No. 79143-1

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP HICKS and RASHAD BABBS,

Petitioners/Appellants.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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[1] All historical statutes cited herein are attached in Appendix A.

[2] Relevant sections of secondary sources cited herein that are not easily accessible on the internet or Westlaw are attached in Appendix B.

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II. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Washington is the state affiliate. The ACLU has long been dedicated to protecting the constitutional right to equal protection of the laws and the right to trial by a jury that is selected free of discrimination. It has submitted amicus briefs in numerous cases where those rights were at stake (including *Batson v. Kentucky*, *infra*).

III. INTRODUCTION

The Pierce County Prosecutor's improper exclusion of the sole African-American venire member remaining by the time of peremptory challenges violated Rashad Babbs's equal protection right against racial discrimination under the test established by the U.S. Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Under that test, the fact that the prosecutor removed the sole remaining African-American venire member where the defendant was also African-American was a sufficient "other relevant circumstance" to support a prima facie case of discrimination under existing case law. Further, the right to trial by jury under the Washington Constitution is more protective than its federal counterpart and supports finding a prima facie case when a prosecutor removes the sole remaining African-American venire member who is also of the defendant's race.

Additionally, the Court could and should eliminate the prima facie case requirement completely and require a *Batson* hearing when a defendant challenges the state's peremptory challenge as discriminatory (as several other states have done). Finally, assuming a prima facie case was established or that requirement is eliminated, a proper evaluation of the evidence demonstrates that the trial court erred as a matter of law in its evaluation of the prosecutor's asserted race-neutral reasons, and Babbs is, accordingly, entitled to a new trial. All of these arguments are particularly compelling because of the demonstrated institutional racism in Washington's criminal justice system.

IV. STATEMENT OF THE CASE

When the prosecutor exercised a peremptory challenge against Juror 9 at Rashad Babbs's trial, Babbs, who is African-American, objected that the challenge was motivated by the venire member's race. Trial Transcript ("Tr.") at 490. Babbs's counsel noted that Juror 9 was the only African-American remaining in the venire following the State's previous challenge for cause, and that the prosecutor had hardly asked her anything during voir dire. Tr. at 491-92. The trial court found that Babbs had established a prima facie case of race discrimination and required the prosecutor to state his reasons for the challenge. Tr. at 496. The prosecutor claimed that his reasons were that Juror 9 had a "master's in education" and was a "social worker." *Id.* He noted as an afterthought that she had "a friend or relative [who] ha[d] been arrested and served time." Tr. at 496-97. Juror 2, who was seated, worked for a public

assistance agency and in child care licensing. Tr. at 477. Others whose questionnaires indicated that friends or relatives had been convicted of crimes were questioned extensively about the circumstances. Tr. at 108, 110 (Juror 14); 145 (Juror 22); 309 (Juror 55); 445 (Juror 37). Yet, the prosecutor did not challenge any of those jurors. Without assessing whether the stated reasons were pretextual by weighing all the evidence before it, the trial court concluded that Babbs failed to establish that the prosecutor's challenge to Juror 9 was racially motivated. Tr. at 498.

In Babbs's subsequent appeal, Division Two did not reach whether the prosecutor's challenge to Juror 9 was racially motivated. Instead, it concluded Babbs had not established a prima facie case of discrimination and that the prosecutor therefore should not have been required to state any reasons for his challenge. *See State v. Hicks*, Nos. 31645-5-II, 31743-5-II, 2006 WL 2223807, at *8 & n.7 (Wash. Ct. App. Div. II, Aug. 4, 2006) (unpublished opinion).

V. ARGUMENT

A. Babbs Established a Prima Facie Case of Discrimination.

The Equal Protection Clause of the U.S. Constitution forbids prosecutors from peremptorily challenging venire members based on their race. *Batson*, 476 U.S. at 89; *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960, 966 (1995). In *Batson*, the Supreme Court established a three-step framework for evaluating defendants' claims of racial discrimination in prosecutors' exercise of peremptory challenges. First, the defendant must establish a prima facie case of purposeful discrimination. To do so,

the defendant "must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove . . . members of the defendant's race." *Batson*, 476 U.S. at 96 (citation omitted). The defendant may "rely on the fact . . . that peremptory challenges . . . permit[] 'those to discriminate who are of a mind to discriminate,'" but must show that this fact together with "other relevant circumstances," raises an inference of discrimination. *Id.* (citation omitted).

Babbs's trial counsel promptly objected to the peremptory challenge to Juror 9. Tr. at 490. In support of his position that striking the lone remaining venire member of the defendant's race could, in combination with other relevant circumstances, constitute a prima facie case of discrimination, trial counsel cited *State v. Evans*, 100 Wn. App. 757, 770, 998 P.2d 373 (2000). In *Evans*, Division One observed that "a challenge of a single prospective juror within a protected class could, in some circumstances, constitute a prima facie case."[3] *Id.*

Here, the trial court held that Babbs had established a prima facie case of discrimination and required the prosecutor to state his reasons for the challenge. Tr. at 496. Once the trial court requires the prosecutor to state his reasons, the preliminary question whether the defendant has established a prima facie case becomes moot. *See State v. Sanchez*, 72

[3] Indeed, Division One had earlier held that "the prosecutor's dismissal of the only eligible African-American juror may imply a discriminatory act or motive." *State v. Rhodes*, 82 Wn. App. 192, 201, 917 P.2d 149, 154 (1996); *see also State v. Wright*, 78 Wn. App. 93, 101-02, 896 P.2d 713, 718 (1995).

Wn. App. 821, 826-27, 967 P.2d 638, 642 (1994) (emphasis added) (citing *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). Neither the defendants nor the State raised the sufficiency of the prima facie case on appeal. Brief of Resp. (State), Ct. of App., at 47.

Nevertheless, the Court of Appeals improperly held sua sponte that Babbs had not established a prima facie case, ending its analysis. *See Hicks*, 2006 WL 2223807, at *8 & n.7. In addition to improperly considering whether Babbs established a prima facie case of discrimination, the Court of Appeals erred as a matter of law in concluding that there was insufficient evidence to establish a prima facie case of discrimination.

The court based its conclusion on its misperception that the only evidence supporting an inference of race discrimination was the fact that Juror 9 was the only remaining African-American venire member. To the contrary, the evidence included not only the fact that "peremptory challenges . . . permit[] 'those to discriminate who are of a mind to discriminate,'" but also other case-specific facts. In contrast to his extensive questioning of other potential jurors, the prosecutor asked Juror 9 almost nothing during voir dire, despite his supposed reliance on her specific characteristics. Lack of questioning prior to challenging a juror can be evidence that the challenge is race-based. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 246, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting

that the explanation is a sham and a pretext for discrimination.") (internal quotation marks and citation omitted). If the prosecutor were concerned with Juror 9's views, he would have questioned her on the subjects on which he claimed to be concerned. Tr. at 496. Additionally, the prosecutor did not make peremptory challenges against the non-African-American jurors possessing the same characteristics as the challenged juror. The burden of establishing a prima facie case is not an "onerous" one, *Johnson*, 542 U.S. at 163, and Babbs handily met this burden.

Numerous other courts have concluded that in conjunction with other relevant circumstances such as the peculiar nature of peremptory challenges, dismissal of the lone juror of defendant's race, especially where both defendant and juror are African-American, can be sufficient evidence to establish a prima facie case of discrimination under *Batson*.[4] Those courts have reached that conclusion with good reason. American history is riddled with notorious verdicts delivered by "all-white juries." *See* Albert W. Alschuler, *Racial Quotas and the Jury*, 44 Duke L. J. 704, 704-07 (1995).[5] The trial court correctly found a prima facie case here,

[4] *See United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *United States v. Roan Eagle*, 867 F.2d 436 (8th Cir. 1989); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987); *United States v. Shelby*, 26 M.J. 921 (N.M.C.M.R.1. 1988); *McCormick v. State*, 803 N.E.2d 1108 (Ind. 2004); *Acklin v. State*, 319 Ark. 363, 896 S.W.2d 423 (1995); *Durham v. State*, 185 Ga. App. 163, 363 S.E.2d 607 (1987).

[5] In that article, Alschuler collected cases of historical note in which verdicts were delivered by all-white juries, including the trials of the Scottsboro boys, African-American youths in Alabama convicted on at best flimsy evidence of raping white women and sentenced to death; the acquittal of the admitted murderers of Emmett Till, a fourteen year-old African-American boy who spoke to a white woman in Mississippi in 1955; and comparatively recent acquittals of white police officers in Miami and Los Angeles where overwhelming evidence indicated that the officers had unjustly harmed African-American suspects, including Rodney King. Indeed, in a jury room with no

and thus, the Court should reverse the Court of Appeals' decision not to proceed beyond the first step of the *Batson* analysis.

B. The Washington Constitution's Right to Trial by Jury Is More Protective than the Sixth Amendment and Supports a Lower Threshold for Establishing a Prima Facie Case and Requiring a Prosecutor to Give Race Neutral Reasons.

The Supreme Court in *Batson* recognized that the equal protection rights at issue were inextricably linked to the right to a jury trial: "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." 476 U.S. at 85. This Court has interpreted the Washington Constitution's right to trial by jury differently than the federal constitution. The state constitution's jury trial right supports a lower threshold to establish a prima facie case of discrimination or, taken one step further, to require a *Batson* hearing whenever a defendant challenges the state's peremptory strike as discriminatory (thereby eliminating the prima facie case requirement). In evaluating whether the Washington Constitution's right to a jury provides protection beyond the federal constitutional right, this Court first determines whether the Washington provision at issue should be given an independent interpretation and then, if so, whether it affords greater protection than its federal counterpart. *Madison v. State*, 163 P.3d 757, 763-65, 2007 WL 2128346, at *3-4 (Wash. July 26, 2007). The Court should answer both questions in the affirmative here.

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jurors of color, jurors may feel comparatively free to rely on implicitly or explicitly racist stereotypes and rationales.

1. An Independent Analysis Is Warranted Under *Gunwall.*

To determine whether a provision of the Washington Constitution requires an interpretation independent from its federal counterpart the Court analyzes six factors established in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).[6] Each factor weighs in favor of an independent analysis of the trial by jury right under the Washington Constitution.

Factor One, the text of the Washington Constitution, favors an independent analysis. Article I, section 21 states:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record . . . .

In interpreting "inviolate," the Court has previously relied on *Webster's* definition: "'free from change or blemish: PURE, UNBROKEN . . . free from assault or trespass: UNTOUCHED, INTACT.'" *State v. Smith*, 150 Wn.2d 135, 150, 75 P.3d 934 (2003) (emphasis added) (quoting *Webster's Third New International Dictionary* 1190 (1993)). This Court has held that "inviolate" "'connotes deserving of the highest protection'" (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)), and "indicates a strong protection of the jury trial right."[7] *Id.*

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[6] Those factors are: (1) the textual language of the state constitution provision; (2) differences in the texts of the parallel state and federal constitutional provisions; (3) state constitutional history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern. *Gunwall*, 106 Wn.2d at 58.

[7] Article I, section 22, the other provision of the Washington Constitution dealing with the right to a trial by jury states: "in criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . . ."

Factor Two, the difference between the text of the Washington and federal constitutions, also favors an independent analysis. The federal constitution mentions the right only in the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

U.S. Const. amend. VI. The Washington Constitution, in contrast, has *two separate* provisions protecting the right to trial by jury. Indeed, the Court has observed that "the fact that the Washington Constitution mentions the right to a jury trial in two provisions instead of one indicates the general importance of the right under our state constitution." *Smith*, 150 Wn.2d at 151. Further, although the Sixth Amendment and article I, section 22 are similar, "article I, section 21 has no federal equivalent." *Id.* (emphasis added) (citing *State v. Schaaf*, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987)).

Factors Three and Four, state constitutional history and preexisting state law, also favor an independent and broader right to trial by jury in the context of peremptory challenges. In 1881, prior to the adoption of the Washington Constitution, statutory law provided criminal defendants with twice as many peremptory challenges as the State, thereby recognizing a need to limit the State's comparative ability to use peremptory challenges.

> In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors.

Code of 1881, ch. 87, § 1079.[8] The State was provided *only half the number* of peremptory challenges in a large subset of criminal cases:

> The prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in all other cases, three jurors.

Id. § 1080.[9] This history supports a stricter limitation on the State's use of peremptories under the Washington Constitution than the federal.[10]

Finally, Factor Six, state interest and local concern, also favors an independent analysis. To determine whether an issue is of particular state interest or local concern, the Court considers whether an issue requires national uniformity. *Smith*, 150 Wn.2d at 152 (citing *Schaaf*, 109 Wn.2d at 16, which held that providing jury trials for juveniles was a mater of local concern rather than an issue requiring national uniformity). Protecting a defendant's inviolate right to a jury free from peremptory challenges that discriminate does not require national uniformity. The local concern is particularly great given the documented racial disparities in Washington's criminal justice system, and the need for the state to have the freedom to remedy discriminatory jury selection practices.

Accordingly, all six factors favor an independent analysis of the jury trial right under the Washington Constitution.

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[8] *See also* Code of 1897, tit. 38, ch. 11, § 6931.

[9] *See also* Code of 1897, tit. 38, ch. 11, § 6932.

[10] The Court has held that because the Washington Constitution is a limitation on the State's otherwise plenary powers while the federal constitution is an affirmative grant of power, Factor Five, differences in structure between the Washington and federal constitutions, *always* weighs in favor of an independent analysis. *Smith*, 150 Wn.2d at 151-52 (citing *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994)).

2. The Washington Right to a Jury Trial Provides Greater Protection Here than Does the Sixth Amendment.

The specific text of article I, section 21 is especially important. For the right to jury trial to remain *inviolate*, as defined by the Court, there can be neither actual discrimination in the use of peremptories nor can peremptories be used to disproportionately remove jurors of color. Washington law prior to the State's adoption of its constitution, which provided criminal defendants with twice as many peremptory challenges as the State, also supports a limitation on the State's use of the challenges.

Further, both preexisting state law and the Washington Constitution protect the right of a criminal defendant to a jury of twelve peers.[11] The federal constitution provides no comparable right to a twelve-person jury. *Burch v. Louisiana*, 441 U.S. 130, 137, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979). The Supreme Court has recognized the relationship between jury size and fair cross section, and that the smaller the size of the jury, the less representative it will be:

> [T]he opportunity for meaningful and appropriate representation does decrease with the size of the panels. Thus, if a minority group constitutes 10% of the community, 53.1% of randomly selected six-member juries could be expected to have no minority representative among their members, and 89% not to have two. Further reduction in size will erect additional barriers to representation.

Ballew v. Georgia, 435 U.S. 223, 237, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978) (footnote omitted) (holding that juries of five violate Sixth and

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[11] *See* Code of 1881, ch. 87, § 1078; *State v. Stegall*, 124 Wn.2d 719, 724, 881 P.2d 979 (1994) (reiterating prior holdings by the Court that Wash. Const., art. 1, § 21 guarantees to a felony defendant the right to be tried by a jury of twelve).

Fourteenth Amendment right to trial by jury and considering as one of several reasons fact that juries of less than six are much less likely to be representative of community). Likewise, commentators have pushed for a federal requirement of twelve-person juries in part because of the decrease in representation of a fair cross section of the community in smaller-sized juries.[12] The Washington Constitution's protection of the twelve-person jury suggests that its framers sought to protect representation by a fair cross section of the community and a diversity of views on the jury. Thus, the state constitution's jury trial right protects an important interest at issue in this case.

