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The Rise and Fall of Affirmative Action injury Selection

Avern Cohn
U.S. District Court for the Eastern District of Michigan

David R. Sherwood
U.S. District Court for the Eastern District of Michigan

THE RISE AND FALL OF AFFIRMATIVE ACTION IN JURY SELECTION†

Avern Cohn*
David R. Sherwood**

The U.S. District Court for the Eastern District of Michigan has historically experienced difficulty in achieving jury compositions that truly represented the surrounding community. In response, the Authors share their insight as to how the court instituted a "balancing" program. By reducing the number of white names in the jury wheel, the balancing program successfully incorporated more minorities into the jury system. The Authors further discuss the Sixth Circuit decision, United States v. Ovalle, *which marked the end of the balancing program.*

I.

The Jury Selection and Service Act of 1968[1] requires the following:

> Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title . . . These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes.[2]

In 1982, the then Chief Judge of the United States District Court for the Eastern District of Michigan[3] and the Clerk of the Court,

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* Judge, U.S. District Court for the Eastern District of Michigan. J.D. 1949, University of Michigan Law School.

** Former Chief of Court Operations, U.S. District Court for the Eastern District of Michigan. A.B. 1962, Brodin College; M.A. 1971, Syracuse University.

1. 28 U.S.C. § 1861 (1994).

2. *Id.* § 1863(a), (b)(3). Section 1861 provides that all litigants are entitled to a jury selected at random from a fair cross section of the community and that all citizens shall have a right to be considered for jury service. *See id.* § 1861. Section 1862 prohibits discrimination on account of race, color, religion, sex, national origin, or economic status in the selection of a jury. *See id.* § 1862.

3. The Eastern District of Michigan is divided into two divisions. The Northern Division is a single unit. The Southern Division is divided into four geographical units for

with the "fair cross section" of the community requirement in mind, began to look at the composition of the juries in the court's Detroit unit. These juries were drawn from the surrounding counties, the largest of which are Wayne, Oakland, and Macomb, and particularly from the City of Detroit. Jury selection was by random draw, beginning with the master wheel,[4] through the qualified wheel,[5] to the panels reporting to the courthouse, from which groups of jurors were sent to the courtroom for the voir dire. All juries were drawn from these groups. Based on census data and observation of the prospective jurors coming to the courthouse, many believed that the panels from which juries were drawn did not reflect the demographic racial composition of the catchment area for the Detroit unit. In other words, there were too few African-Americans on grand juries and on criminal and civil petit juries.

As a consequence, an effort was begun by the aforementioned Judge and Clerk to increase the number of African-Americans in jury panels in the Detroit unit. Questionnaires were mailed to people in particular zip code areas in the City of Detroit, areas that included predominantly African-American neighborhoods.[6] This was a difficult and somewhat unreliable way of achieving the goal of more representative panels. Nevertheless, the effort paid off. The number of African-Americans arriving at the courthouse for jury duty increased.[7]

In 1989, it became necessary to refill the master wheel.[8] Because this was a two-year process and a decennial census was soon to occur, data based on the 1980 census was suspect. Many changes had occurred in the demographics of the City of Detroit particularly.

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purposes of drawing juries. Each unit consists of a separate set of overlapping counties centered around the designated places of holding court within the unit. Designated places of holding court are Detroit, Ann Arbor, Port Huron, Flint, and Bay City.

4. The master wheel is the term given to the pool of prospective jurors drawn at random from the combined voter registration lists and drivers' license registrants in the counties comprising the Eastern District of Michigan. The master wheel is drawn at least every four years.

5. The qualified wheel is the term given to the pool of consecutive jurors in each unit drawn at random from the master wheel after those persons ineligible to serve have been eliminated on the basis of their answers to questionnaires sent to them by the Clerk's Office. The qualified wheel is drawn periodically as needed. Each time it is drawn, approximately 10,000 names are selected for the Detroit unit and a lesser number for the other units.

