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12 ANGRY MEN (AND WOMEN) IN FEDERAL COURT

JUDGE NANCY GERTNER*

INTRODUCTION

The movie *12 Angry Men* reflected everything that is both extraordinary and troubling about the American jury system. It portrayed twelve lay people struggling with questions of guilt or innocence, of bias and fairness, of racism and rationality. It was remarkable to see their interaction, to watch the extent to which the system obliged them to confront each other in an unparalleled example of direct democracy. It was the prototype of a communal verdict based on the expertise and prejudices of twelve independent people. Henry Fonda, portraying the lone dissenter at the outset of the jury's deliberations, persuades the others to reverse their positions from guilty to not guilty, by rationally examining the evidence and rejecting racist appeals. (My favorite moment was when the oldest juror, whose observations were initially ignored, recalls the way an elderly witness walked to the stand—limping, dragging one leg—and then notes the witness's testimony—that he “ran” to the door moments after he heard the telltale sound of a body hitting the floor above him.)

But the movie was troubling in equal measure. These important struggles about guilt or innocence were played out in an all white, all male jury, while the defendant was a minority. The social strata this jury represented was relatively narrow—no apparent extremes of wealth and poverty. The jurors spoke in different accents, reasoned in different ways, but they hardly reflected the true diversity of the city they were in, New York.

The film's irony was that while the deliberations represented the best of the jury system, the jury was wholly unrepresentative of the community. In fact, let me update the scene, federalize it, if you will. Assume the charge was prosecuted in federal court—murder in aid of racketeering under 18 U.S.C. § 1959(a)(1), or robbery under the Hobbs Act, 18 U.S.C. § 1951. Assume that the same offense could have been prosecuted in state court, perhaps the court just across the street, with substantially lower pen-

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alties. Assume further that state court juries looked very different from federal court juries. They reflected the diversity of the urban settings in which they were situated. Federal court juries, on the other hand, had an entirely different composition. By drawing on jurors from a wider area, they included counties that were homogeneous, that mirrored the residential segregation of the suburbs. In fact, while the modern federal jury is not likely to be all male, as in *12 Angry Men*, in most parts of the country, it could well be all white.

This is the situation I confronted in *United States v. Green*.¹ Darryl Green and Branden Morris were African-American men who were likely to be tried before all white, or largely white, juries. While that was troubling in and of itself, it was particularly discomfiting in *Green*. They faced the federal death penalty for murder in aid of racketeering. Had the case been tried a few blocks away, in the state court, the jury would have not only been diverse, but also the penalty would have been life imprisonment.

While jury representativeness has dramatically improved since the days portrayed in *12 Angry Men*, serious problems remain. There are surely no more legal barriers to the participation of women or minorities in the jury. Discriminatory statutes have been repealed or declared unconstitutional. The “key man system,” so-called, has been dismantled.² Technology has made possible random selection, once the jury source lists are prepared.

But no congratulations are in order. In *Green*, for example, the choice to prosecute street crime in federal court, rather than in the courts of the Commonwealth of Massachusetts, reduced the available pool of African-American jurors from 20% in Suffolk County (the urban area in which Boston is located), where the defendants’ crimes allegedly took place, to 7% in the Eastern District of Massachusetts. (And the potential punishment went from life imprisonment in the state courts to the death penalty in the federal courts.) And the 7% minority representation was diluted further to roughly 3% or less, at least in part because of outdated and inaccurate resident lists in the poorer, more diverse areas of the cities. The result was that in most cases, Eastern District juries looked like the jury in *12 Angry Men*, without a single African-American member.³

1. 389 F. Supp. 2d 29 (D. Mass. 2005). *Green*’s remedy was reversed on a mandamus petition to the First Circuit, as I describe below. See *In re United States*, 426 F.3d 1 (1st Cir. 2005).

2. The “key man” system relied on certain individuals, the “key men,” to supply the jury commissioner with the names of potential jurors. *Green*, 389 F. Supp. 2d at 69.

3. *Id.* at 37.

Nor is the *Green* problem unique to Massachusetts. It is likely to be repeated across the country, as more and more street crimes are prosecuted in federal court, where suburban jurors often predominate.

