JURY DUTY FOR THE BLIND IN THE TIME OF REASONABLE ACCOMMODATIONS: THE ADA'S INTERFACE WITH A LITIGANT'S RIGHT TO A FAIR TRIAL

NANCY LAWLER DICKHUTE†

Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civil life.¹

I. INTRODUCTION

Millions of United States citizens are called to jury duty every year in this country. For many, reporting for jury duty is a chore to be avoided; for others it is an opportunity to participate in the democratic process. For many blind citizens, it is a noble aspiration which may never materialize due in large part to their blindness. Even with the enactment of the Americans with Disabilities Act ("Act" or "ADA"),² the misconceptions about the blind and their ability to serve on juries still exist and are not easily resolved in the legal community.³ Despite their considerable numbers,⁴ blind individuals have many hurdles to overcome in order to serve on juries.

Pre-ADA articles written by blind persons chronicle their hopes for serving on a jury,⁵ hopes which too often dissolved when court em-

† Nancy Lawler Dickhute, Director of Legal Writing, Assistant Professor of Law, Creighton University School of Law. Dedicated to Christina Boone, Class of 1996: a blind attorney with great vision. Professor Dickhute wishes to thank Amy Erlbacher-Anderson, Michelle Allen, Courtney Koziol and April O'Loughlin for their assistance.

⁴. There are an estimated 1.1 million legally blind persons in the United States. This number is part of the estimated 4.3 million United States residents who are severely visually-impaired. Yen-Pin Chiang et al., Federal Budgetary Costs of Blindness, 70 MILBANK Q. 319 (1992).
ployees, judges and attorneys dismissed them as "unqualified" or "exempt."6 The stories of these potential jurors proceed something like this: The individual was duly summoned to appear for jury duty in a local court system on a date certain. The potential juror marked the calendar, arranged transportation, checked the location of the courthouse and, as required, reported at the appointed time and place. Once in the jurors' assembly room, the potential juror's name or number was called or checked as "present," and the juror received a copy of the local jury service guidelines or handbook. Before the ADA, service ended for some potential jurors when a court employee, noting the person's blindness, summarily excused the candidate from service for being blind.7

For some whose disability had not been discovered or whose fortitude initially got them beyond the reporting phase, they took their places with other potential jurors. Then, with the aid of another potential juror or accompanying friend, these candidates for service completed any requisite jury forms or questionnaires, and listened to a court employee discuss local jury selection procedures. Once called to a courtroom, the blind candidates could be excused during voir dire by the judge,8 challenged for cause by one of the parties as incompetent under the applicable jury selection statute9 or peremptorily removed.10 In any event, jury service was over.

Some blind or visually impaired potential jurors challenged the system on due process,11 equal protection12 or statutory grounds.13 Frequently, the excused juror just left dejected, because the cost of challenging the selection process was greater than the likelihood of success.14 The plight of blind persons serving on juries changed in

6. See supra note 5 and accompanying text.
8. See Weber, 21 BRAILLE MONITOR at 19, 21.
10. See People v. Guzman, 478 N.Y.S.2d 455 (1984); Brown, 22 BRAILLE MONITOR at 349; Barber, 21 BRAILLE MONITOR at 108.
14. See, e.g., Powers, 499 U.S. at 415 ("The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights," especially in light of "the small financial stake involved and the economic burdens of litigation."). Certainly, given the number of potential blind jurors and the paucity of suits brought by dismissed blind jurors, the argument can be made that the blind acquiesce to the dismissal rather than bear the financial and other hurdles to filing suit.
theory with the enactment of the ADA, at least with regard to the summary dismissal by a court employee. But the likelihood of challenge for cause or peremptory challenge is still great, even with the Act's requirement that disabled individuals should not automatically be excluded from public service.\textsuperscript{15}

To help the legal community understand the challenges faced by the blind and visually impaired in their quest for equal participation in the jury selection process, this article will explore both the ADA's requirements for reasonable accommodation in jury selection and service and each litigant's right to a fair trial by competent, impartial jurors. It will then consider at what point a litigant's right to a fair trial outweighs a blind juror's desire to serve. The article concludes that only in rare instances where the essential evidence in a case mandates visual perception should a prospective juror be eliminated from a jury panel due to blindness.

II. THE REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT

Title II of the ADA\textsuperscript{16} prohibits any state or local government from discriminating against a "qualified individual with a disability" in providing services or programs.\textsuperscript{17} An individual with a disability includes any person with a physical impairment that substantially limits a "major life activity," or has a record of such impairment or is regarded as having such an impairment.\textsuperscript{18} Additionally, "[a] person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment."\textsuperscript{19} As the Eighth Circuit

\textsuperscript{15} See 42 U.S.C. § 12132 (1994) ("No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any entity.").


\textsuperscript{17} Id. § 12132. Under the ADA, "disability" is defined as:
- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

\textsuperscript{18} Id. § 12102(2).

\textsuperscript{19} Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) (citing 29 C.F.R. § 1630.2(l)(3) (1995)). While Wooten discussed impairment in the employment context under Title III of the ADA, the same language appears in Title II.
explained in *Wooten v. Farmland Foods*,20 "[t]his [section of the ADA] is intended to combat the effects of 'archaic attitudes,' erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities."21 Against this backdrop, "seeing" is specifically listed as a "major life activity" within the Act's meaning.22 Furthermore, a "qualified individual with a disability" is a person who, with or without reasonable modifications, is eligible to receive services or participate in state and local government-sponsored activities or programs.23 The person seeking relief under the ADA shoulders the burden of establishing that he or she is "qualified" to perform the essential functions of the program.24

Once qualified as an individual with a disability, Title II prohibits a local or state government from denying the qualified individual from participating in, or being denied the benefits of, any government sponsored program or service.25 Title II requires the government to make reasonable modifications in policies, practices and procedures that deny equal access to the government’s services or programs to individuals with disabilities unless a fundamental alteration in the program would result.26 Neither the Act nor the agency regulations promulgated thereto define "fundamental alteration." However, caselaw has interpreted "fundamental alteration" in Title II and Title III cases under the ADA as an "essential change" in a program or service, one which does "violence to its essential purposes."27 In other words, if an accommodation would jeopardize the integrity of a program or service, produce an unfair advantage to the claimant or discriminate against some other participant, the entity offering the program or service does not have to make the accommodation.28

20. 58 F.3d 382 (8th Cir. 1995).
22. 28 C.F.R. § 35.104; 29 C.F.R. § 1630.2(h)(2)(i).
24. See *Wooten*, 58 F.3d at 386.
27. See Johnson v. Florida High Sch. Activities Ass'n, Inc., 899 F. Supp 579, 585 (M.D. Fla. 1995), vacated on other grounds, 102 F.3d 1172 (11th Cir. 1997); Sandison v. Michigan High Sch. Athletic Ass'n, Inc., 64 F.3d 1026 (6th Cir. 1995); Pottgen v. Missouri State High Sch. Activities Ass’n, 40 F.3d 926, 932-33 (8th Cir. 1994).
Title II also requires state and local governments to ensure opportunities for effective communication with disabled individuals.\textsuperscript{29} In other words, the government must take reasonable measures to assure that it communicates as effectively with each disabled person as it does with non-disabled individuals.\textsuperscript{30} To that end, state and local governments must furnish auxiliary aids and services unless an undue burden or fundamental alteration in the service or program would result.\textsuperscript{31} Title II of the ADA applies to both state and local court systems\textsuperscript{32} and specifically, to the jury selection process.\textsuperscript{33} Recent caselaw has examined the right of the visually or hearing impaired to serve as jurors in light of the ADA's dictates. Not surprisingly, the cases which have examined the ADA's impact on jury service have concluded that a disability alone is insufficient to exclude an individual from jury service.\textsuperscript{34}