6. The process, called "transfusion," is described in Robert A. Mossing, *Changes in the Eastern District of Michigan Detroit Administrative Unit's Jury System*, 63 MICH. B.J. 33 (1984).

7. This "increase" was not statistically verifiable. Rather, this conclusion was based on the observation of prospective jurors coming to the courthouse and the impressions gained from observation of the impaneled juries' racial composition.

8. The 150,000 names drawn in 1988 had been exhausted.

Populations had shifted because of interstate highway construction and massive industrial construction in former residential neighborhoods. Adding questionnaires to addresses in particular zip code areas appeared no longer to be a sufficiently reliable method of increasing representativeness.

In response to this situation, the judges approved an amendment to the jury plan. It called for "balancing" effective April 1, 1992. This change resulted from discussions between the Chief Judge and the Clerk of the Court and engendered little concern among the judges. The amendment, also approved unanimously by the Judicial Council of the Sixth Circuit, read as follows:

> The qualified jury wheel shall be composed of persons who represent a fair cross-section of the area of each place of holding court as set forth in Section III of this Plan. To this end, if the Court determines that a cognizable group of persons is substantially overrepresented in the qualified jury wheel, the Chief Judge shall order the Clerk to remove randomly a specific number of names so that the population of each cognizable group in the qualified wheel closely approximates the percentage of the population of each group in the area of each place of holding court, according to the most recently published national census report. A quotient and a starting number shall be used in this process.[9]

Racial balancing was begun in each of the units in the Southern Division, which sits in Detroit, and in the Northern Division, which sits in Bay City. These changes were implemented without any new analysis regarding the constitutionality or legality of balancing. Additionally, no new statistical study was done regarding racial disparity.

Under balancing, the Jury Clerk used the responses by prospective jurors to questions relating to race and ethnicity on the federal jury questionnaire.[10] Because the number of responses from African-Americans was far less than their percentage in the population, resulting in a disproportionately low number of African-Americans in the qualified wheel that carries over to the individually-selected juries, a sufficient number of white peoples' names

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9. U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, JURY SELECTION PLAN ¶ VIII.B (1998).

10. The questionnaire called for identification by race. It was sent to the prospective jurors drawn from the master wheel to make up the qualified wheels. The Jury Clerk then collated responses to determine the number and percentage of African-Americans in the qualified wheel.

were then subtracted from the qualified wheel to achieve a percentage ratio of whites to African-Americans that conformed to the percentage ratio in the general population established by the current census. A typical balancing order read:

> I[T] APPEARING THAT the Black population, as reported in the 1990 census for the four counties for which the place of holding court is FLINT, is 10.99%, and
>
> I[T] FURTHER APPEARING THAT, as of June 20, 1997, the percentage of qualified Black jurors in the FLINT wheel created in 1997 is 7.23%,
>
> NOW, THEREFORE, IT IS ORDERED THAT, based on the information on the attached "Worksheet for the Removal of Jurors from the Qualified FLINT Jury Wheel," the Clerk of the Court shall remove by a random process the names of 696 White and Other Qualified Jurors from the 2,202 total qualified juror [sic] in the 1997 wheel to bring it into compliance with the cognizable group requirements of Section VIII.B. of the Jury Selection Plan, approved on April 1, 1992, and the policy of the Court. As a result of this procedure the 1997 qualified FLINT wheel shall be composed of 186 Black qualified jurors and 1,506 White and Other qualified jurors.
>
> IT IS FURTHER ORDERED THAT the 696 jurors removed as a result of this administrative order shall be restored to the qualified juror pool and be eligible for selection the next time the qualified wheel is balanced in accordance with the Jury Selection Plan.[11]

Balancing was an easy method of obtaining a racial cross section in the panels from which jury groups similar to that of the community were sent to the courtroom. Instead of adding African-American names to the qualified wheel, as was formerly done, white names were subtracted. According to the 1990 census, the white to African-American ratio for the counties comprising the Detroit unit was 81 percent to 19 percent. Without balancing, the ratio drawn randomly would have been 92 percent to 8 percent based on the statistical analysis of the returned questionnaires. As can be appreciated, balancing was an effort to compensate for this

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11. *In re* Jury Selection—Flint, No. 97-AO-042 (E.D. Mich. June 24, 1997) (administrative order) (on file with the *University of Michigan Journal of Law Reform*).