3. The Court Should Articulate a More Exacting Standard for Requiring Reasons for Peremptory Challenges than that Required by *Batson*.

This broader right to trial by jury under the Washington Constitution supports finding a prima facie case of discrimination where the prosecutor removes the sole venire member of color who is of the same race as the defendant. Taken one step further, the inviolate right to trial by jury supports requiring a *Batson* hearing when the defendant objects to the state's peremptory challenge as discriminatory. Requiring the prosecutor to articulate race-neutral reasons is little price to pay to ensure that the defendant's inviolate right to a jury is maintained.

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[12] *See, e.g.*, Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 Ala. L. Rev. 133, 137-52 (1997); *Development in the Law-The Civil Jury*, 110 Harv. L. Rev. 1408, 1484-87 (1997).

The Supreme Court did not formulate specific rules for *Batson*'s implementation; it merely established the minimum protection afforded by the federal constitution. *See* 476 U.S. at 99 n.24. Indeed, multiple states have altered the *Batson* prima facie case or eliminated it completely to simplify the standard and provide a record for appeal.

> Rather than deciding on a case by case basis whether the defendant is entitled to a hearing based upon a *prima facie* showing of purposeful discrimination under the vague guidelines set forth by the United States Supreme Court, the better course to follow would be to hold a *Batson* hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire. This bright line test would ensure consistency by removing any doubt about when a *Batson* hearing should be conducted. Further, this procedure would ensure a complete record for appellate review.

State v. Jones, 293 S.C. 54, 358 S.E.2d 701, 703 (1987) (modified by *State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317, 319-20 (1995) to require a *Batson* hearing whenever one is requested) (adopted by *State v. Holloway*, 209 Conn. 636, 553 A.2d 166, 171-72 & n.4 (1989), requiring only a *Batson* objection to require the state to give race-neutral reasons).[13] The analysis of those courts applies here and supports a similar approach.

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[13] *See also Commonwealth v. Maldonado*, 439 Mass. 460, 788 N.E.2d 968, 972 n.4 (2003) (burden of establishing prima facie case "ought not be a terribly weighty one"); *State v. Parker*, 836 S.W.2d 930, 937-38 (Mo. 1992) (requiring trial court to consider prosecutor's allegedly race-neutral reasons as part of defendant's prima facie case); *Hayes v. State*, 261 Ga. 439, 405 S.E.2d 660, 668-69 (1991) (Benham, J., concurring) (advocating that Supreme Court of Georgia should follow other states in replacing case-by-case evaluation of prima facie case with *Batson* hearing whenever party challenges peremptory strike of members of cognizable racial group as discriminatory).

Therefore, again, the Court should reverse the Court of Appeals' refusal to go beyond the first step of the *Batson* analysis, evaluate whether the trial court properly concluded that the prosecutor's reasons for the peremptory challenge were non-discriminatory, and hold that it did not.

C. The Trial Court Failed to Evaluate the Prosecutor's Reasons and Should Have Found Pretext.

Once the defendant establishes the prima facie case, the prosecutor "must articulate a neutral explanation related to the particular case to be tried."[14] *Batson*, 476 U.S. at 98. But even if the prosecutor articulates a facially acceptable explanation, the inquiry does not end. The trial court then must evaluate, "in light of 'all relevant circumstances,'" whether the prosecutor's reasons are pretextual. *Miller-El*, 545 U.S. at 232 (quoting *Batson*, 476 U.S. at 96); *see also Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) ("After the prosecution puts forward a race-neutral reason, the court is required to evaluate 'the persuasiveness of the justification.'") (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)).

Both the trial court and the Court of Appeals failed to conduct the third step of the *Batson* inquiry. When the prosecutor gave his ostensibly race-neutral reasons for challenging Juror 9, the trial court did not analyze whether the prosecutor's stated reasons were pretextual. Instead, the court simply stated, "Okay. The *Batson* challenge is denied." Tr. at 498. The Court of Appeals, in turn, did not reach the issue because it stopped after

[14] The explanation must be specific. *Id.* at 98 n.20.

incorrectly concluding that Babbs failed to establish a prima facie case. Failure to conduct the step three analysis alone requires reversal. *See McClain v. Prunty*, 217 F.3d 1209, 1223 (9th Cir. 2000).

Further, the record demonstrates that the prosecutor's reasons here *were* in fact a pretext for race discrimination. Numerous factors weighed in favor of finding pretext: (1) the interaction between institutional discrimination in the criminal justice system (discussed below) and one of the reasons offered by the prosecutor (having a friend or relative who had been arrested and served time); (2) the prosecutor's failure to challenge other jurors possessing the same asserted characteristics as the challenged juror, the fact that peremptory challenges by their nature shield discrimination from public view; (3) the fact that Juror 9 was the only juror of Babbs's race remaining on the venire; and (4) the fact that the prosecutor hardly questioned Juror 9 before electing to challenge her. Any of these factors could be enough to warrant finding pretext, but their cumulative effect demands that conclusion.

First, the stated reasons were not "related to the particular case to be tried" as required by *Batson*.[15] *See* 476 U.S. at 98. Indeed, nothing in the transcript indicates that the alleged reasons were even based in fact. Where the record provides no factual support for a prosecutor's stated

[15] The prosecutor's three stated reasons were that Juror 9 had a "master's in education," was a "social worker," and had "a friend or relative [who] had been arrested and served time." Tr. at 496-97. None of those reasons related to the case at hand.

reason, neither the trial nor the reviewing court need accept the reason. *See Johnson v. Vasquez*, 3 F.3d 1327, 1330-31 (9th Cir. 1993).[16]

Second, the stated reasons were also applicable to white jurors whom the prosecutor did not seek to strike. "Peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged." *McClain*, 217 F.3d at 1221. Juror 2, for instance, worked for a public assistance agency and in child care licensing, Tr. at 477, but the prosecutor did not challenge her as a worker in social services. Tr. at 501. Likewise, Jurors 14, 22, 55, and 37 all had friends or even close relatives who had been convicted of crimes. Tr. at 108, 110, 145, 309, 445. All were questioned extensively and specifically about the circumstances involved, and none were peremptorily challenged, unlike Juror 9, who was challenged without questioning. *Id.*

Third and finally, the prosecutor's stated reason that Juror 9 had a friend or relative who had "been arrested and served time" was not race-neutral. Because of institutional discrimination in Washington's criminal justice system, African-Americans are disproportionately likely to have had contact with the police through traffic stops and arrests and to have been convicted of crimes. Excluding jurors from service on any criminal trial (since the prosecutor did not make his reasons specific to the Juror 9 or to Babbs's case) on the basis that the juror has a friend or relative who

[16] *See also McClain*, 217 F.3d at 1221 (where prosecutor's statements are contrary to facts in record, "serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised").

has been convicted of a crime would necessarily result in disproportionate exclusion of African-American jurors. "If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." *Hernandez*, 500 U.S. at 363. In light of Washington's heightened interest in protecting the inviolate right to jury trial, grounds for peremptory challenges that result in disproportionate exclusion of jurors of color, especially when that disproportion is due to underlying institutional discrimination, should not be found "race neutral" for purposes of *Batson*. Accordingly, the evidence indicates that the prosecutor's stated reasons were pretextual.

D. The Prosecutor's Peremptory Challenge Against the Sole African-American Juror Slated to be Seated in this Case Must Be Evaluated in the Context of the Institutional Discrimination that Plagues the Washington Criminal Justice System.

Washington's criminal justice system, from arrest to charging, charging to prosecution, and prosecution to sentencing, discriminates against persons of color and, in particular, African-Americans. The legal test for upholding a *Batson* challenge should not exacerbate this problem.

In 2005, Washington's Sentencing Guidelines Commission reported a disproportion between the demographic composition of Washington's population and that of adults sentenced for felony convictions. Sentencing Guidelines Commission, *Disproportionality and Disparity in Adult Felony Sentencing* 1 (Dec. 2005), *available at*

http://www.sgc.wa.gov/PUBS/Disproportionality/Adult_Disproportionality_Report_FY05.pdf.[17] The data showed that African-Americans were severely overrepresented in Washington's prisons. *Id.*

Such racial disparities have prompted numerous scholars to investigate the causes. A 1994 study examined the racial disparity in states' prisons, but also considered the comparative levels of criminal involvement as measured by arrests. *See, e.g.,* Robert D. Crutchfield et al., *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. of Res. in Crime and& Delinq. 166 (1994). That study concluded that *less than half* of the overrepresentation of African-Americans in Washington's prisons was warranted by greater criminal activity. *Id.* at 176.

In 2006, a federal court in Washington considered these studies and reports of experts in that case and concluded that there was racial discrimination in Washington's criminal justice system. The court stated:

> The Court finds . . . these reports to be compelling evidence of racial discrimination and bias in Washington's criminal justice system. . . . [T]he Court is compelled to find that there is discrimination in Washington's criminal justice system on account of race.

Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *6 (E. D. Wash. July 7, 2006) (referring to expert reports provided by Katherine Beckett and Robert D. Crutchfield)[18].

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[17] Similar reports are also available for prior years.

[18] The district court in *Farrakhan* granted summary judgment for the State on plaintiffs' voting rights claims and an appeal is pending in the Ninth Circuit, Case No. 06-35669.

One of the primary reports relied on by the court in *Farrakhan*, written by Professor Robert Crutchfield from the University of Washington, examined numerous studies on racial differences in the arrest, processing, and sentencing stages of Washington's criminal justice system. *See generally* Robert D. Crutchfield, *Racial Disparity in the Washington State Criminal Justice System* (Oct. 25, 2005), *available at,* http://moritzlaw.osu.edu/electionlaw/litigation/documents/exhibitsstatementofmaterialfactspart3.pdf. After analyzing studies investigating Washington police practices and focusing on race differentials in the enforcement of drug laws and on racial profiling, Crutchfield concluded:

> There is not evidence of a broad pattern of racial profiling in the State of Washington, but there are substantial reasons to believe that Native Americans, blacks and Latinos are at elevated risk that cannot be justified by differential involvement in crimes likely to lead to arrests.

Id. at 25. Likewise Crutchfield concluded that "there is credible evidence that there are significant racial disparities that are not fully warranted by race or ethnic differences in illegal behavior." *Id.* at 25-26.[19] Professor

[19]Crutchfield analyzed a study by Professor Beckett and others in 2005 that expanded upon Professor Beckett's initial study of racial patterns in drug enforcement by the Seattle Police Department, which was completed for the Defender Association's Racial Disparity Project in 2004. *Id.,* at 23. Additionally, the court in *Farrakhan* considered a report by Beckett based on the same body of research. *Farrakhan*, 2006 WL 1889273, at *5 (discussing Professor Beckett's report submitted to the court regarding drug arrests in Seattle, in which she concluded that although a majority of drug users in Seattle were white and a majority of those who delivered serious drugs were white (each with the possible exception of crack cocaine), blacks and Latinos were disproportionately arrested for drug possession); *see also* Katherine Beckett, *Race and Drug Law Enforcement in Seattle* 65 (prepared on behalf of the Defender Association's Racial Disparity Project, May 3, 2004), *available at* http://www.soc.washington.edu/users/kbeckett/Enforcement.pdf (concluding that "[i]n sum, racial disparity in drug delivery arrests is primarily a function of the [Seattle Police

Crutchfield reviewed three studies of racial discrimination in prosecution. One of those studies found statistically significant differences in charging *even after* legally relevant considerations such as offense seriousness and criminal histories were accounted for. *Id.* at 27. Likewise, even after controlling for legal factors, prosecutors recommended that blacks remain in confinement for 50% longer than whites. *Id.* at 28. Another study found racial disparity in the likelihood of pre-trial release and the amount of bail requested even after taking into account legal factors. *Id.* at 30.

This well-documented and thoroughly analyzed discrimination against African-American defendants, recognized by the federal court, is an essential consideration in analyzing the prosecutor's peremptory challenge where an African-American defendant and African-American juror were involved in this case. Not only does this institutional discrimination increase the likelihood that the peremptory challenge exercised in this case was based on overt or implicit race discrimination, but it also increases the chance that African-Americans generally will disproportionately be removed from juries based on their disparate rate of contact with the criminal justice system.

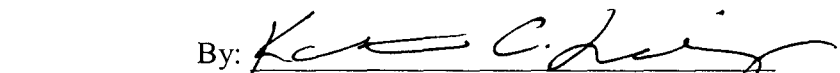
VI. CONCLUSION

For the reasons set forth above, the Court should reverse the Court of Appeals and remand for a new trial.

Department's] concentration on racially diverse and predominantly black outdoor drug venues downtown where crack is more likely to be sold, its targeting of blacks in those and other venues, and comparative lack of attention to the heroin trade, and especially to whites who deliver heroin.").

DATED: September 11, 2007

PERKINS COIE LLP

By: 

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APPENDIX A

CODE OF WASHINGTON

CONTAINING ALL

ACTS OF A GENERAL NATURE

REVISED AND AMENDED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF WASHINGTON, DURING THE EIGHTH BIENNIAL SESSION, AND THE EXTRA SESSION, ENDING DECEMBER 7, 1881; THE CONSTITUTION OF THE UNITED STATES AND AMENDMENTS THERETO; THE ACTS OF CONGRESS APPLICABLE TO THE TERRITORY OF WASHINGTON; AND THE NATURALIZATION LAWS.

Published by Authority.

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C. B. BAGLEY, PUBLIC PRINTER.
1881.

fendant, the court may, in its discretion, grant a change of venue to the most convenient county or district. The clerk must thereupon make a transcript of the proceedings and order of court, and having sealed up the same with the original papers, deliver them to the sheriff, who must without delay deposit them in the clerk's office of the proper county, and make his return accordingly.

SEC. 1074. No change of venue from the district shall be allowed on account of the prejudice of the inhabitants of any particular county, but where a party or his attorney shall make his affidavit, and prove to the satisfaction of the court, or judge, that the inhabitants of any particular county are so prejudiced or excited, or so particularly interested in the cause or question, that he believes the party cannot have justice done by a jury of that county, then no juror for that particular case shall be taken from that county, unless by consent of the party making the objection, but the case shall be tried by the jurors from the other counties who may be in attendance as grand and petit jurors, and if, from challenges or any other cause, there shall not remain twelve competent jurors, then the case may be tried by a number less than twelve: *Provided*, That the defendant and prosecuting attorney consent to so try the case.

SEC. 1075. The court may at its discretion at any time order a change of venue or place of trial to any county or district in the territory, upon the written consent or agreement of the prosecuting attorney and the defendant.

SEC. 1076. When a change of venue is ordered, if the offense be bailable, the court shall recognize the defendant, and, in all cases, the witnesses to appear at the term of the court to which the change of venue was granted.

CHAPTER LXXXVII.

OF TRIALS.

SEC. 1077. A continuance may be granted in any case on the ground of the absence of evidence on the motion of the defendant supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it; and also the name and place of residence of the witness or witnesses; and the substance of the evidence expected to be obtained, and if the prosecuting attorney ad-

mit that such evidence would be given, and that it be considered as actually given on the trial or offered and overruled as improper the continuance shall not be granted.

SEC. 1078. Issues of fact joined upon an indictment shall be tried by a jury of twelve persons, and the law relating to the drawing, retaining and selecting jurors, and trials by jury in civil cases, shall apply to criminal cases.

SEC. 1079. In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors. When several defendants are on trial together, they must join in their challenges.

SEC. 1080. The prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in all other cases, three jurors.

SEC. 1081. Challenges to the panel shall only be allowed for a material departure from the forms prescribed by law, for the drawing and return of the jury, and shall be in writing, sworn to and proved to the satisfaction of the court.

