72666-8

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No. 72666-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

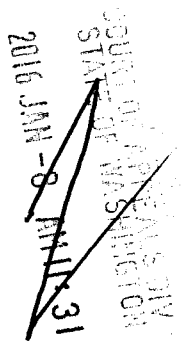
IGNACIO B. MARIN,

Appellant,

v.

KING COUNTY, WASHINGTON.

Respondent.



APPELLANT IGNACIO MARIN'S REPLY BRIEF

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ORIGINAL

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I. REPLY RE: STATEMENT OF THE CASE

Respondent, King County (the County) presents to the Court a statement of the case that ignores Marin's direct and circumstantial evidence of discrimination, evidence of his protected activity and of retaliation, relevant to his opposition to Summary Judgment (SJ) and relevant to the Court's CR 50 ruling. The County makes repeated statements that ignore or conflict with admitted evidence favorable to Marin. Examples follow with citation to evidence and exhibits.

SAGNIS REPRIMAND OF MARIN

The County depends on Sagnis' testimony that he and Marin were "good friends". Resp. Brf. at 5; RP 9/18/2014 at 58:5-18. The objective evidence in the SJ record and trial record allow a jury to find that Sagnis was no friend to Marin. The admissible evidence is that on D crew Marin was disproportionately given Caucasian crew members' hardest and filthiest work projects, RP 9/17/2014. pp. 37-38; and given few desirable higher skill duties. RP 9/17/2014 p.40:2-11.

In April, 2009, Acting Supr. Horton, contrary to normal assignment practices for the Caucasian crew, harassed Marin to leave his high priority duties monitoring unstable boilers, to go to the pre-aeration tanks to "dig grit"; calling in a junior Caucasian male from another crew on overtime for the desirable duties for the purpose of leaving Marin "no

option but to dig grit". Ex.60. Marin, pushed to the breaking point became ill and in April 2009 complained about Horton's harassment making him ill. RP 9/17/2014 p.40:12-20; Exh. 87 p.2 (4/18/2009; 4/19/2009). Marin was so fearful of Sagnis that he took a tape recorder to document the discrimination complaint he was about to make about Horton. CP 256. Sagnis reacted against Marin immediately, without investigation. He and management backed Horton, with a heavy hand of unwarranted discipline. See *infra*. When witnesses came forward in June 2009 supporting Marin, Sagnis acknowledged to management Marin was right to stay at work on the boilers. But the May 10, 2009 discipline was not withdrawn and in 2010 it was "brokered" by the County to leverage Marin to abandon his harassment charges. Exh.162. Sagnis chilled the work environment by telling D Crew members (Marin's witnesses) that Marin would never return to his crew. *Infra*. After the "investigation, when management attempted to return Marin to West Point on Sagnis' crew, Sagnis launched a retaliatory rant about Marin in front of management. Sagnis was explicit with his retaliatory motives. Exh. 122,134,135. Management kept this direct evidence of retaliation secret from its own Investigator Sutherland and from Marin. CP 6929-6932 (Sutherland). If Sagnis was ever a "friend" of Marin it was conditioned on Marin enduring harassment and subjugation in a disparate and "manual laborer" role. Marin was a

Licensed Boiler Operator and a Certified Wastewater Treatment Plant Operator with over 20 years' experience. After Marin's 2009 discrimination complaints, management temporarily, and then permanently, moved Marin to a job where he was considered by management to be "useless", *infra*, as a crew member because there was not time left in his career for him to learn the huge and very different Renton Plant . Exh. 149; RP 9/10/2014 p. 100-101, 9/22/2014 p. 158.

The County states: "Sagnis reviewed Marin's logs and confirmed that he had chosen to perform low priority work rather than follow the priority established by management." Resp. Brf. at 5. citing RP 9/18/2014 at 93:5-98:2. It's admissions of record are contrary. Exh. 162. After Marin complained of harassment and a hostile work environment, WTP management, knowing of the complaints, helped Sagnis issue Marin an unwarranted documented oral reprimand on May 10, 2009. Trial Exh 83, Resp Brf, 5. The reprimand was edited and reviewed by Plant Manager Elardo and Human Resources. Exhs. 70, 71, 72.

Sagnis was told by HR: "[t]he discipline you would like to impose will be more supportable if you do a thorough investigation..." Exh. 73. The discipline issued May 10, 2009 evidenced no such investigation. Exhs. 82, 83. Marin grieved it May 11, 2009 with another complaint of discrimination:

> Just cause has not been satisfied. Disparity of treatment with other similarly situated employees. Supervisor/acting supervisor misconduct and creation of a hostile work environment. Progressive discipline (TLC) was not followed. Past practice for operation of plant/area as operators' first priority violated. Exh. 84.

On June 2, 2009 Sagnis reported he "just found out" Marin had a witness and "good excuse" for April 16, 2009. Exh. 86. Marin was doing priority work. The belated Elardo 2010 grievance response letter confirms:

> "Mr. Marin did not intentionally disregard Mr. Horton's instruction to assist with a clean up project. My assessment after reviewing the facts is that Mr. Marin was legitimately engaged in other work activities." Exh. 162.

Regardless of that and Sagnis' 2009 overt retaliatory outburst about Marin's complaints, the environment was not remedied. Marin could not return to West Point where he had successfully worked his entire career.

TRANSFER OF MARIN TO SOUTH PLANT

The County "temporariliy" transferred Marin to Renton Plant while investigating his comprehensive allegations of discrimination at West Point, including the May 10 reprimand. Exh. 87 (6/19/2009); OP (un-redacted) Ex. 87; Exh. 89. Marin, not his lawyer, asked for temporary transfer away from Sagnis. RP 9/23/2014; P. 122:22-24.

Mr. Marin's psychologist (not Mr. Marin's attorney) later stated that he was doing better at Renton on "C" crew than at West Point, because of the hostile environment he experienced at West Point. RP

9/23/2014 p.123:25 to p.125:13; Exh.159. Despite Renton managers' and crews' resistance to Marin's presence and lack of Renton Plant qualifications, the County did not move Sagnis to allow Marin to return to the job he had performed well over 20 years.

THE COUNTY'S JANUARY 5, 2011 MEMO TO MARIN

The so-called 'Teach Lead Coach' memo, Exh, 206, is not a typical County TLC. It contained of the following language, *inter alia:*

> This memo is a non-disciplinary reminder that you are expected apply your technical knowledge to multiple situations. Further incidents of failing to follow basic procedures may result in progressive discipline up to and including discharge. [Exh. 206]

The reasonable inference is that this so called "TLC Memo" will be used against him, yet he has no right to grieve it. The "TLC" also contains a unique and unreasonable requirement that he should be able to lock out and tag out any piece of equipment in the entire Renton Plant, an impossible, unlawful requirement. RP 9/16/2014 pp.14-16; RP 9/9/2014 p.9:22-25 to p.10:10. RP 9/16/2014 p.30:6 - 31:9 (Evans)

THE COUNTY'S RELIANCE ON SUTHERLAND'S INVESTIGATION OF MARIN COMPLAINTS

The County states that it relied on the investigation conducted by attorney/investigator Karen Sutherland who "found no evidence of discrimination." Resp Brf at 7 citing RP 9/22/2014 pp.17:9-18:18. Nothing in that excerpt states what information the County gave Ms. Sutherland.

Her opinions contradict the plethora of evidence in this case that supports findings of discrimination and retaliation. Sutherland has acknowledged a list of evidence not provided to her, including, *inter alia*, that Sagnis' discipline of Marin was unfounded, that Sagnis version of the April 20 meeting was not credible, and Sagnis' direct retaliatory statements. CP 6929-6932. Sutherland interviewed Gary Fletcher, a D crew member in 2009. RP 9/08/2014 p. 145:20-23. It is a reasonable inference that an investigator learned of the evidence of retaliation Mr. Fletcher testified to at trial. To wit:

> Q. And prior to Mr. Marin -- well, first of all, did you know why Mr. Marin left the D-Crew?
>
> A. No. Nothing was said. He just -- as you came to work he wasn't there and there wasn't anything said, and **when we asked our supervisor, James Sagnis, he just said, "He won't be coming back."** RP 9/08/2014 P. 145: Lines 9-14 (emphasis added)

This retaliatory statement Sagnis made to Fletcher was within a few weeks of Marin's "temporary" transfer. RP 9/08/2014 p.147:20-25; p.148:1-4.

II. REPLY ARGUMENT

A. MARIN DID NOT WAIVE ASSIGNMENTS OF ERROR.

The County's brief ignores evidence supportive of Marin's claims, and also ignores argument supportive of Assignments of Error (AE) 3,8,11, 17 and 18, and then falsely declares Marin has "waived" them.

Each challenged AE is cited to an "Issue Pertaining to Assignments of Error".[1]

Marin's AE 3 relates to exclusion of pre-statute evidence of racial disparity, protected activity, retaliation, and hostile work environment. That issue is repeatedly presented in Marin's Opening brief.[2] At page 12, Marin states "Prior to trial, the Court excluded swaths of Marin's "pre-statute and other evidence in rulings on Motions in Limine CP 2950 – 51". At page 17, Marin reviews pre-statute evidence of his protected activity well known in the plant including opposition to racial comments, a Human

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[1] Pages 3-5 of Appellant's Opening Brief

[2] At page 5 Plaintiff cites his history of experiencing and complaining about racial hostility, different treatment from Caucasian coworkers, and retaliation for complaints and protected activity citing Plaintiff's Declaration on Summary Judgment which chronologically recites two decades of different treatment, harassment, complaints and retaliation. Page 6-7 describes and cites evidence of continuing different treatment and unfair discipline citing Marin's declaration and the declaration of coworker Norm Cook (CP 1424:23-1426: 17 and CP 1429:2-1432:7CP 1434:13-18 and CP 1430:1-6, 17-20. Cook's key pre-statute testimony about pre statute "browbeating" to do a Caucasian workers "checklist" so the Caucasian worker could sleep; mocking of Marin's accent and obvious punishing different treatment with the worst filthy work assignments on West Point's D Crew; was excluded at trial. Page 7 links the pre and post statute HWE period citing Sagnis and Horton's taking over that same D Crew in 2007 – 2010, spanning the limitations period and continuing the same disparity, "worsening the disparity in "filthy" manual labor , public demeaning and limited opportunities for training or skilled operator work, increasing Marin's anxiety and cardiac symptoms, RP 38, 40, including Horton's bullying Marin to dig grit, displacing Marin from high skill engine work by calling in a Caucasian from another crew so Marin would have no excuses not to "dig grit" that made Marin ill in April 2009. At page 8 Plaintiff cites Marin's 2009 complaint and the County HR intake notes which were redacted by Order in Limine to exclude any reference prior to 2007, excluding the time period Norm Cook and Marin testified about on D Crew with the same demeaning treatment and disparate assignments. This connection of evidence and prior complaints about the same plant and crew are essential to Marin's HWE and retaliation claim, and notice of prior protected activity. At page 17 Marin cites WLAD protected activity from 1989 to 2011. He cites Marin's detailed evidentiary declaration, exhibits of pre 2008 complaints and detailed interrogatory answers about the history of the HWE at West Point which followed him to Renton. CP 1435 - 1554.

Rights Commission Complaint, opposition to repeated demotions to grueling manual labor, CP 1435-1554, and his testifying about sexual harassment of a WPTP minority female (CP 1475-1485). At page 26, Marin contends that "Not only should the CR 50 Motion not have been granted as to "retaliation", further evidence of pre-statute "notice" of protected activity and retaliator HWE should have been admitted giving the jury a full and fair picture of WTD's entrenched and retaliatory environment." And see Op. Brf.at 27, (the requirement that Marin present "foundation" of direct evidence that each actor knew of specific "protected activities" was doubly prejudicial when Marin's history of protected activity was excluded (citing CP 2486-2497); finally p. 30 (Marin was unable to cross examine Dr. McClung fully about more than two decades of his perceptions of this hostile workplace. There was no waiver.

Marin's AE 8 relates to Marin's motion to supplement the record with a crucial email from Juror No. 71. Op. Brf. 30-32. Marin previously moved in the Court of Appeals to have the record supplemented with Juror 71's email. In the Notation Order of Commissioner Masako Kanazawa (Appendix) the Commissioner ruled that **"in his brief on the merits, Marin may challenge the trial court's denial of his motion to supplement for consideration of the panel determining this case."** Appellant has in his brief on the merits, challenged the trial court's denial of supplementation of

the record, which is already fully briefed by both parties in the Appellate Court record. Marin devotes Pages 30- 32 to the Juror 71 issue. There is no "waiver".

