

The Jim Crow Jury

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Since the end of Reconstruction, the criminal jury box has both reflected and reproduced racial hierarchies in the United States. In the Plessy era, racial exclusion from juries was central to the reassertion of white supremacy. But it also generated pushback: a movement resisting “the Jim Crow jury” actively fought, both inside and outside the courtroom, efforts to deny black citizens equal representation on criminal juries. Recovering this forgotten history—a counterpart to the legal struggles against disenfranchisement and de jure segregation—underscores the centrality of the jury to politics and power in the post-Reconstruction era. It also helps explain Louisiana’s adoption of nonunanimous criminal juries, which remain in use today.

The Jim Crow jury never fell. Over a century later, state-sanctioned racial discrimination in jury selection remains ubiquitous, and the racial composition of juries continues to shape substantive trial outcomes. This Article examines over 13,000 peremptory strikes in recent criminal trials in Louisiana and demonstrates that race continues to drive the selection of jurors. Additionally, by examining the racial breakdown of 199 recent nonunanimous verdicts, this Article provides an unprecedented measure of how race enters into jury deliberations: viewing the same evidence in courtroom settings, black and white jurors regularly came to starkly different conclusions about guilt and innocence.

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The legal system's current permissive approach to racial bias and the jury perpetuates this tradition. Recent Supreme Court cases, even those granting relief to criminal defendants, fail to meaningfully grapple with this entrenched history of exclusion. But aggressive measures to counter racial bias in the jury system are needed now more than ever; at the very least, the most overt relics of the original Jim Crow jury era—nonunanimous juries—should be declared unconstitutional.

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INTRODUCTION

On May 18, 1896, the *Comité des Citoyens*—an Afro-Creole civil rights organization based in New Orleans—suffered two losses at the United States Supreme Court. The first was a constitutional challenge dubbed “the Jim Crow car” case; Homer A. Plessy, a light-skinned activist handpicked for his role by the *Comité*, was facing a misdemeanor charge for intentionally violating Louisiana’s Separate Car Act.¹ *Plessy v. Ferguson*, rejecting a Fourteenth Amendment challenge to the statute, appropriately occupies a leading place in the “anti-canon” of American constitutional history.²

The second case, another criminal appeal stemming from the same courthouse in Orleans Parish, largely has been forgotten. James Murray, a black man, was condemned to death by an all-white jury for

1. *Plessy v. Ferguson*, 163 U.S. 537, 538–39 (1896).

2. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412–17 (2011); see also Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998) (examining the role of dissents—particularly Justice Harlan’s dissent in *Plessy*—in the “anti-canon” of constitutional law).

murdering a white watchman.³ The *Comité* funded a legal challenge on Murray’s behalf as part of a larger campaign to oppose the rise of what the organization called “the Jim Crow jury.”⁴ Since 1875, federal law prohibited the exclusion of state court jurors on the basis of race,⁵ and for a short period, these rights were enforced.⁶ Two decades later, however, black citizens’ access “into the *sanctum sanctorum* of justice—the jury box”⁷—was sharply curtailed across the South, despite dogged efforts by activists and frequent legal challenges. *Murray v. Louisiana* was typical of these cases: in a short opinion, the Court denied Murray relief, noting that at least a few black jurors made it into the large pool of prospective grand and petit jurors.⁸ Two months later, “crowds fill[ed] the streets” of New Orleans to catch a glimpse of the botched execution, during which Murray’s hanging body “was racked by spasms and convulsions” as though “in the throes of electrocution.”⁹ Murray gasped for air for over nineteen minutes before finally succumbing.¹⁰ Across the South, the exclusion of black jurors from the jury box, in tandem with the exclusion of black voters from the ballot box, served as a key lever for the reassertion of white supremacy.

Over a century later, the jury box continues to reflect and reproduce racial hierarchies in the United States. Recent scholarship illustrates how the legacies of Jim Crow infect and permeate contemporary criminal justice—from surveillance and policing to mass incarceration and execution.¹¹ And, in a reprise of the *Comité des*

3. *Murray v. Louisiana*, 163 U.S. 101, 104–05 (1896).

4. See *infra* notes 71–76 and accompanying text.

5. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336–37.

6. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 892–95 (1994) (outlining the Supreme Court’s treatment of rights of jurors following the enactment of the Civil Rights Act of 1875); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 930–34 (2003) (tracing the sparse enforcement of the Civil Rights Act of 1875 across jurisdictions).