SEC. 1082. Challenges for cause shall be allowed for such cause as the court may, in its discretion, deem sufficient, having reference to the causes of challenge prescribed in civil cases, as far as they may be applicable, and to the substantial rights of the defendant.

SEC. 1083. No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death, shall be compelled or allowed to serve as a juror on the trial of any indictment for such an offense.

SEC. 1084. The jury shall be sworn or affirmed to well and truly try the issue between the territory and the defendant, according to the evidence; and, in capital cases, to well and truly try, and true deliverance make between the territory and the prisoner at the bar, whom they shall have in charge, according to the evidence.

SEC. 1085. The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases.

SEC. 1086. No person prosecuted for an offense punishable by death, or by confinement in the penitentary or in the county jail, shall be tried unless personally present during the trial.

SEC. 1087. No person prosecuted for an offense punishable by a fine only, shall be tried without being personally present, unless some responsible person, approved by the court, undertakes to be bail for stay of execution and payment of the fine and costs that may be assessed against the defendant. Such undertaking must be in writing, and is as effective as if entered into after judgment.

SEC. 1088. The court shall decide all questions of law which shall arise in the course of the trial. The same laws in relation to giving instructions to the jury by the court, and the argument of counsel and taking exceptions, as is now provided in the civil practice act, shall also govern in criminal cases, except as herein specially provided.

SEC. 1089. Juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together, without meat or drink, unless otherwise ordered by the court, to be furnished at the expense of the county.

BALLINGER'S

ANNOTATED

CODES AND STATUTES

OF WASHINGTON,

SHOWING ALL

STATUTES IN FORCE, INCLUDING THE SESSION LAWS OF 1897,

BY

HON. RICHARD A. BALLINGER,

EX-JUDGE OF THE SUPERIOR COURT, AND AUTHOR OF "BALLINGER ON COMMUNITY PROPERTY."

VOLUME II.

BANCROFT-WHITNEY CO.,
LAW PUBLISHERS AND LAW BOOK SELLERS
SEATTLE AND SAN FRANCISCO.
1897.

CHAPTER XI.

OF TRIALS AND VERDICTS IN CRIMINAL ACTIONS.

§ 6925. Rights of Accused on Trial.

On the trial of any indictment or information, the party accused shall have the right to be heard by himself or counsel, to meet the witnesses produced against him face to face: Provided always, That in any case where a witness or witnesses whose deposition or depositions have been taken by a committing magistrate pursuant to law are absent, and cannot be found when required to testify in such case, so much of such deposition or depositions as the court shall decide to be admissible and competent shall be admitted and read as evidence in such case. [Cf. L. '54, p. 76, § 2; L. '73, p. 180, § 2; L. '77, p. 204, § 1; Cd. '81, § 765; L. '91, p. 63, § 89; 2 H. C., § 1362.]

See Const., Art. I., § 22, rights of accused.
See supra § 6866, rights of, under indictment, etc.
See supra §§ 6027, 6708, depositions of witnesses on commitment before magistrates, and notes.
The last part of this section is believed to be in conflict with Art. I., § 22, of the State Constitution. See also 6 Am. U. S. Const., right of defendant "to be confronted with the witnesses against him." The Const. of Cal., Art. I., § 13, authorizes the legislation to this effect.
Depositions in a criminal case, tending to show good character of defendant are inadmissible: State v. Humason, 5 W., 499; State v. Paggett, 8 W., 579, 584.

§ 6926. Right to Witnesses, Process and Speedy Trial.

On the trial of any indictment or information the party accused shall have the right to produce witnesses and proofs in his favor, and have compulsory process to compel the attendance of witnesses in his behalf, and to a speedy public trial by an impartial jury, and no person shall be put upon trial on an indictment or information for a felony until the expiration of five days from the day of his arrest. [Cf. L. '77, p. 205, § 2; Cd. '81, § 766; L. '91, p. 64, § 90; 2 H. C., § 1363.]

The Laws of '77 provide, "or upon an indictment for murder until thirty days from his arrest without his consent thereto in open court."
See supra § 6911 and notes, speedy trial, dismissal.
See Const., Art. I., § 22, rights of accused.
It is not contrary to the provisions of this section for a defendant to be brought to trial within less than five days after the filing of an information against him, where he had been taken into custody before a magistrate and held for trial on the same charge more than five days prior to his trial upon the information: State v. Humason, 5 W., 499.
A defendant in a criminal action is not entitled to the issuance of a subpoena to compel the attendance of witnesses without an order of the court therefor having been first obtained: State v. Graves, 13 W., 485; State v. Grimes, 7 W., 445.
The constitutional right of the accused to a public trial is not violated by an order of court excluding all persons from the court room except the judge, jurors, witnesses, and persons connected with the case, during the trial of a criminal charge: People v. Swafford, 65 Cal., 233; People v. Kerrigan, 73 Cal., 222. The word "public," in that clause of the constitution, is used in opposition to "secret": People v. Swafford, supra. An order excluding from the court room such of the jurors summoned for the term as are not impaneled to try the case is not a deprivation of the right of public trial: People v. Sprague, 54 Cal., 491.

§ 6927. Verdict or Confession Necessary to Conviction.

No person indicted or informed against for an offense shall be convicted thereof unless by confession of his guilt in open court, or by the verdict of a jury accepted and recorded in open court. [Cf. L. '54, p. 76, § 3; Cd. '81, § 767; L. '91, p. 64, § 91; 2 H. C., § 1364.]

See supra § 6909, conviction necessary before punishment.
See infra § 6937, waiver of jury by consent, when.

ment in the penitentiary, six jurors; in all other prosecutions, three jurors. When several defendants are on trial together, they must join in their challenges. [L. '54, p. 118, § 102; Cd. '81, § 1079; 2 H. C., § 1298; see Cal. P. C., § 1056.]

Joinder in challenges applies as well to peremptory as to challenges for cause: People v. McCalla, 8 Cal., 301.

§ 6932. Peremptory Challenges Allowed State.

The prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in all other cases, three jurors. [L. '54, p. 118, § 103; Cd. '81, § 1080; 2 H. C., § 1299.]

§ 6933. Challenges to Panel, When Allowed.

Challenges to the panel shall only be allowed for a material departure from the forms prescribed by law for the drawing and return of the jury, and shall be in writing, sworn to, and proved to the satisfaction of the court. [L. '54, p. 118, § 104; Cd. '81, § 1081; 2 H. C., § 1300; see Cal. P. C., § 1059.]

See note to § 4978.
See note to § 4740.
Although a challenge is not taken in the manner required by this section, but is nevertheless entertained by the court, it should be sustained where it is to the effect that the deputy sheriff instead of the sheriff assisted in drawing the jury, contrary to the provisions of § 59, 2 Hill's Code: State v. Payne, 6 W., 563, 566.
On the trial of a challenge to the panel, the defendant cannot offer his ex parte affidavit in support of the challenge: People v. Brown, 48 Cal., 253.
Where the sheriff who summoned the special panel is sworn and examined, and by his testimony discloses that he has formed or expressed an opinion that the defendant is guilty, the challenge to the panel on the ground of the bias of the sheriff should be allowed: People v. Coyodo, 40 Cal., 592; see also People v. Welch, 49 Cal., 174; People v. Rodriguez, 10 Cal., 50.

§ 6934. Challenges for Cause.

Challenges for cause shall be allowed for such cause as the court may, in its discretion, deem sufficient, having reference to the causes of challenge prescribed in civil cases, as far as they may be applicable, and to the substantial rights of the defendant. [L. '54, p. 119, § 105; Cd. '81, § 1082; 2 H. C., § 1301.]

See supra §§ 4981-4985 and notes, challenges for cause.
The trial of challenges to jurors by the court involves the trial of an issue of fact, and its determination is largely discretionary: White v. Territory, 3 W. T., 397; Blanton v. State, 1 W., 265.
In the examination of a juror upon his voir dire, it is improper to ask him whether he would attach more importance or credibility to the testimony of a minister than to that of anyone else: State v. Holedger, 15 W., 443.
Questions put to a juror in a criminal prosecution, which attempt to ascertain in advance what he would think of the credibility of defendant as a witness, considering his interest in the result, are properly excluded: State v. Everett, 14 W., 574.
Error in overruling a challenge for actual bias interposed to a juror is without prejudice, when the juror is subs quently excluded upon the peremptory challenge of the adverse party: State v. Carey, 15 W., 549.
Where the examination of a juror shows that no fixed or definite opinion exists in the mind relative to the merits of a criminal prosecution, but only a vague or merely floating impression based upon a newspaper report of the case, or heard at about the time of the commission of the supposed crime, the juror is not subject to a challenge on the ground of bias: Id.
A refusal to sustain challenges for proper cause, necessitating peremptory challenges on the part of the accused, will be considered on appeal as prejudicial, where the accused has been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury: State v. Rutten, 13 W., 203; citing State v. Krug, 12 W., 288.
Where a juror admits that he has an opinion as to the guilt of the accused, which it would take evidence to remove, that he believes there was something wrong and he could not go into the jury box and accord the accused the presumption that he was innocent, until he was proven guilty, he should be excused upon a challenge for cause, although he may state in answer to leading questions by the court and the prosecuting attorney that if he was charged as the defendant was he would be willing under the same circumstances to have twelve men try his case who were of the same mind as he was: State v. Rutten, 13 W., supra; following State v. Murphy, 9 W., 204; State v. Wilcox, 11 W., 215.

§ 6928. Trial Docket.

The clerk shall, in preparing the docket of criminal cases, enumerate the indictments and informations pending according to the date of their filing, specifying opposite to the title of each action whether it be for a felony or misdemeanor, and whether the defendant be in custody or on bail; and shall, in like manner, enter therein all indictments and informations on which issues of fact are joined, all cases brought to the court on change of venue from other counties, and all cases pending upon appeal from inferior courts. [Cf. L. '54, p. 115, § 86; Cd. '81, § 1044; L. '91, p. 58, § 65; 2 H. C., § 1295.]

§ 6929. Continuance, When Granted.

A continuance may be granted in any case on the ground of the absence of evidence, on the motion of the defendant, supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and place of residence of the witness or witnesses, and the substance of the evidence expected to be obtained; and if the prosecuting attorney admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the continuance shall not be granted. [L. '77, p. 206, § 7; Cd. '81, § 1077; 2 H. C., § 1296; see Cal. P. C., § 1052.]

See supra § 4977 and notes, continuance in civil cases.

See supra § 6912, continuance on order of court, when.

The denial of an adjournment of a trial, at the close of the evidence, for the purpose of securing the attendance of a witness of whom counsel had just been advised, is not erroneous, when neither the name of the witness, his residence, nor the materiality of the testimony is made to appear: State v. Craemer, 12 W., 217. The application is addressed to the discretion of the trial court: Thompson v. Territory, 1 W. T., 547.

Due diligence in procuring the attendance of a witness is not established by a showing that the defendant had been in the company of the witness on the day before his arrest upon the crime charged, that he knew of the migratory habits of the witness, and that he had no fixed abode, that a short time before the trial letters that he had addressed to him at the locality where last seen and to another point to which it was supposed he had gone, and that a subpoena had been issued to the sheriff of the county in which he was presumed to be, but without any definite direction as to where the witness could be found: State v. Craemer, 12 W., 217.

The overruling of a motion by defendant in a criminal prosecution for a continuance because of the misspelling of the names of witnesses for the state as indorsed upon the indictment is not sufficient to base error upon, in the absence of a showing that defendant was surprised and misled: State v. Everett, 14 W., 574.

While the state may be permitted to contradict the testimony which it had admitted would be given by an absent witness, in order to avoid a continuance, yet it cannot impeach such witness: State v. Carter, 8 W., 272, 276.

§ 6930. Issues to be Tried by Jury—Practice as in Civil Cases.

Except as otherwise specially provided, issues of fact joined upon an indictment or information shall be tried by a jury of twelve persons, and the law relating to the drawing, retaining, and selecting jurors, and trials by jury in civil cases, shall apply to criminal cases. [Cf. L. '54, p. 118, § 101; Cd. '81, § 1078; L. '91, p. 58, § 66; 2 H. C., § 1297.]

See Const., Art. I., § 21, trial by jury.

See supra § 4735 et seq., qualifications of jurors.

See supra § 4982 et seq., causes for challenge.

See supra § 4993 et seq. and notes, manner of conducting jury trial.

See infra § 6937, court may try by consent except in capital cases.

Construing all the statutory provisions together on the subject of challenges to jurors, defendant must, in prosecution for homicide, exercise two peremptory challenges to one by the state, until the twelve and six peremptory challenges respectively are exhausted: State v. Eddon, 8 W., 292.

§ 6931. Peremptory Challenges, Number Allowed Defendant.

In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprison-

APPENDIX B

CHANGING PRACTICES, CHANGING RULES: JUDICIAL AND CONGRESSIONAL RULEMAKING ON CIVIL JURIES, CIVIL JUSTICE, AND CIVIL JUDGING

Judith Resnik[*]

Table of Contents

 Arthur Liman Professor of Law, Yale Law School. Consultant, Institute for Civil Justice (ICJ), RAND. The research for this essay was supported by Yale Law School, by the University of Southern California Law Center, and by New York University School of Law, at which I was a visiting professor during 1996-97.

This essay was first presented as a speech for the Civil Justice Reform Act Conference, co-sponsored by the American Bar Association and the University of Alabama School of Law, and held March 20-22, 1997. Subsequently, a draft (then titled "Constraining Lawyers and Judges: The Civil Justice Reform Act, The Civil Jury, and Congressional Control of the Federal Judiciary," (March, 1997)) was circulated by the USC Working Papers Series (Jennifer Arlen, ed.).

My thanks to Jim Kakalik and Terry Dunworth for many conversations about civil justice reform, to the rest of RAND's ICJ researchers for their thoughtful work, to Rob Jones, Matt Sarago, and Donna Stienstra of the Federal Judicial Center; to Liz Evans of NYU's law library, Gene Coakley of Yale's law library, Roger Karr of the FJC's library, and Denise Russell of USC's law library; to Brenda Mitchell of NYU's computer staff for help on the preparation of charts, to Sam Estreicher and Jeannie Forest for education on the civil jury, to Laura Appleman, Alys Brehio, Hannah McElhinny, Hari Osofsky, Jennifer Rakstad, Jane Small, and Jerri Shick for unusually energetic and able assistance on this essay, and to Dennis Curtis, Oscar Chase, Paul Carrington, Laura Cooper, Shari Diamond, John Frank, Patrick Higginbotham, Deborah Hensler, John Langbein, Nancy Marder, Dan Meador, Tom Rowe, Steve Subrin, and Michael Zander for their thoughts and research guidance.

I. THE CHANGING CONTOURS OF THE CIVIL LITIGATION SYSTEM

The topic for this symposium[1] is procedural change and the respective roles of Congress and of the judiciary in making the rules that govern civil justice. The immediate focus is the last decade of innovations, from the 1980s when a group sponsored by Senator Joseph Biden published a pamphlet *Justice for All: Reducing Costs and Delay in Civil Litigation*,[2] through the en-

1. Civil Justice Reform Act Implementation Conference, Mar. 20-22, 1997 (program on file with the Alabama Law Review).

2. TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COSTS

gram was over, I listened as a federal appellate judge, Patrick Higginbotham, gave an impassioned defense of the twelve-person civil jury. Judge Higginbotham, who sits on the Fifth Circuit, had chaired the Advisory Committee on Civil Rules in the mid-1990s during its work that resulted in a proposed amendment (ultimately unsuccessful) of Federal Rule 48 to reinstate the requirement of a twelve-person civil jury.[6]

A. The Practice of a Six Person Jury, and Subsequently, a Revised Rule

To understand the exchange in 1996 among federal judges about the size of a civil jury, a bit of background is needed about how the size of the civil jury changed, from twelve to six. Insofar as I am aware, advocacy for a jury smaller than twelve began in the 1950s and became more insistent in the 1960s.[7] Advocates

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author) [hereinafter NYU/FJC Jury Conference].