Marin's AE 11 relates to Marin's request for an additional peremptory challenge. AE 11 is the subject of Section 5 E. Op. Brf. p. 37. The final juror was improperly added to the jury after all jurors had been selected and after the all peremptory challenges were required to be exercised. See RCW 4.44.210

AE 17 relates to the Trial Court's award of costs. RCW49.60.030 (3) does not provide the employer fees or costs. The County is entitled to only "costs" under RCW 4.84.010. This is cited by Marin as pertaining to his Issue 9 (Op. Brf. p. 5), that the Judgment for Costs against Marin should be reduced where it awards costs not authorized by statute. *Id.* Marin argued this at pages 58-59 of his Opening Brief. The trial court did not make findings or conclusions regarding the cost bill, rather just interlineated that the award was based on the County's "amended Cost Bill" CP 3558-60. Op. Brf. at 59. The punishing level of $14,378.37 sought in the amended cost bill included full un-apportioned cost of depositions only partly used (CP 3549 re: Alenduff; Marin, Finch, and Vance).(Opposition Calculations at CP 3536-3544); doctors' professional fees for deposition (cost bill CP 3550; CP 3540-44); subpoenas and

service fees for depositions and for cancelled trials where the Defense did not subpoena the doctor to the actual trial (CP 3551). There is no waiver.

AE 18. Marin has argued the many ways the Court denied Marin protection from bias in the trial, as an immigrant man of color with a South American accent. Related to Marin's Issue 6, it is briefed at Op. Brf. 59-60 with case citation and citations to the Clerks' Papers.

B. THE TWO RECORDINGS MADE BY MARIN DID NOT VIOLATE THE LAW BECAUSE THE CONVERSATIONS WERE BOTH PUBLIC AND INVOLVED RCW 9.73.030(2)(b) "UNLAWFUL REQUESTS OR DEMANDS".

The recorded conversations involved both Marin's RCW 49.60 complaint about Horton's harassment (CP 284-289, 621-648) and matters of discipline that required giving Marin Weingarten rights CP 603 (Ramsey to Sagnis.) Exhs.62,73. Where there is no reasonable expectation that the content of the conversation will be kept private – it is not a private conversation for purposes of RCW 9.73.030.

1. Sagnis understood that the April 20, and May 10, 2009 disciplinary communications with Marin would be documented and reviewed outside the meeting by managers "up the organization," and could be grieved by the employee. Employee discipline and County emails become public records. *DeLong v. Parmelee 157 Wn.App.* 119, 160 (2010). CP 770-773, 775-776. See CP 598-612 (Response to King

County's Supplemental Brief RE: Evidentiary Hearing)

2. Sagnis emailed his "draft" disciplinary letter to Mgrs. Ramsey, Grenet, and Elardo including content from the [recorded] meeting: "on ... April 20, 2009," [Sagnisl "informed Marin would be pursuing disciplinary action;" Marin "was unable to produce any documentation regarding his illness;" and "[a] that time [Sagnis] observed no signs of physical ailments." CP 603, 747-749. On April 20, 2009, HR Mgr. Ramsey responded to Sagnis:

> Don't forget to talk to Marin, before making your final decision regarding level of discipline, to determine what he thought his assignments were and/or why he [chose] not to follow direction, also ask him about his reason for needing to leave on BT. He has the right to union representation during the meeting when you ask about these things. CP 603, 780. Exhs. 62, 73.

3. By contract "employees have the right to have a Union representative present in any meeting where the employee has a reasonable belief that the discussion may lead to discipline." CP 603, 784. Sagnis admitted he informs employees of the right to representation for "something like this." CP 603,787-788. Sagnis had formal training on those "Weingarten" rights. CP 792 (11/29/2007).

4. As expected Marin shared the discipline conversations and harassment complaints with his union, medical providers, County EAP

counselor, disability services, and further asked Sagnis for Weingarten Representation. CP 604, 615-617.

5. Sagnis' pressuring Marin not to use his rightful FMLA leave and not to complain about Horton's discrimination and harassment are unlawful requests under RCW 9.73.030(2)(b) (conversations...which convey...unlawful requests or demands ...**may be recorded**.) CP 604.

C. NO DISCOVERY WAS WILLFULLY WITHHELD BY MARIN OR HIS COUNSEL.

Marin's counsel did not willfully withhold any discovery from King County.

As Marin's counsel Mary Ruth Mann stated in her declaration:

> During a working session with Attorney Mark Rose and Ignacio Marin on responses to Defendants' Second Discovery Requests, Mark Rose came to Jim Kytle and myself and informed us that Mr. Marin there was an RFP calling for "recordings" and that he just learned Mr. Marin made a workplace recording of his supervisor. We told Mr. Rose to have Mr. Marin bring in the recording and that it would be produced. I acknowledged that I had a memory of knowing about a recording in prior years, but had never heard the recording (other than to determine it was unintelligible on the machine in 2009). I was not aware of any disc being left with myself or staff in the office. A search in the file for such a disc turned up nothing. Until Mr. Rose mentioned the recording in that conversation, I had forgotten about it, in the time that had passed since it had been brought to my attention. It was never heard, so it was never used in preparing any pleadings in the case. CP 90, ¶4.

Counsel explained in detail that Marin's counsel's only awareness in 2009 was of a prior unintelligible attempt by Mr. Marin to record some conversation, mentioned in an initial consultation with him two years

before any litigation, when she was trying to understand the context of Mr. Marin's numerous complaints of discrimination in a 25 plus year history with King County. There is no evidence to contradict what Ms. Mann has stated in her declaration that the issue had passed from memory and was not brought back until the conversation with Mr. Rose.

Further, if the standard the Court applies is that, regardless of Counsel's awareness or possession, the recording must have been produced prior to the deposition of Sagnis, then the Court should likewise have found that the County intentionally withheld smoking gun evidence about the same conversations until after the Sagnis' deposition, relating to impeachment of Sagnis as to the same conversations with Mr. Marin.

On September 20, 2011, Plaintiff served Request for Production No. 9, seeking "all inter-company notes, memoranda, emails, letters, etc. regarding Plaintiff s ... corrective action [and] discipline...."[3] Milestone assisted in responding to RFP 9. On December 16, 2011, Defendant answered, in part, "**Defendant is providing ... all documents relating to discipline, [and] correcti[ve] action" of Plaintiff.**[4] This answer was false and misleading. Multiple drafts and emails related to the May 10, 2009 reprimand (the document that Plaintiff's audio recordings also relate) were withheld for six (6) more months, and not produced until July 31,

[3] Rose Decl., Exh. 16, (RFP No. 9, at pp. 32-33). CP 937,946-948
[4] *Id.* (Interrogatory No. 1, at pp. 8-9) CP 940-941

2012, one month after Sagnis' deposition and after the recordings were disclosed by plaintiff. CP 846-847, 937, 946-948.

When the County finally produced the documents regarding WTD's and Sagnis' drafts of the discipline that it had been withholding, it did not produce them in a straightforward manner. Rather, the highly relevant disciplinary documents were produced among 30,000 pages of other documents, without any index and stripped of any way to search the content of the electronically stored documents. After counsel made multiple requests for an index to the 30,000+ pages of production, one was finally provided by Defendant in September 2012. CP 848.

The County was well aware Sagnis and WTD possessed "drafts" of the May 10, 2009 reprimand. Sagnis told investigator Sutherland on July 7, 2009, that **he "writes up a draft** of the oral reprimand and **sends it to HR** and **HR finalizes it.**"[5] The "draft" reprimands and related email are crucial, as they contain statements that contradict the statement Sagnis gave to Sutherland in July 2009. Specifically:

> Regarding **whether Mr. Sagnis asked Mr. Marin on April [20], 2009 if he went to the doctor, what is his evidence**, Mr. Sagnis stated [to Karen Sutherland] that **he does not recall that, and does not think there was a discussion of any medical** during the meeting. **Mr. Sagnis does not think he said it was 'bullshit' that Mr. Marin went home sick.** ...[6]

[5] Rose Decl., Exh. 2 (Sagnis statement at KC0005536). CP 895
[6] Rose Decl., Exh. 2 (Sagnis Statement at KC 0005537). CP 896

Contrary to the above statement Sagnis gave the investigator, the draft reprimand that he sent to Plant Managers and to HR states, *inter alia*,

> "[O]n the morning of April 20, 2009, ... *I observed* ***no signs of physical ailments****. (Should I keep this??? **Unqualified diagnosis?)*** ... **You were unable to produce any documentation to verify illness**."[7]

This language contradicts Sagnis' statement two (2) months later, denying "discussion of any medical" or asking Marin for his "evidence" of illness. The "finalized" reprimand of Marin that Sagnis gave Marin in 2009 and initially produced in discovery in 2011 omitted such statements.[8] Language in another "draft" withheld until after the Sagnis deposition similarly includes incriminating language, not made part of the "final" letter: "If you have any **medical circumstances** that would effect [sic] your attendance, notify the supervisor in charge immediately."[9] Another "draft" that Defendant belatedly produced states that Mr. Marin "**claimed to be sick**" on April 18th and "[o]n April 24, 2009, [he] provided FMLA paperwork from [his] physician ... indicat[ing] that [he] [is] unable to return to work at this time."[10] In a related email (entitled "Final discipline letter"), also withheld until *after* Mr. Sagnis was deposed, HR, the Plant Manager, and Sagnis are told by WTD, in part, "[a]t this point [April 29,

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[7] Rose Decl., Exh. 17 (KC 0018202). CP 951
[8] Rose Decl., p. 9-10, ¶ 21-23; Exh 21. CP 848-849, 966-967
[9] Rose Decl. Exh 18: KC 0025366-25367. CP 956
[10] Rose Decl. Exh 19: KC 0026130-KC0026132. CP 964

2009], he **[Marin] has not linked his failure to perform the work to his medical condition**. ... [W]e want to **keep the discipline and the medical issues separate**."[11]

By withholding the "draft" reprimands and related emails until *after* Sagnis was deposed, the County avoided Sagnis being impeached at his deposition with contradictions of statements to Sutherland. The Court gave no consideration to Marin's Motion, nor to the County's withholding of key evidence until after the deposition of Sagnis, until its **7th supplemental response** to Marin's discovery requests. The trial court even admonished Marin's counsel for mentioning the County's withholding, interpreting Marin's discovery motions as failing to "accept responsibility." Marin cited the withholding in two appropriate ways, 1) that the County was not prejudiced by not getting Marin's recordings earlier since the County knew Sagnis' testimony was impeached from their own undisclosed documents; and 2) Marin's production in every way was more prompt and timely than the County's. In its first discovery request to Marin, the County's definition of Document was as follows:

> 6. "Documents" will be construed in the broadest sense allowed by CR 34, and includes any original, reproduction, copy, or draft, including, without limitation, correspondence, memoranda, notes, writings, calculations, computer files, emails, tapes, CD's and images. CP 3657.

[11] Rose Decl. Exh 20. CP 964, Exh. 75

Nothing in this definition evoked a memory by Marin or his counsel. CP 259 (Marin declaration Para. 16 & 17) (Mann declaration P.90 ¶4). A later defense discovery request contained the term "recordings" which triggered Mr. Marin to mention the recorder to Mr. Rose, and Mr. Rose inform Mr. Kytle and Ms. Mann, and to ask Mr. Marin to bring in the recorder. Ms. Mann and Mr. Kytle became alerted to the issue by Mr. Rose.

The trial court's harsh ruling was a manifest abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker,* 79 Wash.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Lu v. King County,* 110 Wash. App. 92, 99, 38 P.3d 1040 (2002).

The trial court concluded that "Plaintiff's counsel should have turned over copies of the recordings to the County before the June 29, 2012 deposition." CP 1094. But the recordings were turned over as soon as Marin's counsel was aware of them and had been able to obtain them from Mr. Marin. CP 257. The recording was unintelligible in 2009 at the early

consultation. Paras. 11 and 12. Marin Decl. Mr. Marin had to search his home in order to locate the recorder and produced the recorder to Mann & Kytle on July 2, 2012. CP 259 Para.17. No one had heard the recordings at Mann & Kytle CP 90, Para. 4.