Notwithstanding the real problems with representation, courts have narrowly interpreted the Sixth Amendment and the federal Jury Selection and Service Act, 28 U.S.C. § 1861 (“JSSA”). In fact, Sixth Amendment jurisprudence has gone the way of litigation in other civil rights cases; the bar for relief is set higher and higher. Although the Sixth Amendment standards are generally stated, and surely could cover a variety of representation problems, they are rarely construed to provide relief in situations short of overt, intentional discrimination. And that situation—where African Americans are explicitly excluded—happens rarely, if at all at this point in American history.⁴ The best way to address serious concerns about representativeness is administratively, changing the jury plans in the respective federal districts or better yet, by statute, as described below.

Here, then, is a version of *12 Angry Men* (and Women). It emphasizes the District of Massachusetts, but it is in fact a cautionary tale for other jurisdictions.

I. THE CHOICE TO FEDERALIZE STREET CRIME

Jury districts are created by statute, court rule, or both. The District of Massachusetts, for example, was created by federal statute;⁵ the various divisions, Eastern, Central, and Western, were created by court rule.⁶ But while legislative districts are drawn with representativeness in mind, resulting in the creation of districts with a majority of minority voters,⁷ judicial districts are arbitrary, administrative contrivances.

Law enforcement chooses the forum (federal or state) for the prosecution of a crime. Taken together, administrative decisions with respect to the district boundaries and the executive’s choice of forum define the geographic areas within which potential jurors will reside. Thus, when courts speak of the constitutional requirement that juries be “reasonably represen-

4. To be sure, overt discrimination is still of concern in the exercise of peremptory challenges. My point is only that is less of a concern in arriving at master jury wheels.

5. See 28 U.S.C. § 101 (2000).

6. L.R.D. Mass. 40.1(c).

7. See Voting Rights Act, 42 U.S.C. § 1973 (2000).

tative” of the community,⁸ they necessarily mean “reasonably representative” of an area that was itself crafted by administrative fiat.⁹

In *Green*, the defendants were charged with murder (for which the death penalty was sought) and street corner narcotics trafficking, crimes traditionally prosecuted in state courts. Indeed, had the case been brought in state court, in the first instance, the “community” for the purpose of determining what comprises a “fair cross-section” would be Suffolk County. In federal court, the relevant community—because of statute and court rule—included all of Eastern Massachusetts.¹⁰

Census data for Massachusetts, as in most states, show that minority populations are clustered in urban areas.¹¹ When a case is brought in federal court, the relevant jury pool is expanded to include the more racially homogeneous suburbs. As a result, minority and even urban representation in the pool from which defendant’s juries will be selected is diluted. In effect, by choosing the forum, the prosecutor picks the general characteristics of the decision maker. To date, there is no redress.¹²

As I found in *Green*,

All, or nearly all, white juries are made much more likely by a single decision of the Executive: The United States Attorney’s office has opted to prosecute “street crime” in federal court, rather than in the courts of the Commonwealth of Massachusetts. With that decision, the available pool of African-American jurors plummets from 20% in Suffolk County, where defendants’ alleged crimes took place, to roughly 7% in the Eastern District of Massachusetts. And the punishment escalates from life imprisonment in the state courts to the death penalty in the federal courts. No matter how troubling the impact, the law gives the federal prosecutor the right to make this decision.¹³

8. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 526–31, 538 (1975) (holding that the systematic exclusion of women during the jury-selection process resulted in jury pools not “reasonably representative” of the community, violating the Sixth and Fourteenth Amendments).

9. The Sixth Amendment provides for the right to trial “by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” U.S. CONST. amend VI.

10. See Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 105–09 (2004) (“Just as the minority vote gets diluted in at-large districting schemes, . . . the values of minority communities are more likely to be subsumed in juries drawn from larger federal districts than they would be in smaller, county-based state court juries.”).

11. To be sure, even the census data have been criticized as undercounting African Americans, as well as other minorities. See Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 902–04 (2001).

12. An interesting question is posed if there were proof that the government chose a federal forum not to take advantage of the higher penalties in federal court, or because of the legitimate prosecution, but in order to avoid a more diverse jury. Presumably, such facts could raise equal protection issues under *Batson v. Kentucky*, 476 U.S. 79 (1986).

13. *United States v. Green*, 389 F. Supp. 2d 29, 37 (2005).

In fact, apart from their all-male character, these juries are not unlike the jury in *12 Angry Men*, both in the good and the not-so-good aspects. Their deliberations are careful; they labor over the evidence, follow the court's instructions, agonize over their verdicts. The issue is whether they are representative.