6. As amended in 1991, FED. R. CIV. P. 48 currently states that: "The court shall seat a jury of not fewer than six and not more than twelve members . . . ." In 1995, the Advisory Committee on Civil Rules had proposed language to state: "The court shall seat a jury of twelve members . . . ." Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure and Evidence, 163 F.R.D. 91, 147 (transmitted by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for Notice and Comment, September 1995) [hereinafter *Proposed Rules*]. According to the memorandum from Judge Higginbotham in support of that change, the Advisory Committee "unanimously recommend[ed] a return to 12-person juries . . . ." *Id.* at 135. As he explained, the purpose was to ensure that a civil jury would commence "with 12 persons, in the absence of a stipulation by counsel of a lesser number, but could lose down to 6 as excused by the trial judge for illness, etc." *Id.* at 136.

7. *See, e.g.*, Roy L. Herndon, *The Jury Trial in the Twentieth Century*, 32 L.A.B. BULL. 35 (Dec. 1956) [hereinafter Herndon, *Jury Trial*]; *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUDICATURE SOC'Y 136 (1958) [hereinafter *Six Member Juries*]; Edward A. Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120 (1962) [hereinafter Tamm, *Five-Man Civil Jury*]; Edward A. Tamm, *A Proposal for Five-Member Civil Juries in the Federal Courts*, 50 A.B.A. J. 162 (Feb. 1964) [hereinafter *Proposal*].

The first federal legislation that I have been able to locate that makes possible a smaller than twelve person jury was introduced on Feb. 19, 1953, by Representative Abraham Multer, a Democrat from New York. *See* H.R. 3308, 83d Cong, Feb. 19, 1953 (to permit that "[i]n each civil action tried by a jury, other than those tried by a jury as a matter of right guaranteed by the seventh amendment of the Constitution, the number of jurors which constitute a jury and the number of jurors who must agree [for a valid verdict] shall be determined by the law of the State in which such civil action is tried"). No hearings appear to have been held nor have I

suggested that shrinking the number of jurors would "relieve congestion," encourage "prompt trials and lower costs," with no effects on outcome.[8] Some of the vocal proponents were federal and state trial judges, who asserted not only their own experiences[9] but also those of state systems that had used smaller juries in certain kinds of cases.[10] A fair inference from the ad-

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found commentary on what sparked this proposal.

In 1958, an Advisory Committee on Practice and Procedure of the Temporary Commission on the Courts reported to the New York State Governor and Legislature about proposed procedural revisions. Included was a provision that a "party demanding jury trial . . . shall specify in his demand whether he demands trial by a jury composed of six or of twelve persons. Where a party has not specified the number of jurors, he shall be deemed to have demanded a trial by a jury composed of six persons." Thereafter, opposing parties would also have had the option of demanding a jury of twelve. Title 41.4 at 223-224, 1958 Report of the Temporary Commission on the Courts, 13 [N.Y.] Legislative Document (Feb. 15, 1958). According to the Notes, the Municipal Court of New York had that practice and it "worked well." Further, New York courts had had six person juries in New York "justice of the peace" courts since the state's inception in the eighteenth century. Appended was a list of the size of the juries in the then forty-eight states. *Id.* at 579-97 (reporting that "[m]ost departures from the twelve-man jury practice occur in courts of limited jurisdiction").

In 1972, the New York Legislature changed its statute to provide for a reduction in jurors from twelve to six. *See* NY CPLR § 4104 (McKinnneys, 1996) ("A jury shall be composed of six persons"). That change accorded with recommendations from the Governor Nelson A. Rockefeller, arguing that, "by speeding up the selection of juries," trials would also be "speeded up." Governor's Memorandum, N.Y. State Legis. Annual, ch. 185; 1972 Laws of N.Y. at 322.

8. *Six-Member Juries, supra* note 7, at 136.

9. For example, United States District Court Judge Tamm referred to his experience with the District of Columbia's code of five person juries in condemnation cases and argued that five provided the "perfect balance in affording the litigants all of the benefits of a jury trial, while eliminating unnecessary delay, expense and inefficiency." Tamm, *Five-Man Civil Jury supra* note 7, at 138.

10. *See, e.g., id.* at 134-35 (citing a 1956 speech by a California judge that "at least 36 states have constitutional and statutory provisions for juries of less than 12 in one or another of their courts," albeit often in only certain kinds of cases).

For a description of state court experiences, see Hon. Richard H. Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354 (1956) (discussing lower court use of six person juries in courts other than the superior court); Philip M. Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J., Apr. 1958, at 27 (reporting on the "success" of the 1957 "experiment" of six person juries in Worcester Superior Court). According to Professor Hans Zeisel, while some of the states permitted smaller juries for cases involving small claims, at least Utah permitted eight person juries in noncapital cases in general jurisdiction courts. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971) [hereinafter Zeisel, *And Then There Were None*]. Judge Devitt reported that in addition to Utah, Florida and Virginia also provided for less than twelve person juries in courts of general jurisdiction. *See* Edward J. Devitt, *The Six Man Jury in the Federal Court,*

vocacy in favor of making this change is that, although the Federal Rule permitted a jury of less than twelve upon stipulation, such stipulations were rare;[11] in the 1960s, the twelve person civil jury was the norm in federal court.[12] In 1970, the United States Supreme Court decided *Williams v. Florida*,[13] which held that Florida's six person criminal jury was constitutionally permissible. That case was decided on June 22, 1970.[14] At the time, Federal Rule of Civil Procedure 48 provided that juries of less than twelve could occur *only* by party stipulation.[15] Nevertheless, within four months, federal district courts began to change their local rules. By 1972, 54 local district court rules provided for six person juries.[16] During that time, the Judicial

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53 F.R.D. 273, 278 n.6 (Address at the Eighth Circuit Judicial Conference, June 30, 1971).

11. *See* Tamm, *Five-Man Civil Jury*, *supra* note 7, at 140 (noting that no one had ever so stipulated in his experience as a judge).

12. I have found no direct empirical evidence on the number of jurors who sat, but the arguments for change all seem to be addressed to a uniform tradition of twelve jurors. For example, according to Judge Tamm, at least one state (Connecticut) that provided for the option of six had not then succeeded in installing six person juries except in courts of limited jurisdiction and that, to "change" the number of jurors, a constitutional and legislative mandate was needed. *Id.* (quoting Phillips, *supra* note 10, at 355-56). *See also* Gordon Bermant and Rob Coppock, *Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington*, 48 WASH. L. REV. 593 (1973) (reporting on the "growing" support for a jury smaller than 12). Further, in 1956, when describing smaller juries, Judge Herndon commented that only the "increasing numbers of heretics have had the boldness to argue that the number twelve is *not* sacred . . . ." (emphasis in the original). Herndon, *Jury Trial*, *supra* note 7, at 47.

13. 399 U.S. 78, 86-103 (1970) (concluding that a criminal defendant's Sixth Amendment rights were not violated by a Florida rule permitting a six person jury).

14. *Id.*

15. As promulgated in the 1930s, Rule 48, entitled "Juries of Less than Twelve—Majority Verdict," provided that the "parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury." RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 102 (ABA, William W. Dawson, ed., 1938) [hereinafter *1938 Rules*].

16. According to Chief Judge Richard Arnold of the Eighth Circuit (who also supported the return in 1995 to a twelve person jury), within the first year after *Williams*, 29 federal district courts had, by local rule, "moved to six person juries." *See* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 25 (1993) [hereinafter Arnold, *Jury of Twelve*]. *See also* Devitt, *supra* note 10, at 277 ("The trend toward six-man juries in civil cases in the Federal Courts is growing rapidly."). For the details of which districts made the change, see H. Richmond Fisher, *The Seventh Amendment and the*

Conference of the United States passed a resolution in favor of a six person civil jury and asked Congress to enact such a rule.[17]

In 1973, the Supreme Court reviewed one of those local federal district court rules that permitted a six person jury in civil cases.[18] The Supreme Court (5-4) held that neither the Seventh Amendment, the Rules Enabling Act, nor the Federal Rules of Civil Procedure required that twelve people sit on a

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Common Law: No Magic in Numbers, 56 F.R.D. 507, 535-42 ("List of U.S. District Courts that Have Adopted Rules Reducing the Size of Civil Juries," beginning in November of 1970 and ending in September of 1972).

Chief Justice Warren Burger's enthusiasm for the smaller jury played a role, but the chronology of changes is somewhat difficult to reconstruct. According to Hans Zeisel, seventeen of these districts changed their rules under the sponsorship of the Chief Justice. *See* Zeisel, *And Then There Were None*, *supra* note 10, at 710. In contrast, the Chief Justice points to districts that had changed their rules as support for his position that such alterations were worth further investigation. *See* Warren E. Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A. J. 855, 858 (1971) (address given July, 1971, and published Sept. 1971). In that address, and despite the existence of FED. R. CIV. P. 48 that then provided for deviations from twelve only upon party stipulation, the Chief Judge mentioned the state practice of smaller juries, that a "dozen federal districts have followed the examples of some of those states" and reduced the size of civil juries, and that he had "urged the recently appointed Committee on Rules of Civil Procedure to look closely at the experience of courts" using smaller juries. *Id.* Paul Carrington recalls the Chief Justice asked in a (perhaps unpublished) speech why juries should be twelve and that soon thereafter, the local rules began to appear. Telephone Conversation with Paul Carrington of Duke University (Feb. 24, 1997).

Support for smaller juries also came from a study, conducted under the auspices of the Institute for Judicial Administration of NYU, which gathered data by surveying lawyers, judges, and court clerks in New Jersey's state courts. *See* INSTITUTE FOR JUDICIAL ADMINISTRATION, A COMPARISON OF SIX- AND TWELVE-MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS (1972) (concluding that smaller juries saved money and that differences in outcomes "appear to be due to differences in the types of cases selected by lawyers to be tried to six- and twelve-member juries rather than to differences in the size of the jury").

17. Arnold, *Jury of Twelve*, *supra* note 16, at 25. *See Report of the Proceedings of the Judicial Conference of the United States*, held at Washington, D.C. March 15-16, 1971 at 5-6 (according to Judge Irving Kaufman, then Chair of the Committee on the Operation of the Jury System, by that time, five or six districts had adopted local rules changing the size). The Conference Resolution stated that it "approve[d] in principle a reduction in the size of juries in civil trials in the United States district courts," and that the means to "effectuate" the change was by rulemaking or by statute. *Id.* In October of the same year, the Conference reaffirmed its resolution. *Report of the Proceedings of the Judicial Conference of the United States*, held in Washington, D.C. Oct, 28-29, 1971, at 41.

18. The rule came from the federal district court of Montana. Colgrove v. Battin, 413 U.S. 149 (1973) (citing Local Rule, U.S. District Court, Montana 13(d)(1)).

federal civil jury; thus, the local variation was neither unconstitutional nor unlawful.[19] Note that, by the time the Supreme Court considered and upheld the federal six person civil jury, more than half the districts had rules providing for six person juries in at least some of their civil cases.[20]

Despite the federal judiciary's enthusiasm for six person juries, the Judicial Conference met with skepticism when it pressed Congress for legislation to change the size of civil juries.[21] After a series of unsuccessful efforts to obtain congressio-

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19. *Colgrove*, 413 U.S. at 160, 162-163. Justice Brennan wrote for the five person majority; Justice Douglas, joined by Justice Powell, argued in dissent that the local rule was flatly inconsistent with the federal rules. *Id.* at 165. Justice Marshall, joined by Justice Stewart, dissented on constitutional grounds as well as on statutory and rule grounds. *Id.* at 166-88. The decision has been much criticized. *See, e.g.*, Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 51 (noting that Geoffrey Hazard had called the decision "monumentally unconvincing" and adding that "[t]o some, it may not be even that persuasive") [hereinafter, Carrington, *The Seventh Amendment*].

20. As the Court so noted. *Colgrove*, 413 U.S. at 150 n.1.

21. Representative Willliam Lloyd Scott, a Republican member of Congress, introduced H.R. 7800, 92d Cong. (1971), to provide that "[a] petit jury in civil and criminal cases in a district court of the United States shall consist of six jurors" except in capital cases. In 1973, after he had become a Senator, Scott introduced an identical bill in the Senate. *See* S. 288, 93d Cong. (1973).

In 1972, Emanuel Celler, a Democrat from New York and then Chair of the Judiciary Committee of the House, introduced H.R. 13496, 92d Cong. (1972), to provide for six person juries in civil cases "unless the parties stipulate to a lesser number." In 1973, Peter Rodino, the new chair of the Judiciary Committee and a Democrat from New Jersey introduced H.R. 8285, 93d Cong. (1973), which was identical to the Celler bill of the year before. A companion bill (S. 2057, which slightly varied from the House version) was before the Senate. In 1977, Representative Rodino introduced a bill again, identical in its effort to alter the jury size but also including requirements of unanimity absent stipulations by the parties. *See* H.R. 7813, 95th Cong. (1977).

Testifying in 1973 on behalf of the legislation were federal judges, including Judge Devitt, Judge Arthur Stanley, Jr. in his capacity as Chair of the Judicial Conference on the Operation of the Jury System, and an official from the Justice Department. *See Three Judge Court and Six Person Civil Jury: Hearings* on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, 93d Cong. [hereinafter *Hearings on a Six Person Jury*].

Judges Devitt and Stanley argued for the reduction in size on the grounds of its utility, economy, and for the statute on the grounds of the need for "uniformity" of practice. *Id.* at 17, 19, 30, 36. James McCafferty of the Administrative Office provided data on juror utilization and cost savings. *Id.* at 25-26. The Justice Department argued that the reduction in size would save money, increase speed, and diminish the burden of service on juries. *Id.* at 92-96. The ABA took no position at that point. *Id.* at 104 (statement of Edmund D. Campbell).

nal blessings, in 1978 the "Judicial Conference agreed to stop seeking legislation on the subject."[22] By that time (1978), 85 of

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Opponents included the ACLU, the NAACP, and Professor Hans Zeisel. Arguments advanced against the change included that juries would have fewer members of minority communities (*id.* at 127, Testimony of Charles Morgan for the ACLU; *id.* at 142, Testimony of Nathaniel Jones for the NAACP; *id.* at 161, testimony of Hans Zeisel); that jury service is an important part of American life that should be encouraged and widely distributed (*id.*); that civil juries were vital parts of the justice system (*id.* at 133-34); and that the claims of size not affecting outcome were erroneous (*id.* at 157-162).

The question of the size of the civil jury was debated thereafter by the ABA. In 1974, an ABA committee initially recommended "support[ing] the enactment of legislation which would revise the number of jurors in civil trials in federal courts to six persons," but when that proposal encountered opposition, withdrew that recommendation. *See Proceedings of the 1974 Midyear Meeting of the House of Delegates* and *Report No. 1 of the Special Committee on Coordination of Judicial Improvements*, ABA ANN. REP., vol. 99, at 182, 305 (1978).