The County's citation to ABA Sanctions Standards for determination of sanctions in disciplinary cases is inappropriate. A disciplinary case is not the same as civil discovery in civil litigation. A disciplinary case is for the violation of the RPCs, whereas this matter is governed by CR 26. The RPCs make clear that the purpose of the rules "can be subverted when they are invoked by opposing parties as procedural weapons." See Scope section of the RPCs. [20] states:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached...The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. **Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.**

D. MARIN ESTABLISHED EVIDENCE OF MANY 'ADVERSE EMPLOYMENT ACTIONS.'

The County seeks to distinguish *Boyd v. State*, 187 Wn. App. 1, 349 P.3d 864(2015) on the basis that Boyd was suspended without pay, 187 Wn. at 14 and argues that "Marin suffered no discipline affecting his pay or benefits." Respondent's brief at 24.

In *Boyd* the plaintiff suffered the following employment actions:

> Boyd presented evidence that WSH suspended him for two weeks without pay, issued a written reprimand that contained a detailed list of his alleged threatening comments and disseminated it to his supervisor, removed Boyd from his ward and from patient interaction, and reported him to the Department of Health and the police. WSH argues that some of these actions were not adverse employment actions; rather, they were "legitimate business decisions" that, were disciplinary or investigatory in nature. 187 Wn. App at 14.

The Appellate Court went on to say that:

> We express no opinion as to whether these employment actions, taken individually, constituted adverse employment actions as a matter of law. However, taken in, context, a reasonable jury could find that these actions, taken together, were materially adverse. **Boyd presented substantial evidence for the jury to find that these, actions would have dissuaded a reasonable worker from making a discrimination charge.** *See Burlington,* 548 U.S. at 68, 126 S.Ct. 2405. 187 Wn. App. at 14. (Emphasis added)

The County further cites *Tyner v. State*, 137 Wn. App. 545, 565 (2007) for the proposition that a reassignment without a loss in pays or benefits is not an adverse employment action. *Tyner*, however, goes on to say :

> The United States Supreme Court recently noted, "reassignment of job duties is not automatically actionable. **Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position.'** " *Burlington North. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 2417, 165 L.Ed.2d 345 (2006) (citations omitted). Id. at 565. (Emphasis added)

And in *Burlington* the Supreme Court stated the following:

> Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White[the plaintiff] from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. **That is presumably why the EEOC has consistently found "[r]etaliatory work assignments" to be a classic and "widely recognized" example of "forbidden retaliation.**" 2 EEOC 1991 Manual § 614.7, pp. 614–31 to 614–32; see also 1972 Reference Manual § 495.2 (noting Commission decision involving an employer's ordering an employee "to do an unpleasant work assignment in retaliation" for filing racial discrimination complaint); Dec. No. 74–77, CCH EEOC Decisions (1983) ¶ 6417 (1974) ("Employers have been enjoined" under Title VII "from imposing unpleasant work assignments upon an employee for filing charges"). *Burlington North. & Santa Fe Ry. Co. v. White,* 548 U.S. 53,71 126 S.Ct. 2405, 2417, 165 L.Ed.2d 345 (2006). (Emphasis added)

Likewise King County's reliance on *Donahue v. Cent. Wash. Univ.*,140 Wash. App. 17, 26, 163 P.3d 801 (2007) is misplaced. In *Donahue* a tenured professor was transferred and claimed retaliation for filing two prior grievances. However the evidence showed the defendant had made the transfer "'to meet the needs of the university'" *Id.* There is no evidence in *Donahue* that plaintiff lacked experience or training to perform the transfer job, nor hostile environment, nor of lack of accommodation leading to early retirement.

In the case *sub judice* Marin presented evidence of suffering many adverse employment actions, as described above in the cases cited by the

County including inter alia, unwarranted "formal discipline". Exhs. 69 p.2, 78, 80, 82, 83; Sagnis telling his crew Marin would notreturn. RP 9/08/2014 Pgs. 145, 147-148; Sagnis made threats to management that if Marin returned "it would not be a pretty sight" "he made his bed now he will have to lie in it" "he shit all over his crew". Exhs. 122, 124, 134, 135; Sagnis excluded Marin in 2009 as needing no further job progression classes because "not active eligible to retire in less than three years". Exh. 85; WTD transferred Marin toRenton where he would be of "little use" and "where it would take years to learn the plant". Exh.149; RP 9/10/2014 Pgs.100-101; RP 9/22/2014 P.158; . RP 9/17/2014 P. 41:Lines 18-25, RP 9/17/2014 P. 42:;7-17; where Renton's training depended on training under an experienced operator to learn the plant. RP 9/16/2014 Pgs.12-13; and "C Crew" trainer Lee Higginbotham declined to train Marin and organized the crew to not allow Marin to "touch" any equipment". RP 9/17/2014 Pgs. 43-44; RP 9/10/2014 P.201; RP 9/18/2014 P.37; where deprived of meaningful work, with nothing to do, management did not notice Marin was gone for a month. RP 9/17/2014 Pgs. 45-46; and Marin was unreasonably threatened with further discipline up to termination without required Procedures, a requested "walk through" with a safety trainer; or equipment specific written procedures for lockouts. (Decl Evans) CP 1387–1423, and where reasonable accommodations to Marin's

medical disabilities were refused. RP 9/16/2014 p.30:6-25; p.31:1-9 (Evans).

E. MARIN SUFFERED DISCIPLINE RISING TO THE LEVEL OF AN ADVERSE ACTION AFTER HIS PROTECTED ACTIVITY.

On Dec.30, 2009 County HR Manager/Attorney Hillary sent Supervisor Read the management and legal office approved Memo (Exh 204, 205, 206) to serve on Marin, 9/9/2014 p.10, accusing Marin of a lock-out error, threatening up to termination if he could not independently "lock out" every piece of equipment at RTP. Exh. 206. This was an impossible and unlawful requirement. RP 9/16/2014 pp.14-16. On Jan. 5, 2010, Marin's first day back after a medical leave, Hillary asked for the initialed copy and asked for Read's schedule, saying "we are doing final preparation and will need to talk with you in more detail." Exh. 205.

> A Teach Lead Coach ("TLC") is "to help the employee and the supervisor communicate better as to what the supervisor wanted from that employee and what the employee was expected to do. There would be very specific language on what the supervisor wanted from the employee and expected from the employee and how the employee could improve."

RP 9/9/2014 p.10:2-7.

It is a reasonable inference that Exh. 206 is not a constructive TLC but a strategic adverse sanction to be used against him, given Marin's protected activity, his anxiety disability, top management's role, and, it was drafted in a format Marin's union could not grieve.

Whether a particular action would be viewed as adverse by a reasonable employee is a question of fact appropriate for a jury. *Boyd v. State Dep't of Social and Health Servs.,* 187 Wash.App. 1, 349 P.3d 864 (2015). See, e.g., *Burchfiel v. Boeing Corp.,* 149 Wash.App. 468, 483, 205 P.3d 145 (2009) (noting that a "corrective action memo," similar to a PIP, could constitute an adverse employment action).

Susan Evans a certified safety professional, a civil engineer, and a certified industrial hygienist testified on behalf of Marin. RP 9/11/2014 P. 149:Lines 7-9. She testified that there are thousands of pieces of equipment in the RTP. That to expect an operator to be able to lock out and tag out all those pieces without written procedures and formalized training is not reasonable or rational. RP 9/16/2014 P. 30:Lines 6-25; P. 31:Lines 1-9. This evidence is sufficient for a fact finder to find an adverse employment action.

F. MARIN IS ALLOWED TO HAVE MULTIPLE LEGAL THEORIES ON THE SAME FACTUAL ALLEGATIONS.

Civil Rule 8(e)(2) ("A party may also state as many separate claims defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both."); see also *Port of Seattle v. Lexington Ins. Co.,* 111 Wn.App. 901, 919, 48 P.3d 334, 343 (2002). Thus, for example, "when there are alternative remedies,

statutory or common law, a plaintiff in an employment discrimination case is not required to elect between, or among, such remedies ...." 22 Am. Jur. 2d Damages § 40. Of course, to the extent that multiple claims arise from a single act, double *recovery* for the same injury is prohibited. Id; see also *Johnson v. Department of Social & Health Servs.*, 80 Wn. App. 212, 230, 907 P.2d 1223 (1996).

In *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002), the Supreme Court of Washington expressly permitted the plaintiff to simultaneously pursue both discrimination claims as well as tort claims, specifically an NEID claim, that arose from the same acts. Recognizing this, the Western District of Washington recently rejected the exact same argument that King County asserts here, stating:

> In *Robel*, plaintiff asserted hostile work environment, retaliation, intentional infliction of emotional distress, and negligent infliction of emotional distress. 59 P.3d at 615-19. All these claims were based on the conduct of harassment by the plaintiff's managers and co-workers due to plaintiff's disability as a result of the work related injury. *Id.* at 614. Plaintiff was allowed to pursue all three claims and prevailed on all three claims regardless of the similarity of legal and factual issues among these claims. *Id.* at 615-621. Because [defendant] did not point to any authority to support its contention, and because the Supreme Court of Washington allows plaintiffs to simultaneously pursue claims for NIED and WLAD, the Court finds that [plaintiff's] NIED claim should not be dismissed.

Gillum v. Safeway, Inc., 2015 WL 1538453 * 11, 98 Empl. Prac. Dec. (CCH P45291, 126 Fair Empl. Prac. Cas. (BNA) 1436 (W.D. Wash. Apr. 7, 2015).

G. MARIN WAS DENIED FULL EVIDENCE OF THE HOSTILE WORK ENVIRONMENT.

Marin was denied the opportunity at trial to present all the evidence on discriminatory and a retaliatory HWE, e.g., pre-statute evidence—and the court failed to instruct the jury it could consider retaliation in considering the HWE claim. The County's reliance on *Bundrick v Stewart*, 128 Wn. App. 11, 20 (2005) for the proposition that the jury having not found a HWE forecloses "[Marin's] current attempt to conduct another trial on the same issue" is without merit. Respondent Brief at 25. The County's argument also completely overlooks the issue of the fairness of the jury as impaneled. See Opening Brief at 30-38.

H. FRIGHTENING STORY OF AN IMMIGRANT THAT WAS SHOT.

The County references what they call a Cracker Jack comic. Respondent's Brief at 26. Mr. Marin came to his supervisor fearful for his safety.(CP 4179). Ms. Read kept a diary on Mr. Marin (and only on Mr. Marin). Exh. 180 is a page from the diary for May 9 as follows:

> May 9 Igancio is working solids for the 2 night shifts-just refresher.This evening at the beginning of the shift he called and ask if I would come out to ACC 4. When I got there he showed me what he saw sitting on the desk when he got there. **It was a Cracker Jack Toy. It amounted to a very small 2 page story about a boy that immigrated to America and led his life with integrity. The man was shot-but the story was a positive story.)After all it was a toy).**

> Somehow he took this to be directed at him. ... **There was a newspaper clipping of a machine gun that was stapled to the bulletin board.** Since he had tied in with Lee H. he thought maybe it may have been directed at him. ... He had tied the man in the story that had been shot with a gun and the picture of a gun to possibly be directed at him. (Emphasis added)

"Lee H" is Lee Higginbotham. Higginbotham had been in ACC-4 the shift before Mr. Marin RP 9/22/2014 P. 137: Lines 21-25; P. 138: Lines 1-2.; RP 9/17/2014 P. 165: Lines 10-15. Marin had complained that he was not getting good tie ins with Higginbotham and Higginbotham was upset. RP 9/17/2014 P 165: Lines 16-25; P. 166: Lines 1-9.

This incident occurred on May 9, 2010 while Mr. Marin was at Renton on D crew. More than a year later on June 17, 2011 after Mr. Marin's premature retirement and tort claim, the County decided to once again hire Karen Sutherland to conduct an "investigation"---- after Marin had left the workplace. Marin was not interviewed. CP4140-4141. Ms. Sutherland could never find such a Cracker Jack toy online. And it belies logic that "Cracker Jack" would have ever produced such a story involving shooting an immigrant. This was a pretextual characterization that Ms. Read placed upon the item. Read did not keep nor report the story of shooting the immigrant nor the machine gun cutout items. CP 4179.

I. THERE IS NO EVIDENCE THE 2009 RETALIATORY REPRIMAND WAS WITHDRAWN FROM MARIN'S FILE.

The County maintains that Marin's reprimand was removed from his file.