II. THE SOURCE LISTS: VOTING LISTS OR RESIDENCE LISTS

The executive's decision as to where to prosecute is not alone responsible for the dilution—and virtual elimination—of minority participation. There are administrative problems in compiling the source lists from which federal jurors are drawn. Under the statute, the usual procedure is for federal courts to draw the names of prospective jurors from either voter registration lists or the lists of actual voters in their districts.¹⁴ But there is an alternative: each federal district court is authorized to “prescribe some other source or sources of names [of prospective jurors] in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title.”¹⁵

The problem with voting lists is that minorities do not vote in the same proportion as their white counterparts.¹⁶ In fact, concerned about the representativeness of voting lists, Massachusetts pioneered the use of resident lists, annually prepared, as the source of potential jurors.¹⁷ It was not

14. 28 U.S.C. § 1863(b)(2) (2000).

15. *Id.* Section 1861 states two affirmative goals—the goal of random selection from a fair cross section of the community and the goal of equal opportunity to be considered for service on juries:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

Id. § 1861. Section 1862 announces the negative, anti-discrimination goal: “No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.” *Id.* § 1862.

16. See Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1404 (2001) (citing Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW & POL'Y 43, 47–48 (1988)).

17. Each district is required to formalize its jury selection procedures in written form pursuant to 28 U.S.C. § 1863(a). Accordingly, the Massachusetts District Court devised the Plan for Random Selection of Jurors (“the Jury Plan” or “the Plan”). In 1989, the District amended its Jury Plan to replace voter lists with resident lists as the source of names for potential jurors. *Green*, 389 F. Supp. 2d at 43 n.22. And in 1992, 28 U.S.C. § 1863(b)(2) was amended to ratify what the District of Massachusetts had already been doing. Massachusetts, the statute noted, “may require the names of prospective jurors to be selected from the resident list provided for in chapter 234A, Massachusetts General Laws, or comparable authority, rather than from voter lists.” Clearly, the reason for the change was profound concern for the representativeness of voting lists. See *United States v. Levasseur*, 704 F. Supp. 1158, 1164 (D. Mass. 1989); see also Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590 (1990).

enough to say, if you don't participate as a voter, you don't deserve to participate as a juror. The JSSA's concern was not *that* potential juror's individual choice. Rather, it was the right of the *defendant* to have a jury drawn from a fair cross section of the community.¹⁸

Unfortunately, as *Green* reflects, the resident lists were also flawed. Every city and town was required to make a list of all residents who resided in the town as of each January.¹⁹ The problem was that this was an unfunded mandate, fulfilled with varying success across the state.²⁰ The more affluent and homogeneous communities could afford to properly maintain the lists; the poorer, more racially diverse communities could not.²¹

Put simply, an Eastern Division resident has a better chance of getting on a jury if she hales from more racially and economically homogenous towns like Needham or Dover, than if she is from more racially and economically diverse towns like Lynn, Brockton or New Bedford. Residents of heavily African-American, poor, and urban communities, like Roxbury and Dorchester, may fare even worse than those from the latter towns.²²

The pattern was not unique. As the Chair of The Jury Project of New York concluded, "Among minorities, a perception that they are not being called to serve in sufficient numbers exacerbates existing suspicions about whether the justice system works for minorities or is stacked against them."²³

To be sure, not all of the underrepresentation of minorities was attributable to the failure to update annual resident lists. Part of the problem was demographic: towns with a higher poverty rate and larger concentrations of African-American citizens also tended to have a higher-than-average rate of mobility. Even if officials did everything they could to update the list,

18. For a provocative contrary view, see Richard Re, *Re-Justifying the Fair Cross-Section Requirement: Equal Representation and Aggrandizement in the American Criminal Jury*, 116 YALE L.J. 1568 (2007) (arguing for an enfranchisement approach to jury service, using the fair cross-section requirement as a means of ensuring that eligible participants are included in the jury franchise).

19. Massachusetts law requires that

each city and town shall make a sequentially numbered list of the names, addresses, and dates of birth of all persons who were seventeen years of age or older as of the first day of January of the current year and who resided as of the first day of January of the current year in such city or town.

MASS. GEN. LAWS ch. 234A, § 10 (2007).

20. "The cost of preparing the numbered resident list shall be paid by the city or town." *Id.*

21. One town went so far as to admit that it did not update its residence lists annually as the statute required it to do. *Green*, 389 F. Supp. 2d at 48 n.38.

