the pre-*Plain* case law that, although seldom expressed, reflected deep concerns as to whether court administrators could meet more than minimal standards.<sup>567</sup>

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561. *Summary of Proposed Changes to the Iowa Criminal Rules of Procedure*, <https://www.iowacourts.gov/collections/483/files/1064/embedDocument/> [<https://perma.cc/R7QD-R5BZ>].

562. *Recommendations of the Committee on Jury Selection*, *supra* note 560.

563. *See id.*; *Summary of Proposed Changes to the Iowa Criminal Rules of Procedure*, *supra* note 561.

564. *State v. Lilly*, 930 N.W.2d 293, 317 (Iowa 2019) (McDonald, J., concurring in part and dissenting in part).

565. *See id.*

566. *See generally id.*; *State v. Plain*, 898 N.W.2d 801 (2017); *Recommendations of the Committee on Jury Selection*, *supra* note 560; *Summary of Proposed Changes to the Iowa Criminal Rules of Procedure*, *supra* note 561.

567. *See, e.g., Smith v. Texas*, 311 U.S. 128, 130 (1940).

In Part II of his dissent in *Lilly*, Justice McDonald expressed his confidence that “state court administration, district court judges, district court clerks, and district court jury managers have acted in good faith to implement the statutory command for full civic participation in jury service.”<sup>568</sup> Neither the Authors nor the NAACP believe there is any evidence that the serious shortcomings in Iowa’s jury selection process, identified by the Branstad Committee, were caused by lack of good faith, let alone by intentional or purposeful racial discrimination on the part of the judicial branch personnel.<sup>569</sup> But good faith is not a defense to a denial of the right to an impartial jury through failure of the jury wheel, jury pool, or jury panel to reflect a fair cross-section of the community served by the court<sup>570</sup> nor is the fact the fair cross-section components of a jury-selection process are race-neutral on their face.<sup>571</sup>

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568. *Lilly*, 930 N.W.2d at 319.

569. *See id.*; *Governor’s Working Group on Criminal Justice Policy Reform Submits Final Strategy Recommendations*, *supra* note 108.

570. Since claims of violation of fair cross-section principles arise under the Sixth Amendment and article I, section 10 of the Iowa constitution, and not under the Fourteenth Amendment’s Equal Protection Clause, good faith should no more be a defense than should the lack of discriminatory intent. U.S. CONST. amend. VI; IOWA CONST. art. I, § 10.

571. For example, although the NAACP vigorously challenges the felon-exclusion rule as effectuating systematic exclusion, without consideration of the nature of the crime, the years since its commission, evidence of rehabilitation and citizenship, and, where applicable, restoration of rights, it does not allege that judges are not applying Rule 2.18(5)(a) even-handedly to whites and persons of color. IOWA R. CRIM. P. 2.18(5)(a); *see* Amicus Curiae Brief in Support of Defendant-Appellant *supra* note 238, at 40–42. Rather, it alleges this race-neutral rule has had and is having, without justification, an extreme impact on defendants by depriving them, especially defendants of color, of the racially diverse juries that the impartial jury requirement deems vital to a fair, impartial trial. *See id.*; *Case: Free the Vote for People with Felony Convictions*, NAACP LEGAL DEFENSE FUND (Feb. 16, 2018), <https://www.naacpldf.org/case-issue/free-vote-people-felony-convictions/> [<https://perma.cc/7P8J-S4J8>]. The question demanded by the Sixth Amendment of the U.S. Constitution and article I, section 10 of the Iowa constitution is whether in practice there has been a failure of the jury-selection system to secure a fair cross-section of the community from which to select a jury. *See* U.S. CONST. amend. VI; IOWA CONST. art. I, § 10. Hannaford-Agor reports: “[I]ntentional discrimination in the procedures employed to summon and qualify jurors for service is long gone. There is still widespread belief—and substantial evidence to support that belief—that peremptory challenges are routinely exercised with discriminatory intent.” Hannaford-Agor, *supra* note 93, at 793 n.177 (citations omitted). The NAACP likewise believes the 2019 jury data puts in play in some jurisdictions its

## D. Plain, Lilly, and Stare Decisis

Simply put, given the text and reasoning in *Taylor* and *Duren*, the scholarship of Chernoff that exhaustively documents the distinctly different “provenances” and purposes of the Sixth and Fourteenth Amendments, the Iowa Supreme Court’s longstanding commitment to equality, the clear urgency of addressing the huge racial disproportionalities pervasive in the Iowa’s criminal justice system, and the court’s awareness that the Iowa court system ignored the problem for 25 years following *Jones*, *Plain* got it right.<sup>572</sup> *Lilly* got it right, too.<sup>573</sup> These decisions of the Iowa Supreme Court should “stand,” as it were, and influence the development of the law that is part of the jury-selection system in the future.<sup>574</sup> Indeed, the Authors believe they should be hailed.