7. William Henry Grey, Address at the Arkansas Constitutional Convention of 1868 (Jan. 7, 1868), in ARKANSAS CONSTITUTIONAL CONVENTION, DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK, JANUARY 7TH, 1868, 95–96 (John G. Price, ed., 1868):

Give us our rights as citizens before the law, the right of trial by a jury of our peers, — admit us into the *sanctum sanctorum* of justice—the jury box,—give us a fair show in the courts. . . . The idea of giving a negro justice, in a court where . . . the jurors there assembled are imbued with the animus of the majority of the court in the case of Dred Scott, and do not believe that I have any right to be protected from the encroachments of that class looked upon as my superiors!

8. 163 U.S. at 104.

9. *Last of Greasy Jim: His Taking off Proves a Bungling Job*, TIMES-DEMOCRAT (New Orleans, La.), July 25, 1896, at 3.

10. *Id.*

11. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2011); PAUL BUTLER, CHOKEHOLD (2017); ANDREW GUTHRIE FERGUSON, THE

Citoyens' work, a new generation of activists is forcefully arguing for the centrality of criminal justice reform in the contemporary movement for civil rights.¹² But the enduring role of racial exclusion in jury selection—and the stark, outcome-determinative impact of this exclusion—remains undercontextualized and inadequately documented.

This Article argues for the salience of these continuities. Part I presents new archival research resurrecting the lost history of the late nineteenth-century struggle against “the Jim Crow jury,” a movement across the post-Reconstruction South that contested racial exclusion from juries. While historians and legal scholars have devoted significant attention to black suffrage restrictions and the implementation of de jure segregation during the *Plessy* era, the concomitant battle over the jury box has received significantly less attention. The social and political meaning of the jury during this period—and activists’ mobilization, both inside and outside the courtroom, against the exclusion of black jurors—have gone almost entirely unexamined.¹³ For both civil rights activists¹⁴ and their

RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT (2017); CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016); Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015) (connecting the array of fee, court costs, and assessments in contemporary juvenile and criminal courts to post-Civil War peonage systems); 13TH (Kandoo Films 2016). For an incisive and important critique of the limits of “the New Jim Crow” frame, see James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 21 (2012):

The analogy [presented by Michelle Alexander] presents an incomplete account of mass incarceration’s historical origins, fails to consider black attitudes toward crime and punishment, ignores violent crimes while focusing almost exclusively on drug crimes, obscures class distinctions within the African American community, and overlooks the effects of mass incarceration on other racial groups. Finally, the Jim Crow analogy diminishes our collective memory of the Old Jim Crow’s particular harms.

12. See, e.g., *End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/end-war-on-black-people/> (last visited June 24, 2018) [<https://perma.cc/LB9V-E7U2>] (“We demand an end to the war against Black people. Since this country’s inception there have been named and unnamed wars on our communities. We demand an end to the criminalization, incarceration, and killing of our people . . .” (emphasis omitted)).

13. The most notable exception is Forman, *supra* note 6, at 897, who devotes careful attention to examining “how various parties during the antebellum and Reconstruction eras thought about juries, and especially how they thought about juries and race.” His nuanced study—which emphasized the jury’s centrality in efforts “to protect black victims of white violence”—ends where this one begins, with the Supreme Court’s 1880 decision in *Strauder v. West Virginia*, 100 U.S. 303 (1880). *Id.* For an excellent recent account of the racial politics of civil justice during this era, including some discussion of black jurors in civil cases, see MELISSA MILEWSKI, *LITIGATING ACROSS THE COLOR LINE: CIVIL CASES BETWEEN BLACK AND WHITE SOUTHERNERS* 27–110 (2017).

14. This Article uses the phrase “civil rights activists” to refer to the *Comité* and others like them during this period. Although for many at the time, “[t]he right of blacks to serve on juries was initially conceived, alongside voting, as quintessentially ‘political’ in nature, and therefore not guaranteed by the Civil Rights Act of 1866 or the Fourteenth Amendment, both of which were

antagonists in post-Reconstruction America, however, the racial policing of the jury box was anything but secondary; this Article underscores the profound symbolic and practical importance of the jury after the fall of Reconstruction. Particularly as the Supreme Court evinces renewed interest in issues of racial bias and the jury—as it did last Term in *Peña-Rodriguez v. Colorado*¹⁵ and the Term before in *Foster v. Chatman*¹⁶—this research provides some historical context for the fraught intersections of criminal justice, the jury, and movements for racial equality in America.

It also solves a historical puzzle with important contemporary implications. Oregon and Louisiana still allow nonunanimous juries to return verdicts in serious felony cases.¹⁷ In recent years, there has been a flurry of scholarly and popular attention devoted to the issue of nonunanimity in both states,¹⁸ with several scholars observing that the practice was first adopted in Louisiana at a Constitutional Convention expressly convened “to establish the supremacy of the white race.”¹⁹ An Equal Protection Clause challenge to the constitutionality of nonunanimous verdicts in Louisiana, however, recently failed. Although there was “clearly . . . racist intent to disenfranchise African American voters through the 1898 Constitution,” a state appellate court concluded that the existing scholarship failed to show evidence that the contemporaneous shift to nonunanimous verdicts was motivated by

understood to protect only ‘civil’ rights.” Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1321 (2012).