In \textit{People v. Green},\textsuperscript{35} a pre-ADA case, the trial court afforded a deaf juror protection under the auspices of \textit{Batson v. Kentucky}\textsuperscript{36} when she was peremptorily struck from a criminal jury panel.\textsuperscript{37} In \textit{Green}, the prosecution admitted its sole reason for challenging the juror was the juror's deafness.\textsuperscript{38} The trial court disallowed the challenge because the prosecution could not articulate any rational disability-neu-

\begin{thebibliography}{99}
\bibitem{29} 28 C.F.R. § 35.160 (1998).
\bibitem{30}  Id.
\bibitem{31} 28 C.F.R. § 35.164 (1998). Section 35.104 of the ADA regulations sets forth a list of those auxiliary aids and services for the visually impaired including, but not limited to, "[q]ualified readers, taped texts, audio recordings, Brailled materials, [or] large print materials." \textit{Id.} § 35.104.
\bibitem{32} 42 U.S.C. § 12131 (1994). While the ADA does not apply to the federal court system, the federal court system is subject to the requirements of sections 501 and 504 of the Rehabilitation Act, which served as the model for the ADA's requirements for equal access to government services. 29 U.S.C. § 794(a) (1994).
\bibitem{33} See, e.g., \textit{Caldwell,} 603 N.Y.S.2d at 714 (stating that based on the ADA, the disabled juror at issue could not have been removed from the jury solely because of her disability); \textit{Galloway,} 816 F. Supp. at 18-19 (stating that it "is obvious . . . the jury system falls within the parameters of the ADA"). See also \textit{Green,} 561 N.Y.S.2d at 131 (analyzing a pre-ADA case and declaring, in \textit{dicta}, that the newly enacted ADA prohibited denial of jury service by a deaf person who was otherwise qualified).
\bibitem{34} See \textit{supra} note 33 and accompanying text.
\bibitem{35} 561 N.Y.S.2d 130 (1990).
\bibitem{36} 476 U.S. 79 (1985). In \textit{Batson v. Kentucky,} the United States Supreme Court established that the prosecution's use of peremptory challenges to eliminate all black veniremen from the jury panel violated the black defendant's Sixth and Fourteenth Amendment rights to a jury drawn from a fair cross section of the community. \textit{Batson v. Kentucky,} 476 U.S. 79 (1985). The action also violated the defendant's, as well as the black juror's, equal protection rights under the Fourteenth Amendment. \textit{Batson} established that peremptory challenges cannot be used to eliminate a cognizable racial group from the jury selection process solely on the basis of race.
\bibitem{38} \textit{Green,} 561 N.Y.S.2d at 133.
\end{thebibliography}
Noting that “Batson-like protections have been applied beyond race,” the county court concluded that dismissing the deaf juror would deny her (1) equal protection under the New York Constitution, and (2) the opportunity to act as a juror — which is a “privilege of citizenship.” In dicta, the court noted the newly enacted ADA “must also be heeded even if not yet effective,” because it “signals the end of the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.”

Following this line of thinking, in the first reported case involving a blind juror since the effective date of the ADA, the federal district court in *Galloway v. Superior Court* found that the District of Columbia Superior Court’s categorical exclusion of blind jurors violated section 504 of the Rehabilitation Act, sections 201 and 202 of the ADA, and stated a cognizable claim under 42 U.S.C. § 1983. The federal court examined both the District of Columbia’s jury selection statute, which eliminated all persons from jury duty “determined to be incapable by reason of physical or mental infirmity of rendering satisfactory jury service,” and the Superior Court’s policy of excluding all blind persons from serving on juries under the statute. The court determined that Mr. Galloway, the excluded juror, fit within the Rehabilitation Act’s definition of a “handicapped individual” because he was blind. The court then examined whether Mr. Galloway was also “otherwise qualified” under the New York jury selection statute to

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39. *Id.* The county court, in *dicta*, indicated that under the governing state constitutional provisions and state statutes, strict scrutiny may be applied in determining the validity of dismissing a disabled juror if jury service is found to be a fundamental right. *Id.* at 132.


41. *Id.* at 132-33.

42. *Id.* at 133 (citation omitted).


44. *Galloway v. Superior Court*, 816 F. Supp. 12, 15-18 (D.D.C. 1993). Section 504 of the Rehabilitation Act provides in pertinent part: “No otherwise qualified individual with a disability in the United States ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. ...” 29 U.S.C. § 794(a) (1994).


46. *Id.* at 19.

47. *D.C. Code Ann.* §§ 11-1901 to -1918 (1989). Section 11-1901 of the District of Columbia Code provides in pertinent part that all qualified individuals shall have the opportunity to be considered for service on grand and petit juries in the District of Columbia and shall be obligated to serve as jurors when summoned for that purpose.

48. *D.C. Code Ann.* § 11-1906(b)(2)(A) (1989) (providing in pertinent part that “[a]n individual shall not be qualified to serve as a juror ... if determined to be incapable by reason of physical or mental infirmity of rendering satisfactory jury service”).


50. *Id.* at 15.
sit on the jury. The court interpreted "otherwise qualified" in the jury context to require that the handicapped individual be capable of performing the essential tasks of jury duty: weighing the content of the testimony given and assessing credibility.\footnote{52}

Relying on Mr. Galloway's uncontradicted evidence that blind persons could weigh testimony, examine speech patterns, intonation and syntax in assessing credibility,\footnote{53} and use auditory cues corresponding to visual ones, the court concluded that blind jurors can perform the essential functions of a juror in most instances.\footnote{54} Thus, the court determined that under the Rehabilitation Act, Mr. Galloway was a "handicapped individual" "otherwise qualified" to sit on a jury.\footnote{55} The court intimated that Mr. Galloway, as well as other blind persons, could be competent to perform essential juror duties.\footnote{56} As a result, the district court concluded that because the court system received federal funding, a requisite to invoking the Rehabilitation Act, the district's policy of categorically and systematically excluding blind persons violated section 504(b)(1)(A) of the Rehabilitation Act.\footnote{57} The court bootstrapped its discussion of the Rehabilitation Act to the ADA, finding that a blind person is an "individual with a disability" and blindness alone does not disqualify someone from serving on a jury.\footnote{58} With reasonable accommodations, the court concluded that "the number of cases for which a blind person could be chosen increase[d] even further."\footnote{59}

Several months later, in People v. Caldwell,\footnote{60} a New York criminal court judge seated a juror with a detached retina in one eye and limited vision in the other, ruling that such physical limitations did not jeopardize the defendant's due process rights.\footnote{61} In an opinion written to supplement an oral ruling,\footnote{62} the presiding judge explained her reasoning for permitting the juror, "Ms. B," to continue to sit on the jury following her disclosure on the second day of trial that she had limited vision.\footnote{63}

\footnotetext{51}{Id. at 16.} \footnotetext{52}{Id.} \footnotetext{53}{Id.} \footnotetext{54}{Id. at 16 & n.5.} \footnotetext{55}{Id. at 15, 18.} \footnotetext{56}{Id. at 16.} \footnotetext{57}{Id. at 15, 20.} \footnotetext{58}{Id. at 18-19.} \footnotetext{59}{Id. at 19; see infra notes 216-37, 255-65 and accompanying text (discussing various accommodations which can be used to aid visually impaired and blind jurors).} \footnotetext{60}{603 N.Y.S.2d 713 (1993).} \footnotetext{61}{People v. Caldwell, 603 N.Y.S.2d 713, 713-14 (1993), aff'd, 661 N.Y.S.2d 436 (1997).} \footnotetext{62}{Caldwell, 603 N.Y.S.2d at 713.} \footnotetext{63}{Id. at 714-16.}
The court in *Caldwell* explained that under its interpretation of section 201 of the ADA, 64 Ms. B was a qualified individual with a disability. 65 Thus, Ms. B "could not be considered unqualified unless she could not, with reasonable accommodations, fulfill the functions of a juror in this case." 66 Relying on a pre-ADA case in which a deaf juror was seated in a criminal case, *People v. Guzman*, 67 the trial judge in *Caldwell* ruled that there was sufficient indicia that, with reasonable accommodations, Ms. B could fulfill her duties as a juror. 68 Borrowing from *Guzman*, the court considered the "essential duties" of a juror to include understanding all the evidence, evaluating the evidence in a rational manner, communicating effectively with other jurors and comprehending the applicable legal principles. 69 The court's major concern was Ms. B's inability to see the witnesses' faces, thus limiting her ability to evaluate the evidence. 70 Echoing *Galloway*, the judge ultimately concluded Ms. B could not be disqualified simply because she could not see the witnesses' facial expressions or body language. 71 The court reasoned that Ms. B had to assess situations and make judgments every day without visual cues. 72 If Ms. B determined credibility in everyday life, the court reasoned, she could do the same on a jury as long as reasonable accommodations were made to assure full comprehension of the evidence. 73

### III. THE DOUBLE EDGED SWORD: JURORS' V. PARTIES' RIGHTS

While each of these cases indicates a willingness on the part of various court systems to recognize and implement ADA requirements, the cases also wrestle in varying degrees with the larger question: At what point in implementing the ADA must its requirement of reasonable accommodations or modifications bow to a litigant's constitutional right to a fair trial? At what point is an individual's "right to serve" outweighed by a litigant's due process concerns?

In addressing these questions, this article explores the following concerns:

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64. 42 U.S.C. § 12131(2) (1994).
66. *Id.* at 714.
68. *Caldwell*, 603 N.Y.S.2d at 715.
69. *Id.* at 715-16.
70. *Id.* at 715.
71. *Id.*
72. *Id.*
73. *Id.*
(1) Historically, what fair trial guarantees, if any, do blind jurors fundamentally threaten? Conversely, what aspects of a trial create the impression that blind jurors abridge these rights?

(2) To what extent does the ADA's reasonable accommodations/modifications requirement aid in overcoming or alleviating these perceived threats?

(3) In what trial setting must a court ultimately acknowledge due process concerns and prevent a blind juror from sitting despite efforts at reasonable modifications?

This article concludes that while at first blush the seating of a blind juror might appear to compromise the guarantees of an impartial, competent jury, upon closer examination these guarantees are neither sacrificed nor compromised. With reasonable accommodations, blind jurors can serve in virtually every case where visual cues, used for interpreting evidence, can be substituted for other equally reliable sensory cues.

