
JURY POOL COMPOSITION ISSUES: WHO IS MISSING AND WHY?

By Lois Heaney, NJP Litigation Consulting/West



Lois Heaney has been a trial consultant with NJP Litigation Consulting (formerly known as National Jury Project) in Oakland since 1979. She has assisted counsel in thousands of civil and criminal cases, including Robert Blake, Snoop Dogg, Menendez Brothers, & Stephen Bingham, more than 50 state and federal capital cases, and civil cases including asbestos, civil & disability rights, personal injury, insurance coverage and all manner of business cases, throughout California and across the country. She assists counsel in case presentation & theme development, mock trials, survey research, venue studies, witness preparation & jury selection. She has helped prepare witnesses for trial and deposition testimony – including many non-English speakers, from the county jail to the board room, and all manner of places in between.

Before we get to the matter of cause and peremptory challenges and their often disproportionate impact on people of color it is worth looking at the composition of the jury pool, who is in it, how did they get there and why are some people missing. We in California live in a highly diverse state, in an increasingly diverse nation, and yet jury pools often do not adequately reflect the population.

Valerie Hans observed in her article, *The Twenty-First Century Juror—the Worst of Times or the Best of Times*, “Juries now resolve fewer than 5% of criminal dispositions in the federal courts.”¹

She went on to say, “Despite substantial reforms in the jury selection process, jury service remains unequally distributed. Primarily because of a differential response to jury summons, the young, the poor and racial and ethnic minorities continue to be underrepresented in jury panels.”

Source Lists

Certainly, as compared to the days when jury pools were assemblies of white, male property owners, they are more diverse.² The Jury Selection and Service Act of 1968 put an end to the “key man” and “blue

ribbon” juries in which jury commissioners typically hand-selected names of “key men” in the community. As late as 1967, a majority of federal courts still used the key man system. Most state court jury selection systems require the use of particular source lists. Four states have no mandatory list requirement (Indiana, Massachusetts Nevada, and Utah). Typically the mandatory lists start with voter registration, and most states and many federal courts now supplement this with DMV lists of holders of drivers’ licenses and state-issued identification cards for non-drivers. The addition of DMV lists to voter registration lists (so-called “Motor-Voter” lists) is a step toward broader inclusion. Some state courts have made significant improvement in their reach by utilizing additional source lists such as income tax filers, unemployment and/or public assistance benefit recipients, and utility records (in New York, Connecticut, Rhode Island, Vermont, North Dakota and the District of Columbia, among others). Alaska’s reach has broadened through its use of the Permanent Fund list which provides annual dividends to state residents. The National Center for State Courts recommends that source lists should reach 85% or more of the jury-eligible population, and these additional lists go a long way toward fulfilling that objective.

The frequency with which the master wheel is updated also impacts the reach of jury lists. Jury lists constructed every four years

1 Hans, Valerie (2006), *American University Criminal Law Brief*: Vol. 1: Issue 1, Article 4.

2 For a comprehensive discussion of jury pool composition issues, see E. Krauss & S. Chopra (eds.), *Jurywork: Systematic Techniques*, Thomson-Reuters, updated annually, Chap. 5, “The Law of Jury Composition Challenges,” pp. 327-435.

after the presidential election, as is the practice in many federal jurisdictions, means that over the term of the list, the group ages (e.g. 18-year-olds become 22-year-olds by the end of the term). By the third and fourth year of the term, there are nearly no people under the age of 20. Likewise, if a list is not updated over the four-year term new residents are excluded, and people who move frequently are typically lost. Home ownership is a stabilizing factor in any community, and people who rent generally tend to be poorer, younger and move much more often than homeowners, causing them to slip through the cracks of the jury list, especially in jurisdictions which do not update their lists annually and fail to follow-up on non-deliverable or non-responsive jury qualification questionnaires.

Juror Compensation

As Paula Hannaford-Agor of the National Center for State Courts

wrote, “Juror fees make up just one part of a fairly complex formula concerning juror hardship. Equally important are the length of service and whether and for how long employers compensate employees while on jury service. But there is no question that the amount of juror compensation is strongly related to jury yield, juror hardship and juror satisfaction.” She adds, “Our entire jurisprudence concerning the right to trial by jury is premised on the ideal of juries that reflect the broadest possible cross section of their communities. One might reasonably doubt the ability of a jury to be fair and impartial if it was selected from a jury pool consisting only of people with the wherewithal and inclination to serve.”³

The federal courts pay jurors \$40 /

³ “The Laborer is Worthy of His Hire and Jurors are Worthy of Juror Fees,” *The Court Manager*, Vol. 21, Issue 2.

day, six states pay \$41-50/day, seven states pay \$40/day, 13 pay \$25-35/day, three states pay \$20/day, while 21 pay \$16 or less/day including California; while Illinois, Georgia and Missouri pay \$6/day or less. Under all of these arrangements jury pay is still below the federal minimum wage and, in most cases, makes jury duty an economic hardship for any working person not paid by their employer for jury duty.