22. *Id.* at 36. Professor Jeffrey B. Abramson of Brandeis University was the court-appointed expert whose conclusions on both the law and the facts helped shape the *Green* decision.

23. Memorandum from Colleen McMahon, Chair, to Members of The Jury Project, Introductory Remarks 2 (Aug. 13, 1993), cited in Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 765 (1993).

there was bound to be slippage. And then there was the issue of choice, the fact that some who received jury summonses, whose addresses were accurate, simply did not respond. Whatever its source, the result was troubling.

And so it happened that the vast majority of juries in the federal court in the Eastern District of Massachusetts—like the jury in *12 Angry Men*—did not have a single African-American member.²⁴

III. CONSTITUTIONAL FRAMEWORK—SIXTH AMENDMENT ANALYSIS

The Sixth Amendment should have provided some redress for this kind of a situation, but it did not. Over time, judicial interpretation of the Sixth Amendment has narrowed its coverage, making it harder and harder to establish even a minimal, *prima facie* case of a Sixth Amendment violation. In *Duren v. Missouri*,²⁵ the Court outlined the requirements for finding a *prima facie* violation in characteristically general terms: the defendants must show that the group excluded is a “distinctive” group in the community, the cognizable group prong; that the representation of the group in the venire is not “fair and reasonable in relation to the number of such persons in the community,” the underrepresentation prong; and that the underrepresentation is due to the “systematic exclusion” of the group, the systematic exclusion prong.²⁶

Significantly, the Sixth Amendment analysis does not require proof that a group was excluded *because of* discrimination, as does equal protection. While equal protection focuses on the process of selecting jurors, the claim that selection decisions were made with discriminatory intent, the Sixth Amendment is concerned with impact, the systematic exclusion of a cognizable group. It does not matter how benevolent the reasons; in *Duren*, for example, women were excluded because of administrative convenience, the assumption being that women were bound to claim exemptions from jury service because of child rearing responsibilities. The Sixth Amendment is about discriminatory effects, while equal protection is about discriminatory purposes.²⁷

The problem is that in interpreting each of *Duren*’s prongs under the Sixth Amendment, the distinction between equal protection analysis and Sixth Amendment analysis has become muddled. It is as if only the most extreme cases of underrepresentation—numbers that strongly suggest in-

24. *Green*, 389 F. Supp. 2d at 37.

25. 439 U.S. 357 (1979). See generally NANCY GERTNER & JUDITH MIZNER, *THE LAW OF JURIES* §§ 2-11 to -19 (1997).

26. 439 U.S. at 363-64.

27. See GERTNER & MIZNER, *supra* note 25, §§ 2-10 to -13; *Green*, 389 F. Supp. 2d at 51.

tentional discrimination—will suffice to make out a prima facie case that the jury is not “fairly representative of the community.”²⁸ And without a prima facie showing, the government is not even required to justify its practices, to prove “that a significant state interest [is] manifestly and primarily advanced.”²⁹

For underrepresentation, defendants not only have to show that African Americans are underrepresented in the jury pool in relation to their numbers in the population, but also they have to show that the underrepresentation has reached a certain threshold percentage. Many courts have rejected jury challenges where the absolute disparity³⁰ is less than 10%.³¹ While others claim to have not adopted any threshold figure, their actual practice suggests otherwise, citing the 10% jurisdictions with approval.³² If the minority representation in the community is already below 10%, a prima facie case is well nigh impossible. In fact, in the District of Massachusetts, for example, if each and every African American in the Eastern Division were excluded, the absolute disparity would be “only” 6.9%.³³

The constitutional question raised by *Duren’s* underrepresentation should not simply be about picking numbers out of context. The real ques-

28. 439 U.S. at 363 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)). For a discussion of a case in which the Court conflated the illegitimate-means analysis with the unrepresentative-end analysis, see *infra* notes 32–33 and accompanying text.

29. 439 U.S. at 367–68.