In 1983, the ABA promulgated its first set of Standards Relating to Juror Use and Management; in that volume, ABA Standard 17(b) stated that civil juries should "consist of no fewer than six and no more than twelve." *See* ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, at 150 (1983) [hereinafter ABA STANDARDS]. *See also* Standard 17(b) at 156 (ABA, 1993).

At the midyear meeting in 1990, the ABA House of Delegates approved by voice vote a resolution from the Section of Tort and Insurance Practice that the ABA supports "legislative efforts to restore the size of a federal civil jury to 12 persons and to enable 10 of the 12 to render a verdict in a civil trial." (resolution on file with author). The ABA House of Delegates endorsed that resolution in 1991. 1993 ABA STANDARDS, *supra*, at 161.

22. *Report of the Proceedings of the Judicial Conference of the United States*, held in Washington, D.C., Sept. 21-22, 1978, at 78 (Judge C. Clyde Atkins, then Chair of the Committee on the Operation of the Jury System, reported that, because local rules provided for juries of six in 85 of the federal districts, no further legislation should be sought). *See also* Arnold, *Jury of Twelve*, *supra* note 16, at 27. Between 1971 and 1978, the Conference considered the size of the jury several times. In 1972, it approved the then-pending H.R. 13496, "drafted" in furtherance of the Conference's resolution in support of a smaller jury. *Report of the Proceedings of the Judicial Conference of the United States*, held in Washington, D.C., Apr. 6-7, 1972, at 4-5. In 1973, 1974, and 1977, the Conference reiterated its support for smaller juries. *See Report of the Proceedings of the Judicial Conference of the United States*, held in Washington, D.C., Apr. 5-6, 1973, at 13; *Report of the Proceedings of the Judicial Conference of the United States*, held in Washington, D.C., Sept. 19-20, 1974, at 56; *Report of the Proceedings of the Judicial Conference of the United States*, held in Washington, D.C., Sept. 15-16, 1977, at 83-84.

As among the different proposals, the Conference expressed its preference for one bill (S. 2057) that provided for unanimity absent stipulation and for alterations in peremptory challenges over another bill (H.R. 8285) that did not have those features; the Conference also stated its view that juries should be reduced in size in civil but not in criminal cases. *Report of the Proceedings of the Judicial Conference of the United States*, held in Washington, D.C., Sept. 13-14, 1973, at 54-55.

the districts had their own rules permitting fewer than twelve jurors.[23]

Not until more than a decade later, however, did the national rule reflect this change. Moving forward to the late 1980s, Professor Paul Carrington (then the Reporter for the Advisory Committee) proposed revisiting Rule 48 initially in the hopes of *returning* to the twelve person jury. But, upon finding little support in the Advisory Committee for that position, Professor Carrington thought it appropriate to revise the text to reflect the practice of empaneling smaller juries.[24] Thereafter, the Advisory Committee proposed a rule change to authorize judicial selection of a smaller civil jury; the comment explained that the older rule was rendered "obsolete,"[25] an inventive euphemism to capture the point that the national rule was disobeyed at the local level. Hence, in 1991, about twenty years after the change in practice, the Supreme Court promulgated an amended Federal Rule 48 to state that a court "shall seat a jury of not fewer than six and not more than twelve."[26] Today, federal civil juries across the United States routinely consist of fewer than twelve persons.[27] I provide an overview of the evolution of this rule

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23. *See supra* note 22, and Arnold, *Jury of Twelve*, *supra* note 16, at 27-28. By 1989, four more districts had enacted such local rules, so that eighty-eight districts authorized smaller juries. Telephone Conversation with David Williams, Administrative Office of the United States Courts (Feb. 28, 1997).

In terms of the size of juries in states, see J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1490-91 (1996) (describing eight states that have juries of less than twelve in certain kinds of felony cases and, in contrast, "fewer than fifteen" states that have civil juries of twelve "without exception"; also reporting a recommendation to reduce jury size in certain criminal cases in California).

24. Telephone Conversation with Paul Carrington of Duke Law School (Feb. 24, 1997). *See also* Carrington, *The Seventh Amendment*, *supra* note 19, at 52-53 (because the then-text of Rule 48 "is rendered meaningless . . . it is now necessary to revise the rule, lest it mislead parties and counsel in light of the reality established by the local rules").

25. *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 127 F.R.D. 237, 357 (1989), FED R. CIV. P. 48 advisory committee's notes.

26. FED. R. CIV. P. 48; *see* Amendments to Federal Rules of Civil Procedure, 134 F.R.D. 525, 545 (1991).

27. Once again, statements in rules and the actual practice diverge. Many local rules speak of six person juries. Yet case law from litigants seeking reversals on the grounds that the wrong number of jurors deliberated demonstrates that, regardless

change in Chart I.

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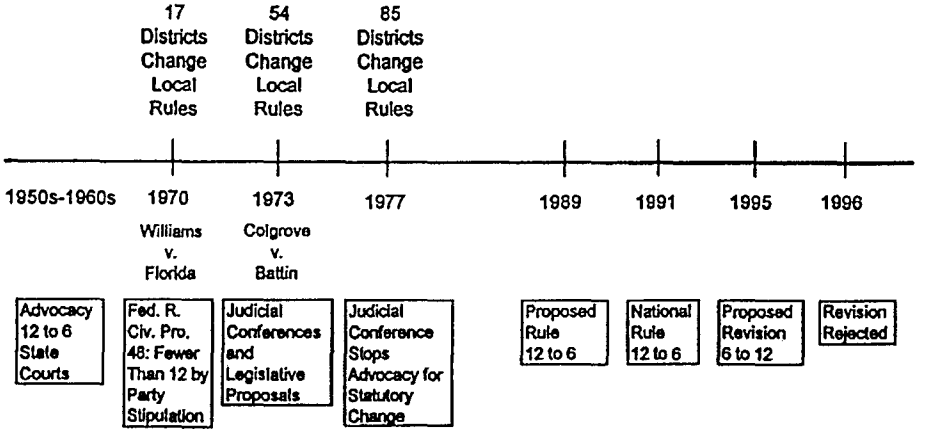
of mandates of six or twelve, some district judges sent more than six jurors and fewer than twelve to deliberate. For example, the Fifth Circuit concluded in one case that, if a judge "convert[s]" alternate jurors to "regular voting jurors before" discharging the jury to deliberate, the acceptance of a verdict from the larger jury (there, a jury of eight) was not reversible error, absent a party's objections at the time. Rideau v. Parkem Indus. Servs., Inc., 917 F.2d 892, 895 (5th Cir. 1990). The Fourth Circuit developed a rule that no more than six jurors could retire to deliberate (*see* Kuykendall v. Southern Ry., 652 F.2d 391, 392 (4th Cir. 1981), while the Sixth Circuit concluded that permitting a larger number to deliberate did not constitute reversible error. Hanson v. Parkside Surgery Ctr., 872 F.2d 745 (6th Cir.), *cert. denied sub nom.*, Hanson v. Arrowsmith, 493 U.S. 944 (1989). *See also* E.E.O.C. v. Delaware Dep't of Health & Social Servs., 865 F.2d 1408, 1420-21 (3d Cir. 1989) (noting that a seven person jury, comprised of six jurors plus one alternate deliberating, was not a "problem" when parties did not object); UNR Industries, Inc. v. Continental Ins. Co., 682 F. Supp. 1434, 1446-47 (N.D. Ill. 1988) (rejecting a challenge to an eight person jury consisting of six jurors and two alternates)).

Such anecdotal evidence can only be supplemented in part. According to John K. Rabiej of the Administrative Office of the United States Courts, when the Advisory Committee was considering the proposed change, it sought to obtain comprehensive data but learned that such information could not be collected nationwide from the current data base. Telephone Conversation with John K. Rabiej, Administrative Office of the United States Courts (Feb. 17, 1997). Thereafter, David Williams of the Administrative Office did a survey for the Committee; he reviewed monthly juror utilization forms returned periodically from different districts. *See* Monthly Petit Juror Usage, JS 11, Rev. 10/90 (on file with author). When filled out by the districts, some but not all of these forms distinguish between civil and criminal juries. Some note use of alternatives, but many do not. The form does not request information on the number of jurors sitting at the time of verdict. Within these constraints, Mr. Williams concluded that, in 1994, eight person civil juries were utilized most frequently in the federal courts, followed by seven, twelve, and nine person juries, and relatively infrequently, six person juries. Interview of Alys Brehio with David Williams, Administrative Office of United States Courts (Feb. 28, 1997).

Given the practice of varying numbers of jurors, the Advisory Committee argued that its proposal was less transformative than would be a leap from six to twelve jurors: "[t]hroughout the United States today the district courts are seating 8 and 10 person juries for any other than the most routine civil matters." *Proposed Rules*, *supra* note 6, at 136. At the NYU/FJC Jury Conference, *supra* note 5, many district judges also commented that they rarely used six person juries and that the debate was not fairly cast as six versus twelve but more accurately should be understood as nine versus twelve.

For a local rule detailing a district judge's options on the number of jurors, see the current rule in the United States District Court for the District of South Carolina, Local Civil Rule 48.01 (1997) (providing that civil cases may be submitted to either a jury of six or twelve, "at the discretion of the presiding Judge. However, if the parties agree to waive a six (6) person jury with one or more alternate jurors and proceed to trial with an eight (8) person jury with no alternate jurors, the Court may allow them to do so." Further, if any of the eight leave, the court may take a verdict as long as at least six remain).

Chart 1
Twelve to Six Person Juries



From this background, move forward once again to December of 1996, and consider the exchange between Judge Higginbotham and the federal district court judges. With the skill of a well-practiced trial lawyer, Judge Higginbotham made an impassioned plea for the twelve person jury. For him, trial courts were the "heart" of the federal judiciary, and jury trials one of the most important activities of the trial court.[28] He argued that a return to twelve persons helped the quality of deliberations and the consistency of verdicts.[29] He pointed out that a twelve person jury also enhanced the opportunity for a diverse group of citizens to participate in and be educated by the jury—all of which, in his view, improved the fairness and the legitimacy of the jury and outweighed what he considered to be the negligible savings in cost and time achieved by a smaller jury.[30]

But despite my appreciation for the skills of the advocate,

28. Judge Patrick E. Higginbotham, Oral Presentation, at NYU/FJC Jury Conference, *supra* note 5 and accompanying text.

29. *Id.*

30. *Id.*; *see also* Memorandum from Patrick E. Higginbotham to Members of the Advisory Committee on Civil Rules, re Six-Person versus Twelve-Person Juries (Oct. 12, 1994) (on file with author).

most of his audience of 45 district trial judges were unmoved.[31] Rather, these federal trial judges insisted on how *normal* a jury of six to nine people was; more were rarely needed. Many trial judges reported positive experiences with smaller juries and believed them to be "economical and expeditious."[32] Moreover, these district judges bridled at the prospect of a *mandatory* twelve person jury; they decidedly preferred the flexibility and discretion that inhered in the current rule. Judge Higginbotham did succeed in one respect. In conversation afterwards with a few relatively new trial judges, I learned that, prior to Judge Higginbotham's speech, they had not realized that they had the discretion to have a jury "as large as twelve;" some reported they might well "try" a jury of twelve.

Thus, within twenty-five years, a rule and practice had changed so completely that a generation of "new" judges assumed it ordinary to have juries of less than twelve and thought it odd for someone to insist that twelve was a number not only to be preferred but to be mandated. The district judges' views were sufficiently powerful within the Judicial Conference[33] to cause that body to reject a proposal by the Standing Committee on Civil Rules to return to the twelve person jury.[34] The avalanche of protest from federal district judges—a kind of rebellion against *their own judicial* rulemakers—resulted in the refusal to transmit a proposed rule change.[35]

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31. Judge John Keenan, of the United States District Court for the Southern District of New York, was assigned the task of presenting the arguments on behalf of a smaller jury and representing the district judges' views. NYU/FJC Jury Conference, *supra* note 5.

32. Rule 48, Prepublication Comments, materials provided to the *NYU/FJC Jury Conference*, *supra* note 5, at 21 (on file with author).

33. Bruce D. Brown, *Judges Kill Plan to Require 12 on Jury*, LEGAL TIMES, Sept. 30, 1996 at 12 (a spokesperson for the judiciary cited district court opposition to the proposal); Henry J. Reske, *The Verdict of Most States and the Judicial Conference is . . . Smaller Juries are More Efficient*, 82 A.B.A. J. 24 (Dec. 1996).

34. In June of 1996, the Standing Committee on the Rules of Practice and Procedure of the United States Judicial Conference voted, 9-2, in favor of the proposed amendment to Rule 48. *Report of the Proceedings of the Judicial Conference of the United States* at 70 (Sept. 17, 1996).

35. *See* Brown, *supra* note 33, at 12 (describing comments about district court opposition). *See also* materials provided for the NYU/FJC Jury Conference, *supra* note 5, at Tab "Jury Size and Unanimity" including excerpt from Report of the Judicial Conference, Committee on Rules of Practice and Procedure, Agenda F-18, Rules Sept. 1996 (including prepublication comments on proposed amendments to Rule 48,

B. Initial Lessons

The civil jury practices provide a first occasion from which to look at the processes of rule change. Note the trajectory: First, the practice relating to the size of civil juries changed at the *local level*, initially coming from state court practice and then moving to federal district civil practice. Thereafter, the United States Supreme Court countenanced—indeed, endorsed—both the state and federal practices and found them permissible under federal constitutional and statutory law.[36]

Second, local federal rule changes both *predated the national rule* and were *at variance with* the governing federal rule.[37] Third, the national rule—Rule 48—followed *long after the practice* and codified what was already deeply in place. National

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many of them negative and from district court judges and noting that the Judicial Conference Committee on Court Administration and Case Management opposed the amendment, in letters written on December 21, 1994, and March 20, 1996, and provided to the Judicial Conference).

36. As noted earlier, national signals of support were forthcoming from Chief Justice Burger and the Judicial Conference. *See supra* notes 16-17 and accompanying text. Further, the Court's case law also provided enthusiastic support for a smaller jury—explained in part by its effort to cushion the impact of the application of the Sixth Amendment to the states.

For example, in *Williams v. Florida*, the Court (per Justice White) argued against "codifying" a twelve-person jury as a constitutional requirement by claiming that it was a "feature so incidental" to the Sixth Amendment that only ascribing "a blind formalism to the Framers" could support its constitutional imposition. 399 U.S. 78, 103 (1970). Justice White cited Justice Harlan's earlier dissent, in *Duncan v. Louisiana*, in which Harlan—arguing against incorporation of the obligation of a jury trial on the states—noted that the federal rule of twelve is not fundamental, but rather that the number was "wholly without significance 'except to mystics.'" *Williams*, 399 U.S. at 102, quoting *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Harlan, J., dissenting). Justice Harlan, in turn in *Williams*, protested that, because of the incorporation doctrine he had argued against in *Duncan*, the Court would permit "diluting constitutional protections within the federal system" including a twelve person criminal jury. *Williams*, 399 U.S. at 117-119 (Harlan, J., concurring and dissenting).

37. Here the dissenters in *Colgrove* clearly have it right that the local rules and the national rule did not "mesh." Colgrove v. Battin, 413 U.S. 149, 165 (Douglas, J., dissenting). The national rule stated that parties could "stipulate" to juries of less than twelve whereas the local rule at issue mandated juries of six. In short, the local rules violated the national rule. Paul Carrington has observed that, given the ruling in *Colgrove*, the "sky seemed to be the limit" on local deviation from national rules. Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J., 929, 951 (1996) [hereinafter Carrington, *Disunionism*].

rulemaking was *not* the beginning of change, but the announcement of a change that had already occurred. While at the formal level, the change was complete within about twenty years (measured from the time of introduction in the early 1970s to the enactment of the national federal rule in 1991), local practice had been revised more rapidly.