11 percent drop in African-Americans in the randomly chosen qualified wheel.

Many reasons existed for the disparity between the actual ratio of whites to African-Americans and the ratio reflected in the jury wheel when names were drawn randomly. The addresses for many African-American citizens were incorrect, as indicated by the number of questionnaires returned undelivered. Michigan does not have a centralized voting register. Lists of names making up the master wheel came from the various political entities in the Southern Division of the Court. While the list of names from which the master wheel was drawn was supplemented by drivers' license names, the number still decreased. Residents of the inner city frequently moved, so their addresses became obsolete. Inner-city residents did not register to vote with the same frequency as suburbanites, and even fewer inner-city residents had drivers' licenses. Some current studies suggest inner-city residents are reluctant to respond to government inquiries.[12] Lastly, only recently has it been realized that if a person lived in the City of Detroit in the 1980s and 1990s, she was three times as likely to be called for jury duty because of the peculiarities of the City of Detroit/Wayne County court administrative structure.[13]

In mid-1997, alerted to a legal challenge to balancing,[14] the judges decided to phase it out. In addition, the decision in *United States v. Ovalle*,[15] as described below, abruptly accelerated abandonment of balancing. The State of Michigan is currently putting together a statewide system of voter registrations that would simplify creation of the master wheel and better track changes of addresses.[16] This also influenced judges to abandon balancing because many believed that an improved list from which the master wheel is drawn would ultimately yield more representative panels and would reduce the eleven percent disparity in the qualified juror wheel.

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12. *See, e.g.*, David L. Word, U.S. Bureau of the Census, *Who Responds/Who Doesn't? Analyzing Variation in Mail Response Rates During the 1990 Census* (visited July 1997) <http://www.census.gov/population/www/documentation/twps0019.html>.

13. At the time, Detroit residents were eligible to serve on the juries of four courts: Wayne County Circuit Court, Recorder's Court for the City of Detroit, 36th District Court, and the U.S. District Court for the Eastern District of Michigan.

14. *See generally* United States v. Greene, 971 F. Supp. 1117 (E.D. Mich. 1997), discussed *infra* notes 18, 26–29 and accompanying text.

15. 136 F.3d 1092 (6th Cir. 1998), discussed *infra* notes 20–21, 31–38 and accompanying text.

16. State-maintained voter registrations will be piggybacked on the drivers' license list in a computer compatible format.

II.

Creation of jury panels from a balanced qualified wheel was a matter of public record beginning in the early 1990s. Periodic administrative orders calling for balancing the qualified wheels have been posted continually in the several courthouses in the district. The procedure has been publicly discussed and criticized.[17] Yet the process leading to abandonment began in the following way.

In February 1996, an African-American defendant charged with bank robbery, going to trial represented by a public defender, mindlessly challenged the composition of the group from which her jury was to be drawn on the grounds that African-Americans were under-represented.[18] The public defender did no research. He simply complained when he saw that the group of prospective jurors in the courtroom seemed to lack African-Americans. The judge to whom the challenge was directed then examined the procedures of the jury wheel selection and was concerned that panel selection had a racial tinge. The judge took this concern to the Chief Judge, who then brought her concerns to the court. Members of the court who supported the balancing method of jury selection recognized that the jury selection procedure, which had yielded salutary results, was in trouble given the composition of the bench and the difficulties affirmative action programs were experiencing.