30. Absolute disparity measures the difference between the cognizable group’s percentage in the population against the percentage in the master jury wheel. *United States v. Hafen*, 726 F.2d 21, 23 (1st Cir. 1984). It is an approach that has been criticized, particularly where the underrepresented group is already a small percentage of the population. See *United States v. Rogers*, 73 F.3d 774, 776 (8th Cir. 1996) (“Although utilizing the absolute disparity calculation may seem intuitive, its result understates the systematic representation deficiencies . . .”). Comparative disparity is an alternative method, which measures whether there is a diminished likelihood that members of an underrepresented group will be called for jury service. Some courts have combined the two. In *United States v. Weaver*, for example, the Third Circuit noted that “figures from both methods [absolute and comparative disparity] inform the degree of underrepresentation” and thus the court considered both. 267 F.3d 231, 243 (3d Cir. 2001); see also *United States v. Pleier*, 849 F. Supp. 1321, 1329 (D. Alaska 1994) (“[T]he absolute disparity test cannot reasonably be applied without some regard for the representation of the particular distinctive group in the total population. For example, an absolute disparity of 7.7 percent would be far more troubling when dealing with a distinctive group . . . than it would be if the group made up 15 percent of the total population.”). Other methods of identifying underrepresentation which offer a more sophisticated analysis, and could be used alongside absolute disparity, are statistical decision theory and disparity of risk. See Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913, 1918 (1994).

31. *United States v. Clifford*, 640 F.2d 150 (8th Cir. 1981); *United States v. Maskeny*, 609 F.2d 183 (5th Cir. 1980).

32. *Hafen*, 726 F.2d at 23; see also *United States v. Green*, 389 F. Supp. 2d 29, 54 n.51 (D. Mass. 2005) (citing numerous cases).

33. And the 10% rule is in fact based on faulty precedent. A number of courts have cited to *Swain v. Alabama*, 380 U.S. 202 (1965), to justify the 10% standard. See, e.g., *Maskeny*, 609 F.2d at 190. But *Swain* was about purposeful discrimination and purposeful discrimination is not part of the Sixth Amendment’s analysis. See *Green*, 389 F. Supp. 2d at 55 n.52.

tions are normative ones: How much underrepresentation of African Americans is constitutionally tolerable? Does it matter that the choice of forum—the executive’s choice—has already affected the nature of the decision maker, diluting the jury pool from 20% to 7% African American? What significance should be accorded to the fact that the federal government has opted to prosecute street crime, with extraordinary penalties, when a substantial percentage of those defendants are African American and the overwhelming majority of jurors are white? In that case, should even a 2% or 3% underrepresentation be considered excessive? Shouldn’t constitutional alarms be raised whenever an entire group is eliminated from the jury pool?

If defendants do get over the underrepresentation hurdle, proving underrepresentation at whatever level a court happens to set, they must also show with considerable specificity how that underrepresentation occurs—that it is attributable to official action or inaction, rather than random.³⁴ And, even if defendants show that official misfeasance contributes to *some degree* to the problem but they cannot show *precisely how much*, their claim may still fail. A finding of a “systematic” exclusion, for example, may be defeated if factors that are arguably beyond the court’s control are also to blame, like high levels of transience among poorer population or individual choices to ignore jury summonses.³⁵ To be sure, there is little or no case law on the subject. Given the stringency of the underrepresentation prong, few have gotten to this point in the *Duren* progression.

Ultimately, in *Green*, the stringent Sixth Amendment precedent controlled: the defendants could not prove the magnitude of the disparity that

34. As one scholar described it, the question is whether the underrepresentation was “inherent in the system used, rather than a product of random factors on one particular jury venire.” Williams, *supra* note 17, at 617. But the meaning of this prong is unresolved: On the one hand there are affirmative official acts that exclude a cognizable group, as in *Duren*, when administrators determined that all women should get an automatic exemption from jury service once they requested not to serve since women were more likely to claim exemptions based on their child rearing obligations anyway. See *Duren v. Missouri*, 439 U.S. 357, 366–67 (1979). On the other hand, there are negative official acts, which fail to correct an obvious problem, such as where the jury selection mechanism is not adequate to the task of capturing a more transient minority population or one less interested in responding to jury summonses.

35. This debate is analogous to that in employment law about “mixed motive” claims:

Does a plaintiff have to show that a given adverse employment decision was *entirely* caused by a defendant’s discriminatory animus? Or is it enough to show that discriminatory animus *played a part* in the final decision? In this context, if the goal is a fully representative jury, it should be enough that official misfeasance played a part in diminishing African-American representation, even if we cannot quantify that role, much less effect a perfect system because there will always be some people who will not respond to questionnaires or who will frequently change residence.