Fourth, and related to the roots of the change at the local level, the revision had great support from *trial judges*, who promoted the concept of a smaller jury, persuaded the bar, and then implemented the change. For example, when proponent Edward Devitt (then Chief Judge of the federal district court in Minnesota) described his local rule on six person juries, he explained how the change was negotiated by the bench with the bar. In his words, "[i]n the interest of securing the cooperation of the members of the Bar in accepting the Rule graciously and assisting in making its purposes effective," the change had initially a limited application.[38]

Fifth, the change enhanced the *discretion* of trial judges, who in this instance took authority away from litigants (or more accurately, their lawyers) to decide on the number of jurors.[39] As judges at the 1996 NYU/FJC Jury Conference explained, they have varied practices on the number of jurors routinely empaneled. Few reported selecting only six, and more said that they

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38. Devitt, *supra* note 10, at 274-75 ("the Rule was made applicable only to those cases where jurisdiction was also obtainable in the state courts. Hence it was limited to Diversity, FELA, and Jones Act cases with the thought that if the Rule in its limited form was effective and withstood challenge, if any, it later would be extended to federal jurisdiction cases as well"). According to Judge Devitt, the State of Minnesota adopted a rule providing for six person juries after Williams v. Florida was decided in 1970. *See Hearings on a Six Person Jury*, *supra* note 21, at 31; *see* MINN. STAT. ANN. § 593.01 (June 8, 1971). The prior rule had defined a jury to be a "body of 12 men or women, or both" but was replaced with the definition of a "body of six persons." Historical Note to MINN. STAT. ANN. § 593.01 (1988). In 1988, the Minnesota Constitution was amended; it now states that "[t]he legislature may provide for the number of jurors in a civil action or proceeding, provided that a jury have at least six members." MINN. CONST. art. I, § 4. Thereafter, the Minnesota statute was repealed by 1990 MINN. LAWS 1990, ch. 553, § 15 (Rule 48 of the Minnesota Rules of Civil Procedure continues to provide that "parties may stipulate that the jury shall consist of any number less than twelve . . . .").

39. We lack definitive empiricism to tell us how that discretion is exercised in practice, how many juries of what kinds are populated by what number of jurors, both at the time of commencement of a trial and at its completion. *See supra* note 27 and accompanying text.

often picked eight or nine jurors. An obvious utility of using more than six is permitting attrition without a mistrial.[40] Trial judges liked this flexibility and objected strongly to a mandated number of jurors, and, more specifically, twelve. As Professors Stephen Subrin and Stephen Burbank have taught us,[41] a basic feature of the twentieth century rule reform in the United States has been the growth of judicial discretion; specifically, discretionary practices more commonly associated with equity were imported by the federal rules into law and have become routine across the federal docket. Here we see an example of that increase in judicial discretion.[42]

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40. The system of empaneling alternate jurors on the civil side changed when judges gained the flexibility of determining the number of jurors. In 1989, when proposing to authorize smaller juries, the Advisory Committee proposed the elimination of the practice of empaneling alternative jurors. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate and Federal Rules of Civil Procedure*, *supra* note 25, at 355-357. At the time, Rule 47 had provided that judges could empanel no more than six additional jurors who would sit and then, prior to deliberations, be excused if not needed. *Id.* The Advisory Committee noted "dissatisfaction" with the "burden . . . on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation." *Id.* at 356. Further, if judges attempted to include the alternates, they risked reversal. Some circuits held that, absent parties' consent on the record, judges who permitted alternate jurors to deliberate commit reversal error. *See, e.g.*, Cabral v. Sullivan, 961 F.2d 998 (1st Cir. 1992) (ordering a new trial when a district judge permitted four alternates to deliberate with six jurors). *See also supra* note 27.

The 1995 proposals to return the jury to the larger size were not accompanied by a return to alternates; rather, proposed Rule 48 provided that the court seat twelve jurors, that all participate "unless excused," that absent party stipulation, verdicts be unanimous, and that no verdict be taken from fewer than six jurors. *Proposed Rules*, *supra* note 6, at 147. The alternate juror system remains on the criminal side. *See* FED. R. CRIM. P. 24(c). Data remain unavailable nationwide on the number of jurors empaneled as contrasted with those sitting at verdict. Further, to my knowledge, no research has been done on whether the willingness to excuse jurors has been altered since the rule changes. *See supra* note 27 and accompanying text.

41. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin, *How Equity Conquered*]; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993) [hereinafter Burbank, *Ignorance and Procedural Law Reform*].

42. The rejection of a proposed lawyer voir dire of jurors is consistent with this aspect of the trajectory of judicial control rather than of lawyer/litigant control. *See Proposed Rules*, *supra* note 26, at 129, 145 (Advisory Committee recommendation that Rule 47, on the selection of jurors, be modified so that, after a judge-conducted voir dire, the "court shall also permit the parties to orally examine the prospective

The sixth point is about the *role of Congress*, which stayed away from making changes. Presumably, the popular base of juries[43] made it politically unpopular to press for legislation cutting their size. Some members of Congress evidently also thought it unwise.[44] This example of the size of the civil jury provides no evidence of Congress as adventurously championing efforts to alter civil practice in a dramatic fashion. Rather, Congress appears to have been a conservative spectator.[45]

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jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion."). While an FJC study determined that, in practice, about sixty percent of the federal judiciary permits such lawyer involvement, judges opposed mandating that practice. *See* Marcia Coyle, *Rules Would Expand Voir Dire, Civil Jury Size*, 18 NAT'L L.J., Mar. 11, 1996, at A12. The opposition resulted in the withdrawal of the proposed amendment and instead on educational efforts to encourage judges to permit attorney voir dire. *See* Draft Minutes of the Civil Rules Committee, Apr. 18-19, 1996, at 5 (on file with author).

43. While criticism of the jury is longstanding, so is support for it. *See, e.g.*, THE AMERICAN JURY SYSTEM, FINAL REPORT OF THE ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, June 24-25 (Roscoe Pound Foundation, 1977); VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993).

44. Judge Arnold mentioned "congressional misgivings" in discussing the absence of legislation to decrease jury size. Arnold, *Jury of Twelve*, *supra* note 16, at 27. Specifically, both Representatives Kastenmeier and Drinan expressed skepticism about the wisdom of the reduction. During the questioning, Representative Kastenmeier asked about opposition to the change stemming from litigants concerned about the "quality of justice," and about whether a change in the civil jury was a "foot in the door for the reduction in size of criminal juries." *Hearings on a Six Person Jury*, *supra* note 21, at 29, 32. Representative Drinan stated that, given the 5-4 decision in *Colgrove*, he did not believe that the matter was "settled." *Id.* at 30. Furthermore, in his view, federal judges had exceeded their authority by local rulemaking beyond the parameters of Rule 48 and the Rules Enabling Act. *Id.* at 36. Drinan also raised the possibility of some kind of "compromise" in which certain kinds of cases, such as those involving civil rights, would be exempt from the smaller jury provisions. *Id.* at 139.

45. When testifying in opposition to the then-pending legislation, Professor Zeisel called upon the committee to make "the 12-man jury obligatory in Federal courts." *Hearings on a Six Person Jury*, *supra* note 21, at 163. Kastenmeier demurred, explaining that he had not received reports of injustice. In an exchange with Representative Drinan, Professor Zeisel discussed the politics, that in his view, the *Colgrove* case was one in which the defendant insurance company wanted the larger jury, and that, plaintiffs' lawyers "almost by a political decision" had not complained. Given his view that a smaller jury was a more erratic jury, he thought that plaintiffs' attorneys might well have a preference for it. *Id.* at 164.

It is not clear whether views of the size of the jury during the 1970s corresponded to one's position in the bar as a "defense" or "plaintiff" attorney. According to the lower court opinion in *Colgrove*, both plaintiff and defendant protested District

Seventh, the grounds for change were *economy and efficiency: speed and ease*. More than two decades ago, proponents argued on behalf of a "six man" jury in words familiar today. As Judge Devitt put it, the change would "improve[] efficiency at less cost without sacrifice of legal rights."[46] Hans Zeisel, a critic, put it more bluntly: that the two arguments in favor of a reduction in size were "save money and . . . save time."[47]

Eighth, once the change was made, the new approach became *hard to revise*, even when its underpinnings were questioned from several directions; for many, the change was a "terrible blunder."[48] One ground for objection to the central premise of the 1970s Supreme Court rulings is familiar. Made then and now is the argument that courts err when they conclude that twelve versus six jurors makes no difference in the outcome; social scientists instruct us that jury size matters.[49] A second

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Judge Battin's decision to empanel a six person jury; the plaintiff filed the mandamus action and was then joined by the defendant. Colgrove v. Battin, 456 F.2d 1379, 1380 (9th Cir. 1972).

46. Devitt, *supra* note 10, at 273 (speaking at the Eighth Circuit Judicial Conference in June of 1971). *See also* Tamm, *Five-Man Civil Jury*, *supra* note 7, at 141 ("Modern conditions, i.e., ever increasing congestion and delay in the federal courts, mounting costs—monetary and social—of the jury system necessitate its serious reform in the interest of efficiency and economy if the jury system is to survive.").

47. *Hearings on a Six Person Jury*, *supra* note 21, at 167. His response was that the "time argument is absolutely wrong and the money argument is quite clear." *Id.*

48. Conversation with John Frank, Feb. 24, 1997. *See generally* Arnold, *Jury of Twelve*, *supra* note 16, at 32-35. See also the debates within the ABA, *supra* note 21.

49. Hans Zeisel, *supra* note 10, at 715-24, was one of the first to attempt to correct the Supreme Court's interpretation of social science data. *See also* ROBERT J. MACCOUN, GETTING INSIDE THE BLACK BOX: TOWARD A BETTER UNDERSTANDING OF CIVIL JURY BEHAVIOR (ICJ, Dec. 1987); Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263 (1996).

Professor Shari Diamond of the American Bar Foundation and the University of Illinois pointed out to me that the "frequency and magnitude of differences due to size are likely to be modest—although certainly important." Given the small number of cases that individual judges see tried to verdict, trial judges are unlikely to attribute surprising verdicts to size; "it is only be a systematic study of multiple cases (or a large scale simulation) that we can detect real and important, although not huge effects." Hence, judges may be comfortable accepting "the apparent efficiencies" (ranging from selection time to reduced interruptions due to personal needs of individual jurors) associated with smaller juries and not perceive them "as purchased at the price of less dependable jury verdicts." Letter from Shari Diamond to Judith Resnik (May 15, 1997) (on file with author).

argument is new and it is about the effect of size on the diversity of members within a jury. As Judge Higginbotham and others have explained, between 1970 and 1990, aspirations for participation on the jury changed. Juries shrunk in size as the jury pool was opened by Supreme Court doctrine[50] to include a wider range of individuals and as the Court revised its doctrine on peremptory challenges to ban those based in race and gender.[51] Noting with poignancy this temporal sequence, Judge Higginbotham argued that, given contemporary concerns about inclusivity, whatever the accuracy of the 1970s cost/benefit analysis, it should be recalculated to reflect current views on the importance of diversity on the jury.[52] But these substantive, specific arguments against the six person jury were trumped by two general positions: that trial court *discretion* was the desirable means to achieve the desired goal of judicial *economy*.

III. A SECOND ILLUSTRATION: THE CIVIL JUSTICE REFORM ACT

Turn now from the change in the size of a civil jury, a change that is discrete, specific, and small in terms of the scope of its application[53] compared with that of the CJRA,[54] legisla-

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50. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975); Batson v. Kentucky, 476 U.S. 79 (1986); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); J.E.B. v. Alabama, 511 U.S. 127 (1994). *See generally* Nancy Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995).

51. *See also Proposed Rules*, *supra* note 6.

52. *Id.* (arguing that a "12 person jury . . . works an exponential increase in its ability to reflect the interests of minorities. . . . Reducing the size from 12 to 6 plainly deals a heavier blow to the representativeness of the civil jury than any bigoted exercise of preemptory challenges."). Albert Alschuler and Andrew Deiss note that, "as the jury's composition became more democratic, its role in American civil life declined." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 868 (1994).

53. The change in the number of jurors affects a small fraction of all federal litigation; over the past decades, civil jury trials in the federal courts represent under 10 percent of the annual dispositions. For example, in 1971, when the number of jurors was being reduced in federal courts by local rulemaking, a trial was commenced in 7950 of the civil cases, of which 3,347 were jury trials and 4,603 were non-jury trials; in contrast, the federal courts disposed of 85,638 cases; thus 9.3 percent of the civil caseload reached trial. 1971 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C-4 at 280.

In 1995, a trial was commenced in 7,443 of the civil cases (4,126 of which were jury trials and 3,317 were non-jury trials). The district courts disposed of a

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Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity

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ANALYTICAL AND AGGREGATION BIASES IN ANALYSES OF IMPRISONMENT: RECONCILING DISCREPANCIES IN STUDIES OF RACIAL DISPARITY

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The literature on racial disparities in criminal justice processing is unclear about whether Black defendants are treated differently from White defendants. Although some studies find no difference in treatment, others report that Blacks are treated significantly more harshly than Whites; still other studies find that Black defendants are treated more leniently. This analysis examines three methodological procedures: (1) the selection of single or multiple points in the criminal justice system for study, (2) the number of jurisdictions included in studies, and (3) the level of aggregation of jurisdictions used in studies of racial disparities. The authors conclude that some of the ambiguity reported in this literature can be traced to studies of single or few jurisdictions, single decision points in criminal justice processing, and to inappropriate aggregation.

The presence, pervasiveness, and causes of racial discrimination in the criminal justice system are subjects of continuing controversy. Prompted by disproportionately large populations of Black prisoners in state and federal correctional facilities, scholars continue to debate the causes of the disproportionality and, specifically, the factors contributing to Black imprisonment rates. Some attribute high Black imprisonment rates to differences in the legal system's treatment of White and Black defendants. Reasoning that law enforcement officials and courts punish Blacks and other minorities accused of crime more severely than Whites, these scholars explain disproportionality in terms of racial discrimination. Others, however, reject the idea that the legal system discriminates against racial minorities. Arguing that courts impose punishments mainly in relation to the seriousness of offenses, they explain disproportionality primarily in terms of racial differences in crime.

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They reason that courts imprison Blacks at higher rates because Blacks are more heavily involved in serious and violent offenses.