Mgr. Elardo's proposed withdrawal of the letter was a conditional proposal of resolution which included a finding that Mr. Marin had not been in a Hostile Work Environment at West Point. There is no evidence the proposal was ever accepted. Marin did not ever accept it. "Mr. Sagnis and Mr. Horton have harassed me and disgraced my work and do things that are not right, so it was not something I could say yes." RP 9/17/2014, P. 48:Lines 1-3. By then he had been transferred to RTP where he was shunned and of "little use", etc. *see supra.* at 16-17.

J. MARIN ESTABLISHED HIS PROTECTED ACTIVITY WAS A SUBSTANTIAL FACTOR IN THE COUNTY'S ACTIONS AND HWE.

Marin could not return to D crew because of Sagnis' retaliation for Marin's WLAD complaints. Sagnis remained in charge. The County knew they could not return him because of Sagnis retaliation for his prior protected activity. RP 9/23/2014 P. 166-167; Exhs. 135. 160. Even if he did go back to another crew Sagnis would still have authority over Marin. Exh. 27. Marin was not told what King County knew, that Sagnis directly threatened retaliation, and that Marin was seen as of little use at RTP.

K. MARIN ESTABLISHED HIS WORK WAS SATISFACTORY.

Marin worked for King County for over 25 years. He had no prior discipline and satisfactory performance at West Point. At Renton, Supr Read gave him a performance review in September of 2010. Exh. 186, CP

1621-1622. Ms. Read stated in the review:

> Ignacio is working hard to learn a new plant. He is able to work mostly unassisted in solids, secondary and primary. At this time he is training in DCB. He strives to learn this plant. Ignacio needs to work on communication skills as there is still a language barrier at times.

L. THE COUNTY'S EXPLANATIONS ARE PRETEXTS.

In 2010, it was a pretext for discrimination and retaliation for the County to condition withdrawal of the retaliatory, false reprimand, on Marin dropping his 2009 discrimination and HWE claim. Exh. 162. Resp. Brf. pp. 19-21 re: pretext. Sagnis' excuses for the reprimand lack credibility. The County still misrepresents the Renton TLC memorandum which a jury could find was a pretext to set up and intimidate Mr. Marin, when he did not drop his grievance or complaint about Horton, Sagnis and West Point. The County also mispresents the comparison TLC Billy Burton received. Resp. Brief p.33. Burton received a verbal TLC that did not involve any threat of termination, nor any impossible or terrifying unique performance standards. CP 1504 Para. 2; RP 9/22/2014 P. 201, 207-208. Compare Exh. 223(Burton) to Exh. 206 (Marin).

M. THE TRIAL COURT IMPROPERLY EXCLUDED AND DISREGARDED ADMISSIBLE EVIDENCE OF RETALIATION.

The County cites *Graves v. Dist. Of Columbia*, 850 F.Supp.2d 6,14 (D.D.C.2011) for the Court requiring at trial that Marin lay a foundation

outside the presence of the jury before providing evidence of "retaliation" by a witness. *Graves*, however, required that an offer of proof be made in advance of trial not at trial. *Id.* at 14. Marin had survived Summary Judgment on his retaliation HWE claim. Marin established by exhibits and testimony at trial widespread notice of his protected activity in management, HR, disability services, West Point crews, Renton Supervision and management, and Renton crews.

N. HOLMAN'S TESTIMONY SHOULD NOT HAVE BEEN STRICKEN.

The context of Holman's testimony clearly indicates that Marin was still working when Holman heard the relevant statements in the workplace, about Marin having made a complaint about Alenduff regarding an offensive picture on his computer. RP 9/17/2014 P. 33; RP 9/17/2014 P34:Lines 7-14. Resp.Brf. at 28.

O. JUROR GILBERT SHOULD HAVE BEEN REMOVED.

The County's assumption that because the verdict was unanimous Juror 71 made no difference is meritless. The Supreme Court has long said that:

> "The right to trial by jury includes the right to an unbiased and unprejudiced jury. A trial by a jury, one or more of whose members are biased or prejudiced, is not a constitutional trial." *Allison v. Department of Labor & Indus.*, 66 Wash.2d 263, 265, 401 P.2d 982 (1965).

Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 159, 776 P.2d 676, 679 (1989) (Order granting California resident a new trial of personal injury action was not abuse of discretion, where jury foreman failed to disclose his bias against California residents, particularly his perception regarding their litigiousness.)

The County's argument that "even if he had been stricken and his replacement had voted for a plaintiff's verdict, the judgment would have been for King County" is pure speculation. If one biased juror—and in this case the foreperson—makes no difference, then why did the County strenuously object to his removal before trial, and again prior to deliberation, when Marin renewed his motion for cause when one juror had to be excused as an alternate?

Jury research indicates that "[f]orepersons and highly-participatory jurors are influential in deliberations". See, e.g., *Status on Trial: Social Characteristics and Influence in the Jury Room*, York and Cornwell, Social Forces, Volume 85, Number 1, September 2006, pp. 455-477 at 464 (Article), Oxford University Press. (Appendix). In this case Mr. Gilbert had raised on 3 occasions that he was concerned about his fairness. See opening brief pgs. 12-13; 30-38.

P. DR. MCCLUNG'S OPINIONS REGARDING "TRAITS" WERE IMPROPER CHARACTER EVIDENCE AND IRRELEVANT.

Dr. McClung acknowledged Mr. Marin's accommodation requests were reasonable and his fears and stress symptoms were not "faked". RP 9/24/2014 Pgs. 58-59

> (By Ms. Mann) Now, what Mr. Marin needed, according to his doctor, if we look at Exhibit 130 -- Dr. Vance -- was to not be singled out publicly for criticism when others similarly situated could get away with similar things and receive no public rebuke; do you recall that?
>
> A. Yes.
>
> Q. And that's not hard to accomplish in a fair place, is it?
>
> A. No. That would be an appropriate request to make.
>
> Q. And so if the criticism Mr. Marin had gotten was in public and the write-up that he got was different from others in his work group who were doing similar or worse things, the County could take that out of his file and apologize, couldn't they?
>
> A. Yes, they could.
>
> Q. And that would be a reasonable accommodation, wouldn't it?
>
> A. That would be, yes.
>
> Q. And they could tell him they wouldn't do it again, couldn't they?
>
> A. Yes.
>
> Q. And they could take him through a walk-through in the plant and say, "If you're going to have to lock out this, here's the procedure to do it and here's how to find it"; right?
>
> A. Yes.

Q. And they could provide him training, couldn't they, so that he would understand electrical things that scared him?

A. Yes.

RP 9/24/2014 P. 65

(By Ms. Mann) Doctor, is it a fair summary that you found Mr. Marin began reporting stress-related symptoms in his workplace in 2008 and that the symptoms he reports are not faked?

MR. CALFO: Are not what?

MS. MANN: "Faked."

A. Correct.

The County's citation to *In re Miestrell*, 47 Wn. App. 100, 733 P.2d 1004 (1987) for the proposition that prior mental history is not excluded because it is not character evidence but evidence of behavior is misplaced and in applicable to this case. See objection RP 9/23/2014 Pgs. 210-211. Dr. McClung's testimony was not about prior mental history. Rather he offered repeatedly that while Marin did not have a diagnosis of a personality disorder he did have "paranoid character traits". 9/24/2014 P. 43:Lines 24-25; P. 44:Lines 1-2. (See Resp. Brf. pp. 19, 72-75)

Evidence of traits of character is not admissible in a civil case if a party's character is not directly at issue. 5D Wash. Prac., Handbook Wash. Evid. ER 404 (2015-16 ed.). See, e.g., *Breimon v. General Motors Corp.*, 8 Wash. App. 747, 752-754, 509 P.2d 398 (Div. 1 1973), the court held

inadmissible testimony that the plaintiff was "always a fast driver" and "always drove that way, dangerously" where the factual issue was well developed at trial by both parties and properly left to the jury to resolve. See *State v. Camarillo,* 115 Wash.2d 60, 71, 794 P.2d 850 (1990) (stating that "[c]redibility determinations are for the trier of fact"); see also *State v. Cheatam*, 150 Wn.2d 626, 649, n. 5 81 P.3d 830, 842 (2003)**(stating that "an expert has no legitimate role in assessing the credibility of a witness").**

Q. CR 50 DISMISSAL OF "RETALIATION" WAS ERROR.

Whether harassment is sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment is a "question of fact," which is to be "determined" with regard to the totality of the circumstances."*Loeffelholz v. Univ. of Washington,* 175 Wn.2d 264,275, 285 P.3d 854 (2012); *Adams v. Able Bldg. Supple, Inc.*,114Wn. App. 291,296,57 P.3d 280 (2002). The Court considers, *interalia*, whether the conduct includes "public humiliation," false accusations of misconduct, and "whether the conduct interfered with the employee's work performance." *Adams*, 114 Wn. App. At 297; *Ray v. Henderson*, 217 F3d. 1234, 1245-46 (9th Cir. 2000). In *Loeffelholz* the Court held that a single comment that a supervisor made to a group of employees, saying he was going to return from, military duty an "angry man," could be severe

enough, on its own, to alter the conditions of employment and establish a hostile work environment."175 Wn.2d at 277.

The County knew Marin could not succeed at Renton, placing and keeping him there after learning of his complaints of discrimination is evidence in and of itself of retaliation. Sagnis knew of Marin's complaint, and his HWE grievance in response to harassment and reprimand and Sagnis told Fletcher within a few weeks of his leaving that Marin would not be coming back. RP 9/08/2014 Pgs. 145, 147-148.

Management all the way up to WTD Manager Elardo, County HR, County Disability Services, County EAP, County Legal participated in the complaints, investigations and discipline /reprimand and TLC of Marin. They knew in June 2009 that Sagnis reprimand of Marin was unwarranted, and in Fall 2009 that Sagnis was overtly retaliatory toward Marin. They knew Marin was not being trained at Renton and that he reported actual sexual harassment and retaliation on C Crew in Fall 2009.

Marin "needn't provide direct evidence that his supervisors knew of his protected activity; he need only offer circumstantial evidence that could reasonably support an inference that they did." *Jones v. Bernanke*, 557 F.3d 670, 679 (D.C. Cir. 2009); *see also Bonds v. Leavitt*, 629 F.3d 369, (4th Cir. 2011) (holding that "a jury could reasonably infer" that an individual with direct knowledge of Plaintiff's protected activity "would

have told" her supervisor about her complaint; and that issue of fact also existed where supervisor "would have suspected [Plaintiff] of bringing about the investigation").

In *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111 (2000) the Second Court of Appeals specified the "knowledge" of protected activity required for a Title VII retaliation claim:

> Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity. ...
>
> A jury... can find retaliation even if the agent denies direct knowledge of a plaintiff's protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge.
>
> Accordingly, to the extent that the district court charged the jury that the very *agents* of the Board who engaged in retaliatory actions against Gordon had to know of her protected activity, it erred.

Id., at 116-117; *accord Jones*, 557 F.3d at 679, *citing Holcomb v. Powell,* 433 F.3d 889, 903 (D.C.Cir. 2006) (recognizing temporal proximity when employee "traded **correspondence**" **with unidentified** "**senior [agency] personnel**" around the time that supervisors allegedly retaliated against her); *Henry v. Wyeth Pharmaceuticals, Inc.*, 616 F.3d 134, 148 (2nd Cir. 2010) (holding that decision maker's

"*encouragement* by a superior (who has knowledge)" is sufficient causal connection for retaliation claim); *Graves v. State, Dept. of Game*, 76 Wn.App. 705, 712 887 P.2d 424 (1994) (stating that causal connection for RCW 49.60 retaliation claim is met where "employee participated in an opposition activity, *the employer* knew of the opposition activity," and the employee was subject to adverse action). "[I]t is the jury's job to choose between inferences when the record contains reasonable but competing inferences..." *Burchfiel v. Boeing Corp.*, 149 Wn.App. 468, 205 P.3d 145 (2009).

VI. CONCLUSION

Ignacio Marin should receive a full and fair jury trial, with all claims and admissible evidence, before an unbiased jury, with protection against bias. Marin seeks attorney fees and costs on this appeal.

DATED this 7th day of January, 2016.

