

*State of Connecticut v. Gibbs*, 1998 WL 351903 (Conn. Super, June 17, 1998) (Spada, J) *aff'd*. 254 Conn. 578, 758 A.2d 327 (2000)

The Connecticut Public Defenders Office claimed that defendant David Gibbs could not get a fair trial because Hispanics appeared to be excluded from Connecticut juries. His trial for murder was delayed while this issue was litigated. They brought in David Pollard, a professor of statistics at Yale University—at that time the chairman of the statistics department—to support their claim. The state engaged LRA.

Having read the literature on jury selection, Pollard determined that he would follow the logic and methodology of Michael Finkelstein's 1966 article, which had been accepted by the Supreme Court in 1977.<sup>1</sup> Finkelstein set out a method by which the Court might infer discrimination in jury selection from a large disparity between the percent of the target group in the population and the percent of that group on juries. Finkelstein provided a way for courts to rationalize a finding of jury selection discrimination, a finding courts had seemed incapable of coming to in the 1960s. Although his method was politically effective, it was statistically unsound. Stephan Michelson had been making this point for over a decade, but no one was listening.<sup>2</sup> Especially not David Pollard.

The basic fallacy of Finkelstein's argument—and therefore of Pollard's—is the inference of a single party's actions from the results of many parties' actions. That is, one cannot know who did what from the comparison of jury demographics to Census demographics. If the complaint is about actions by government officials, one needs to specify which government officials did what.<sup>3</sup> Curiously, one of Pollard's main points was that the percent Hispanic declined over time, using of the same master list. It then was higher at the first use of a new master list, and declined again over successive draws of jurors from that list. A federal magistrate had seen the same phenomenon in federal jury selection, and was as baffled by it as was Pollard.

Pollard's data work was essentially correct. His failure was in determining what these figures mean. Judge Margolis had written about "exhausting" the Hispanics on the federal jury list, though she never articulated how that could be accomplished. Not only was there no shuffling of names on a master list, to bring Hispanics to the top, there was no way that could have been done. First, the master list was sorted into random order by a computer program. Second, there was no race or ethnic identification within the computerized data. Identification that one

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1 Michael O. Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases," 80 *Harvard Law Review* 2:338 (1966); *Castaneda v. Partida*, 430 U.S. 482 (1977)

2 The Second Circuit court seemed to listen in *United States v. Rioux*, 97 F.3d 648 (2nd Cir. 1996), in that they accepted Michelson's argument until it came up against the *Castaneda* precedent. At that point they had the opportunity to point out that the *Castaneda* reasoning was faulty. Appeals courts seldom do that. Thus the *Rioux* decision stands at odds with the logic of the opinion announcing it.

3 Apparently having reconsidered their reasoning in *Castaneda*, this is what the Court told future complainants to do in *Duren v. Missouri*, 439 U.S. 357 (1979).

was of Hispanic origin was not made until a venire was assembled. This belief that numbers tell the story, when that story cannot be correct, is bad statistical analysis.

The percent Hispanic declines over the use of a master list because Hispanics on that list have left the jurisdiction to a greater extent than others. It is the behavior of people living in the district – the differential behavior between Hispanics and non-Hispanics – that explains the data. No government action is involved.

To be a juror one not only has to be over 18 year old and live in the district; in addition one needs to be captured on a list used by the jury selection agency, and be a United States Citizen, not be a convicted felon, and be able to understand what is going on in court, in English. Most importantly, it turns out, one must be present in that jurisdiction when the jury notice is mailed, which is months after the names for the list are collected.<sup>4</sup>

From Census data Michelson showed that the Hispanic population was younger, more likely to be male and single, less likely to speak English, more likely to rent in areas that had more housing vacancies, compared with non-Hispanics. They were more likely than non-Hispanics not to have lived in the same place five years earlier. That is, it appeared that Hispanics counted by the Census was a poor indication of Hispanics who could be jurors. They had characteristics, as Judge Spada noted in his Superior Court opinion, of an immigrant population, finding its way. Judge Spada had grown up in the Italian section of Hartford, the very section that now was inhabited by Hispanics.

That Hispanics were more mobile – more likely not to be present when summoned for jury duty – than non-Hispanics, could be inferred from Census data alone. But as proof there is one problem with these data: They represent the people who are present when the Census was taken. We know where they have been, but not where they are going. Anyone with common sense would assume that these people replaced others much like them, but whether a court would make this leap was not known. So Michelson looked to data that would directly say what happened to people who had been in this judicial district earlier.

The first source was collected by the jury administration itself, and formed part of Pollard's argument that someone was tampering with potential Hispanic jurors. That is mail returned by the post office, addressee unknown. More such returns came from Zip codes identified as Hispanic than from other Zip codes; and the number of such returns increased over the life of the master list. Hispanics who had lived there, some of whom would have been jury eligible, had moved on. In this case they did not leave a forwarding address, which is a characteristic of young single mobile males.

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4 Names collected from different sources, such as drivers licences and voter registrations, are processed a) to eliminate people clearly ineligible for jury duty, and b) to eliminate multiple entries for the same person.

The second data source was six years of drivers license records obtained from the Department of Motor Vehicles. The DMV would not provide names, but they did provide addresses. Being Hispanic was inferred from Zip Codes, the same procedure Pollard used. License number and address and renewal date were pulled for those getting or renewing, using data only for early years so that renewal behavior could be tested. Then Michelson tried to find each of these licenses to see if they were ever renewed. Because Hispanics in general were younger than non-Hispanics, this test is somewhat biased against Michelson's hypothesis that Hispanic licenses would be less likely to be renewed. Some people die, and although DMV is supposed to be notified, it not always is. However, the study showed that Hispanics were less likely to renew their license, no doubt because they were no longer in the state of Connecticut.

Among those renewing licenses, Hispanics were more likely to have changed their address. To the jury administrator, moving to another Connecticut address is the same as moving outside the state, if that new address is not in the same judicial district. Such people may become jurors, but in a different court.

The actions taken to produce the outcome that Pollard saw were not government actions. They were actions taken by Hispanics. Population data are a bad estimate of jury eligibility, as Michelson went on to show in Rhode Island and New Hampshire. That Finkelstein had a good idea and published it is to his credit. This is how science progresses, by proposing solutions to problems. But the next step in this progress should be criticism from people in the same field. When the Supreme Court accepted Finkelstein's solution, eleven years later, there had not been a single demurral in the law review literature. Finkelstein did not fail, but was failed by a profession so enamored by a "mathematical" proof of discrimination that no one paused to ask just what Finkelstein's method might mean, and how it might come up with the wrong answer.

Rather than think out the problem, David Pollard followed along. The mathematics were trivial. The hard part was putting together data. But the data did not show who was eligible for jury duty, only who was "putatively" eligible—a classification Pollard called "OK." He understood that these people might not all be eligible, but apparently did not understand that if their ineligibility were correlated with their ethnic origin, they would legitimately not become jurors. His client's assertions would be wrong.

Judge Spada got it. Pollard's statistics were based on false assumptions. Many resources had been wasted on a position for which there was no proof. At first the judge had been proud to have a Yale professor in his courtroom. Later, he realized that being such a professor did not necessarily indicate that one was an expert analyst. The Connecticut Supreme Court affirmed the judge's decision for the state. Gibbs was tried and convicted.