Within criminology, the latter view is perhaps more widely held. Criminologists and legal scholars from quite divergent orientations, from Wilbanks (1987) to Wilson (1987), conclude that racial differences in levels of criminal behavior explain disproportionately high rates of Black imprisonment. In drawing this conclusion, most typically cite research by Blumstein (1982), a replication and extension of Blumstein's work (Langan 1985), or complementary evidence on sentencing offered in reviews of the sentencing literature (e.g., Hagan 1974; Kleck 1981) for empirical support. Among these, however, Blumstein's work is one of the most prominent and frequently cited. In reporting that minority involvement in arrests for serious and violent crimes explains 80% of racial disproportionality in U.S. imprisonment rates, Blumstein (1982) concludes that "racial differences in arrests alone account for the bulk of racial differences in incarceration" (p. 1268). Further, Blumstein dismisses the need to remedy discrimination in the legal process based on these findings, reasoning that

> attacking discrimination in the criminal justice system to redress disproportionality is not likely to have the desired effect on prison populations. Any significant impact on the racial mix in our prisons will have to come from addressing the factors in our society that generate the life conditions that contribute to the different involvement between the races in serious person crimes. (p. 1281)

Despite wide acceptance and citation of Blumstein's findings, periodic publication of research countering his findings and conclusions has kept alive controversy over racial discrimination in imprisonment. A growing body of evidence suggests that justice is by no means guaranteed for some groups facing criminal processing (Peterson and Hagan 1984; Myers and Talarico 1987; Bridges and Crutchfield 1988; Bridges, Crutchfield, and Simpson 1987). Unlike other writers such as Christianson (1980a, 1980b), who considers disproportionately large Black prison populations to be evidence of discrimination, this work takes into account race differentials in crime rates, particularly for violent crimes, in analyzing the factors associated with racial differences in imprisonment. These studies show empirically that racial differences in crime and arrest rates contribute substantially less to racial differences in imprisonment than Blumstein's (1982) and Langan's (1985) work suggests. For example, Bridges and Crutchfield' s (1988) multivariate analysis of state differences in imprisonment concludes that "racial differences at arrest for serious criminal behavior may be coupled with differential

treatment (of minorities) in the legal system" (p. 717). That the conclusions reached in these studies about the relationship between crime and imprisonment differ from those of Blumstein and his colleagues suggests that a deeper understanding of racial inequality in criminal processing is needed.

Increasingly, research on racial disparities in imprisonment (e.g., Petersilia 1983; Crutchfield and Bridges 1986) reveals that conventional treatments may produce false negatives (i.e., conclusions that no disparity exists when courts do treat Blacks and Whites differently). Our concern in this article is with problems created by past research, which has frequently (a) focused on single decision-making points in the criminal justice process, usually sentencing; (b) focused on single jurisdictions; or (c) used inappropriately aggregated jurisdictions. The first two problems concern the analytical focus of prior research, whereas the third concerns the level of aggregation used; both can introduce bias into studies of racial disparities in imprisonment. Kleck's (1981) frequently cited review of studies of racial differences in sentencing is a useful starting point for an analysis of these sources of bias, not only because it is thorough and inclusive, but also because it highlights problems that emerge when scholars limit their studies to single decision points and to single jurisdictions.

PROBLEMS OF STUDYING SINGLE DECISION POINTS AND SINGLE JURISDICTIONS

One of the most comprehensive reviews of research on racial disparities in sentencing is Kleck's (1981) article summarizing 40 studies published between 1935 and 1979. In 28 of these studies, the authors examined a single jurisdiction, in some cases a city, in others a county, and in others a single state.[1] Of the 28 studies, 14 reported no evidence of racial discrimination (6 found evidence of discrimination and 8 reported mixed results). Among the 11 studies of two or more jurisdictions, 5 reported no evidence of discrimination, 2 reported discrimination, and 4 found mixed results. Presumably, the mixed results are indicative of some differential treatment under some circumstances based on the race of defendants. Two conclusions emerge from these results. First, although a plurality of the studies report no discrimination (19 of 40), there is insufficient evidence to dismiss altogether the possible existence of racial bias in sentencing. Second, most of the studies that report no evidence of discrimination focused on single jurisdictions.

Recently, Crutchfield and Bridges (1986), Kempf, Decker, and Bing (1990), and Bridges (1993) have shown that minorities and Whites experience significantly different patterns of treatment by courts and law enforce-

ment agencies at different points in the processing of criminal cases. Within any single jurisdiction, racial differences in treatment may be pronounced at one stage (e.g., filing of charges or pretrial diversion) and small at another (e.g., conviction and sentencing). Further, the points at which differential treatment occurs actually varies across jurisdictions. Disparate treatment might occur at sentencing in one county or state, whereas elsewhere it might occur at the filing of criminal charges. Because convicted and sentenced defendants are a biased subsample of those initially at risk of punishment, and thus a subsample of those who may experience differential treatment in processing, it is necessary to correct for this sample selection bias in comparing Black and White differences in treatment in sentencing (Peterson and Hagan 1984; Crutchfield and Bridges 1986; Bridges 1993). Thus studies focusing solely on single points of decision making in criminal justice, or those that overlook the sample selection problem in studying sentencing, should not be generalized beyond those points in the system to jurisdictions dissimilar from those studied. All of the studies examined by Kleck suffer these limitations.

The second concern with Kleck's (1981) review is the matter of single jurisdictions. If differential treatment occurs at different points in the legal process in different jurisdictions, then studies of sentencing, particularly sentencing in one jurisdiction, may find no evidence of discrimination, when in fact it does exist. Conversely, researchers might find evidence of discriminatory treatment if it happens to occur at sentencing in the jurisdiction that they select as their research site. The conflicting findings on racial discrimination in sentencing may have emerged largely from many criminologists' failure to appreciate the complexity of this issue. At the same time, faulting this research as inadequate would be unfair. In some instances, examination of racial differences in treatment at single sites, and even at single decision points, may be the best strategy when, for example, detailed examination of case files is the objective. A thorough understanding of this issue requires, however, that we consider the larger body of evidence on the subject and, in drawing conclusions about the pervasiveness of racial discrimination in the legal process, make adjustments for the number of jurisdictions and decision points examined in the research.

PROBLEMS OF AGGREGATION

An alternate method, which scholars have used to address these jurisdictional issues, is to employ social aggregates in examining the criminal justice process. As mentioned above, Blumstein (1982) and Langan (1985) use

statistics generated for the United States and conclude that little racial discrimination exists in criminal justice in the United States. Our concern with the work of Blumstein and Langan is their aggregation of prison statistics for the entire United States. This would not be problematic if they were studying federal courts, where one could argue that one system of criminal justice exists. At another level, however, the 50 states are 50 different legal and justice systems. To consolidate them is to mask important differences in procedure, law, history, and a host of other factors relevant to criminal justice processing and race relations.

Although our concerns about focusing on single points in the legal process and single jurisdictions can be made clear using the extant literature, illustrating the problem of inappropriate aggregation is best done with data. In the remainder of this article, we present partial replications of Blumstein (1982) and Langan (1985). The analysis builds on and significantly extends the work of Christianson (1980a, 1980b) in examining state-level differences in imprisonment rates. The Langan replication is less consistent with the original than is the Blumstein replication, but we believe that in both instances our analyses will reveal the major limitations of their work. The limitations suggest that their conclusions about racial discrimination in criminal justice are unwarranted.

THE STUDY

State-level data were collected from published sources on (a) race-specific trends in imprisonment and measures of racial disparity in imprisonment and (b) race-specific arrests for violent crimes and measures of racial disparity in arrest. These measures are comparable to the measures employed by Blumstein (1982). Although more recent data could have been employed in the analysis, these were used to ensure a high degree of comparability with those used by Blumstein. Further, it is unlikely that analyses of more recent data would yield significantly different findings or conclusions about the aggregate structure of racial disparities in imprisonment.

Imprisonment

We collected data on the racial composition of state prisons as of December 31, 1982, using the published census of state prisons sponsored by the U.S. Department of Justice (1982). Black-White imprisonment disparity was computed in a manner that reflects the comparative odds of imprisonment for the two groups. Consistent with Blumstein (1982), imprisonment rates were

computed by (a) dividing the number of Blacks housed in state correctional institutions as of December 31, 1982 by the number of Blacks in each state's total population; (b) repeating the procedure for Whites; and (c) multiplying each rate by 10,000.[2] The measure of racial disparity in imprisonment in each state was computed as the overall ratio of the Black imprisonment rate to the White imprisonment rate.

Arrests for Violent Crimes

Data were also collected from the F.B.I.'s *Uniform Crime Reports* (UCR). State-by-state data were collected on crime and arrest rates. Race-specific data were collected on arrests for serious and violent crimes (i.e., F.B.I. Part I crimes) to determine whether disparities in imprisonment are strongly associated with disparities at arrest.[3] The measure of racial disparity in arrest in each state was computed as the overall ratio of the Black arrest rate for violent offenses to the White arrest rate for violent offenses. We chose to focus on arrests for violent crimes, as did Blumstein (1982), because (a) disparities in imprisonment are most frequently attributed to disproportionate minority involvement in violent crime (Hindelang 1978; Blumstein 1982) and (b) violent offenders currently are more than 50% of all persons housed in state correctional institutions.

RESULTS

The analyses initially examined the geographic variation in Black and White rates of imprisonment and the rankings of the states for each of these rates. The results were comparable to those reported by Christianson (1980a) except that ours were based on males and females, rates for Whites were included, arrest rates for violent crimes were included, and data included information from 1982, whereas Christianson's analysis was based on data from 1978. Christianson (1980a) uses rates such as these to make the case that America's prisons are disproportionately Black. Our analyses revealed that White rates of imprisonment tend to be high in southern states whereas Black imprisonment rates are relatively low. In contrast, Black imprisonment rates in some north central states are high whereas the White imprisonment rates are quite low.

Few would question that Blacks are overrepresented in prisons, but the critical question for criminologists is "why?" Some scholars consider the percentage of Black in state populations to be the expected level of imprisonment for Blacks. Thus, if 10% of a state's population was Black, it might

be reasonable to expect that a state's prison population would also be 10% Black. If the percentage of the prison population that was Black was significantly larger than 10%, then some might conclude that there is evidence of racial discrimination. To justify this procedure, however, one must assume that levels of crime and arrest are essentially equal for Blacks and Whites. Other research (e.g., Hindelang 1978) has shown, however, that this is not an empirically defensible assumption. Our analyses of Black and White arrest rates clearly show that arrest rates are higher for Blacks in every state (except New Hampshire where the rates for Blacks are small and unstable) than they are for Whites.

The Black proportion of the prison population is larger than the Black proportion of the total population. Although some scholars (e.g., Christianson 1980a) conclude that the differences between the percentages are a direct reflection of discrimination, this conclusion ignores the most prominent explanation for racial disproportionality in imprisonment (i.e., that Blacks are overrepresented in prison because of higher arrest rates for those crimes most likely to result in prison sentences). Of course, it is possible to argue that Black arrest rates are simply indicative of discriminatory police practices, or that they are produced by pervasive racism in the society that leads to higher levels of crime among Blacks.

In many states, the Black and White rates of imprisonment vary together. In many others, however, the two rates diverge. When considering these rates, Christianson's conception of expected incarceration would suggest that those states with low Black incarceration rates are less discriminatory in criminal justice processing and those with high rates are more discriminatory. But if a state also has a high White incarceration rate in addition to a high Black imprisonment rate, its treatment of Blacks may not be unfair; all persons may be equally exposed to unusually severe sanctions. Similarly, a low incarceration rate does not mean fairness in processing either. Alaska has the lowest Black imprisonment rate, but it may be inflated by discriminatory practices if the crime rates among Blacks in Alaska are inordinately low.

Blumstein's (1982) and Langan's (1985) analyses correct for the failure of previous studies to consider racial differentials in criminal involvement in analyses of imprisonment disparity. Instead of using the Black percentage of the population to determine the expected Black imprisonment rate, Blumstein uses the Black arrest rate for violent crimes. Langan uses the results of the National Crime Survey (NCS) to measure differential involvement as reported by victims of crime. Racial disproportionality in imprisonment as defined by Blumstein includes a comparison of Black and White incarceration rates and a similar comparison of Black and White violent crime arrest rates. Further, Blumstein uses the following equation to define the amount of

racial disproportionality in imprisonment that is accounted for by disproportionality in arrest:

$$\text{Disproportionality explained by crime} = \frac{\text{Ratio of expected Black-to-White incarceration rates based only on arrest disproportionality}}{\text{Ratio of Black-to-White incarceration rates actually observed}}$$

Using 1974 and 1979 arrest and imprisonment rates for the United States, Blumstein found that disproportionality = 80.0%. He concludes that 80% of racial disproportionality in American prisons can be accounted for by the legally relevant factor of higher rates among Blacks of arrest for violent crimes. He suggests that the 20% of racial disparity that could not be accounted for by arrest rates might be produced by extralegal considerations that should not be a part of American criminal justice decision making. Langan's (1985) comparable analysis yielded similar results.

In our replication using 1982 rates, disproportionality explained by arrest = 89.5%. Following Blumstein, one could conclude that America made remarkable progress in reducing "unwarranted" disparities in recent years. The problem with Blumstein's computation, our comparable computation using 1982 data, and Langan's analysis based on NCS data is that by aggregating state data and using rates for the United States, large regional and state variations are masked, leading to the unwarranted conclusion that racial disparities in imprisonment are caused almost completely by disproportionately high Black crime and arrest rates.

Two examples should illustrate the problems introduced by using national aggregations in these analyses. First, Blumstein's claim that 80% of racial differences in imprisonment can be accounted for by differences in arrest may hold true in one region or state, but not in others. Second, aggregation may mask state or regional differences between imprisonment and arrest ratios that cancel each other out. For example, if one state has a Black/White arrest ratio of 6:1 and an imprisonment ratio of 10:1, one would conclude that only 60% of the Black/White imprisonment difference can be accounted for by the higher incidence of Black arrest for violent crimes. For another state, a ratio of 16:1 for arrest and a 16:1 ratio of imprisonment for violent crimes would lead to the conclusion that 100% of the racial disparity in imprisonment is accounted for by the arrest differential. When the two states are combined to create aggregate ratios, such as those developed for the United States as a whole, the comparisons are 11:1 for violence arrest rates and 13:1 for imprisonment rates.[4] Aggregating would then suggest that 85% of Black/

White differences in imprisonment is accounted for by the higher frequency with which Blacks are arrested. Although not technically incorrect, this procedure masks a substantively important finding. In one state, the imprisonment rates seem to be determined by the legally relevant determinants—who commits violent crime—but in the other state, 40% of that difference cannot be justified by this legal factor. As long as there is significant variation across states in crime rates, arrest rates, imprisonment rates, and the ratios created with them, combining states to measure the extent of racial disproportionality in imprisonment or to consider theoretical explanations for any differences is inappropriate.

Using Blumstein's (1982) procedure, we calculated ratios of expected to observed imprisonment for each state; these are presented in Table 1. The table displays ratios of Black to White imprisonment rates, ratios of Black to White arrest rates for violent crimes, and the percentage of the former that can be "accounted for" by the latter. In Table 1 the problem created by aggregating the data for states into a single ratio for the United States is graphically clear. The ranges of the Black to White imprisonment ratios and of the arrest ratios are quite large. The lowest imprisonment ratio is 2.8:1 for Alaska and the highest is 20.9:1 for Minnesota. The lowest Black to White ratio for arrest for violent crimes is New Hampshire's .5:1, whereas the highest is Minnesota's 24.3:1. The relationship between the arrest and imprisonment ratios is much weaker than expected ($r = .368$, $r^2 = .14$) given the high ratio of expected to observed imprisonment for the aggregated United States. Whereas Blumstein's and Langan's analyses suggest that little unwarranted racial disparity in imprisonment exists in the United States, our analysis suggests that in some areas, the unwarranted disparities are substantial and that the statistical relationship between arrest and imprisonment rates is quite weak.

When disaggregated data are used rather than national data, the north central states, which have the highest imprisonment disparities, seem to imprison fewer Blacks than one would expect given Black arrest rates. The northeast, on the other hand, can only account for 69% of imprisonment disparities with arrest rates, far below the nationally aggregated figure of 90%. The range between states is even greater. Nebraska imprisons approximately half as many Blacks as "expected," whereas in New Hampshire, only 15%[5] of racial disparities in imprisonment can be accounted for by arrest rate differentials between Blacks and Whites. These results clearly show that using nationally aggregated rates of arrest and imprisonment glosses over dramatic and substantively important differences.

