

JURIES AND THE REPRESENTATIVE CROSS-SECTION RULE

by Joseph O. Fitzgerald and David E. Cannon, Ph.D.

Riverside County is not a place of the past; it is in constant motion, with an eye toward the future. The county has become increasingly diverse over the last decade, as it has been a magnet for transplants from other countries and from other populous counties throughout Southern California. Exactly how is this impacting our juries, and what we should expect to see in the venire? To address these questions, we need an understanding of how the state requires that jury pools resemble the diversity of a community's jury-eligible population.

Article 1, section 16 of the California Constitution provides the right to a jury trial. The California Supreme Court added to this right that the jury must be "drawn from a representative cross-section of the community." (*Williams v. Superior Court* (1989) 49 Cal.3d 736, 740.) Essentially, California law imposes a demographic requirement that guarantees that "the pools from which juries are drawn do not systematically exclude distinctive groups in the community." (*People v. Anderson* (2001) 25 Cal.4th 543, 566.) This is known as the "Representative Cross-Section Rule" and is aimed at having a jury pool mirror the community as closely as the process of random draw permits. (*People v. Harris* (1984) 36 Cal.3d 36, 48-49.) This article is brief overview of the rule and its application.

The Representative Cross-Section Rule is generally an issue that is raised in criminal court. However, it applies equally in civil cases and can be raised during any stage of the jury selection process, from as early as when the master list of potential jurors is compiled.

To establish a prima facie violation of the Representative Cross-Section Rule, the objecting party must show each of the following: (1) that the group that has been excluded is a "cognizable group" in the community; (2) that the representation of the cognizable group in the jury pool is not "fair and reasonable" in relation to the number of such persons in the community; and (3) that the underrepresentation is due to "systematic exclusion" in the process by which the jury pool is created. (*People v. Anderson* (2001) 25 Cal.4th 543, 566.)

For purposes of the first requirement, the California Supreme Court has held that groups defined by race, gender, religion, or sexuality are considered "cognizable." (See *People v. Fields* (1983) 35 Cal.3d 329, 347; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1277.) Compare this to age,

Riverside County v. California





	Riverside County	California
White	84% (42%NH)	77% (42%NH)
Black	7%	7%
American Indian	1%	1%
Asian	6%	12%
Hispanic	44%	37%
2+ Races	2%	3%

social status, and economic status, all of which have been determined by the California courts to be groups that do not qualify as "cognizable."

The second prong requires the objecting party to show that the representation of the cognizable group in the jury pool is not "fair and reasonable" in relation to the number of such persons in the community. The "community" that the rule focuses on is the judicial district in which the court is located. (See Code Civ. Proc., § 197(a); *Williams v. Superior*

Riverside Migration

Net Migration 2000 -2008:

Riverside grew by:	+ 500,000	
Los Angeles County declined by:	- 368,000	
Orange County declined by:	- 52,000	
San Diego County declined by:	- 10,000	

Sexual Minorities and Gender

- Palm Springs year round (jury eligible) population is estimated to be 35% gay/lesbian.
- Females comprise approximately 50% of the population in most Riverside Communities.
 - Palm Springs is the exception.
 - Females only comprise 48% due to a greater number of gay men in that community.

sion.” (*People v. Burgener* (2003) 29 Cal.4th 833, 857-858.)

Once the prima facie case is established, the burden shifts to the opposing party to provide either (1) a more precise statistical showing that no constitutionally significant disparity exists, or (2) a compelling justification for the procedure that has resulted in the disparity. (*People v. Burgener, supra*, 29 Cal.4th at p. 856.)

There are reasons other than “systematic exclusion” why any particular jury pool may not entirely reflect the breadth of diversity of a community. Juror demographics sometimes do not exactly mirror county demographics, particularly in fast-growing areas that are attracting residents from other areas of the world. Changes in the jury pool are often slower than changes in the community. People move, but they often do not immediately change their voter or DMV registrations to their new communities. It also takes time for new immigrants to become U.S. citizens. As a result, many of our newest residents are not jury-eligible. And sometimes, especially when selecting a small group of the entire population, a random selection may look nothing like the community, even though the selection was entirely random and appropriate.

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Court, supra, 49 Cal.3d at p. 745.) There are two different approaches to calculating underrepresentation. The first is called “Absolute Disparity,” which is the difference between the underrepresented group’s percentage in the jury-eligible population and the group’s percentage in the jury venire. Absolute Disparity is calculated by subtracting the group’s percentage in the jury pool from its percentage in the overall jury-eligible population. (*People v. Ochoa* (2001) 26 Cal.4th 398, 427, fn. 4.) The second method is known as “Comparative Disparity,” which is the percentage by which the number of the particular group in the venire falls short of the number of that group in the overall jury-eligible population. The formula for Comparative Disparity is to take the Absolute Disparity and divide that number by the underrepresented group’s percentage in the overall jury-eligible population, then multiply this result by 100. (*Ibid.*) Regardless of what formula is used, the California Supreme Court has not clearly defined what degree of disparity is constitutionally impermissible. However, it has determined that an Absolute Disparity between 2.7 and 4.3 percent (or a Comparative Disparity between 23.5 and 37.4) is generally “within the tolerance accepted” by reviewing courts. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1156.)

Recall from above that all three elements must be met to prove a violation of the Representative Cross-Section Rule. Therefore, after showing a statistical discrepancy in the representation of a cognizable group, the objecting party must identify some aspect of the jury selection process that is (1) the probable cause of the disparity and (2) constitutionally impermissible. (*People v. Bell* (1989) 49 Cal.3d 502, 524.) This particular element is known as “systematic exclusion” and is normally the death blow to any representative cross-section challenge due to the fact that an objecting party must show that the flaw is in the government’s procedure for selecting the jury. At this point in the analysis, any disparity in the particular panel assigned to the case is irrelevant. “Once the jury has been fairly selected, the law assumes that its members, whether Black, White, Hispanic, Catholic, . . . are equally capable of representing the community.” (*Williams v. Superior Court, supra*, 49 Cal.3d at p. 747.)

A number of cases demonstrate that, even when a cognizable group is underrepresented in the jury pool, the systematic exclusion requirement cannot be overcome due to the fact that most jury pools are selected at random from voter registration and DMV records. (E.g., *People v. Morales* (1989) 48 Cal.3d 527; *People v. Sanders* (1990) 51 Cal.3d 471.) So long as jury pools are drawn from such neutral sources, the failure to adopt corrective measures to improve a particular group’s representation does not constitute constitutionally impermissible “systematic exclu-