Green, 389 F. Supp. 2d at 56. Indeed, one interpretation of *Duren* and *Taylor* is that the Court found a Sixth Amendment violation even though administrative policies were not responsible for the full extent of the disparity; cultural patterns played a role as well.

the First Circuit required, although they proved a substantial disparity, and they could not prove the precise extent to which that disparity was attributable to official misfeasance, although they proved that official action and inaction in not keeping accurate and updated lists contributed to the problem.³⁶ That conclusion was not disturbed on appeal.³⁷

IV. STATUTORY FRAMEWORK

The finding that was reversed on appeal was *Green's* conclusions about the scope of the JSSA. In *Green*, I found that the JSSA went beyond the requirements of the Sixth Amendment, that Congress passed the JSSA to accomplish via statute what the Supreme Court had chosen not to do through constitutional analysis.³⁸ I construed the JSSA as imposing an affirmative obligation on districts to use jury selection processes that ensured random selection from a "fair cross-section of the community."³⁹ The statute, after all, requires that the district jury's plan "prescribe some other source or sources of names" in addition to the usual source list, "where necessarily to foster the policy and protect the rights secured by" the fair-cross-section guarantee.⁴⁰ I found that the failure of the Massachusetts court to direct the Federal Jury Administrator to supplement the flawed resident lists amounted to a "substantial" statutory violation of the duty to

36. And there is a hybrid approach as well. Usually, if absolute disparity is not high enough the court does not even get to the question of systematic exclusion. It would be possible to elide the two prongs, the more clear that there is official exclusion of some kind, the less tolerance for the underrepresentation. *Id.* at 57.

37. *In re United States*, 426 F. 3d 1 (1st Cir. 2005).

38. As I noted in *Green*, there are three reasons for so construing the statute:

First, Congress decried the underrepresentation of minorities in the "key-man" system, whatever the cause, whether intentional discrimination, or the natural, even well-intentioned, tendency of the key men to draw upon their limited circle of acquaintances. H.R. Rep. at 4; S. Rep. at 10. The statute's goal was broad and remedial: "The defect that calls for congressional action is that the representational goal of jury selection is impaired when the methods used are *haphazard or less than adequate* to ensure fair selection from a fair sample." S. Rep. at 10 (emphasis added).

Second, even though Congress chose to use voter registration lists as the default source list, it recognized their inadequacies. It left it to the courts to define when a particular voter list is so underrepresentative that it requires supplementation, as in communities in which a substantial percentage of the population has not registered to vote. S. Rep. at 16–17, 25.

Third, and relatedly, Congress recognized that the fact that a citizen chose not to register to vote did not necessarily mean it was appropriate to disqualify him or her from jury service. The issue was not *that* potential juror's individual choice. Rather, it was the right of the *defendant* to a jury drawn from a fair cross-section of the community; a goal that would be undermined if juries consisted exclusively of those "who have manifested their civic interest by registering to vote."

Id. at 70 (citing Laura R. Handman, Comment, *Underrepresentation of Economic Groups on Federal Juries*, 57 B.U. L. REV. 205, 207–08 (1977)).

39. 28 U.S.C. § 1863(b)(2) (2000).

40. *Id.*; *id.* § 1861.

supplement the lists.⁴¹ Under the JSSA (and the supervisory authority of the court) I ordered the following, *inter alia*:

- (a) For all summonses returned to the court as “undeliverable” the same number of new summonses should be mailed to residents who live in the same zip code areas as the undeliverable summonses targeted;
- (b) For all summonses returned to the court as “non responses,” the Jury Administrator should send summonses in numbers equal to the number of non responses in a given zip code area.

The First Circuit reversed.⁴² The court held that the remedial order did not comport with the Jury Plan of the District of Massachusetts, and further, was not justified because the Jury Plan did not violate the JSSA.⁴³ Moreover, to the extent the *Green* order amounted to a further enlargement of the jury array it was not an appropriate means of supplementing the lists. It was a “de facto amendment” of the Jury Plan, which an individual judge lacked the authority to order. The correct route was for the District of Massachusetts to amend the Plan.⁴⁴

And then the appellate court added, “Yet there is assuredly cause for concern, . . . where African American defendants have been indicted for major crimes, and the proportion of blacks who return jury questionnaires is half the percentage to be expected from their presence in the division of the district concerned.”⁴⁵ The “district court,” it added, “has always been free to revise its jury plan in compliance with the statute.”⁴⁶

As a result, the *Green* case proceeded before a jury that was overwhelmingly white—but within eighteen months, the District Court for the District of Massachusetts amended the Jury Plan.