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CERTIFICATE OF SERVICE

The undersigned declares that on the below date I caused the foregoing pleading to be served via ABC Delivery to the following attorneys:

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DATED this 8TH day of January 2016.

s/James Kytle
James Kytle

APPENDIX

1. Notation Order of Commissioner

APPELLANT MARIN'S REPLY BRIEF

RICHARD D. JOHNSON,
Court Administrator/Clerk

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April 29, 2015

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CASE #: 72666-8-I
Ignacio Marin, App/Cross-Resp v. King Co WA, Resp/Cross-App

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on April 29, 2015, regarding Appellant's motion to supplement the record on appeal:

This is an employment discrimination case where plaintiff Ignacio Marin appeals from a judgment for King County on a unanimous defense verdict in October 2014. On April 2, 2015, Marin filed a motion to supplement the record on appeal. He asks to supplement the record with an email that a juror sent to the trial judge. As explained below, Marin's motion to supplement is denied.

Marin filed the same relief in the trial court by filing a motion to supplement on November 24, 2014, after he filed a notice of appeal from the defense judgment. The trial court denied his motion, stating that the "entirety of the email is contained in the oral record."

During the trial, the trial court put the contents of the email on the record:

> Counsel, continuing with our jury issues, which don't seem to abate, I don't know if you remember, but this particular juror had his card raised for a long time and was not called upon, but he sent us an e-mail saying, "I did not get an opportunity to bring up this issue. When the issue was raised, I held up my card and was not called to answer."
>
> This is Mr. Gilbert. He says, "I raised my card for some time at the end of voir dire, but again was not called upon. When the judge asked me at the end, I said I had a fairness issue, which might have been perceived as a fairness of the process. Rather than that, what I meant was my own fairness or impartiality. I have a good friend, my wife's best friend, who is a King County prosecutor in the Employment Group. My concern is that I would feel some bias towards the King County prosecutor, so I wanted to bring this up."
>
> Do either counsel with to question the juror at this point in time?

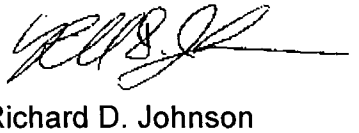
RP (Sep. 4, 2014) at 101-02. Marin did not seek a copy of the email when the trial court orally addressed the email. His counsel engaged in questioning but did not ask whether the juror could be impartial. Nor did counsel ask about the contents of his email. Counsel moved to strike the juror, and King County objected, arguing that Marin failed to raise the issue during voir dire and had not established that the juror could not be impartial. The trial court reserved ruling and asked the parties for further research and briefing. After reviewing the parties' briefs, the court declined to remove the juror, stating that Marin had not established a for-cause challenge.

I deny Marin's motion to supplement in part because he failed to make the email part of the record by requesting its copy at the time of the trial. However, in his brief on the merits, Marin may challenge the trial court's denial of his motion to supplement for consideration of the panel determining this case.

Please be advised a ruling by a Commissioner "is not subject to review by the Supreme Court." RAP 13.3(e)

Should counsel choose to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served... and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

APPELLANT MARIN'S REPLY BRIEF

APPENDIX

2.

Status on Trial: Social Characteristics and Influence in the Jury Room, **York and Cornwell, Social Forces, Volume 85, Number 1, September 2006, pp. 455-477 at 464 (Article), Oxford University Press. (Appendix)**

Status on Trial: Social Characteristics and Influence in the Jury Room

Erin York, *University of Chicago*
Benjamin Cornwell, *University of Chicago*

Abstract
The American jury is heralded as an institution that is simultaneously representative and egalitarian. However, jury studies conducted 50 years ago found that white, upper-class men dominate jury deliberations, presumably due to their higher status outside of the jury room. Logistic regression analysis of dyadic influence inside the jury room updates this research. Results indicate that today upper-class jurors alone – not men, not whites – are regarded as most influential in deliberations. Upper-class jurors' influence is not simply a product of status deference. Rather, upper-class jurors seem to influence deliberations due to generalized expectations of their competence or their possession of skill sets that enhance jury room performance. We conclude that increased statistical representation in the jury pool does not guarantee that diverse views will affect verdicts.

Fifty years ago, research from the Chicago Jury Project demonstrated that upper-class men do most of the talking in mock jury deliberations (James 1959; Strodtbeck, James and Hawkins 1957; Strodtbeck and Mann 1956). This research indicated that recognizable, external status characteristics, such as gender and social class, can restructure otherwise undifferentiated small groups. However, women and minorities were severely underrepresented in juries and mock jury studies of the 1950s, and times have changed. The Jury Selection and Service Act of 1968[1] mandated that jury pools include all eligible voters, and subsequent jury selection reforms have increased jury diversity. Are the more diverse juries of today actually able to achieve an inclusive and egalitarian interaction, or do jurors from historically privileged status groups still dominate deliberations?

From outside its doors, the jury room appears to be one of the most representative and egalitarian spaces in American society. The historical development of the jury was guided by the assumption that diverse groups could set aside external differences to arrive at a shared verdict. In fact, the earliest English mixed juries of the 12th through the 15th centuries decided disputes between persons from two communities by bringing together a mix of jurors, such as foreigners and citizens, Jews and Christians, and local and foreign merchants (Constable 1994). And, in the past several decades, many discriminated groups have argued for and won representation in the jury pool on the grounds that jury composition is integral to the achievement of justice.[2]

We are grateful to Susan Silbey, Andrew Abbott, Tom Burke, the late Fred Strodtbeck, Esther Wilder and two anonymous reviewers for their helpful comments. We thank Judges John Cratsley, Nancy Gertner and Peter Lauriat, along with the Massachusetts Jury Management Advisory Committee, for their assistance with data collection. Partial funding for this research was provided to the first author by the Jerome A. Schiff Fellowship at Wellesley College. *Direct correspondence to Erin York, Department of Sociology, University of Chicago, 1126 E. 59th Street, Chicago, IL 60637. E-mail: eyork@uchicago.edu.*

In addition to the historical importance of jury diversity, formal norms of jury procedure aim to minimize role differentiation inside the jury room. Unanimous verdicts require that all jurors must concur – one juror in disagreement can overturn all the others. Juror orientation materials encourage inclusive deliberations with instructions such as, "No juror should dominate the discussion. No juror should remain quiet and leave the speaking to others. Everyone should participate."[3] Compared with stratified deliberations, the egalitarian deliberations promoted by these procedural norms are more likely to focus on story construction, rather than bargaining, and ultimately result in more accurate verdicts (Hastie, Penrod and Pennington 1983).

The jury room, in its idealized form, constitutes a protected space where diverse individuals can gather and deliberate as equals. However, sociological research suggests that, in small heterogeneous groups, processes such as status deference and status generalization may allow members of historically-dominant groups to steer discussions.[4] Thus, the combination of a diverse jury and the expectation of an egalitarian deliberation poses a paradox. A representative jury is assumed to draw on the group's diverse perspectives, while overlooking the external status differentials that make the group diverse.

We revisit the Chicago Jury Project's early research to consider whether race, class and gender still structure influence in the jury room. We use surveys completed by jurors and operationalize influence as a dyadic, or juror-to-juror, process. We examine whether status deference and status generalization, key processes of status translation in small groups, allow some jurors to have more influence than others. If influence in jury deliberations is determined by external status roles, then the potential value of jury diversity is not fully achieved.

Status Processes in Small Groups

Sociologists have long been preoccupied with the role of status – achieved or ascribed, subjective or objective, total or segmental, consistent or inconsistent – in structuring social interactions. As Linton (1936:202) noted, "it is extremely hard for us to maintain a distinction in our thinking between statuses and the people who hold them and who exercise the rights and duties which constitute them." Indeed, we are hard pressed to find a status vacuum; there seems to be no situation in which status does not, in some way, affect interactions.

Status Deference

The concept of status deference originates in the close – almost inextricable – linkages between individuals, their statuses and their concomitant rights and duties (Shils 1968). Status itself is both constituted by and reflected in interactional gestures at the dyadic level. Such acts can be appreciative or derogative. High deference reflects one's positive assessment of another, while low deference indicates one's negative assessment of another. Shils emphasizes the close connections between status and the roles or actions that reflect status by suggesting that one's overall status can be described as a "deference-position." (107) Taken as a whole, then, status differences are most obvious when we

consider the acts of deference that reflect, on the dyadic level, evaluative judgments about positions in society.

Deference-entitling characteristics are derived from one's closeness to, or distance from, social centers of power, values, norms and legitimacy. As indicators of proximity to societal centers, occupational position and educational attainment loom large. According to Shils, ascribed characteristics, such as ethnicity and gender, afford deference only because they are frequently concordant with occupational and educational distinctions. However, subsequent research emphasizes a broader range of characteristics potentially relevant to status hierarchy formation. Race, gender, age, ethnicity, religion and even height have been found to generate status differentials (Balkwell and Berger 1996; Berger, Cohen and Zelditch 1972; Katz and Cohen 1962; Kirchmeyer 1993; Marcus, Lyons and Guyton 2000; Meeker and O'Neill 1977; Ridgeway and Smith-Lovin 1999; Webster and Whitmeyer 2001; and Ziller and Exline 1958).

Status Generalization

While Shils (1968) theorized about status deference, Berger, Cohen and Zelditch (1966,1972) detailed a broader process of status generalization:

> *When a task-oriented group is differentiated with respect to some external status characteristic, this status difference determines the observable power and prestige within the group whether or not the external status characteristic is related to the group task (1966:243).*

In other words, social characteristics are laden with expectations about generalized competency (Berger, Cohen and Zelditch 1972; Skvoretz and Fararo 1996). Culturally-derived status distinctions are transposed to valuations and behavioral outcomes in small task groups (Berger, Fisek, Norman and Zelditch 1977; Webster and Foschi 1988). Here, influence in groups flows to persons in historically advantaged status categories because others simply assume that they are more competent.

To elaborate this process, status generalization begins when one individual, *i*, observes the status characteristic(s) of another, *j*. *J*'s observable status characteristics lead *i* to form expectations about *j*'s general abilities, and these expectations are manifest in behavioral outcomes. As a result, individuals in a small group are likely to assign low-status positions within the group to persons whose characteristics are negatively-evaluated in the larger society. Conversely, they assign high-status positions within the group to persons whose characteristics are positively viewed in the larger society (Webster and Foschi 1988).

While status deference relies on recognized status differentials, particularly at the dyadic level, the process of status generalization is rooted in the conscious or unconscious transposition of external status to determine power and prestige orders in small group interactions. Both theoretical approaches have contributed to the development of an extensive body of research noting the profound effects of status expectations and cultural schemas. As long as status distinctions are

recognizable and culturally or socially meaningful, they can be transposed to order power and prestige hierarchies within any otherwise undifferentiated group.

Evidence of the processes of status deference and generalization surfaces in many contexts. Previous research has elucidated various behavioral outcomes of status differentials and has identified a multitude of settings in which external status structures otherwise egalitarian interactions. Status differentials are manifest in small group settings as disparate opportunities to perform, rates of performance outputs, performance evaluations, influence (Berger, Cohen and Zelditch 1972), collective validation (Kalkhoff 2005), leadership roles and respect or esteem (Webster and Driskell 1978). Micro-level analyses have indicated that social status is predictive of conversational variations such as turn-taking (Smith-Lovin and Brody 1989) and topic-changing (Okamoto and Smith-Lovin 2001). These behavioral outcomes, stemming from external status differentials, have been observed in workplaces (Caudill 1958, Katz and Cohen 1962), summer camps (Sherif, White and Harvey 1955), and classrooms (Cohen and Roper 1972), as well as innumerable experimental groups and mock juries (Strodtbeck, James and Hawkins 1958).

Status in the Jury Room

Theories of status hierarchy formation are informative in attempts to understand jury room influence. Research examining the effects of social status in the jury room long precedes this paper. As early as 1953, the University of Chicago Jury Project assembled mock juries to observe whether class, race and gender affect participation in deliberations (James 1959; Strodtbeck, James and Hawkins 1957; Strodtbeck and Mann 1956). More recent research has considered the effects of status on specific features of deliberations, such as turn-taking (Manzo 1996), discussion topics (Hastie, Penrod and Pennington 1983), coalition formation (Hawkins 1961) and juror narratives (Manzo 1993).

As in the Chicago Jury Project research, recent studies of power or influence in jury deliberations focus on differentials in juror participation (Kirchmeyer 1993; Nemeth, Endicott and Wachtler 1976). This approach posits that participation in a small group discussion correlates with influence over the group decision or product (Strodtbeck, James and Hawkins 1957). Past jury studies reveal surprising variation in levels of participation – on average, three jurors account for more than half of the total speaking time in a deliberation (James 1959; Strodtbeck, James and Hawkins 1957). Who are the most participatory jurors?