A. THE GUARANTEES OF TRIAL BY JURY

The guarantee of a fair trial has many aspects, including the right to a speedy,\textsuperscript{74} public trial\textsuperscript{75} by an impartial tribunal.\textsuperscript{76} One aspect of a fair trial is the right to trial by jury in certain matters.\textsuperscript{77} The concept of trial by jury is deeply rooted in the English common law on which American jurisprudence is based.\textsuperscript{78} The right of trial by jury is preserved in the United States Constitution in three places: Article III, Section 2,\textsuperscript{79} the Sixth Amendment\textsuperscript{80} and the Seventh Amendment.\textsuperscript{81} Article III, Section 2 provides that all criminal trials except impeachment must be to a jury in the state where the crime was committed.\textsuperscript{82} Furthermore, the Sixth Amendment guarantees criminal defendants a speedy and public trial by an impartial jury.\textsuperscript{83} Additionally, the Seventh Amendment expands the right to a jury trial in a civil case,

\textsuperscript{74} Klopfer v. North Carolina, 386 U.S. 213 (1967).
\textsuperscript{75} In re Oliver, 333 U.S. 257 (1948).
\textsuperscript{77} Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1879).
\textsuperscript{78} JAMES J. GIBERT & WALTER E. JORDAN, JURY SELECTION, THE LAW, ART, AND SCIENCE OF SELECTING A JURY 9 (2d ed. 1990).
\textsuperscript{79} U.S. CONST. art. III, § 2.
\textsuperscript{80} U.S. CONST. amend. VI.
\textsuperscript{81} U.S. CONST. amend. VII.
\textsuperscript{82} The language of Article III, Section 2 provides in part: "The trial of all crimes, except in cases of impeachment, shall be by jury, and even trial shall be held in the State where the said crimes have been committed." U.S. CONST. art. III, § 2.
\textsuperscript{83} Amendment VI states in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. CONST. amend. VI.
"[i]n suits at common law, where the value in controversy shall exceed twenty dollars. . . ."84

Given the historical development of jury trials in England,85 from a puppeting device of the crown86 to a foothold against oppressive government action,87 not surprisingly jury trials have been seen as one of the priceless safeguards of liberty in America.88 Jury verdicts decided without governmental interference or oppression dovetail with our sounding fathers' concepts of ordered liberties and democracy.89

Numerous cases over the last two centuries have wrestled with defining and refining the constitutional rights of trial by jury and its place within the concept of due process.90 The dominant aspects of the right to trial by jury which most impact jury service by the blind are the right to: (1) a fair cross-section of the community on the jury;91 (2) an impartial jury;92 and (3) a competent jury.93 A review of the cases which have molded these rights reveals there is no right to demand a blind juror be seated to comply with the fair cross-section requirement,94 nor are the guarantees of an impartial or competent jury sacrificed in removing a blind juror from a jury panel.95 At most, from a constitutional perspective, jury wheels must not systematically exclude any distinguishable group.96

84. U.S. CONST. amend. VII.
85. E.g., W. FORSYTH, HISTORY OF TRIAL BY JURY (1852); GOBERT & JORDAN, supra note 78, at 8-9.
86. See GOBERT & JORDAN, supra note 78, at 9-10.
87. Id. at 10-11; Duncan, 391 U.S. at 151, 155; Bushnell's Case, 124 Eng. Rep. 1006 (C.P. 1670).
89. GOBERT & JORDAN, supra note 78, at 10-11; Duncan, 391 U.S. at 148-49.
91. See State v. Spivey, 700 S.W.2d 812, 813 (Mo. 1985) (en banc) (declaring that the Constitutional guarantee of a jury comprised of a fair cross-section of the community is applicable to the States through the Fourteenth Amendment).
94. See Spivey, 700 S.W.2d at 814-15 (noting that there can be no systematic exclusion of women from a jury); Guthrie v. State, 194 P.2d 895 (Okla. Crim. Ct. App. 1948).
96. See Duran, 439 U.S. at 360; GOBERT & JORDAN, supra note 78, at 177.
1. Fair Cross-Section

*Strauder v. West Virginia*\(^{97}\) was the first case to wrestle with the fair cross-section requirement by reviewing a black defendant’s claim that excluding blacks from the jury venire violated the defendant’s equal protection rights under the Fourteenth Amendment.\(^{98}\) In *Strauder*, United States Supreme Court equated “fairness” in a trial with the necessity of drawing a jury panel from a panel of one’s peers.\(^{99}\) Specifically, the Court noted that “[t]he 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.”\(^{100}\) The Court in *Strauder* declared that the purpose of the then newly enacted Fourteenth Amendment was, in part, to assure the black man’s enjoyment of civil liberties, including jury venires drawn from the entire community.\(^{101}\) The holding of *Strauder* was strictly limited to the question of race; the Court specifically left to the states the right to set other jury qualifications such as age, sex, citizenship, property status and education.\(^{102}\) Still, in noting the breadth of the Fourteenth Amendment,\(^{103}\) the Supreme Court opened the door for further consideration on the rights the Fourteenth Amendment affords. Since *Strauder*, protection under the Fourteenth Amendment has been expanded to include any systematic exclusion of jurors based on gender\(^{104}\) or classes to which the defendant did not belong.\(^{105}\)

While there is no constitutional language specifically mandating a right to a jury of one’s peers,\(^{106}\) the right implicitly flows from the language of Article III, Section 2 and the Sixth Amendment’s language requiring a jury to be drawn from the crime’s vicinage.\(^{107}\) To meet this fair cross-section requirement does not require representation of every cognizable group in the community on every jury;\(^{108}\) however, the requirement does prohibit systematic exclusion of any one

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97. 100 U.S. (10 Otto) 303 (1879).
99. *Strauder*, 100 U.S. at 308.
100. Id.
101. Id.
102. Id. at 310.
103. The Supreme Court stated: “The Fourteenth Amendment makes no attempt to enumerate the rights it [is] designed to protect.” *Strauder*, 100 U.S. at 310.
104. See *J.E.B.*, 511 U.S. at 129.
group from a jury pool. Specifically, the United States Supreme Court's rationale in *Duren v. Missouri* set forth the three-prong test used to establish a fair cross-section violation. Under *Duren*, the defendant must show that: (1) the excluded group is distinct in the community; (2) the jury pool in question under-represents this group in relationship to its number in the community; and (3) the under-representation is due to the systematic exclusion of the group from the jury selection process. As an earlier court stated: "[R]ecognition must be given to the fact that those eligible for jury service are to be found in every stratum of society."

In fact, in *State v. Spivey*, a deaf defendant appealed his conviction in part due to the systematic exclusion of blind and deaf persons from the jury. The *Spivey* court found no systematic exclusion, because it did not find the deaf (and by implication the blind) to be a distinct group to which the fair cross-section right attached. The court found no community of attitudes or ideas within the deaf community which should be legally recognized in the jury selection process. Instead, the court in *Spivey* categorized deafness as a "misfortune" which "exists in all segments of the community." Commentators and other courts disagree.

In *People v. Guzman*, the New York Supreme Court held defendant's Sixth Amendment right to a fair trial was not violated when a deaf juror was not removed for cause. In *Guzman*, the court found deaf persons to be a cognizable group for Sixth Amendment fair cross-section purposes, requiring their inclusion in jury venires. The court determined a cognizable group was one in which: (1) the membership did not "shift" — that is, the group was cohesive; (2) the group had a similarity of attitudes shared by its members; and (3) exclusion from jury pools created a possibility of bias or partiality to the

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109. See *People v. Wheeler*, 583 P.2d 748 (Cal. 1978); *Jones*, 483 N.Y.S.2d at 626.
114. 700 S.W.2d 812 (Mo. 1985).
115. *State v. Spivey*, 700 S.W.2d 812, 813 (Mo. 1985) (en banc). See *Guthrie v. State*, 194 P.2d 895 (Okla. Crim. Ct. App. 1948) (noting that the right of a person to have a jury of his peers does not mean a blind defendant is entitled to a jury comprised of twelve blind persons).
116. *Spivey*, 700 S.W.2d at 814.
117. *Id.*
118. *Id.*
119. See infra notes 120-26 and accompanying text.
cases being heard. The court determined the deaf community possessed all these characteristics and denied defense’s motion to remove the juror for cause.

Similarly, Professor D. Nolan Kaiser finds characteristics of the blind community sufficiently distinct to constitute a separate “peer” group for inclusion in jury pools. These characteristics include involuntary membership in a group: (1) that is reasonably numerous; (2) that “contain[s] members who individually or collectively pursue activities and goals” non-disruptive of society’s operation; and (3) whose history is unique such that its perspective cannot be replicated by any other group in society. However, until a court of last resort rules on the issue of cognizability, neither blind or deaf persons nor litigants can challenge exclusion from jury selection on this basis. The same is not true for the question of impartiality and competence.