The Chief Judge appointed a special committee to study jury selection procedures. Some judges urged immediate abandonment of balancing. Others were of the view that the court should proceed cautiously. When the bench learned that the white people's names removed from the qualified wheel through balancing were effectively discarded,[19] judges in favor of the balancing process endorsed recycling the names in order to gain the support of judges averse to balancing. Discarding the subtracted names was likely too heavy a burden for the jury selection procedure to bear; by recycling these names, the court did not bar, but only deferred, jury service. More importantly, no judges apparently had been aware of the discard procedure. At the inception of balancing, subtracted names had actually been recycled. In 1994, during the federal

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17. *See, e.g.*, Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993); Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273 (1996).

18. *See Greene*, 971 F. Supp. at 1120.

19. These names were not recycled into the qualified wheel, and hence these prospective white jurors lost the opportunity to serve.

budget squeeze, the recycling ceased due to the high computer costs associated with this process. The Chief Judge at the time authorized the change without consultation with the bench.

On the advice of the special committee, the Chief of Court Operations, the administrator responsible for jury selection, began recycling names by putting the subtracted names back into the qualified wheel. The committee began an in-depth study of the balancing process and considered possible courses of action for the court in light of the pending challenge by the African-American defendant. At this time, the judges were unaware that a Hispanic defendant, in a Bay City case in the Northern Division, had unsuccessfully challenged the composition of the jury wheel from which the jurors who tried him had been chosen on the grounds of under-representation of Hispanics.[20] The appeal from the unsuccessful challenge was then pending before the U.S. Court of Appeals for the Sixth Circuit.[21]

As the court began the study of racial balancing, belief in the virtues of the process was largely subjective. Instinctively, many of the judges simply felt the court was doing the right thing. A recent article articulates well-reasoned support for affirmative action in jury selection.[22] It states: "[A]n affirmative mechanism to secure racially-representative juries is essential to both the appearance and substance of fairness in criminal jury proceedings, and . . . maximizing the essence of legitimacy of jury verdicts is a compelling governmental interest."[23]

The special jury committee carefully studied the balancing plan and the problems faced in obtaining fairly representative juries in the future. Already described is the difficulty of obtaining a fair cross section of African-Americans in the qualified wheel. The problems that the Census Bureau reports in getting responses to questionnaires directed to inner-city residents confirms one of the principal reasons for these difficulties—suspicion of a government inquiry.[24] The committee consulted the Southeast Michigan Council of Government (SEMCOG) regarding census data and employed the National Center for State Courts to review the situation.[25]

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20. *See Ovalle*, 136 F.3d at 1094.

21. *See id.*

22. *See generally* 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).

23. *Id.* at 645–46.

24. *See generally* Word, *supra* note 12.

25. *See generally* G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, FEDERAL DISTRICT COURT EASTERN DISTRICT OF MICHIGAN JURY PROCESS REVIEW (1997).

In August 1997, the committee solicited views at a public meeting from representatives of bar associations and other legal groups in metropolitan Detroit. The judges' concerns were generally known to the community. Every bar association in the metropolitan area endorsed continuation of the balancing plan and pledged support if a constitutional challenge arose. Only the U.S. Attorney's Office took the position that balancing should be abandoned.

Meanwhile, the direct challenge by the African-American defendant was dismissed as untimely in a well-reasoned decision.[26] *United States v. Greene* describes, in some considerable detail, the history of the efforts in the Eastern District of Michigan to achieve racial parity in jury pools.[27] It also raises serious questions about the legitimacy of balancing.[28] The decision in *Greene* also takes note of the recycling initiative but expresses no opinion on whether it cured the problems created, in the judge's view, by subtraction.[29] The committee saw a dark cloud on the horizon.