First, early research using mock juries suggests that men speak in deliberations more frequently than women, regardless of occupation or race (James 1959; Strodtbeck, James and Hawkins 1957; Strodtbeck and Mann 1955), and more recent mock jury research echoes this finding (Kirchmeyer 1993; Nemeth, Endicott and Wachtler 1976). In fact, one mock jury study suggests that males initiate about 40 percent more comments than females (Hastie, Penrod and Pennington 1983). These findings parallel social psychological research, which has shown that gender differences in mixed-sex groups shape performance expectations, conversational norms, and behavioral outcomes (Balkwell and Berger 1996, Meeker and O'Neill 1977, Ridgeway and Smith-Lovin 1999).

Second, previous jury research indicates that individuals with higher occupational statuses and higher levels of education participate more than their lower status counterparts (Hastie, Penrod and Pennington 1983; Hawkins 1961; James 1959). In mock jury experiments, proprietors and clerical workers spoke more frequently than skilled and unskilled laborers (Strodtbeck, James and Hawkins 1957). Income levels combine with both educational attainment and occupation in their effects on participation in deliberations (Hastie, Penrod and Pennington 1983).

Unfortunately, previous research has not adequately addressed jury deliberation participation by race, as past jury studies have severely underrepresented minority subjects. However, small group studies indicate that members of minority races are often relegated to positions of low status in task groups (Asante and Davis 1985). Compared with their white counterparts, minorities receive fewer opportunities to participate (Elsass and Graves 1997), and ultimately contribute less to decision-making (Kirchmeyer 1993). An experiment using college-age men found that whites dominated small groups even after numerous interventions designed to increase black members' assertiveness (Katz and Cohen 1962).

In sum, a multitude of studies provide strong evidence that status distinctions may affect participation in the jury room despite ideals of unanimity and diversity. But much of the research on social status in the jury room is quite dated, and particular issues, such as the effects of race and whether participation can be equated with influence, have not yet been adequately explored. Many of the mock jury studies were conducted prior to or concurrent with the Jury Selection and Service Act of 1968 and subsequent rulings which increased diversity in jury pools. The potential effects of status deference and status generalization are intimately linked to social norms, and cultural and social changes of the past generation may have altered the effects of social status in the jury room.

Data

While there are many benefits of mock jury research – the researcher can observe the deliberations and manipulate details of the case with different juries, for example – it has several notable shortcomings. Because mock jurors are aware that they are not deliberating toward a decision that will have real-life consequences, they do not experience the same motivations as actual jurors (Kessler 1975). Even in the best of scenarios, mock jury decisions do not exactly mirror actual jury decisions. A real jury and a mock jury of the same size may sit in a criminal courtroom and listen to the same testimony, but the real jury is simply less likely to convict (Diamond and Zeisel 1974:291). If verdict outcomes differ, we cannot infer that deliberation interactions of mock juries accurately reflect those of real juries.

Nevertheless, the observation of actual juries is nearly impossible. In an effort to validate their mock jury studies, researchers from the Chicago Jury Project recorded six jury deliberations in 1954. Although they had gained permission from the judges and lawyers involved, the researchers were accused of jury tampering and subpoenaed to testify in a congressional investigation.[5] They were ordered

to destroy the data, and resulting legislation largely closed the jury room door to social scientific researchers.

In the absence of actual jury deliberations, post-verdict juror surveys provide a way to gauge jurors' perceptions of the deliberations (Marcus, Lyons and Guyton 2000). Theoretically, one's recollection of influence in an interaction may more accurately represent his or her impressions than an actual coding or observation of the interaction (Thomas and Thomas 1928). An anonymous paper and pencil survey provides a forum in which an individual may express status-based discrimination that might be more suppressed in a face-to-face context. Post-verdict recollections depart from observation of the actual interaction in that they are filtered through respondents' perceptions of social norms, but we suspect that these same perceptions also affect the jury deliberation.

On the other hand, an individual may be more conscious of his or her behavior when completing a survey than interacting in face-to-face deliberations. In this case, he or she might suppress status-based discrimination when completing the post-verdict survey so that results of the survey would provide only a very conservative measure of the effects of social status. Further research is needed to assess whether post-verdict recollections overestimate or underestimate the effects of status. We proceed with this analysis based on our belief that post-verdict surveys provide a rare and valuable, albeit incomplete, look behind the closed door of the jury room.

The first author surveyed jurors in Massachusetts courts from November 1998 to January 1999. Four judges in the Superior Court of Suffolk County and one judge in the Superior Court of Middlesex County[6] were selected using a snowball sample. Each judge distributed the surveys to jurors after a verdict had been rendered in his or her courtroom. The judges were given a script to introduce the surveys and encourage the jurors to complete them as soon as possible after leaving the courthouse. They assured the jurors that their responses would remain anonymous, as the surveys were coded only by respondent numbers. A stamped, addressed envelope was included with each survey to allow its anonymous return to the researcher. In total, completed surveys were received from jurors who served on 14 different juries. Eleven of the juries decided civil cases (78.6 percent) and three juries heard criminal trials.[7] The criminal juries consisted of 12 members, while civil juries had either 12 or 14 jurors. The overall response rate was 35 percent, with 62 of a total 177 jurors completing the survey.[8]

We are interested in jurors' perceptions of each other and how these perceptions might have affected jurors' diagnoses of others' influence over the verdict. To facilitate recollection, the first page of the survey provided respondents with a diagram of the table in the jury room and asked them to try to remember other jurors by using their seating positions (labeled with the letters A-L or A-M, depending on jury size). The survey then asked respondents to record the letters representing those jurors who were "most influential in the group's decision." It is this judgment that we investigate in this paper.

On subsequent pages of the survey, respondents rated each juror's amount of participation in the deliberations. Respondents were then asked to recall each juror's race and gender and to infer his or her occupation and lifestyle.[9] While

jurors may not share information about their occupation and are probably even less likely to offer information about their income, we expect that respondents can infer such characteristics based on other jurors' dress, speech and casual references to experiences (Strodtbeck, James and Hawkins 1957). Thus, class is measured using respondents' estimates of other jurors' lifestyles (as a qualitative measure of income) and coded into four categories: upper, upper-middle, middle and lower class.[10]

Analytic Strategy

The dependent variable is one's influence during a jury deliberation, as assessed by one's fellow jurors. We first examine the distribution of the influence nominations to determine what kinds of jurors were most likely to be seen as influential. In particular, we want to determine how internal status roles (such as foreperson status and amount of participation) and external status roles (such as race, class and gender) affect influence in the jury room.

Recent research suggests that participation may not be the causal link between status and influence in the jury room. Conversation analyses of status generalization in small groups indicate that early, frequent or assertive participation by low status group members can arouse negative reactions. On the other hand, group members tend to respond positively to any participation by high status individuals (Meeker and O'Neill 1977, Ridgeway and Berger 1986). Thus, we examine both participation and influence in the jury room, and allow social status to affect both participation and influence separately.

This study improves upon research that has examined social status in jury deliberations on an aggregate level. Deference, as Shils (1968) theorized, occurs when one individual recognizes the higher or lower status of another. In this way, a juror exercises influence not on the jury as a whole, but on each of the jurors interpersonally. One juror's perception of another's influence may vary according to his own social background and the background of the juror he is evaluating. If we want to know whether an upper-class juror was seen as influential due to her performance or due to the deference gained by her status, we need to somehow account for the status of her fellow jurors. Aggregate measures of group similarity would not capture this dyadic process.

To examine the extent to which jury deliberations are marked by status deference or status generalization, we use logistic regression to assess the probability that a given juror, *i*, identified another juror, *j*, as influential.[11] The unit of analysis is a *pair* of jurors, rather than an individual. In a given setting containing n persons, there are $n * (n - 1)$ potential dyads. There were 14 juries surveyed, some comprised of 12 jurors and others 14. Not everyone returned the questionnaire, so the number of dyads reported in each jury varies. We utilize influence judgments made by 62 (35 percent) of the 177 jurors. Excluding missing cases (e.g., where a respondent did not remember one of the other jurors), we observe 828 dyads.[12]

The analysis proceeds as a series of nested models. We first consider whether status roles internal to the jury process – such as *j*'s participation in the deliberations and whether or not *j* is the foreperson – are associated with *j*'s

Table 1: Descriptions of Variables Included in the Analysis (n = 605 dyads)

Variable	Description	Mean	Standard Deviation
Influence	Whether *i* identified *j* as the most influential juror in deliberations {0 = no, 1 = yes}	.094	.292
j's Characteristics			
Foreperson	Whether *j* was the foreperson {0 = no, 1 = yes}	.081	.273
Participation	*j*s perception of *j*s level of participation in deliberations (range = 1,5)[a]	3.116	1.176
Male	Whether *j* is male {0 = no, 1 = yes}	.420	.494
White	Whether *j* is white {0 = no, 1 = yes}	.808	.394
Social class	*j*s perception of *j*s social class {range = 1,4}[b]	2.223	.580
i's Characteristics			
Male	Whether *i* is male {0 = no, 1 = yes}	.298	.458
White	Whether *i* is white {0 = no, 1 = yes}	.846	.361
Social class	*i*s self-reported social class {range = 1,4}[c]	2.436	.571
Dyadic Characteristics			
Sex deference	Whether *i* is female and *j* is male {0 = no, 1 = yes}	.274	.447
Race deference	Whether *i* is a minority and *j* is white {0 = no, 1 = yes}	.104	.306
Class deference	Whether *i* is a lower social class than *j* {0 = no, 1 = yes}	.131	.337
Controls			
*i*s expansiveness	Number of people other than *j* that *i* nominated as most influential {range = 0,6}	1.055	.918
*j*s attractiveness	Number of people other than *i* that nominated *j* as most influential {range = 0,4}	.296	.620

[a] "How often did Juror [X] speak during deliberations?" {5 = "Much more than other jurors;" 4 = "Somewhat more than other jurors;" 3 = "About the same as other jurors;" 2 = "Somewhat less than other jurors;" 1 = "Much less than other jurors."}

[b] "Although it is unlikely that you know other jurors' incomes, what was your impression of Juror [X]'s lifestyle?" {"Luxurious," "Above average," "Average," "Below average."} "Luxurious" is coded as 4 = upper class; "Above average" is coded as 3 = upper-middle class; "Average" is coded as 2 = middle class; and "Below average" is coded as 1 = lower class.

[c] Self-ratings of class are derived from respondents' ratings of themselves using the same set of questions used to rate other jurors. Instructions indicated, "If you are the juror who is referenced in a question, please respond to the question by describing yourself."

perceived influence on the verdict. *J*'s foreperson status is modeled with a dummy variable, where a positive effect signifies that authority over the formal aspects of deliberations causes influence. Note that when jurors select forepersons there is a likely additional link between status and participation (Strodtbeck, James and Hawkins 1957). In Massachusetts, forepersons are selected by the judge, so this linkage is attenuated.

The second model considers the effects of status roles that are external to the jury room. This model includes *j*'s sex, race, and social class (see Table 1).[13] We use the lifestyle rating described above as a proxy for class.[14] The respondent's (*i*'s) characteristics (race, sex and class) are entered in the third model. These variables are essentially controls. Without considering them, it is impossible to know whether members of a given group, such as males, are judged most influential because they were actually more influential or because males were the dominant sex group in the jury room, thus allowing them to capitalize on in-group preferences.