2. Impartiality and Competence

The Constitution recognizes that due process requires impartiality. Indeed, “[a] fair trial in a fair tribunal is a basic requirement of due process.” The United States Supreme Court, in Swain v. Alabama, struggled with protecting an accused’s right to an impartial jury drawn from a fair cross-section of the population facilitated by the use of peremptory challenges while maintaining a jury selection system untainted by racial discrimination. While erroneously concluding there was no systematic exclusion of black jurors from the black defendant’s jury, the Swain court did recognize the competing in-

123. Id. at 467
124. Id.
126. Id.
127. U.S. CONST. amend. VI.
130. Swain v. Alabama, 380 U.S. 202 (1965). The Swain court discussed and then recognized the validity of the peremptory challenge: “Although ‘[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges,’ . . . nonetheless the challenge is ‘one of the most important of the rights secured to the accused.’” Swain, 380 U.S. at 219 (quoting Stilson v. United States, 250 U.S. 583, 586 (1919); Pointer v. United States, 151 U.S. 396, 408 (1894)). The Court noted that the purpose of the peremptory challenge was to “eliminate extremes of partiality on both sides,” and to insure that jurors who would decide the case did so based solely upon the evidence. Id. The Court then set up a test by which the defense could challenge the validity of a peremptory challenge predicated on race. Id. at 221-22. The test afforded the prosecution a presumption that the peremptory challenges were exercised to create an impartial jury, not to discriminate. This presumption was rebuttable on a showing that the prosecution in the jury selection process systematically discriminated against a race over a period of time. Id. at 222-27.
131. Swain, 380 U.S. at 231-32. (Goldberg, J., dissenting). Justice Goldberg’s dissent noted that in Talladega County, Alabama, where the trial was venued, 26% of the
terests at play in picking a jury; namely, using peremptory challenges to choose an impartial jury without allowing such challenges to circumvent racial discrimination prohibited by the Fourteenth Amendment. While the test of systematic exclusion in Swain was subsequently changed in Batson v. Kentucky, Swain demonstrates that the struggle is in maintaining the independent nature of the jury selection process without government interference.

Impartiality was again the outstanding feature of the Supreme Court's opinion in Irvin v. Dowd. In Irvin, the Court granted habeas corpus relief to a defendant convicted of murder and sentenced to death where his trial, and thus, the jury panel was subjected to widespread pretrial media coverage. The Irvin Court declared that the pretrial publicity raised a question of the jury's impartiality, which required vacating the conviction and remanding the case for a new trial. In so holding, the Court explained that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors [and] the failure to accord an accused a fair hearing violates even the minimal standards of due process." While the Irvin Court provided no litmus test for impartiality, the Court did retrace its English roots in stating that impartiality required "indifference" to the extent that a prospective juror has no opin-

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133. 476 U.S. 79 (1986). Under Batson, a defendant can establish systematic exclusion from a jury based on race, looking only to the facts of the instant case. Batson v. Kentucky, 476 U.S. 79, 89-96 (1986). The test requires the defendant to: (1) establish defendant is from a distinct racial group, and the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the jury venire; (2) show facts and relevant circumstances which raise an inference that the prosecutor used the peremptory challenges to exclude the race from jury selection; and (3) the burden of proof then shifts to the state to demonstrate race-neutral reasons for the challenges. Batson, 476 U.S. at 96-97.
134. 366 U.S. 717 (1961). Interestingly, the concept of impartiality is relative. As one commentator points out: "First and foremost: jury selection involves the search for impartial jurors. That lawyers approach this task by eliminating those jurors whom they perceive to be partial to the opposition, that they understandably search for jurors partial to their side rather than neutral jurors, does not distract from the two importance of impartiality." GOBERT & JORDAN, supra note 78, at xiii. Further, in the criminal context, jurors are not impartial at the onset of a trial; they are to presume the defendant's innocence until proven guilty — which is clearly an example of an institutionally created bias. Id. at 50.
136. Id., 366 U.S. at 725, 729.
137. Id. at 722.
138. Id. at 724. Further, the Court noted: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." Id. at 724-25 (quotations omitted).
ions of the case which could not be set aside, and accordingly render a decision based strictly on the evidence presented.\(^{139}\)

Later, in *Duncan v. Louisiana*,\(^ {140}\) the Court carried the requirements of impartiality and fair cross-section selection to the states as part of the due process requirements of the Fourteenth Amendment.\(^ {141}\) The *Duncan* Court stated that preserving the court system from the government's arbitrary use of power was essential to ordered liberty, requiring a jury trial in criminal matters carrying a prison sentence of two years or more.\(^ {142}\)

Intimated in *Irvin* and *Duncan*, and implicit in their discussions, is that one aspect of impartiality is competence: the ability to comprehend and evaluate evidence. For if a juror is unable to comprehend fully the evidence presented, how can the juror render an impartial decision?\(^ {143}\) Moreover, as the *Batson* Court explained, “[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial.”\(^ {144}\)

As recognized in *Thiel v. Southern Pacific Co.*,\(^ {145}\) juror competence is decided on an individual, rather than a group, basis.\(^ {146}\) It is this competence component of due process which has historically posed the greatest problem for courts in seating blind or visually-impaired jurors. As one court explained, “[f]undamental to the right of an ‘impartial’ jury is the requirement that jurors be competent and qualified.”\(^ {147}\) Historically, this competence depended on a juror being free from any physical infirmities that could interfere or preclude discharging this duty.\(^ {148}\)

Early courts feared that a blind juror’s inability to see the expressions on the faces of witnesses or observe their demeanor or body language inhibited the blind juror from justly weighing the evidence.\(^ {149}\) Similarly, in *Rhodes v. State*,\(^ {150}\) the court viewed blindness as an ab-

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139. *Irvin*, 366 U.S. at 722.
144. *Batson*, 476 U.S. at 87.
147. *Berberian*, 374 A.2d at 781.
149. See *Lewinson*, 282 N.Y.S.2d at 85-86; *Black*, 9 S.W.2d at 744; *Rhodes*, 27 N.E. at 868.
150. 27 N.E. 866 (Ind. 1891).
solute disqualification to sitting on a jury, regardless of the type of evidence the juror had to evaluate.\textsuperscript{151} The oft-cited case of \textit{Black v. Continental Casualty Co.}\textsuperscript{152} equated physical handicap with incompetence.\textsuperscript{153} The trial court equated deaf or blind jury service with sacrificing impartiality and thus, the parties’ right to a fair trial:

> Obviously a juror whose vision or hearing is so defective that he cannot hear material testimony, or see the conduct of the witness on the stand, cannot as an impartial juror pass upon the credibility of the witness or the weight to be given his testimony, nor render a fair and impartial verdict solely on the evidence.\textsuperscript{154}

Since the \textit{Black} opinion was issued in 1928, this belief that sensory-impaired jurors posed a threat to a litigant’s right to a fair trial has been echoed by a number of courts.\textsuperscript{155}

Ironically, the courts have not classified sighted jurors as a “threat” to blind or deaf litigant’s rights. In two cases more than thirty-seven years apart, \textit{Guthrie v. State}\textsuperscript{156} and \textit{State v. Spivey},\textsuperscript{157} one blind and one deaf defendant claimed, respectively, that they were denied a fair trial because no one on the jury could personally appreciate the nature of their disability.\textsuperscript{158} Both the \textit{Guthrie} and \textit{Spivey} courts dismissed the defendant’s claims, primarily because the courts expected jurors having full sensory perception to be able to put themselves in the shoes of the disabled defendants.\textsuperscript{159} Both \textit{Guthrie} and \textit{Spivey} pose interesting perspectives as courts struggle with the “limi-
tations" deaf and blind jurors pose to all litigants, but conveniently dispose of concerns facing blind and deaf litigants whose claims are heard by juries possessing all their senses.

Moreover, many states, through statutory law, have historically excluded the blind because of an inability to speak and read English.\textsuperscript{160} The New York jury selection statute\textsuperscript{161} in effect at the time \textit{Lewinson v. Crews}\textsuperscript{162} typified the state statutory requisite that a juror be able to "speak and read English" and have full use of all senses. Section 596 of the New York Judiciary Law\textsuperscript{163} provided that in order for a person to sit on a jury, the person must "be in possession of his natural faculties and not infirm or decrepit" and "intelligent, of sound mind and good character, well informed; able to read and write the English language understandingly."\textsuperscript{164} \textit{Lewinson} signaled one of the first suits brought by a potential juror dismissed due to blindness.