Langan's (1985) approach is similar to that of Blumstein (1982), except that Langan used NCS data instead of data from the UCR to compute his

TABLE 1: Racial Disparities in Imprisonment, 1982 and Racial Disparities in Arrest for Violent Crimes, 1981

State/Region	*Black/White Imprisonment Disparity*	*Black/White Violent Crime Arrest Disparity*	*Percentage of Imprisonment Disparity Explained by Arrest Disparity*
National	6.80	6.09	89.50
Northeast	9.01	6.29	69.83
Maine	6.23[a]	3.62	58.09
New Hampshire	3.44[a]	.52	15.13
Massachusetts	11.59	4.58	39.55
Rhode Island	12.38	7.99	64.50
Connecticut	10.16	9.67	95.19
New York	6.13	6.37	103.99
New Jersey	10.33	7.04	68.12
Pennsylvania	12.40	13.29	107.16
North Central	9.79	11.27	115.11
Ohio	8.01	6.12	76.36
Indiana	6.29	10.27	163.33
Illinois	9.67	7.04	72.76
Michigan	9.27	9.71	104.75
Wisconsin	14.97	21.63	144.48
Minnesota	20.90	24.29	116.22
Iowa	14.63	10.08	68.87
Missouri	5.53	8.29	149.97
North Dakota	6.25[a]	7.87	126.01
South Dakota	7.46[a]	15.63	209.55
Nebraska	14.99	18.07	120.55
Kansas	9.42	7.90	83.92
South	5.08	4.49	87.58
Delaware	6.92	7.55	109.13
Maryland	8.03	5.33	66.35
Virginia	5.66	4.98	87.95
West Virginia	4.69	5.89	125.39
North Carolina	4.08	3.86	94.67
South Carolina	3.22	2.93	90.88
Georgia	3.81	4.25	111.67
Florida	5.91	4.93	83.48
Kentucky	4.94	5.12	103.61
Tennessee	4.26	3.38	79.40
Alabama	4.53	2.45	54.13
Mississippi	4.24	5.05	119.31
Arkansas	5.54	5.43	97.91
Louisiana	6.06	4.14	68.32
Oklahoma	5.07	5.61	110.76
Texas	5.06	3.24	64.00
West	6.50	5.93	91.14
Idaho	10.92[a]	5.82	53.28
Wyoming	4.34[a]	6.03	138.82
Colorado	6.39	3.98	62.28
New Mexico	5.25	8.10	154.07

(continued)

TABLE 1 Continued

State/Region	Black/White Imprisonment Disparity	Black/White Violent Crime Arrest Disparity	Percentage of Imprisonment Disparity Explained by Arrest Disparity
Arizona	7.07	5.90	83.35
Utah	14.41[a]	16.98	117.81
Nevada	4.22	7.59	179.80
Washington	9.28	3.72	40.05
Oregon	9.06	8.59	94.80
California	5.25	5.05	96.05
Alaska	2.82[a]	3.88	137.39
Hawaii	4.08[a]	4.61	112.85

a. States with less than 25 Black inmates or fewer than 25,000 Blacks in the resident population. Data are not available for Vermont or Montana.

expected imprisonment rates. Langan calculated the probability of imprisonment for White offenders by dividing the number of Whites admitted to prison (1974, 1979, and 1982 admissions census of state prisons) by the number of White offenders (from NCS reports of victims' descriptions of their assailants). The proportion of Black offenders that would be expected to go to prison, according to Langan (1985), can be computed by "multiplying the number of black offenders (from NCS reports) by the crime-specific probability of a white offender going to prison" (p. 678). In a racially neutral criminal justice system, one would expect that the proportion of White and Black offenders going to prison would be equal. This Black expected imprisonment rate, which is based on the observed White imprisonment rate, was therefore used to compare the observed Black imprisonment rates for the United States in 1973, 1979, and 1982. Langan concludes that no significant difference existed between the expected and observed Black imprisonment rates for 1973 and that 84% and 85% of the 1979 and 1982 Black imprisonment rates can be accounted for by the higher offending levels of Blacks.

We concede that the data we are using are not the same as those used by Langan, but again, as is the case with Blumstein, we can demonstrate that aggregating data across states masks important differences. First, we should note that Langan makes a convincing case for the comparability of NCS and UCR data. Second, although he used prison admissions, we are restricted to prison populations. If Blacks tend to be held longer once incarcerated than Whites, then we will, by using prison populations, paint a more negative picture than the admissions data used by Langan. Langan's analysis is more conservative if the question is whether Blacks are disproportionately admitted to prison. In contrast, our analysis is most appropriate if the question is whether Blacks are treated differentially by the criminal justice system. It is

our opinion that both issues are important, but the latter is most consistent with the questions asked by Christianson (1980a, 1980b) and Blumstein (1982).

Table 2 presents Black observed and expected imprisonment rates for the United States, four regions, and the individual states. Column 3 contains the percentage of the Black observed imprisonment rate explained by the Black expected imprisonment rate. The expected rates in this table are based on all seven of the UCR index crimes (Langan used the NCS equivalent of the index crimes). Clearly, the percentage of the national observed Black imprisonment rate that is explained by the expected rate, 66.41%, is substantially less than the approximately 84% reported by Langan. This difference is not unexpected because different data are used in this replication. The important point to be gained from this table is that, as was the case when Blumstein's analysis was disaggregated for regions and states, the national figures mask important differences. Nearly 40% of the states explain less of their observed Black imprisonment via differential Black involvement in serious crime than can be explained for the aggregated national observed Black imprisonment rate.

Table 3 duplicates Table 2 except that violent crimes (instead of all index crimes) are used to calculate expected imprisonment rates. Here the state-expected Black imprisonment rates do a better job of explaining the state-observed rates, but again, there is substantial variation in "percentage of observed Black imprisonment explained by expected" for the states. Although the aggregated national average is 89%, the states range from Hawaii's 172% to New Hampshire's 18%. About one third of the states account for less of their Black imprisonment via higher levels of violent crime arrest rates for Blacks than can be accounted for in the United States when aggregated values are used. Again, aggregating across states and focusing solely on national statistics masks important state and regional differences.

SUMMARY AND CONCLUSION

This article describes and illustrates two sources of discrepancy in studies of racial disparities in imprisonment. The first is different analytical foci of studies. Studies limited either to single decision points in the criminal justice process or to single jurisdictions are less likely to observe significant racial disparities because they may miss subtle manifestations of the disparate treatment of minorities (Crutchfield and Bridges 1986; Kempf et al. 1990; Bridges 1993). The second source is the different levels of aggregation used in research on racial discrimination in the administration of justice. Some states, and even some jurisdictions within states, deliver justice with greater

TABLE 2: Black Observed Imprisonment, 1982 and Black Expected Imprisonment (based on index arrests, 1981)

State/Region	*Black Imprisonment Observed*	*Black Imprisonment Expected*	*% of Black Observed Imprisonment Explained by Expected*[a]
National	155,924	103,552	66.41
Northeast	26,650	16,505	61.93
Maine	15	56	39.45
New Hampshire	5	1	28.81
Massachusetts	1,329	408	30.71
Rhode Island	246	145	85.89
Connecticut	2,105	1,247	59.26
New York	13,407	9,721	72.50
New Jersey	4,455	1,974	44.30
Pennsylvania	5,088	3,003	59.03
North Central	33,813	22,900	67.73
Ohio	7,229	3,866	53.47
Indiana	2,795	2,677	95.78
Illinois	8,217	5,639	68.63
Michigan	8,515	5,715	67.12
Wisconsin	1,689	950	56.26
Minnesota	421	196	46.64
Iowa	490	168	34.31
Missouri	2,974	2,791	93.83
North Dakota	2	31	42.98
South Dakota	14	11	75.54
Nebraska	533	276	51.79
Kansas	934	609	65.16
South	81,065	54,645	67.41
Delaware	1,021	792	77.57
Maryland	6,761	3,387	50.09
Virginia	5,376	3,401	63.27
West Virginia	218	180	82.66
North Carolina	8,380	7,477	89.23
South Carolina	4,972	4,238	85.24
Georgia	7,313	6,081	83.15
Florida	11,351	7,205	63.48
Kentucky	1,171	882	75.35
Tennessee	3,346	2,519	75.28
Alabama	4,718	2,883	61.11
Mississippi	2,829	2,816	99.54
Arkansas	1,632	1,292	79.19
Louisiana	6,763	3,879	57.36
Oklahoma	1,482	1,178	79.47
Texas	13,732	6,433	46.84
West	14,396	9,502	66.00
Idaho	26	10	38.32
Wyoming	25	17	67.35
Colorado	579	282	48.69
New Mexico	160	—	—

TABLE 2 Continued

State/Region	Black Imprisonment Observed	Black Imprisonment Expected	% of Black Observed Imprisonment Explained by Expected[a]
Arizona	1,009	561	55.56
Utah	107	54	50.74
Nevada	591	615	104.14
Washington	1,106	213	19.26
Oregon	340	281	82.65
California	10,270	7,350	71.57
Alaska	139	856	0.99
Hawaii	44	34	78.00

a. The percentage of observed imprisonment that is explained by the Black expected imprisonment was calculated prior to rounding of the expected values.

equality than others. Because there is considerable variation among the states in the degree to which levels of criminal involvement among Blacks actually explain observed Black imprisonment rates, studies that aggregate across states and other jurisdictions are likely to mask this variation.

Racial patterns in imprisonment are substantively important for criminologists, and the perpetuation of unwarranted racial disparities in imprisonment is a critical matter for public policy. It is imperative that this issue be addressed carefully. Further, conclusions about the pervasiveness and causes of disparities must be drawn cautiously. The problems we have discussed have appeared in widely cited and publicized research, leading some to conclude that criminal justice in the United States is racially discriminatory, whereas others have concluded precisely the opposite—that problems in the treatment of Blacks and other minorities are minimal or nonexistent. Our analyses show that there is great variation within the United States in racial patterns of imprisonment, and that these variations probably account for the diversity of results that have been reported. The complexity of this variation must be incorporated into research designs, with researchers choosing appropriate levels of aggregation and bearing in mind the substantial differences in criminal processing that exist across jurisdictions. Similarly, consumers of research literature on racial discrimination and criminal justice must be cautious when drawing conclusions about the pervasiveness of discrimination or racial differences in treatment.

Finally, the results of this study lend support to the argument that social contexts influence how courts and law enforcement agencies impose criminal punishments (Myers and Talarico 1987). Differences in context contribute significantly to variation in the form and severity of punishments and to variation in the types of persons and groups punished for crimes. These

TABLE 3: Black Observed Imprisonment, 1982 and Black Expected Imprisonment (based on violent crime arrests, 1981)

State/Region	*Black Imprisonment Observed*	*Black Imprisonment Expected*	*% of Black Observed Imprisonment Explained by Expected*[a]
National	155,924	138,184	88.62
Northeast	26,650	24,482	91.86
Maine	15	10	65.65
New Hampshire	5	1	18.31
Massachusetts	1,329	496	37.33
Rhode Island	246	178	72.22
Connecticut	2,105	1,949	92.60
New York	13,407	13,459	100.39
New Jersey	4,455	2,788	62.59
Pennsylvania	5,088	5,600	110.07
North Central	33,813	33,208	98.21
Ohio	7,229	5,383	74.47
Indiana	2,795	4,504	161.13
Illinois	8,217	6,478	78.83
Michigan	8,515	8,796	103.30
Wisconsin	1,689	2,366	140.08
Minnesota	421	482	114.46
Iowa	490	324	66.23
Missouri	2,974	3,460	116.34
North Dakota	2	73	70.97
South Dakota	14	28	197.20
Nebraska	533	619	116.10
Kansas	934	834	89.30
South	81,065	67,657	83.46
Delaware	1,021	1,045	102.36
Maryland	6,761	4,293	63.50
Virginia	5,376	4,676	86.98
West Virginia	218	269	123.50
North Carolina	8,380	8,048	96.04
South Carolina	4,972	4,602	92.56
Georgia	7,313	8,148	111.41
Florida	11,351	9,713	85.57
Kentucky	1,171	1,176	100.40
Tennessee	3,346	2,916	87.14
Alabama	4,718	2,486	52.69
Mississippi	2,829	3,463	122.41
Arkansas	1,632	1,789	109.62
Louisiana	6,763	4,659	68.89
Oklahoma	1,482	1,515	102.23
Texas	13,732	8,860	64.52
West	14,396	12,765	88.67
Idaho	26	16	60.28
Wyoming	25	24	96.87
Colorado	579	349	60.35
New Mexico	160	—	—

TABLE 3 Continued

State/Region	Black Imprisonment Observed	Black Imprisonment Expected	% of Black Observed Imprisonment Explained by Expected[a]
Arizona	1,009	789	78.21
Utah	107	115	107.46
Nevada	591	835	141.23
Washington	1,106	398	35.98
Oregon	340	368	108.21
California	10,270	9,702	94.47
Alaska	139	93	66.74
Hawaii	44	76	172.43

a. The percentage of observed imprisonment that is explained by the Black expected imprisonment was calculated prior to rounding of the expected values.

differences may assist in explaining the pronounced variation in rates of imprisonment between Blacks and Whites exhibited in this article. By examining contextual differences and specifically the characteristics of areas and regions related to patterns of punishment, research may identify social and demographic conditions in which inequality in punishment is most likely to emerge. The differences may also reveal macrolevel processes at work in law and legal decision making. For example, they may establish how degrees of social or economic inequality within areas or regions influence inequality in law enforcement and judicial decisions. However, until scholars fully identify the nature of these macrolevel processes, analyses that ignore the varying contexts of law will contribute little to debate over inequality in the imposition of punishment. Further, the analyses will be vulnerable to biases that undermine their validity and importance to the field.

NOTES

1. We consider studies of federal courts and the U.S. Military to be multiple-jurisdiction studies. We categorized these as multiple because they are composed of very distinct, autonomously acting jurisdictions. They are different from states that include county jurisdictions because, within a state, county courts frequently operate with rules determined by central authority. If specific counties of one or more states were the subjects of research, these were also categorized as multiple jurisdictions.

2. Rates of imprisonment were calculated in this manner so as to reflect rates of admission to prison and the length of prison stay. This is appropriate for analyses of disproportionality (see Bridges and Crutchfield 1988).

3. In this context, serious and violent offenses mean the major categories of index crimes recorded by the F.B.I. in the UCR. These offenses include homicide, aggravated assault, forcible rape, robbery, burglary, larceny, motor vehicle theft, and arson.

4. This example assumes that the two states have equal or nearly equal populations.

5. We of course recognize that the rates for New Hampshire are very small and, as a consequence, are very unstable. The same point can be made by using New Hampshire's neighbor, Massachusetts, which has more individuals imprisoned and larger arrest rates. Massachusetts can account for only 40% of its racial disparity in imprisonment with racial differences in arrest for violent crimes.

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CERTIFICATE OF SERVICE

I, Kathryn C. Loring, attorney for Amicus Curiae American Civil Liberties Union of Washington, certify that on September 11, 2007, I hand-delivered to each of the following persons a copy of the document on which this certification appears:

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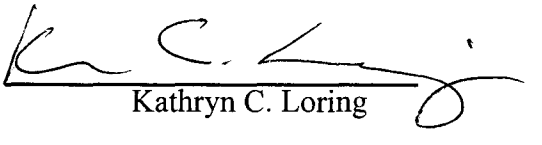

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