*Plain* necessarily left questions to be resolved, with the confidence that on remand and in future cases they would be addressed and improvements in the administration of justice considered and achieved.<sup>575</sup> *Lilly* was right to

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concern that both intentional and implicit bias may exist in prosecutor’s exercise of peremptory challenges and that the ineffectiveness of existing procedures to implement *Batson*’s protection remains a major hurdle to securing trial juries that are representative of the community. See Amicus Curiae Brief in Support of Defendant-Appellant *supra* note 238 at 40–42. Inattention coupled with implicit bias can and has produced juries that have not truly reflected their communities. See *id.* The court in *Williams* clearly explained how insidious implicit bias is, causing even those who honestly believe they are fully committed to equality to take actions that reflect that bias even as they justify their actions on race-neutral reasons. See *State v. Williams*, 929 N.W.2d 621, 638 (Iowa 2019) (Wiggins, J., concurring in part and dissenting in part). Washington Supreme Court General Rule 37, which prohibits not only racially discriminatory peremptory strikes that are intentional, but also those that reflect implicit bias, provides a model worthy of the court’s consideration. See *State v. Veal*, 930 N.W.2d 319, 358 (2019) (Cady, C.J., concurring). Yet one cannot read the Branstad Committee’s Report and Recommendations and not conclude the judicial branch in 2015 was at least inattentive to the constitutional and statutory command for full civic participation in jury service. *Governor’s Working Group on Criminal Justice Policy Reform Submits Final Strategy Recommendations*, *supra* note 108. The 2019 jury data suggests that the judicial branch has made significant strides toward fulfilling the Branstad Committee’s final recommendation: “Oversight and accountability should be restored to the jury selection process.” *Id.*; see *Discourse*, DRAKE L. REV., <https://drakelawreview.org/discourse/> (containing the Addendum to this Article to be published in 2020).

572. See *State v. Plain*, 898 N.W.2d 801, 829 (Iowa 2019).

573. See *Lilly*, 930 N.W.2d at 309.

574. See *Plain*, 898 N.W.2d at 829; *Lilly*, 930 N.W.2d at 309.

575. See *Plain*, 898 N.W.2d at 829.

reject the absolute disparity and comparative disparity tests.<sup>576</sup> The plain truth is that cases addressing the “required” absolute disparity or comparative disparity are all over the map; there is no consistency in them, nor really even any principled and persuasive rationale, diserving the rule of law and the administration of justice in both respects.<sup>577</sup> *Lilly* establishes an underrepresentation standard drawn from the discipline of statistics that is realistic and rational in fact.<sup>578</sup> There will be questions to resolve in calculating underrepresentation in individual cases as we have explained above.<sup>579</sup> For example, if African Americans who are multi-racial are added to those who check the “African American” box on the juror questionnaire when the court makes its jury pool count—an adjustment the Authors think is quite common—a correlative adjustment must be made in calculating the jury-eligible census population of the combined distinctive group.<sup>580</sup> In finding that jury management practices causing underrepresentation constitute systematic exclusion under the Iowa constitution, *Lilly* stands on solid ground and reached the right result.<sup>581</sup> In doing so, *Lilly* continues Iowa’s longstanding commitment to addressing racial inequality, securing civil rights, and improving the administration of justice in Iowa’s court system. And it recognizes the existing and developing administrative expertise of the judicial branch and its personnel to resolve jury selection problems through good jury management practices, technology, and good judicial administration.<sup>582</sup>

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576. See *Lilly*, 930 N.W.2d at 302.

577. See *id.*

578. See *id.* at 304.

579. See *supra* Part III.A.

580. Despite the limitations imposed by the records in *Lilly* and *Veal*, in his dissent, Justice McDonald went ahead and did his own statistical calculations in both cases. *Lilly*, 930 N.W.2d at 317–18; *State v. Veal*, 930 N.W.2d 319, 365–66 (Iowa 2019). The dissent made the same miscalculation in both cases. See *Lilly*, 930 N.W.2d at 317–18; *Veal*, 930 N.W.2d at 365–66. When multi-racial African Americans are included in the court’s jury pool count, multi-racial African Americans in the “Two or More Races” category must be counted too in the jury-eligible population resulting in a similar upward adjustment of the census percentage of jury-eligible African Americans in Lee and Webster Counties. See *Lilly*, 930 N.W.2d at 317–18; *Veal*, 930 N.W.2d at 365–66. Justice McDonald failed to make such an upward adjustment in both cases. See *Lilly*, 930 N.W.2d at 317–18; *Veal*, 930 N.W.2d at 365–66.