In \textit{Lewinson}, Mr. Lewinson sued after being summarily rejected by the county clerk for jury duty because he was blind.\textsuperscript{165} The New York Supreme Court upheld the trial court's judgment in favor of the clerk, declaring that Mr. Lewinson, as a blind person, was not pos-

\begin{footnotes}
\footnote{161}{N.Y. JUDICIARY LAW § 596 (repealed 1978).}
\footnote{162}{282 N.Y.S.2d 83 (1967).}
\footnote{163}{See supra note 161 and accompanying text.}
\footnote{164}{Id.}
\footnote{165}{Lewinson v. Crews, 282 N.Y.S.2d 83, 84, aff'd, 236 N.E.2d 853 (1967).}
\end{footnotes}
essed of his “natural faculties and was infirm” and therefore, disqualified for jury duty under section 596.\textsuperscript{166} Almost as an afterthought, the court also dismissed Mr. Lewinson from jury service because he could not read English as mandated under the “reading English” section of the state statute.\textsuperscript{167} The appeals court in \textit{Lewinson} labeled blindness as an “infirmity,” a limitation on a person’s natural faculties.\textsuperscript{168} The court stated that natural faculties have two components: powers of the mind and memory and physical attributes\textsuperscript{169} and thus, reasoned that the mind was fueled by the senses.\textsuperscript{170} The court then proclaimed that “[t]he judgment reached by the mind is predicated upon the impressions which the senses convey to it.”\textsuperscript{171} Because Mr. Lewinson lacked sight, the court concluded that he could not meet the eligibility requirement of being “in possession of his natural faculties and not infirm.”\textsuperscript{172} The \textit{Lewinson} court was not alone in its thinking. Later cases relied on the notion that any impairment of the senses, especially hearing and sight, eliminated a person’s ability to serve on a jury.\textsuperscript{173} Historically, sight was viewed as critical to the jury function of evaluating evidence and credibility.\textsuperscript{174}

The dissent in \textit{Lewinson}, however, was the first reported opinion to challenge the traditional judicial notion that a “disability” equals “incapacity.”\textsuperscript{175} In \textit{Lewinson}, Justice James D. Hopkins, dissenting, argued that the statute’s focus was not on physical attributes, but rather on intellectual capabilities, which are serviced by more than one sense.\textsuperscript{176} In support of his position, Justice Hopkins cited the majority opinion, which stated that “[t]he ability to serve effectively as a juror must be the point of the statute, and the possession of intellectual power to discharge the duty is the meaning of the term ‘natural faculties’ which the statute employs.”\textsuperscript{177} Justice Hopkins argued that if blind attorneys and judges can serve the public in court, so can blind jurors.\textsuperscript{178} Furthermore, he noted that evaluating evidence as a juror required \textit{more} than vision for every juror:

\textsuperscript{166} \textit{Lewinson}, 282 N.Y.S.2d at 85-86.
\textsuperscript{167} \textit{Id.} at 84
\textsuperscript{168} \textit{Id.} at 85.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{174} \textit{Susi}, 477 N.E.2d at 998.
\textsuperscript{175} \textit{Lewinson}, 282 N.Y.S.2d at 86-89 (Hopkins, J., dissenting).
\textsuperscript{176} \textit{Id.} at 87 (Hopkins, J., dissenting).
\textsuperscript{177} \textit{Id.} (Hopkins, J., dissenting).
\textsuperscript{178} \textit{Id.} at 88 (Hopkins, J., dissenting).
True, the blind juror cannot see the witness or real evidence. But an appraisal of testimony does not depend on the mere visual presentation; the voice of the witness and the inherent probability of the truth of the testimony are as cogent signs of the credibility of the evidence. In the use of these tests a blind person is no more handicapped than the sighted.\textsuperscript{179}

In accordance with the vigorous dissent in \textit{Lewinson}, several pre-ADA cases were divided on empanelling sensory-impaired jurors.\textsuperscript{180} Additionally, several cases which have classified these potential jurors as incompetent also explain that, while serving on a jury is a noble desire to fulfill one's civic duty, such a desire must be secondary to a

\textsuperscript{179} \textit{Id.} (Hopkins, J., dissenting).

\textsuperscript{180} The following pre-ADA cases declared that a sensory impaired juror should be excused from the jury: State v. Berberian, 374 A.2d. 778 (R.I. 1977) (declaring that by seating a hearing impaired juror, a criminal defendant was denied due process and a fair trial); \textit{Eckstein}, 452 F. Supp. at 1244-45 (noting that a deaf juror that was removed from a jury for cause had no claim for violation of equal protection or due process under a state jury selection statute, which required that jurors speak or understand English and noting that a juror with impaired hearing or sight was unable to evaluate evidence in violation of litigant's right to a fair trial); \textit{Jackanen} v. \textit{Carey}, 476 F. Supp. 421 (E.D.N.Y. 1979), \textit{aff'd}, 633 F.2d 204 (N.Y. App. Div. 1980) (analyzing a blind juror's equal protection challenge to section 510(3) of New York's Judiciary Laws, which disqualified him due to blindness); State v. \textit{Spivey}, 700 S.W.2d. 812 (Mo. 1985) (en banc) (holding that a deaf defendant was not deprived of a fair trial and right to a fair cross-section on jury under a state jury selection statute, which required jurors to be able to read, write, speak and understand English and thus, excluded a blind and deaf person from the jury); \textit{Commonwealth} v. \textit{Greener}, 455 A.2d. 164 (Pa. Super. 1983) (declaring that a defendant was denied a fair trial when a deaf juror was unable to hear a key witness' testimony); \textit{Susi}, 477 N.E.2d at 998 (stating that a blind juror should have been removed for cause and that the trial court erred in forcing the defendant to use a peremptory challenge to remove the juror because a significant part of the evidence was composite identification).

The following cases found no fair trial violations in seating a sensory-impaired juror: \textit{United States} v. \textit{Dempsey}, 830 F.2d. 1084 (10th Cir. 1987) (holding that the trial court did not err in refusing to strike a deaf juror for cause when the presence of an interpreter allowed the juror to evaluate the evidence); \textit{DeLong} v. \textit{Brumbaugh}, 703 F. Supp. 399 (W.D. Pa. 1989) (declaring that a federal trial court erred by excluding a deaf juror from the jury and noting that the court was required to make reasonable accommodations for the deaf juror); \textit{People} v. \textit{Pagan}, 595 N.Y.S.2d 486 (1993) (stating that the trial court was not required to grant a defendant's challenge for cause against a visually impaired prospective juror who could evaluate the witnesses' credibility); \textit{State} v. \textit{Keeven}, 728 S.W.2d 658 (Mo. Ct. App. 1987) (stating that the trial court did not abuse its discretion by refusing to strike a venireman for cause due to his poor vision); \textit{Bewley} v. \textit{State}, 695 P.2d 1357 (Okla. Ct. Crim. App. 1985) (noting that nothing in the record indicated that a juror should have been automatically excluded from the jury due to blindness); \textit{Guzman}, 478 N.Y.S.2d at 467 (holding that the inclusion of a deaf juror did not violate the defendant's Sixth Amendment right to a fair trial and stating that the inclusion was consistent with the fair cross-section requirement of the Constitution); \textit{Jones}, 483 N.Y.S.2d at 625-27 (declaring that while a blind juror was removed for cause due to the nature of the physical evidence, recognizing that a decision to seat a blind juror must be made on a case-by-case basis).
litigant's right to a fair trial.\textsuperscript{181} As the appellate court in \textit{Eckstein v. Kirby},\textsuperscript{182} noted, "[t]he interest of the [disabled] in becoming a juror must be secondary to the interest of the state in assuring a fair trial to the litigants in its courts."\textsuperscript{183}

Historically, the right to serve on a jury has not generally been viewed as fundamental,\textsuperscript{184} but at best a "duty or a privilege"\textsuperscript{185} which is secondary to a litigant's rights, in light of the legal traditions of challenges for cause and peremptory challenges.\textsuperscript{186} In \textit{People v. Green},\textsuperscript{187} however, the court (in \textit{dicta}) suggested that a disability may rise to the level of a "suspect classification."\textsuperscript{188} According to \textit{Green}, a "suspect classification" under New York statutes and the United States Constitution would require strict scrutiny in assessing any exclusion from service under state jury selection statutes if "individuals have a fundamental right to serve as jurors."\textsuperscript{189}

Another major concern raised by pre-ADA cases was the potential for violating the sanctity of jury deliberations if a "thirteenth" person were present to aid the handicapped juror in assessing the evidence.\textsuperscript{190} However, the rule excluding persons other than jurors from the jury room has historically pertained to officers of the court, such as bailiffs, judges or counsel.\textsuperscript{191} Regardless, the courts have consistently feared that an interpreter or reader in a jury room would: (1) fail to interpret the evidence accurately;\textsuperscript{192} (2) offer opinions to the aided juror or the group; (3) disrupt the deliberations;\textsuperscript{193} or (4) ultimately interfere with a vigorous and candid discussion of the issues.\textsuperscript{194} Similarly, some courts have also maintained that the thirteenth juror posed a "threat of disclosure" to the rest of the world.\textsuperscript{195} As one court explained, "the need for privacy and secrecy in jury deliberations

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\textsuperscript{181} See, e.g., \textit{Eckstein}, 452 F. Supp. at 1241-42 ("[T]he interests of litigants supercede any other interest an individual may have in serving on a jury."); \textit{Spivey}, 700 S.W.2d at 815.
\textsuperscript{184} \textit{Eckstein}, 452 F. Supp. at 1241; Adams v. Superior Court, 524 P.2d 375 (Cal. 1974) (en banc). \textit{Cf. Green}, 561 N.Y.S.2d at 132 (stating that based upon the state constitution, individuals may "have a fundamental right to serve as jurors").
\textsuperscript{186} \textit{Eckstein}, 452 F.Supp. at 1241.
\textsuperscript{187} 561 N.Y.S.2d 130 (1990).
\textsuperscript{189} \textit{Green}, 561 N.Y.S.2d at 132.
\textsuperscript{190} \textit{Guzman}, 478 N.Y.S.2d at 465-67.
\textsuperscript{191} \textit{Id.} at 466.
\textsuperscript{192} \textit{Eckstein}, 452 F. Supp. at 1242.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Guzman}, 478 N.Y.S.2d at 466; \textit{Dempsey}, 830 F.2d at 1090.
\textsuperscript{195} \textit{Guzman}, 478 N.Y.S.2d at 466; \textit{Dempsey}, 830 F.2d at 1090.
\end{flushleft}
arose out of the danger that '[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.' Indeed, such an invasion would deny a litigant the right to trial by jury under the Sixth and Fourteenth Amendments. Some courts have also feared that if a juror “missed” comprehending any evidence during trial, an inherent danger existed that the juror would unreasonably rely on another juror’s interpretation of the evidence in rendering a decision. For the courts, such reliance could necessarily foreclose the litigants from receiving a verdict arrived at by “each and all of the jurors upon the evidence introduced.”