The final model assesses whether positive appraisals of influence reflect valuations of social status, using variables that indicate the relationship between *i*'s and *j*'s attributes (shown in Table 1). For race, sex and class we create one dummy variable apiece indicating status asymmetry between *i* and *j*, such that *j* has higher status or is in a more historically dominant group than *i*. If any of these dummy variables are positive and significant, then status deference is operating on influence appraisals.[15,16]

Results

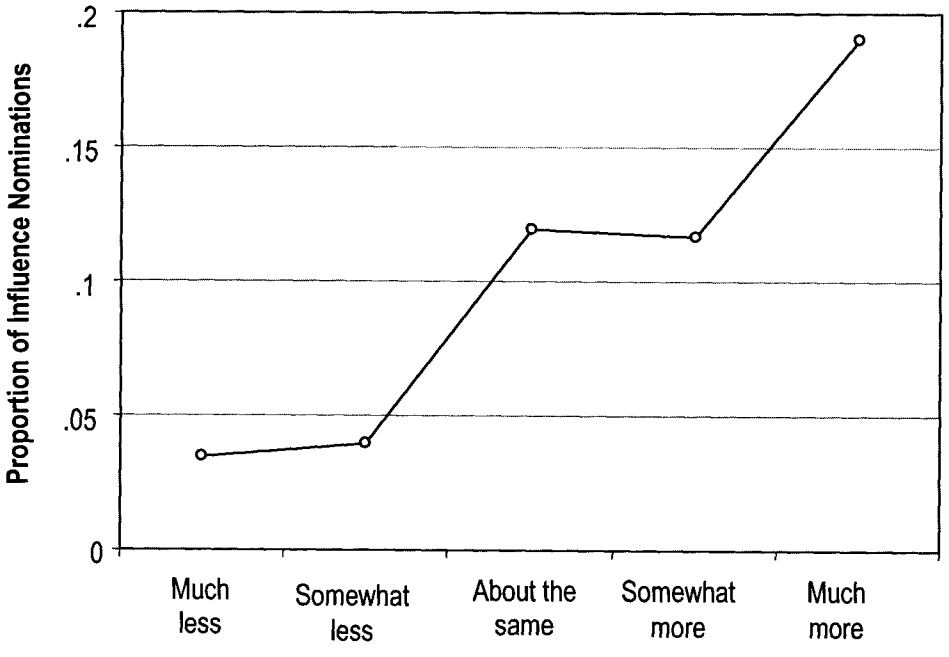
Who is Influential in the Jury Room?

Influence is not exactly a scarce resource in juries, and jurors often vary widely in their appraisals of influence (Marcus, Lyons and Guyton 2000). In our study, 44 (or about 25 percent) of the 177 jurors were identified as influential by at least one respondent. On average, each juror who was seen as influential was nominated by 40 percent of his fellow jurors.[17] In half of the juries, the average level of agreement about who was influential fell just below 33 percent, with only one jury under 25 percent agreement and one above 50 percent agreement.

Influence can emerge through two key mechanisms: status differentiation internal to the jury process and the mapping of external social characteristics (and their corresponding status roles) onto jury interactions. With regard to internal processes, one would expect the foreperson to be particularly influential. Indeed, of the 14 forepersons, eight (57 percent) were named as influential by at least one other juror.[18]

A second form of internal status is a juror's participation in deliberations. Highly participatory jurors are more influential. Overall, about 40 percent of the jurors who participated "much more" than others were seen as influential, compared to only 14 percent of those who spoke "much less" than others. As Figure 1 shows, when we look within each jury, those who talked "much more" than others were recognized as influential by about 19 percent of their fellow jurors, on average.

Figure 1. Average Proportion of Influence Nominations from Fellow Jurors, by Juror j's Participation Level (n = 177)



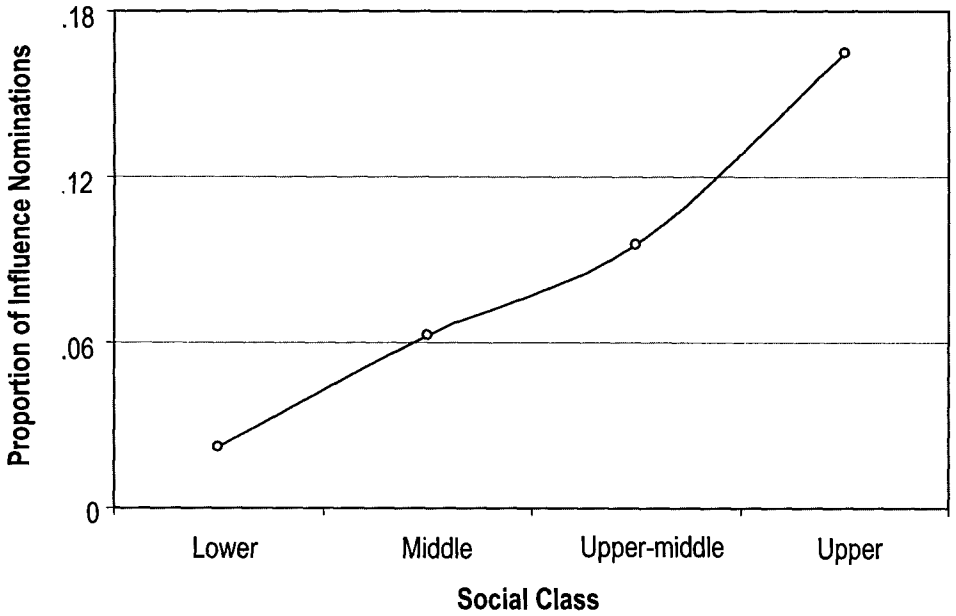
By contrast, those who spoke "somewhat less" or "much less" than others had less than a 4 percent chance of influencing their fellow jurors.

Influence in the jury room may also stem from external status. Early research found that upper-class, male jurors have the most influence over verdicts (Hawkins 1961; James 1959; Strodtbeck, James and Hawkins 1957; Strodtbeck and Mann 1956). Our analyses indicate that these associations are not as strong as they once were. Overall, 27 percent of male jurors and 24 percent of female jurors received at least one influence nomination. (The difference is not statistically significant.) In addition, 28 percent of *both* whites and non-whites were seen as influential.

While influence is conferred nearly equally among males and females, whites and non-whites, it is not evenly distributed by class. About 39 percent of upper-class and 38 percent of upper-middle-class jurors were regarded as influential, compared to just 13 percent of middle class and 8 percent of lower class jurors ($\chi^2 = 17.054$, $p < .001$). Figure 2 indicates that members of the upper classes received influence nominations from a relatively high proportion of respondents within their juries. Upper-class jurors received nominations from 17 percent of the respondents in their juries, whereas lower-class jurors received nominations from only 2 percent of their fellow jurors.

Who, then, has influence in the jury room? Forepersons and highly-participatory jurors are influential in deliberations. Influence does not appear to vary by race or gender, but it does seem to vary by class. Thus, jurors derive influence from statuses both internal and external to the jury. From these analyses, however, it is

Figure 2. Average Proportion of Influence Nominations from Fellow Jurors, by Juror j's Social Class (n = 177)



difficult to tell whether differentials in influence are due to status generalization or status deference. Theoretically, both processes allow the transposition of external status differentials onto jury room interaction. Interpersonal influence, however, implicates the statuses of both the rater and the ratee within the same process. We thus turn to the dyadic analysis.

Influence at the Dyadic Level

Dyadic logistic regression analysis, presented in Table 2, demonstrates robust effects of internal status roles on influence. Forepersons are more than twice as likely as non-forepersons to be regarded as influential (odds ratio = 2.3, $p < .05$). Participation has a similarly strong impact on influence. Recall that jurors rated each other using five levels of participation. A juror at any given participation level was 1.7 times more likely to be influential than a juror at the next lowest level of participation, on average.

Status roles external to the deliberation process affect influence in a limited way. The inclusion of *j*'s external status characteristics significantly improves the model's predictive power. (See Table 2 for the decrease in -2 log likelihood associated with the addition of these variables.) Of the three characteristics – sex, race and social class – only class has a significant impact on influence. On average, members of any given social class are 2.3 times more likely to be influential than members of the next lowest class.

Figure 3 clarifies the relationship between social class, participation and influence. Neither high social class nor high participation guarantees influence in the jury room, but they are both very consequential. For example, the probability that an upper-class juror who participates at the highest level will be judged

Table 2: Logistic Regression Models Predicting the Likelihood of a Juror (*j*) Being Judged by Another Juror (*i*) as Most Influential in the Jury's Decision (n = 605 dyads)

Predictor	1	2	3	4
j's Characteristics				
Foreperson status	2.219*	2.280*	2.245*	2.229*
	(.428)	(.444)	(.453)	(.452)
Participation	1.649***	1.565**	1.635***	1.707***
	(.148)	(.151)	(.154)	(.160)
Male		1.393	1.396	1.525
		(.332)	(.337)	(.592)
White		1.023	1.059	1.439
		(.484)	(.490)	(.627)
Social class		2.308**	2.277**	3.616**
		(.279)	(.282)	(.452)
i's Characteristics				
Male			3.358**	3.447*
			(.459)	(.628)
White			.688	.308
			(.567)	(.934)
Social class			.955	.620
			(.404)	(.501)
Dyadic Characteristics				
Sex deference				.923
				(.719)
Race deference				.303
				(1.012)
Class deference				.373
				(.675)
Constant	.026***	.003***	.002**	.004***
	(.751)	(1.085)	(1.526)	(1.592)
Decrease in -2LL[a]	--	11.086†	9.417†	3.902
Nagelkerke R^2	.196	.231	.261	.273

Note: Standard errors are presented in parentheses below odds ratios. Dummy variables indicating from which jury the case is taken and controls for *i*'s expansiveness and *j*'s attractiveness are included, but not shown.

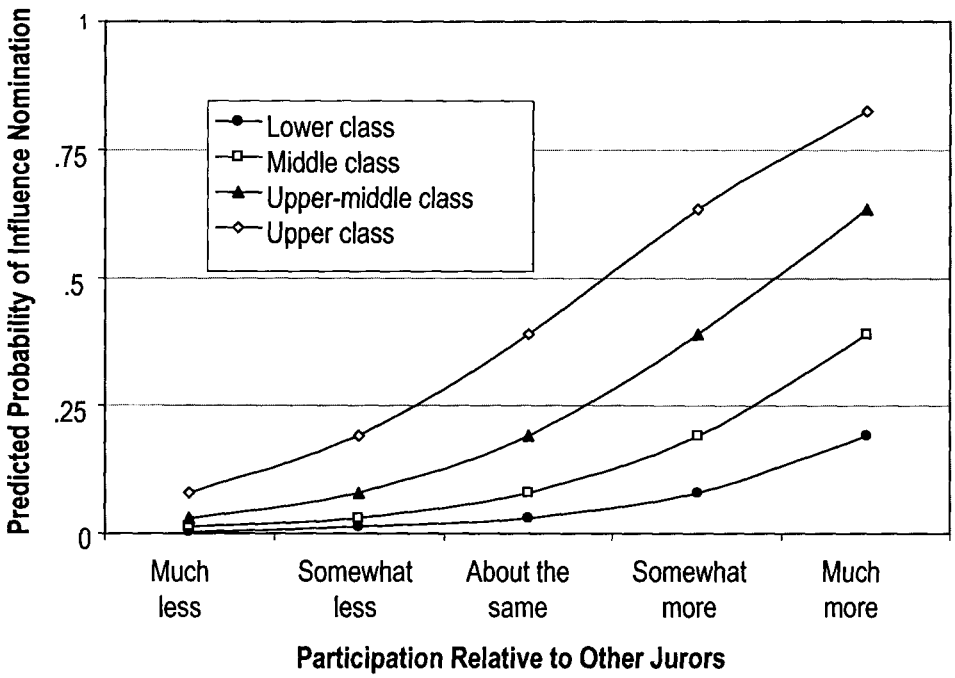
* $p < .05$ ** $p < .01$ *** $p < .001$ (one-tailed tests)

[a] Decrease in -2 log likelihood from previous model is evaluated using χ^2 (df = 3), † $p < .05$.

influential is .825, whereas, for middle class jurors who participate at the highest level, the probability is .390. At the same time, it appears that class has a much stronger effect on influence than participation. Lower-class jurors who participate at the highest level barely achieve the influence enjoyed by upper-class jurors who participate at the lowest level. Highly participatory members of the upper class were the most influential, but we find no interaction between participation and social class.

The third logistic regression model introduces external status characteristics – the sex, race and social class – of *i*, the rater. The predictive power of these characteristics rests primarily on *i*'s sex. The likelihood of male respondents judging a fellow juror as influential was over three times that of female respondents. Perhaps

Figure 3. Predicted Probability of Influence Nomination, by *j*'s Social Class and Participation Level (n = 605 dyads)



men were more comfortable conferring influence nominations, or they recognized influence more readily, than women. Further research is needed to clarify the cause of this discrepancy. The external status characteristics of *i*, however, are not a main focus of this study and are included here primarily as controls.

Finally, we incorporate dyadic characteristics, which are intended to measure deference across sex, race and class categories. The key finding here is that the inclusion of these variables does not significantly alter the model's predictive power (χ^2 = 3.902, p = n.s.). Furthermore, none of the deference variables are significant. Status differences between individuals, then, do not appear to create a greater propensity to confer influence.[19] For example, women were no more likely to recognize men as influential than they were to nominate other women,

and minorities were no more likely to rate whites as influential than they were to nominate other minorities.