New Mexico and Arizona lead the list of states with a real effort to compensate people for jury service and thereby increase participation. New Mexico matches the federal minimum hourly wage for each hour of service while Arizona has implemented a “Lengthy Trial Fund” that comes into play after the fourth day of jury service and reimburses lost income up to \$300 a day for jurors who serve on trials of ten days or longer.

An innovation to allow for increased jury pay includes no pay for the first day of service — when typically large numbers of people are present and do not serve — allowing that money to be redistributed as higher daily rates to those who do serve as trial jurors.

The overwhelming reason people are excused from jury duty, especially in long cases which almost always include capital cases, is financial hardship. This has a direct impact on diversity — economic or class to be sure, along with its nexus to race and ethnicity.

Economic hardship profoundly skews the jury pool, and we can expect this to continue. With few people employed in jobs that provide extended paid jury duty, jury service on long trials is left to the retired, the well off, spouses of wealthy individuals or spouses in well off dual income families, government

workers and employees of large corporations that may offer paid jury duty. Much of the job growth in recent years has been among low hourly wage earners, who receive few benefits and rare among them is paid jury service. While an employer is forbidden from terminating an employee on jury duty, living paycheck to paycheck does not allow for the lost income of even a few days of jury service, let alone extended service. Although federal government employment is usually a good source of jurors available for long trials, probationary and temporary employees are not always guaranteed to be paid for extended jury service.

The Jury Selection and Service Act of 1968 set federal jury fees at \$20/day, doubling the fees allowed under 28 USC Section 1871 (1964). In 1968 Lyndon Johnson was president, the median annual income in the United States was \$7,750 (in 2013 the median income was \$52,250)⁴, the median home price was \$26,000 (nationally, the existing median sales price in March 2015 was \$212,100)⁵ and gas was 34 cents a gallon (the national average in 2013 was \$3.49 a gallon).⁶ If 1968 jury fees of \$20/day were calculated for inflation they would be \$134/day in 2015 dollars according to the CPI Inflation Calculator, Bureau of Labor Statistics.

In 2009 I interviewed the jury administrator for the Northern District of California as we prepared for a

federal capital case. He told me that for every 1000 Pre-Voir Dire Jury Panel Questionnaires their office mailed out, the typical yield of jurors available for the pool in a long cause matter was one in ten.

Even among those people who receive paid jury duty from their employers or are willing to serve by using vacation time or savings, many fear that an extended absence from work will result in missed promotions or make them an easy target later in the event of a reduction in force.

Modified trial schedules can alleviate some of the burden for jurors, allowing more people to serve and making better use of their time. Trials conducted from 8:30 a.m. to 1 p.m. with two short breaks and no lunch, allow four hours of courtroom time in a compact manner and allow many jurors to work part time at their jobs throughout the trial. The old tradition of running trial days from 10 a.m. to noon with a morning recess, followed soon after with a lengthy lunch break and an afternoon session running from 1:30 (or 2) to 4:30 p.m. with an afternoon break offers little more actual trial time per day – and left many jurors waiting with little to do over an extended lunch period.

Back in the early eighties I interviewed another jury administrator for the same Northern District. At that time court budgets were especially tight, and the jury administrator was told not to have large panels go to waste and so summoned as few jurors as possible. I asked what happens if not enough jurors report. He explained by taking me to a file drawer containing index cards with the upper right corner colored green; these he said were his “green berets,” people he could call in a pinch, and they would come down for jury duty.

So much for random selection. While courts are still required to account for juror utilization, the “green beret” practice is likely not in use anymore.

Disenfranchisement: Language Barriers

According to the U.S. Census, “The size of the foreign-born population has increased over the last three decades, from 14.1 million in 1980 to 40.0 million in 2010. In 2012, the foreign born numbered 40.8 million.”⁷ In 2012 40% of the nation’s foreign-born population lived in Texas, California and Illinois.