One noted practitioner, James G. McConnell, echoed concerns that, based on his review of research, blind jurors did not bring to the deliberative process the same independent judgment and analysis as sighted jurors. McConnell’s conclusion was predicated, in part, on clinical studies which initially found that where an individual relies only on one sense to gather information, the individual’s retention level was drastically reduced as opposed to a person relying upon two senses to collect information. McConnell hypothesized that if a jury containing a blind person were deadlocked, given this reduced retention of evidence, the blind juror would ultimately be forced to rely on the judgment of other jurors or third parties. In response to McConnell’s position, D. Nolan Kaiser, a blind professor, countered that McConnell’s research was inapplicable to people who have lost a sense. According to Kaiser, McConnell’s research was flawed because it relied only on subjects with full sensory capabilities who were temporarily deprived of a sense. As Kaiser explained, in individuals who have lost the use of a sense, the other senses become more acute and compensate for the loss. Specifically, for each visual cue, the blind find a corresponding auditory cue; for each piece of physical evidence, there is more than one way to analyze it. It is Kaiser’s more open approach to analyzing sensory information which serves as

196. Guzman, 478 N.Y.S.2d at 466 (citing Clark v. United States, 289 U.S. 1, 13 (1933)).
198. Black, 9 S.W.2d at 744.
199. Id.
201. McConnell, 60 Chi.-Kent L. Rev. at 212.
202. Id. at 213.
204. Kaiser, 60 Chi.-Kent L. Rev. at 216.
a more accurate model for utilizing the Americans With Disabilities Act\textsuperscript{206} when considering blind persons as jurors.

B. The ADA's Reasonable Accommodation Approach

The ADA's purpose, in part, was not only to recognize discrimination in access to all goods and services, but also to provide a remedy for this discrimination and in turn, to educate and eliminate the traditional stereotypes placed on the disabled.\textsuperscript{207} As caselaw discussing reasonable accommodations for blind jurors demonstrates, the judicial system and attorneys who serve it have a long road to haul in overcoming such stereotypes. Although the courts have generally acknowledged that a blind or visually impaired person has the right to serve on a jury, the courts have been less than unanimous on the types of cases on which blind jurors can sit.

In one pre-ADA case, Jones v. New York City Transit Authority,\textsuperscript{208} the court recognized that being blind did not \textit{per se} disqualify a potential juror;\textsuperscript{209} rather, in cases involving a significant amount of physical evidence, such as personal injury cases, a blind juror would be unable to evaluate the evidence sufficiently.\textsuperscript{210} The court so concluded despite recognizing that all jurors work together in deliberations to formulate the decision.\textsuperscript{211} Adding to the list of situations in which a blind juror could questionably not be seated, the court in Commonwealth v. Susi\textsuperscript{212} held that where the predominant issue was one of identification, requiring the viewing of photographic evidence and comparing a composite drawing to the defendant, the trial court erred in allowing a blind juror to be seated.\textsuperscript{213} Similarly, in Galloway v. Superior Court,\textsuperscript{214} the court questioned a blind juror's ability to effectively serve in cases involving a substantial amount of documentary evidence.\textsuperscript{215}

By contrast, the court in People v. Caldwell\textsuperscript{216} ostensibly disagreed with the Jones court's position that a blind juror could not assess physical evidence, noting that courts have continually disagreed

\textsuperscript{207} See id. § 12101 (stating the purpose behind the enactment of the ADA).
\textsuperscript{208} 483 N.Y.S.2d 623 (1984).
\textsuperscript{210} Id., 483 N.Y.S.2d at 627.
\textsuperscript{211} Id.
\textsuperscript{212} 477 N.E.2d 995 (1985).
\textsuperscript{213} Commonwealth v. Susi, 477 N.E.2d 995, 998-99 (Mass. 1985). Cf State v. Norman, 113 N.W. 340 (Iowa 1907) (analyzing a situation where a juror with an eye defect was allowed to sit on the jury, which required comparison of physical evidence — comparing one foot print to another).
\textsuperscript{216} 603 N.Y.S.2d 713 (1993).
on a blind judge's ability to assess physical evidence.\textsuperscript{217} \textit{Caldwell} also
recognized that removing blind persons from cases involving any
physical evidence is tantamount to a \textit{per se} exclusion of the blind from
juries:

> It is difficult to imagine a trial in which absolutely no docu-
ments, diagrams, police reports, photographs or physical evi-
dence are introduced. If this court were to hold that \{a blind
juror\} was disqualified simply because a few documents and a
few photographs were presented, it would, in effect, be con-
cluding that there were almost no cases on which visually-
-impaired or blind jurors could sit. Such a ruling would vi-
olate the spirit and intent of the ADA and of the Rehabilitation
Act of 1973.\textsuperscript{218}

Rather, the \textit{Caldwell} court noted that the relevant inquiry should fo-
cus on the "reasonable accommodations" which could be made for ju-
rors to allow them to evaluate the evidence.\textsuperscript{219}

Several cases, including \textit{Caldwell}, have listed those accommoda-
tions which were or could be made to allow blind or visually impaired
jurors to serve. Such accommodations have included:

1. moving a blind juror's seat in the jury box closer to the witness
   box;\textsuperscript{220}
2. having documentary evidence read into the record;\textsuperscript{221}
3. providing the blind juror with a description of physical\textsuperscript{222} or
documentary evidence;\textsuperscript{223}
4. providing an enlarged print version of a transcript to use as
   an aid in listening to an audiotape entered into evidence;\textsuperscript{224}
5. using audio-describers (people who describe documents, physi-
   cal evidence and/or demonstrative evidence to the juror);\textsuperscript{225}

\textsuperscript{217} People v. Caldwell, 603 N.Y.S.2d 713, 715 (1993), aff'd, 661 N.Y.S.2d 436
   (1997). In \textit{Caldwell}, the trial judge initially distinguished \textit{Jones}, noting that the pres-
   ent case dealt primarily with witness credibility and did not present any physical evi-
dence. \textit{Caldwell}, 603 N.Y.S.2d at 715. However, the court then discussed the visually
-impaired juror's consideration of photographic evidence and her ability to rely both on a
description of the photograph as well as witness testimony to which the photograph
pertained in order to assess the underlying facts to which the evidence related. \textit{Id}.

\textsuperscript{218} \textit{Caldwell}, 603 N.Y.S.2d at 716.

\textsuperscript{219} \textit{Id.} at 714

\textsuperscript{220} \textit{Id.}

\textsuperscript{221} \textit{Id.}

\textsuperscript{222} \textit{Galloway}, 816 F. Supp. at 17-18. While \textit{Galloway} suggests several accommo-
dations which could be made for blind or visually impaired jurors, the court took no
position on the reasonableness of any particular accommodation.

\textsuperscript{223} \textit{Caldwell}, 603 N.Y.S.2d at 714.