581. See *Lilly*, 930 N.W.2d at 307 (“Yet, we do hold today that jury management practices can amount to systematic exclusion for purposes of article I, section 10.”).

582. See *id.*

Like any systemic change, there may be some growing pains, but the changes required of the court system to implement the holdings of *Plain* and the *Lilly* trilogy are proving to be neither impractical nor burdensome.<sup>583</sup> Indeed, it seems most unlikely that the Criminal Rules Revision Committee would have proposed extension of the fair cross-section mission of *Plain/Lilly* where existing fair cross-section reforms are burdensome or likely to impose significant costs on the Judiciary's fiscal budget.<sup>584</sup> As Hannaford-Agor reported, good jury management practices will result in juries that reflect the racial composition of their communities.<sup>585</sup> The various steps recommended by the Branstad Committee and the court's Jury Selection Committee reflect jury management practices that have been followed to good effect by many of the nation's court systems.<sup>586</sup> With training of judges and jury managers on jury management practices as well as training of all judicial branch personnel regarding implicit bias, progress in achieving representative jury pools is evident in the jury data for 2019 collected and made available by the OSCA.<sup>587</sup> The six urban counties with the largest African American populations each had jury *pools* that were representative, although the diversity of the jury pools was not maintained at the *panel* stage in four of the six counties.<sup>588</sup> Nevertheless, this is definitely *Plain* progress which the Iowa Supreme Court's decision in *Lilly* affirms and advances.<sup>589</sup> Both need to be recognized, applauded, and seen as serving not only as a beachhead but as a catalyst.

Justice Kennedy opened his opinion in *Peña-Rodriguez* with these eloquent words on the historic primacy of the jury in our American system of justice:

The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a

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583. See *id.*; *State v. Plain*, 898 N.W.2d 801, 829 (Iowa 2017).

584. See *Governor's Working Group on Criminal Justice Policy Reform Submits Final Strategy Recommendations*, *supra* note 108.

585. Hannaford-Agor, *supra* note 93, at 788 (citations omitted).

586. See *Governor's Working Group on Criminal Justice Policy Reform Submits Final Strategy Recommendations*, *supra* note 108; *Recommendations of the Committee on Jury Selection*, *supra* note 560.

587. See *Discourse*, DRAKE L. REV., <https://drakelawreview.org/discourse/> (containing the Addendum to this Article to be published in 2020).

588. *Id.*

589. See *State v. Lilly*, 930 N.W.2d 298, 307 (Iowa 2019); *State v. Plain*, 898 N.W.2d 801, 829 (Iowa 2017).

necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.<sup>590</sup>

The Iowa Supreme Court recognized, first in *Plain* and again in its *Lilly* trilogy, that this aspirational view of the United States' jury system only rings true if the jury is truly representative of "the people" and it has established the framework and has set the tone for addressing future, inevitable, and vital questions on the road to democracy in action, juries that are truly representative of the community.<sup>591</sup>

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590. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

591. See *Lilly*, 930 N.W.2d at 307; *Plain*, 898 N.W.2d at 829. There are many hurdles yet on the road but the momentum for systemic change has been there these past six years, between 2014 and 2020, as is the will that it continue. It will require staying the *Plain/Lilly* course by (1) not setting an evidentiary standard for proving causation/systematic exclusion that is too high; (2) reform of the felon-exclusion rule going beyond adoption of the proposed amendments to Rule 2.18(5)(a); (3) reform of the procedures intended to protect against discriminatory peremptory challenges, by expanding *Batson* to protect against implicit bias (and perhaps abolishing peremptory challenges altogether as has been done in the United Kingdom); (4) adoption of proposed amendments to rules 2.18(5)(o) to disqualify prospective jurors who are biased; (5) implementing individualized voir dire to detect and disqualify jurors harboring potential bias; (6) continuing the system-wide training of judges and court personnel on implicit bias and developing jury instructions and other teaching techniques so district court judges can educate jurors about implicit bias; and (7) adoption of the proposed amendment to Rule 2.11(10), governing change of venue. See *Lilly*, 930 N.W.2d at 310–14 (Appel & Wiggins, JJ., special concurrence).