V. CHANGING COURT RULES AND PLANS

After a period of comment, the District of Massachusetts amended the Jury Plan to embody the “undeliverable” approach.⁴⁷ The District of Kan-

41. If there is a “substantial failure” to comply with the provisions of the act, “the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.” *Id.* § 1867(d).

42. *In re United States*, 426 F. 3d at 9.

43. *Id.* at 5–6. The statute, the court held, was identical in its scope to the Sixth Amendment. If there were no constitutional violation, there was surely no statutory one.

44. *Id.* at 7.

45. *Id.* at 9 (citations omitted).

46. *Id.*

47. See U.S. DIST. COURT FOR THE DIST. OF MASS. PLAN FOR RANDOM SELECTION OF JURORS (Mar. 1, 2007), available at <http://www.mad.uscourts.gov/New/RevisedJuryPlan.pdf>. No amendment was proposed to address the “non response” problem, although the court pledges to review that issue and others regarding representation.

sas went further.⁴⁸ It amended Kansas's local rules to provide that additional summonses be sent not only to the zip codes from which the "undeliverable" summonses came, but also to the zip codes to which the nonresponding forms had been sent.

Significantly, no litigation had prompted the Kansas rule—no findings of inaccurate lists, or official misfeasance. Indeed, none could have succeeded; the numbers of minorities in Kansas were so small that the absolute disparity analysis was within the limits of the constitutional analysis, as in Massachusetts.⁴⁹ The purpose of the Kansas rule was straightforward—to redress the underrepresentation of blacks, Asians, and Hispanics in the court's jury pool.

VI. THE FUTURE OF *12 ANGRY MEN*

There is no question that we can do better to enhance representation of minorities in our jury pools far beyond the "zip code" alternative. A proposal in the Massachusetts legislature, for example, called for a comparative study of the reliability and accuracy of the residential data in the annual resident lists and residential data that would be in a list denominated "the administrative records list." That list would be derived from a compilation of information maintained in the electronic databases of a variety of government agencies—the Secretary of State, the Registry of Motor Vehicles, the Department of Revenue, the Board of Higher Education, the Department of Transitional Assistance, the Office of Medicaid, the Department of Public Health, and the Division of Unemployment Assistance. Proponents suggested that the government had accurate data about who lives where; they only needed to compile it. Although the proposal was for a three-year study, in the spring of 2006, the legislature rejected it.⁵⁰

Other courts have tried, without success, to enforce more aggressive remedies, such as "weighted mailings." Under a "weighted mailings" approach regions containing a disproportionate number of minorities receive extra jury summonses to increase the likelihood of a racially representative

48. L.R.D. Kan. 38.1, available at <http://www.ksd.uscourts.gov/rules/Rule38.1-060107.pdf>.

49. See, e.g., *United States v. Orange*, 447 F.3d 792, 801 (10th Cir. 2006) (rejecting challenge to 3.57% disparity); *United States v. Gault*, 141 F.3d 1399, 1403 (10th Cir. 1998) (rejecting challenge to 7% disparity).

50. See Revisions to the Jury Plan of the United States District Court for the District of Massachusetts, Notes of the Jury Plan Committee 7, available at <http://www.mad.uscourts.gov/New/NotesofJuryPlanCommittee.pdf>.

venire. Such a plan was implemented in Hennepin County, Minnesota,⁵¹ and another in the Eastern District of Michigan. Both were struck down on equal protection grounds.⁵²

But the Massachusetts/Kansas models, the administrative list model, and the affirmative action models, so called, should not exhaust the alternatives available. We have to consider more aggressive efforts to increase citizen participation across all racial and ethnic groups. We have to use all the tools available to us—the internet, for example—to reach out to potential jurors, to make jury service more convenient, to increase the fee for jury service so as to minimize the burden on poorer citizens. And we have to fundamentally rethink the federalization of street crime that makes the underrepresentation all the more troubling.

In short, Henry Fonda cannot be counted on to save the day again. However careful the deliberations of the all-white, all-male jury in *12 Angry Men*, its verdict, in an increasingly diverse world, is necessarily flawed.

51. See Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645 (1997).

52. See *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998); *Hennepin County v. Perry*, 561 N.W.2d 889, 896–97 (Minn. 1997).