\textsuperscript{224} \textit{Id.}

\textsuperscript{225} \textit{Galloway}, 816 F. Supp. at 18 & n.11.
(6) instructing attorneys and witnesses to provide accurate and complete descriptions of exhibits or diagrams;\textsuperscript{226}

(7) using a Kurzweil Reading Machine which translates printed material into audio;\textsuperscript{227} and

(8) allowing the juror to view exhibits at close range.\textsuperscript{228}

In addition, the American Bar Association ("ABA"), in its guide Into the Jury Box: A Disability Accommodation Guide for State Courts,\textsuperscript{229} lists additional accommodations which the ABA Commission on Mental and Physical Disability Law and Legal Problems of the Elderly would consider "reasonable" at various stages of litigation.\textsuperscript{230} The guide is designed to implement and coordinate states' use of the ABA's Standards Relating to Juror Use and Management,\textsuperscript{231} and the guide begins by dividing the jury process into three stages: (1) pretrial;\textsuperscript{232} (2) trial;\textsuperscript{233} and (3) deliberation.\textsuperscript{234} The pretrial phase focuses on accommodations from jury pools' creation,\textsuperscript{235} notification,\textsuperscript{236} transportation and access through orientation and \textit{voir dire}.\textsuperscript{237}

Obviously, the idea of creating non-discriminatory jury pools is tied to state statutes which establish jury qualifications. The guide takes the position that state statutes containing language which excludes persons who are incompetent "by reason of physical or mental ability to render satisfactory jury services," or because they are unable to read, speak or understand English, open these statutes to broad judicial interpretation and are, therefore, questionable under the ADA.\textsuperscript{238} In fact, twenty-eight state statutes presently require a potential juror to be physically and mentally able to render satisfactory jury service,\textsuperscript{239} and thirty-three states require potential jurors to

\begin{itemize}
\item \textsuperscript{226} Id. at 18 n.11.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} State v. Keeven, 728 S.W.2d 658, 664 (Mo. Ct. App. 1987).
\item \textsuperscript{229} AMERICAN BAR ASS'N, INTO THE JURY BOX: A DISABILITY ACCOMMODATION GUIDE FOR STATE COURTS (1994) [hereinafter ACCOMMODATION GUIDE].
\item \textsuperscript{230} ACCOMMODATION GUIDE, supra note 229, at 19-40.
\item \textsuperscript{231} AMERICAN BAR ASS'N, STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).
\item \textsuperscript{232} ACCOMMODATION GUIDE, supra at note 229, at 21-29.
\item \textsuperscript{233} Id. at 29-35.
\item \textsuperscript{234} Id. at 35-37.
\item \textsuperscript{235} Id. at 8-11.
\item \textsuperscript{236} Id. at 22.
\item \textsuperscript{237} Id. at 25-29.
\item \textsuperscript{238} Id. at 9; see supra note 160 (listing state statutes which choose jury lists based on ability to read, speak, or understand English).
\item \textsuperscript{239} ALA. CODE § 12-16-60 (1995); ARK. CODE ANN. § 16-31-102(a) (1997); COLO. REV. STAT. § 13-71-105 (1998); CONN. GEN. STAT. § 51-217(e) (Supp. 1996); DEL. CODE ANN. tit. 10, § 4509 (Supp. 1998); D.C. CODE ANN. § 11-1906 (1995); HAW. REV. STAT. § 612-4 (Supp. 1997); IDAHO CODE § 2-209(2) (1998); IND. CODE § 33-4-5.5-11 (1998); KY. REV. STAT. ANN. § 29A.080 (Banks-Baldwin 1995); LA. CODE CRIM. PROC. ANN. art. 401(A) (West 1981); Md. CODE ANN., CTS. & JUD. PROC. § 8-207(b) (1995); MASS. GEN.
hear, read, write or understand English.²⁴⁰ The guide also questions the sources from which many states draw their jury lists. Many states use drivers' licenses lists²⁴¹ (which discriminate against the blind or visually impaired) or voters' registration lists²⁴² (which often do not include persons that are physically challenged to get out to vote).

Instead, states could follow the lead of seventeen states²⁴³ which have specific legislation in place that affirmatively provides that hear-


²⁴¹ See supra note 160.


ing, visual or physical disabilities alone do not render a person ineligible for jury duty.244 Alternatively, states could strike the qualifying language which requires “physical or mental ability” to perform jury duty and insert language which deals with essential jury functions such as “the abilities to comprehend the functions of a juror, to understand the issues and to deliberate.”245 Similarly, state legislatures could substitute words like “ability to read, write and speak English” for broader phrases such as the “ability to communicate effectively in English.”246 In the same vein, states can revise their jury selection statutes to include names drawn from sensory-neutral lists such as tax, utility, telephone directories or social service compilations.247 Such lists could also include identification cardholders drawn from motor vehicle registration, the sheriff’s department or the ADA para-transit eligibility list available from local public or private transit providers.248

The *voir dire* directives in the ABA’s guide aim to help judges avoid stereotyping jurors during questioning by suggesting the courts use open-ended questions to interview all potential jurors, ones which allow the juror to determine the form and substance of the answer.249 (Example: “Tell me what being a juror means to you,” or “Tell me about any experience you have had with courts before.”)250 The guide also suggests that as questions of individual juror competence arise, the courts should use private sidebar questions to explore a person’s ability to receive and evaluate evidence.251 The questions should be tailored to both the specific disability and the specific evidence. (Example: “Given your vision loss, how would you evaluate a witness’ credibility?” or “This case involves photographs of an accident — how would you assess the pictorial evidence in this case?”)252 The guide also recommends the use of the “struck jury system” for peremptory challenges which allows all peremptories to be made at the end of *voir dire* in which counsel alternately strike names from the venire.253 This method minimizes embarrassment to struck jurors and “focuses

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244. ACCOMMODATION GUIDE, supra note 229, at 9.
245. Id. at 20.
246. Id.
247. Id.
248. Id. at 28-29.
249. Id.
250. Id.
251. Id.
252. Id.
253. Id.
on 'affirmative choice of the final jurors rather than on the disqualifications of individuals along the way.'

In the second phase of the jury process (the trial), the guide suggests visually-impaired or blind jurors be accommodated by:

1. Reserving seating with the closest distance and best line of sight to the witness box for hearing or visually impaired jurors;
2. Providing adequate lighting to enhance any impaired vision a juror may have;
3. Using assistive listening devices and systems which amplify sound;
4. Making written evidence available in Braille or digital forms;
5. Permitting a visually impaired juror to use a magnifier for printed or pictorial evidence;
6. Allowing additional notetaking or recording devices if not prohibited by state or local rule;
7. Permitting court personnel to describe physical evidence to a juror with a vision impairment and making that description part of the record;
8. Offering the assistance of court personnel to a physically-impaired juror who needs help handling documents or evidence.

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254. Id.
255. Id. at 31.
256. Id. at 33.
257. Id. at 34.
258. Id.
259. Id.
260. Id. at 35.
261. Id. The court should administer an oath to the reader/describer if such a reader/describer is going to be used. Such an oath would be similar to the one administered in People v. Green, which reads:

Do you swear that you will accurately translate from the English language into the sign language understood by the juror ... who is deaf, and from that language as used by [the juror] into the English language, and that during the deliberations of the jury, while present in the jury room, your communications with [that juror] and the other jurors will be limited to translating for [the deaf juror] what the other jurors say and translating for them what [the deaf juror] says, so that you will not otherwise participate yourself in the jury's deliberations, and that you will keep secret all that you hear in the jury room unless ordered differently by the court or unless authorized by [the deaf juror] after the trial is finished to disclose anything said by [the deaf juror] during the deliberations.

Green, 561 N.Y.S.2d at 131, reprinted in Accommodation Guide, supra note 229, at 33. Further, under the Code of Ethics for Interpreters, if an interpreter believes a certain matter is beyond his or her ability to explain, the interpreter should be excused and replaced. See Eckstein, 452 F. Supp. at 1242.
(9) allowing service animals (such as guide dogs) to accompany a disabled juror;\textsuperscript{263}

(10) providing a structured period during recess to ask for any clarification of requested information;\textsuperscript{264}

(11) asking jurors to raise their hands if at any time one of them cannot hear what is being said before trial begins.\textsuperscript{265}

Prior to deliberations, jury instructions can be placed on audiotapes and/or courts could also allow another juror or employee to read the instructions.\textsuperscript{266} The instructions must clarify the neutral, non-participatory role of any reader or personal assistant during the deliberative process.\textsuperscript{267} If a personal assistant is allowed in the jury room, the court should require an oath that the assistant will not participate in the deliberations or require a written statement from the assistant to help foreclose any potential fair trial challenges.\textsuperscript{268} The court may also consider additional instructions which direct jurors to speak one at a time during deliberations and which allow one juror to describe evidence or read documents to a visually impaired juror.\textsuperscript{269}

C. Due Process Concerns

Even with the use of these or other accommodations, due process concerns necessarily beg the question: Are courts merely paying lip service to the disabled at the expense of the litigants? Are the parties really receiving a decision rendered by impartial jurors, each of whom predicated their decision upon an independent comprehension and evaluation of the evidence in question? After all, our court system embraces the traditional notion that a "case should not be decided on less than all proffered evidence."\textsuperscript{270} As the court in \textit{Eckstein v. Kirby}\textsuperscript{271} articulated, a juror's interest in serving must be secondary to a liti-

\textsuperscript{263} Id.
\textsuperscript{264} Id.
\textsuperscript{265} Id.
\textsuperscript{266} Id. at 36.
\textsuperscript{267} Id.
\textsuperscript{268} Id. at 37. In \textit{Guzman}, the court reiterated that even with an instruction at the onset of the proceedings as set forth in the sample oath, an interpreter for a deaf juror should be admonished prior to sequestration "that his/her only function in the jury room will be to facilitate communication and (s)he must not counsel, advise, or interject personal opinions or participate in any way other than as a transmitter of the spoken word." \textit{Guzman}, 478 N.Y.S.2d at 466-67 n.53.
\textsuperscript{269} ACCOMMODATION GUIDE, supra note 229, at 36. \textit{Compare} Black v. Continental Casualty Co., 9 S.W.2d 743 (Tex. Ct. Civ. App. 1928) (overturning a civil judgment upon finding that a deaf juror relied upon other jurors' accounts of the witness' testimony), \textit{with} Susi, 477 N.E.2d at 998 ("A mere description of the physical evidence would not have conveyed adequately the subtleties which would [have been] apparent on a visual comparison [of a composite drawing and photographic evidence].")
\textsuperscript{270} Susi, 477 N.E.2d at 998.
gant's right to a fair trial. Thus, the argument is that to fulfill the jury purpose, evidentiary analysis requires unimpeded perception. This perception requires evaluating evidence in the context of when and how it is presented at trial. Any jury accommodations may be construed as impinging upon the constitutional guarantee to a fair trial.