The final model, with all controls, reiterates the impact of social class on jury room influence. Upper-class jurors are three and a half times as likely as lower-class jurors to be regarded as influential. As depicted in Table 3, upper- and upper-middle class jurors, on the other hand, enjoy a large share of influence votes. By contrast, none of the lower-class jurors were seen as influential. This pattern is

Table 3: Influence Nominations from Juror *i* to Juror *j* by Social Class (n = 605 dyads)

	j's Social Class		
***i*'s Social Class**	**Lower**	**Middle**	**Upper-Middle and Upper[b]**
Lower	.0% (n = 5)	.0% (n = 5)	50.0% (n = 2)
Middle	.0% (n = 21)	8.7% (n = 241)	16.4% (n = 67)
Upper-Middle and Upper[a]	.0% (n = 14)	5.2% (n = 154)	16.5% (n = 97)
Total	.0% (n = 40)	7.3% (n = 400)	16.9% (n = 166)

[a] For the purposes of this table, upper class cases were merged into the upper-middle class category due to the small number of upper-class jurors.

not affected by respondents' class. These results, then, suggest that external status differences do not impose themselves on the otherwise egalitarian jury via status deference. Upper-class jurors were the most influential because jurors from *all* classes recognized them as such.

Conclusion

The jury has come a long way in the 50 years since the studies of the Chicago Jury Project found that upper-class men dominate deliberations. Minorities and women have been brought into the jury room, and these groups now appear to participate in jury deliberations and influence jury verdicts as much as their white, male counterparts. Status deference does not seem to be operating in today's jury room. Our results suggest that members of historically, culturally or socially dominant groups, *ipso facto*, no longer dominate jury discussions. Male jurors do not influence female jurors, white jurors do not influence their minority

counterparts, and upper-class jurors do not influence lower class jurors solely because of differences in social status.

Nevertheless, jury room influence is not wholly unaffected by status. There is a powerful, and singular, effect of social class on influence in the jury room. Upper-class jurors exercise more influence than middle- or lower-class jurors. This is not due to status deference, as some classical sociological theories might suggest. Members of the upper class are more influential because jurors almost unanimously recognize them as influential.

More predictably, participation also appears to contribute to influence in the jury room. The present findings depart from earlier studies which posited that participation in deliberations is an adequate proxy for influence (Strodtbeck, Simon and Hawkins 1957). Upper-class individuals' greater participation does not fully explain their above-average levels of influence. Instead, both participation and upper-class status simultaneously contribute to influence in the jury room.

If upper-class jurors' influence cannot be traced to status deference, and it is not explained by their higher levels of participation, then to what might it be attributed? The most accessible explanation, given the wealth of research on the topic, is that status generalization is operating in the jury room. Recall that status deference stems from status asymmetries, but status generalization is based on broader beliefs and shared expectations about particular groups (Berger, Cohen and Zelditch 1966; Berger et al. 1977; Webster and Foschi 1988).

Social class may translate more readily than race or gender into expectations of a juror's performance for two reasons. First, unlike race or gender, class is often an achieved status. As such, it is more amenable to expectations about generalized skills. Assumptions about the greater competence, intelligence, and experience of upper-class persons may cause jurors to value the opinions of upper-class jurors, and to doubt lower-class jurors' contributions.

Second, efforts to address the historical effects of racism and to create protected categories related to visible status differences have decreased the legality and social acceptability of translating such statuses to generalized expectations of competence. Doing so, in fact, would amount to overt discrimination. As a result, social and cultural distinctions of ascribed statuses, such as race and gender, are being replaced by the growing inequalities introduced by achieved status (Wilson 1980). Lines of social class now crosscut racial and gender inequalities. Social class, then, may constitute the most salient and socially-acceptable basis for status generalization today.

The influence of upper-class jurors might also stem from the high education levels and high-status occupations that are typically correlated with upper-class status. Skills such as public speaking, group leadership, and logical reasoning could enhance the effectiveness of upper-class jurors' comments (e.g., Brady, Verba and Scholzman 1995). Upper-class jurors also may be more accustomed to the types of arguments, technical details and legal complexities presented during a trial, resulting in a greater mastery of, and ability to recount, this information. Perhaps a cultural affinity among upper-class jurors, attorneys, expert witnesses and judges, gives upper-class jurors more clout among their fellow jurors.

Further research is needed to identify the source of upper-class jurors' influence. This will require distinguishing between the potential effects of status generalization and actual skills that are concentrated in the upper class. Whatever the source, we also need to consider more fully the legal and social implications of upper-class individuals' disproportionate influence within the jury room. Does this have an effect on patterns of verdicts for defendants of various backgrounds? How would verdicts differ if influence were equally distributed by class? A perceived lack of influence by members of the lower and middle classes might result in their dissatisfaction with and distrust of the justice system.

While not all jurors can be equally influential in deliberations, we might take some measures to reduce the disproportionate influence of the upper class. Experiments attempting to reduce status generalization in mixed-race small groups have found that merely reminding participants that all group members are equal does not result in egalitarian interactions. Informing group members that typically marginalized groups have something unique and valuable to contribute to the discussion, though, does lead to more inclusive interactions (Katz and Cohen 1962). Thus, if jurors are told that lower- and middle-class individuals, in particular, have important viewpoints to contribute to deliberations, they might look to these jurors for input.

Second, giving pre-trial instruction about the legal issues in a case and providing a formal structure for deliberations might help to reduce the advantage that upper-class individuals enjoy as a result of acquired skills, such as public speaking and group leadership. Aside from the unanimity requirement and general guidelines about participation typically found in juror handbooks, few formal norms guide the process of deliberation. Without a specified procedure for the discussions, upper-class members are likely to adopt a pattern of interaction that closely resembles that of "position statements" in organizational meetings (Manzo 1996:111). By outlining a more detailed format for structured, egalitarian deliberations, reaching a verdict could be a unique and unfamiliar experience for all jurors.

Finally, changes to the process of trial and deliberation could reduce the advantage of upper-class jurors. Recent studies have examined the effects of trial innovations, such as allowing jurors to take notes and ask questions in the courtroom, permitting juror discussion during recesses, providing jurors with notebooks of evidence and videotapes of testimony, and presenting more detailed verdict instructions (Diamond et al. 2003, Mott 2003). Further research is needed to determine how such modifications could alter interactions inside the jury room.

Examining the impact of status characteristics in the jury room is useful for more than just opening the black box of jury deliberations or for testing whether we can have better deliberations or better justice. Jury room interactions are "bound to have a great influence on national character." (Tocqueville [1835] 1969:274) Small groups, such as juries, allow for the collective development and recognition of symbols, communities and identities (Harrington and Fine 2000). The jury system makes possible the interaction of diverse individuals within the institutionalized authority of the American courtroom, and the emergence of

external status hierarchies within this space powerfully reinforces the dominance of particular groups.

Notes

1. 28 U.S.C., secs. 1861-69.

2. In *Taylor v. Louisiana* 419 U.S. 522 (1975) the Supreme Court required that the jury pool represent a cross-section of the community. And, the Court's decisions in *Batson v. Kentucky* 476 U.S. 79 (1986) and *Powers v. Ohio* 499 U.S. 400 (1991) aimed to reduce group-based discrimination in peremptory challenges.

3. *Massachusetts Trial Juror's Handbook*. 1984. Boston, MA: Office of the Jury Commissioner for the Commonwealth.

4. See, for example, summaries on the effects of gender (Meeker and O'Neill 1977, Ridgeway and Smith-Lovin 1999), education (Webster and Whitmeyer 2001), race (Katz and Cohen 1962), and occupation (Berger, Cohen and Zelditch 1972) in small group interactions.

5. United States Senate. 1955. *Hearings on the Recording of Jury Deliberations Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary, 84th Congress, 1st Session.* Washington, D.C.: Government Printing Office.

6. In the commonwealth of Massachusetts, Superior Courts have jurisdiction in civil cases where the damages exceed $25,000 and in criminal felony cases such as murder, armed robbery and rape.

7. This proportion of civil and criminal trials correlates with the distribution of cases within the Massachusetts Superior Court system, where approximately 80 percent of the cases heard each year are civil trials (conversation with Judge Peter Lauriat, Oct. 28, 1998).

8. Female and white jurors were slightly more likely to respond to the survey, but across race and gender, the subsets of jurors and respondents are representative of county populations. (See appendix Table A1 for race and gender distributions.)

9. The respondent's initial identification of the most influential juror(s) was purposively located on the first page of the survey, while questions about each juror's race, class and gender were asked on following pages. This design was intended to reduce the likelihood that recall of status characteristics and social and cultural norms regarding their value would affect a respondent's likelihood to nominate a particular juror as influential.

10. Subjective assessments are a useful estimation of the effects of social status, as it is through individuals' subjective evaluation of one's status that

status differentials operate in a small group interaction. Status is a measure of deference, and as such, assessments of the audience offering deference are an appropriate measure of status (Shils 1968).

11. Six respondents identified more than one juror as being the most influential. In such cases, all nominations are considered valid.

12. The response rate is low. Therefore, to test for potential selection effects in the sample, we used logistic regression to predict whether or not a juror's influence affected his decision to complete a survey. We also included as predictors sex, race, class, foreperson status, jury number and participation. Only class and sex were significant at the .05 level, suggesting that while returned surveys are not selective with respect to the dependent variable, results disproportionately represent the views of females and those in higher classes. These status characteristics are controlled in the analysis.

13. A white/non-white race variable is sufficient to capture the effects of being in America's historically dominant race group. A more elaborate coding scheme involving five race categories was tested, but results were not different.

14. We ran models using a dummy-based operationalization of class. The models included upper-middle, middle and lower class, while treating upper class as the reference category. Results did not change considerably, so we use the ordinal operationalization.

15. To moderate effects of non-independence among cases in dyadic regression models we incorporate several parameters that capture structural features of the network relative to each dyad (Wasserman and Pattison 1996). One way of capturing fixed effects by each sender and receiver is to include two measures: 1) *i*'s "expansiveness," or tendency to confer influence, as measured by the total number of jurors *i* nominated, *not including j*; and 2) *j*'s "attractiveness" or tendency to attract influence, which is the number of times *j* was nominated by people other than *i*. This is a parsimonious alternative to the roughly 240 parameters that would need to be added in the form of dummy variables representing each *i* and each *j* (Moody 2001). (There would be 11 or 13 dummy variables for the *j*s in each jury plus the number of dummy variables for *i*, which would equal the number of respondents.) Controls for the effects of expansiveness and attractiveness are included in each of the models.

16. There is some evidence of multicollinearity arising from high correlations between the variables for race deference and "Is *i* white?" and between the variables representing sex deference and "Is *j* female?" Thus, we ran alternate models dropping the individual-level measures. The results did not change.

17. To generate this statistic, we calculated the proportion of nominators that voted for each juror who received at least one nomination. We then aggregated this statistic to the jury level and then calculated the overall average. These are conservative estimates of agreement, as they do not correct for the fact that, in some cases, not all respondents made nominations. Instead

of counting these as missing, we assume that no one stood out as influential for these respondents. Furthermore, there is tremendous agreement about who was not most influential, which is not reflected in this measure.

18. The forepersons in the 14 cases studied here include eight female (57 percent), 12 white (85 percent), 7 middle-class (50 percent) and 7 upper-middle-class (50 percent) jurors.

19. We tested whether status similarity, rather than deference, affects perceived influence. Results were not significant. However, status similarity was positively related to the conferring of influence, whereas deference appears to be negatively related to influence.

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Appendix

Table A1: Racial Composition of Jurors, Respondents and Overall Population for the Counties Included in the Sample

Race	Jurors	Respondents	Residents[a]
Asian	3 (1.69%)	2 (3.2%)	84,491 (4.10%)
Black	30 (16.95%)	8 (12.9%)	178,916 (8.68%)
Hispanic	6 (3.39%)	1 (1.6%)	116,955 (5.67%)
White	138 (77.97%)	51 (82.3%)	1,670,812 (81.01%)
Other	0	0	11,185 (.54%)
Total	177 (100.0%)	62 (100.0%)	2,062,359 (100.0%)

Source: 1990 U.S. Census and survey data.

[a] "Residents" represents the total residents of Middlesex and Suffolk Counties in Massachusetts, from which the jurors were drawn.