Jury News

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A NOTE FROM TOM MUNSTERMAN:

My first Jury News column appeared in these pages some 12 years ago. Over these years I have had a lot of help, primarily from individuals in the many courts and organizations who have given me something to write about. Another great source of help has been my colleague here at the National Center for State Courts, Paula Hannaford-Agor, who has often written this column. I now leave it in her hands and ask you, dear readers, to do two things. First, keep improving your jury systems, and second, please let Paula know what you are doing and share with her your jury concerns. Thanks to all of you and please keep up the good work. You are the Jury News.

A well-known prayer asks for serenity to accept the things that cannot be changed, courage to change the things that can, and wisdom to know the difference. I am reasonably sure that jury managers often utter these words as they go through their various efforts to ensure that their jury pools reflect a fair cross-section of the community. Some problems in jury management can be remedied relatively easily, some require a more concerted effort, and some are completely beyond the control of the courts. Or are they?

That is the question that seems to lurk just beneath the surface of a case litigated in the federal district court in Massachusetts last year. In a pretrial motion, the defendants in *United States v. Green* challenged the composition of the jury venire. Specifically, they claimed that the source list used to compile the master jury list was so inaccurate and out-of-date that potential jurors, especially those in urban areas with the highest proportion of minorities, could not be located for qualification and summonsing purposes. In the Eastern District of Massachusetts, the proportion of African Americans in the community is approximately 7 percent, but only 3 percent — less than half — routinely appears in the jury pool. The defendants claimed that the disparity violated their Sixth Amendment right to an impartial jury as well as provisions of the federal Jury Selection and Service Act (JSSA).

In her ruling on the motion, Judge Nancy Gertner found that the defendants failed to prove that the African American disparity in the jury pool violated constitutional requirements, but did find that use of the inadequate source list violated the federal statute governing jury selection. As a remedy, she ordered that a new summons be mailed to someone randomly selected from the same zip code for each summons returned undeliverable and for each summons not responded to after a second mailing. The federal First Circuit Court of Appeals subsequently overruled her decision, but only because the proposed remedy was inconsistent with the district's jury management plan, not because the court disagreed with her findings.

What is interesting in this case is the apparent shift in thinking about what constitutes systematic exclusion for the purposes of fair cross-section analysis. Recall that *Duren v. Missouri* set out three steps necessary to support a challenge to the jury pool:

1. The underrepresented population must be from a "cognizable" group;
2. The proportion of the cognizable group in the jury pool is not fair or reasonable in relation to the number of persons in the community; and
3. The under-representation is due to systematic exclusion.

Traditionally, systematic exclusion referred to some barrier established and maintained by the court, rather than societal factors beyond the court's authority to address. In *Duren*, for example, the automatic exemption for women was deemed a systematic exclusion because it was an inherent part of the court's jury management system. But even if a party successfully meets all three prongs of the *Duren* test, some forms of systematic exclusion may be permissible if they serve a significant state interest. For example, qualification criteria that prevent individuals with felony convictions may be justified, even though they have a disproportionate impact on minorities.

More recent examples of systematic exclusion are computer glitches that unintentionally, but systematically, exclude racial or ethnic minorities from jury service. In 1992, the federal district court in Connecticut discovered system errors that resulted in the complete suppression of names for all Hartford and new Britain residents — coincidently the home of the state's largest population of African American and Hispanic residents. One of the errors was a field formatting error that caused the jury system computer to misread the "d" in Hartford as "deceased." Kent County, Michigan, experienced a similar software error in 2001 in which its computer system randomly selected names only from the top 25 percent of the master jury list rather than from the entire list. The master source list was ordered alphabetically by zip code, so the error had the effect of excluding citizens from higher zip codes — again coincidentally where the county's largest population of African Americans lived. These examples are quite clearly instances of systematic exclusion, however unintentional. But what about disparities that occur as a result of factors unrelated to jury service?

An historical view of this question tells us a great deal. As courts abandoned the key-man system of jury selection in the 1960s, most initially turned to random selection from the voter registration list because that list was already established, regularly maintained, and used essentially the same eligibility criteria as required for jury service (e.g., age, citizenship, residency, no felony convictions). But in terms of demographic representation, it also tended to over-represent older, upper-income, and predominantly white voters. Did the fact that younger, lower-income, and minority citizens fail to register to vote constitute a systematic exclusion for the purposes of jury selection? Although many challenges alleging violation of fair cross-section requirements were raised, only the California Supreme Court found that sole use of the non-representative voter registration lists violated the Sixth Amendment right to an impartial jury.

Most courts that considered the question concluded that the failure of citizens to register to vote was not a systematic exclusion by the court and even if the exclusive use of voter registration lists was inherently systematic, the costs of remedying the under-representation of minorities through supplemental source lists did not justify its use. Today, however, most courts in the United States combine the lists of registered voters and licensed drivers and identification card holders to compile their master jury list. Indeed, New York State and Connecticut supplement the voter registration list with licensed drivers, state income tax filers, unemployment compensation recipients, and some welfare lists (New York only). As the technology for merging and removing duplicate records from multiple source lists improves, and the costs of doing so decrease, the justification for exclusive reliance on the voter registration list becomes increasingly weak. Under these circumstances, would failure to supplement the voter registration list with other types of source lists still be viewed as permissible? Or would it be viewed as a systematic exclusion for fair cross-section purposes?

Of course, increased use of multiple source lists only addresses the issue of under-representation of minorities on the master jury list. But it does not solve the many problems involved in summoning and qualifying prospective jurors. For example, poor maintenance by the agencies that compile the source lists often results in large numbers of bad addresses, especially in urban areas. The undeliverable rate for jury summonses averages 10 percent nationally, but can be as high as 50 percent in some urban areas. If the resulting jury pool is skewed in terms of its racial or ethnic characteristics, is it systemic exclusion for the court to continue to use those source lists? At one point in time, courts could argue that the administrative costs of locating prospective jurors who had moved were so great that it qualified as an important state interest justifying the exclusion. But the availability of NCOA vendors that can provide updated addresses at relatively low cost undermines the credibility of claims that the problem of undeliverable summonses is too costly to address. If there are still many undeliverable after the court has undertaken these available remedies, then what?

Non-response to jury questionnaires and summonses is another factor that can lead to inadequate racial nd ethnic representation in the jury pool. The non-response rate is 8 percent nationally, but it is closer to 18 percent in major urban areas. Judicial follow-up with increasingly severe consequences for non-response can address this problem quite effectively. The Los Angeles Superior Court evaluated the effectiveness of its follow-up measures and found that 29 percent of non-responders answered a second summons, 6 percent responded to a Failure to Appear notice, and 18 percent responded to an Order to Show Cause notice. Assuming that other courts would have similar results, would it be systematic exclusion for a court to fail to rigorously enforce the summons through an effective follow-up program?

The underlying message in Judge Gertner's opinion is that the definition of systematic exclusion can shift to include some social factors that were previously considered wholly beyond the control of the courts, especially as courts develop the means to address those factors in cost-effective ways. And that shift now poses a challenge for all of us: what can we be doing to improve the cross-section in our jury pools? And if we're not doing it, is our failure to do so a systematic exclusion in itself?