Nevertheless, the judges stayed the course. Meanwhile, other changes were happening in Detroit. First, a new master list from the statewide voter registration list, a benefit of the Motor Voter Registration Act,[30] was soon to be available. Additionally, the Recorder's Court for the City of Detroit was soon to be abolished, thus reducing the jury-service pressure on Detroit residents. In light of these factors, the special committee recommended going to random selection on approximately July 1, 1998, the date on which the new statewide voter registration list could likely be put to use by the federal court. The random selection plan was accompanied by a further recommendation for a tracking program to capture data on the results of using the new lists. The recommendations were almost unanimously approved by the judges, including several conservative judges. The belief that the appearance of justice was as important as the fact of justice persuaded the judges to continue balancing until the better system of random balancing could be put into effect in July. Trying an African-American defendant before a white jury was thought to offer a poor form of justice.

The report did not clearly recommend that the court continue balancing nor did it clearly recommend the abandonment of balancing. *See id.* at 18–20.

26. *See* United States v. Greene, 971 F. Supp. 1117, 1142 (E.D. Mich. 1997).
27. *See id.* at 1121–24.
28. *See id.* at 1141–42.
29. *See id.* at 1142 n.25.
30. *See generally* M.C.L.A. § 168.491 (1994).

The balancing plan, however, blew up on February 23, 1998, when the U.S. Court of Appeals for the Sixth Circuit, in *United States v. Ovalle*,[31] the Bay City case, held the balancing plan unconstitutional.[32] The principal issue in *Ovalle* concerned the number of Hispanics in the qualified juror list for Bay City. The focus on Hispanics was incongruous, however. Hispanics, under balancing, were not considered a cognizable group. Further, Hispanic is *not* a "racial" category according to federal law.[33] As a practical matter, Hispanics often claim to be white, black, Native American, or "none of the above." The juror questionnaire does not link Hispanic to the notion of race, and the jury system in the Eastern District of Michigan has never been administered with regard to responses on the questionnaire for Hispanics. Whether this was an error is not addressed in *Ovalle*. The *Ovalle* court says, in part:

> Much of the focus on appellants' objections to the jury selection process has been on . . . Hispanics. . . . What has received less attention is what we now determine to be the controlling issue in this case: that in an effort to assure that African-Americans are fairly represented in the qualified jury wheel, *one in five non-African-Americans were selected at random to be removed from the jury wheel simply because of their racial status.*[34]

The "simply because of their racial status" observation is puzzling. The African-American experience is unique in history and in the manner in which our criminal justice system has been administered. Additionally, the decision in *Ovalle* is based on a record that did not consider recycling of the names removed. *Ovalle* reflects an appellate decision that did not give fair notice of the issue the panel considered. Further, the decision in *Ovalle*, based as it was on the lack of racial neutrality, does not engage in the statistical analysis traditionally associated with a challenge to underrepresentation of a racially identifiable group in a jury pool, i.e., absolute disparity or comparative disparity.[35]

The *Ovalle* court goes on to say:

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31. 136 F.3d 1092 (6th Cir. 1998).

32. *See id.* at 1105–07.

33. *See generally* Lisette E. Simon, Comment, *Hispanics: Not a Cognizable Ethnic Group*, 63 U. CIN. L. REV. 497 (1994) ("Because the term Hispanic encompasses all races, Hispanics are not readily identifiable by race . . . .").

34. *Ovalle*, 136 F.3d at 1095.

35. *See, e.g.*, United States v. Gault, 141 F.3d 1399, 1402–03 (10th Cir. 1998).

> Because the administration of the plan is not race neutral, we now move on to determine whether there is both a compelling governmental interest for the plan and, if so, whether the means chosen to achieve that interest are narrowly tailored. The Jury Selection Plan here arguably was adopted in an effort to achieve a compelling governmental interest. The purpose of the plan was to select grand and petit jurors at random from a fair cross section of the community, and to assure that all citizens would have the opportunity to be considered for service on those juries.[36]

The court acknowledged that the government has a compelling interest in ensuring that jury pools represent a fair cross section of the community.[37] This is a bright light, indeed, the only one in the decision. However, the mistake, the *Ovalle* court concludes, is that the plan was not narrowly tailored to meet this end:

> Rather than affirmatively removing otherwise qualified jurors because of their racial status, alternative methods of broadening membership in the jury pool could have been utilized. The Eastern District of Michigan could have chosen to supplement the voters' list and drivers' license list to diversify the pool of potential jurors. Such measures can establish a jury pool that represents a fair cross section of the community without unconstitutionally discriminating ... What is not permitted is the exclusion of potential jurors for the sole reason that they are not African-American, absent a showing that such exclusion is a narrowly-tailored remedy to meet a compelling governmental interest.[38]

The trouble with this reasoning is that the court did explore alternatives. The record of the work of the special committee establishes that the judges explored other ways to meet the objective of a fair cross section. The court may not have done a good job, but it did try. There was no other practical way to achieve a fair cross section given the problems of the two years it takes to create a master wheel, of bad addresses, of under-responsiveness to questionnaires, and of pressures on jury service.[39] The judges cer-

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36. *Ovalle*, 136 F.3d at 1105.

37. *See id.*

38. *Id.* at 1106–07.

39. *See* Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL'Y & L. 445, 456 (1994) (reviewing HIROSHI FIKARAI ET AL., *Race and the Jury: Racial Disenfranchisement and the Search for Justice* (1993)) ("Residential mobility [of African-Americans] may

tainly were justified in what they did and in continuing the balancing until a new master wheel was available.[40]

The *Ovalle* decision created a good deal of mischief by giving support generally to challenges by defendants awaiting trial at the time. Criminal jury trials were suspended for several weeks. The work of grand juries was stopped. Certainly balancing was vulnerable. If the *Ovalle* court had confined itself to the issue actually raised—i.e., failure to account for under-representation of Hispanics and the consequent disadvantage to the defendants—and had granted a new trial on that basis, there would be no objections to the decision.

The Eastern District of Michigan now selects juries under an amended plan calling for random selection. The court now has "clean" grand juries and "clean" panels. Early experiences suggest that judges are trying criminal cases largely with African-American defendants, prosecuted in front of mostly white judges, by mostly white prosecutors and defense counsel, and with decisions made by almost all-white juries. This is not fairness in the criminal justice system.[41]

Editor's Note: In considering a defendant's *Ovalle* challenge to the jury selection procedures for forming the grand and petit juries, the Sixth Circuit Court of Appeals stated in an unpublished decision: "Although *Ovalle* may be ill-advised in its reasoning or unduly circumscribed by its own terms in its application, we are constrained to abide by it." Spearman v. United States, 1998 WL 840870, *10 (6th Cir. Nov. 17, 1998).

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affect whether citizens are ever added to jury master lists at all, but it even more directly affects the citizen's ability to be summoned once selected from the master list."); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1557, 1562–64 (1988) ("Fifteen to thirty percent of the people sent questionnaires do not receive . . . [or] return them, and are thus disqualified from jury duty. . . . [T]he poor, the undereducated, and the transient are most likely to be screened out. Because nonwhites are overrepresented in these groups, they are disproportionately excluded at this stage.").

40. *See, e.g.*, Viet D. Dinh, 111 HARV. L. REV. 1289 (1998) (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997)) (describing the problems of responding to every minority in a multi-racial society); Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 1306 (1998) (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997)) (emphasizing the important role race plays in our criminal justice system). I suggest that Professor Taylor-Thompson's views give strong support to the balancing plan.

41. In recent months, the Circuit Court in Oakland County, Michigan has begun an effort to improve jury pool diversity. *See* Karen Eness Pope, *Oakland County Tries to Improve Jury-Pool Diversity*, OAKLAND COUNTY LEGAL NEWS, June 2, 1998, at 1. The Michigan Supreme Court has expressed concern over the lack of representative jury pools. *See* Anne M. Vrooman, *Justice in the Balance: Making Juries More Representative*, MICH. SUP. CT. REP., Apr. 1998, at 3. In each instance, the sole recommended solution is to increase the response rate to jury questionnaires and summons among minorities, a method found to be unsuccessful in the Eastern District of Michigan.