The Census reports that the proportion of the foreign-born population that spoke a language other than English at home has increased from 70 to 85% over that same time period with almost half the foreign-born population in the U.S. describing their English language ability as “Not Well” or “Not At All.” California and Hawaii were among the seven states in which limited or no English language ability was higher than this national average. The Census reported that limited English language ability is especially prevalent among immigrants in the United States with large resident populations from Mexico, China, El Salvador, Vietnam, Cuba and Korea. This is also true among immigrants from Haiti, Guatemala, Colombia, Honduras and the Dominican Republic.

In response to the significant percentage of U.S. citizens (including those foreign born and those born in the U.S.) who have limited English language ability, the United States Election Assistance Commission now publishes voter guides in 10 lan-

4 “Household Income: 2013,” American Community Surveys, U.S. Department of Commerce. September, 2014.

5 Ycharts.com

6 Money.CNN.com/2013/news/economy/gas-prices.

7 “English-Speaking Ability of the Foreign-Born Population in the United States: 2012,” American Community Surveys, U.S. Department of Commerce.

guages (Cherokee, Chinese, Dakota, Japanese, Korean, Navajo, Spanish, Tagalog, Vietnamese, and Yupik).

Limited English proficiency is a barrier to jury service in every state except New Mexico where today almost half of the state's population is Latino. Courts here are required to provide interpreters for non-English speaking jurors, which has customarily meant Spanish speakers. Juror qualification questionnaires are available in English and Spanish. Going still further, in 2002 the New Mexico Supreme Court in a case involving Navajo speakers ruled that inconvenience alone was not a sufficient reason to excuse a non-English and non-Spanish speaking juror and held that a trial should be delayed a reasonable amount of time to secure an interpreter for the juror.⁸

On the other end of the spectrum is the federal court in Puerto Rico where 90% of prospective jurors are excused because of insufficient English language ability, although typically nearly everyone involved in the case - judges, lawyers, litigants and witnesses - speak Spanish

fluently.⁹ English language ability in Puerto Rico is tied directly to race and class, and the language requirement largely results in the exclusion of Puerto Ricans of color and the poor.

Disenfranchisement: Felon Status

"Felons" may not serve on juries in federal court or in 31 states. In federal court, a person convicted of a felony is precluded from serving on a federal jury unless his/her civil rights have been restored (28 U.S.C. § 1865 (b) (5)). A person can seek to have his/her civil rights restored through a presidential pardon or "some affirmative act recognized in law..." (U.S. v. Hefner, 842 F.2d 731 (4th Cir.) cert. den. 488 U.S. 868 (1988)).

The rate of felon disenfranchisement has grown enormously. In 1976 there were 1.17 million people who had been disenfranchised due to a felony conviction, by 1996 that number had grown to 3.34 million,

and by 2010 to 5.85 million.¹⁰ One in every 13 African Americans of voting age is disenfranchised, approximately six times the rate of the non-African American population.

The impact of felon disenfranchisement is most acute on communities of color and most especially African Americans who are disenfranchised at rates above 20% of their Voting Age Population in three states: Florida topping the list at 23.3%, followed by Kentucky at 22.3% and Virginia at 20.3%, and above 5% throughout much of the rest of the country.

Jury Composition Studies

Jury composition studies are painstaking but an important tool for investigating whether there is a systemic problem in the manner in which the pool is assembled. Their impact can be far reaching beyond the individual case. Sometimes the problem lies in the frequency with which the list is composed, the inadequate follow-up on jurors who do not respond to the summons, the scope with which hardship excusals are granted, or the source lists being used. As described above New York, New Mexico and Arizona have attempted to address the problem in a variety of ways with some success. Addressing the limitations of "motor-voter" source lists and the economic hardship of jury duty seems like a key issue, particularly in long criminal trials - as death penalty cases always are - and creative motion work may be in order.

A guide to conducting a composition study and the motion work involved is contained in our book Jurywork: Systematic Techniques, published by Westlaw and updated annually.

8 For a more complete discussion of including non-English speaking jurors, see Chavez, Edward, Chief Justice of the Supreme Court of New Mexico, "New Mexico's Success with Non-English Speaking Jurors," *Journal of Court Innovation*, Vol. 1, No. 2, Fall 2008, pp. 303-327.

9 Rose, Jasmine B. Gonzales, "The Exclusion of Non-English Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 46, No. 2, Summer 2011, pp. 497-549.

10 Uggen, Shannon and Manza, "State-Level Estimates of Felon Disenfranchisement in the United States, 2010," *The Sentencing Project*, July 2012.