

# THE BOSTON PHOENIX

## The color of random

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Last Friday, the US Court of Appeals for the First Circuit threw out an innovative plan devised by federal district judge Nancy Gertner that sought to restore randomness to the federal jury-selection process in Massachusetts. In true Orwellian fashion, the court countermanded Gertner's plan because it supposedly *deviated* from the district's randomness requirement in the jury-selection process. (Disclosure: I was Gertner's law partner for many years.) What gives?

Gertner openly intended to right gross racial disparities on federal juries — notorious among lawyers and judges alike — and yet she proposed nothing like a quota system. To understand her proposal, a brief primer in jury selection is in order. Federal juries are drawn at random from lists of residents, and jury summonses are mailed out to names selected by chance. In practice, a disproportionately large number of summonses that go to people in black neighborhoods are returned "undeliverable" or not returned at all, usually because people have moved and that information hasn't made it into the record. The major reason for this pattern, Gertner concluded, is that residential lists are better maintained and updated in lily-white suburban areas than in inner-city areas with higher concentrations of black citizens. In other words, maintaining updated jury lists is just one more service, like trash collection and snow removal, that is performed inadequately for black neighborhoods. Because of this, the current system is non-random by default.

Under Gertner's plan, *any* potential juror at *any* address in *any* neighborhood whose summons is returned as undeliverable or not returned at all would be replaced by mailing a summons to another name and address *within the same ZIP code*. This would have the effect not only of replacing the missing addressee, but of replacing him or her with a neighbor. To the Court of Appeals this was the problem, because it concluded that this likely would replace the absent potential juror with another potential juror of the same race, since, the Court assumed, people of the same race likely live in the same ZIP code.

The Court of Appeals agreed that black citizens' names were under-represented in the summonses returned by potential jurors. Yet it concluded that Gertner's plan did not give all names on the list "equal odds of selection." Simple logic tells us, however, that it is impossible for each name on the list to have "equal odds of selection" when so many no longer live at the address to which the summonses are mailed. In fact Gertner's plan was *race-blind*, since it would seek replacements, in the same neighborhood, for *all* addressees who did not return their summonses, *whether white or black, urban or suburban*.

The entire brouhaha arose when Gertner acceded to a request by lawyers for defendants — some of whom are black — in a racketeering prosecution involving assault and firearms offenses. Normally such cases would be tried in state court, but US Attorney Michael Sullivan has a history of squeezing such offenses into federal statutes, and he does so for two reasons. First, the death penalty is available under federal but not under state law. Second, federal juries for many years have substantially underrepresented black jurors who, it is widely felt based on long courtroom experience, are more skeptical about police testimony as well as about the death penalty. Indeed, such skepticism is found in the African-American community across lines of economic class.

By throwing out Gertner's remedy, the Court of Appeals assured the perpetuation of a disproportionately white jury — in this case and in future federal cases — and it did so, outrageously, in the name of race-neutrality: "No one is entitled automatically to be tried by a jury of persons comprised of his or her own race," intoned the court self-righteously. True enough. But these defendants were *not* asking for racially proportionate juries. They were seeking to vindicate their right to be tried by a jury *randomly selected* from the population. Instead, thanks to the Court of Appeals, the shameful system of racially stacked federal juries will continue.