In Commonwealth v. Greiner, a deaf juror did not hear the material evidence presented during trial. The court in Greiner ruled that repeating the evidence at a later time was an insufficient basis for adequate evaluation by the juror. Further, the court explained that while isolated pieces of evidence could be repeated out of context, material evidence could not. As the court in Greiner noted, material evidence must be heard or perceived during witness testimony — especially where testimony of the defendant's guilt is contradictory. In other words, the court found that the timing of hearing the evidence was crucial to the juror's assessment of credibility. For the Greiner court, the juror needed to perceive the evidence as it was introduced.

The concept of perceiving evidence in context forces this question: Does the use of reasonable accommodation decrease the likelihood that the evidence will not be assessed as it is produced? I think not. In reality, even with the ideal of twelve all-knowing, all comprehending jurors in a case, the reality of jury deliberations is that no one person sees or hears everything or remembers all evidence, in context or out; that is why there are twelve jurors, not one. Jury deliberations yield a consensus. When a jury deliberates, its members debate, exchange ideas and persuade — all in the hope of reaching a consensus. The courts encourage this process, for without it a verdict would never be reached. As jury members discuss a case, they

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274. Id.
277. Greiner, 455 A.2d at 167.
278. Id.
281. Id.
282. Id. Kaiser noted: "The court recognizes and encourages debate and persuasion as appropriate to consensus. If perfect autonomy were the juror ideal, it would remain so after the jury is instructed. And we would not speak about 'jury deliberations' but about 'juror reflections.'" Id. at 202.
fill in the gaps for each other; what one has missed, another provides.\textsuperscript{283}

There are no guarantees that each jury member will remember all the specific details of each witness’ testimony or recall it in the same manner. The factors each juror will rely upon to evaluate evidence will largely be a function of the juror’s experience.\textsuperscript{284} As one author noted, “[n]o one knows exactly how jurors weigh different indicators of credibility, nor does anyone know how accurate any indicator is.”\textsuperscript{285} In reality, jury members reach the same result based on different evidence or their different interpretation of the same evidence.\textsuperscript{286} Jury deliberations are, at best, imperfect because jurors are imperfect. As one court explained, “[m]any jurors have somewhat less than perfect hearing or vision, or have other limitations on their abilities to assimilate or evaluate testimony and evidence. A defendant is not entitled to a perfect trial, only a fair one.”\textsuperscript{287}

This recognition of individual limitations is not intended to diminish the high standards of integrity and quality to which each court system and jury should aspire. No individual should be allowed to serve if he or she is incapable of adequately perceiving the evidence, but as Professor Kaiser points out, “there is nothing which requires this perception [to] be . . . visual.”\textsuperscript{288}

Indeed, to exclude one class of potential jurors from the jury process denies the excluded class of the opportunity to participate equally in the administration of justice\textsuperscript{289} and ultimately “cast[s] doubt on the integrity of the whole judicial process.”\textsuperscript{290} Excluding a class harms litigants, as well, by denying them a unique perspective to the case which sighted people may lack.\textsuperscript{291} As one commentator noted:

The sighted community categorizes persons in accordance with views and values which if their basis were clearly understood then most sighted jurors would be dismissed in voir dire on grounds of bias or prejudice. Sighted jurors develop beliefs about defendants by observing their deportment and dress on and off the stand. They reinforce preconceived ideas by stud-

\textsuperscript{283} Guzman, 478 N.Y.S.2d at 461. This is so because all jurors “have different attention spans and phase in and out of focus.” Id. at 461-62.
\textsuperscript{286} Kaiser, 60 Chi.-Kent L. Rev. at 202.
\textsuperscript{287} Dempsey, 830 F.2d. at 1088.
\textsuperscript{288} Kaiser, 60 Chi.-Kent L. Rev. at 195.
\textsuperscript{289} Id.
\textsuperscript{290} Guzman, 478 N.Y.S.2d at 465 (quoting Peters v. Kiff, 407 U.S. 493, 502-04 (1972)).
\textsuperscript{291} Id.
y ing the family and associates of the defendant. They weigh testimony by watching the judge’s facial expressions. In all of these instances, that which proves to be a channel of information facilitating understanding concurrently poses a clear threat to the objectivity of the information so acquired. On the other hand, what the blind juror is supposed to lose in way of information he necessarily gains in way of objectivity.292

Clearly, the blind juror does not judge a book by its cover.

As the court in Galloway stated, if reasonable accommodations are made for the blind juror, the juror will be “qualified” under most jury statutes and be able to serve in most cases.293 While being qualified as a juror must be determined on a case-by-case basis, the essential question which will determine jury qualification will be a juror’s ability to understand crucial evidence.294 The cases which have wrestled with “What constitutes crucial evidence?” are less than uniform. As discussed earlier, courts have debated whether physical evidence,295 documentary evidence,296 photographic or composite evidence297 is crucial to the case. What seems clear, however, is that crucial evidence means evidence essential to the verdict.298

In every case the presiding judge and attending counsel must ask themselves: Is there a piece of evidence so essential to the party’s position that nothing short of perceiving it visually will allow adequate evaluation? Drawing on this theme, in Commonwealth v. Susi,299 the appeals court reasoned that identifying the defendant and visually comparing his likeness to a composite drawing was a crucial task for members of the jury which could not be effectively evaluated using any other senses, such as having the two described to the juror.300 In so holding, the court in Susi relied on Jones v. New York City Transit Authority301 to remove a blind juror where a significant portion of the evidence presented was physical.302 However, as the court in People v. Caldwell303 explained, the Jones case never discussed if reasonable

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296. Caldwell, 603 N.Y.S.2d at 715.
297. Susi, 477 N.E.2d at 996, 998.
298. Id. at 998.
302. Susi, 477 N.E.2d at 998.
accommodations could have been made to allow the blind juror to receive a verbal description of the physical evidence.304

Practitioners and judges alike must ask, as the blind have asked themselves for years: Will another sense compensate for the lack of sight? If the evidence presented is physical, it can be explained by the sponsoring witness, described verbally or touched. As one blind juror stated, “[y]ou can touch the evidence. I can get a lot more from touching a gun than you can get from seeing it from across the room.”305 If the evidence is documentary in nature, it can be read, audiotaped or Brailled. Its importance will be the subject of testimony. If the evidence is photographic, it can be explained or described verbally. If, however, the evidence is contested, it will be the subject of cross-examination which will necessarily point out its accuracies or inaccuracies, the weight to be assigned and the credibility it deserves.306 As one observer noted, when a piece of visual evidence is crucial to a case, the expert testimony, not the physical review, will determine the evidence’s weight.307 In our legal system, rarely does a piece of evidence exist in a vacuum, without corroborating support from some other source.

Further, if our court and electoral systems have seen fit to appoint judges who are blind and must act as the “sole trier of fact” in various civil and criminal cases,308 surely blind jurors under the court’s auspices can act as fact finders as well. If for any reason a blind or visually impaired juror cannot adequately evaluate the evidence, the court’s recourse is to allow an alternate juror to serve, or ultimately to remove the case from the jury’s deliberation.309 Such inherent safeguards exist for those jury verdicts which are in jeopardy of being challenged as less than fair.

IV. CONCLUSION

Although jury selection lies ultimately in the discretion of the presiding judge, with increasing judicial and practitioner awareness of the true capabilities of the visually impaired or blind, there are few trials in which the blind cannot qualify for jury duty. Similarly, with reasonable accommodations, these physically challenged jurors will

308. See Gallaway, 816 F. Supp. at 17.
not pose any threat to the due process rights of the litigants. As Justice Budd G. Goodman\textsuperscript{310} explained, in agreeing that a deaf juror was competent to hear a criminal matter:

\begin{quote}
We live in an imperfect world and the jury system is our imperfect attempt to deal with that world. The best we can do is to try to find twelve citizens, imperfect as they are, to listen, observe, consider, discuss, and reach the best verdict, the fairest verdict, they know how, given their imperfections. That is the most we can ask, and to my unending surprise, by whatever route they travel, juries by and large arrive at substantial justice.\textsuperscript{311}
\end{quote}

\textsuperscript{310} Justice Goodman is a member of the New York Supreme Court.

\textsuperscript{311} Guzman, 478 N.Y.S.2d at 462.