15. 137 S. Ct. 855 (2017).

16. 136 S. Ct. 1737 (2016).

17. The original enactment in 1898 of Louisiana’s nonunanimous jury system provided that verdicts in cases involving offenses necessarily punishable at hard labor (i.e., serious noncapital felonies) could be decided by a 9-3 vote. LA. CONST. of 1898, art. 116. A subsequent constitutional convention in 1974 altered the provision to require the concurrence of ten jurors to return a lawful verdict. LA. CONST. art. I, § 17. But change may be underway. In May 2018, the Louisiana Legislature passed Senate Bill 243, proposing to amend the Louisiana Constitution to eliminate the use of nonunanimous verdicts in criminal cases. The measure will go before voters in November 2018.

18. *E.g.*, THOMAS AIELLO, JIM CROW’S LAST STAND: NONUNANIMOUS CRIMINAL JURY TRIALS IN LOUISIANA (2015); Angela A. Allen-Bell, *How the Narrative about Louisiana’s Non-unanimous Criminal Jury System Because Person of Interest in the Case Against Justice in the Deep South*, 67 MERCER L. REV. 585 (2016); Bidish Sarma & Robert J. Smith, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361 (2012); Kyle R. Satterfield, *Circumventing Apodaca: An Equal Protection Challenge to Nonunanimous Jury Verdicts in Louisiana*, 90 TUL. L. REV. 693 (2016); Adam Liptak, *Guilty By a 10-2 Vote: Efficient or Constitutional?*, N.Y. TIMES, July 6, 2009, at A10.

19. Thomas Semmes, Chairman of the Judiciary Committee, Address at the Louisiana Constitutional Convention of 1898, in CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA: HELD IN NEW ORLEANS, TUESDAY, FEBRUARY 8, 1898, at 374 (H. J. Hearsey, Convention Printer 1898) [hereinafter OFFICIAL JOURNAL].

hostility toward black *jurors*.²⁰ This Article's research fills the gap regarding the Louisiana jury law's original purpose. Across the post-Reconstruction South, nonunanimity gained political traction as a mechanism for vitiating the veto power that the occasional minority juror might wield through his dissenting vote. In Louisiana, where black jury participation remained relatively robust into the late nineteenth century, these reform proposals eventually made their way into law. Understood in its full context, the discriminatory origins of this peculiar jury system are inescapable.²¹

Part II turns to the Jim Crow jury today, offering the most comprehensive data assembled to date on race, jury selection, and jury deliberation in U.S. courts. Through an analysis of a new dataset—which includes information on thousands of Louisiana jury trials (and over 13,000 individual race-coded prosecution and defense peremptory strikes)—this Article demonstrates that the systematic exclusion of nonwhite jurors remains ubiquitous. While prosecutors disproportionately target nonwhite jurors for exclusion in all cases, the disparity is significantly more pronounced in trials involving black defendants. The data also provide an unprecedented look at the impact of race in jury decisionmaking: because individual jurors' votes in nonunanimous cases are occasionally included in court records, the practical effect of racial exclusion can now be measured in a novel and

20. *State v. Hankton*, 122 So. 3d 1028, 1037 (La. Ct. App. 4th Cir. 2013) (emphasis added).

21. This Article does not examine in detail the adoption of nonunanimous jury verdicts in Oregon, the only other state to employ the practice today, but there are conspicuous parallels to the Louisiana experience. Oregon adopted nonunanimous juries in the wake of a 1933 murder prosecution of a Jewish defendant, which controversially ended in a manslaughter verdict—a compromise resulting from a lone holdout juror. Oregon's leading papers editorialized in outrage:

This newspaper's opinion is that the increased urbanization of American life, the natural boredom of human beings with rights once won at great cost, and *the vast immigration into America from southern and eastern Europe*, or people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory.

Editorial, *MORNING OREGONIAN* (Portland, Or.), Nov. 25, 1933, at 2 (emphasis added); *see also Modify the Jury Law*, STATESMAN J. (Salem, Or.), Nov. 26, 1933, at 4 (endorsing *Morning Oregonian* position and reprinting “southern and eastern Europe” argument). The *Morning Oregonian* later cited “the epidemic of lynchings” across the country as further reason to endorse the change. *Jury Reforms Up to Voters*, *MORNING OREGONIAN* (Portland, Or.), Dec. 11, 1933, at 6. Although the evidence of discriminatory intent is significantly more circumstantial in Oregon than in Louisiana, one district judge recently held that “race and ethnicity was a motivating factor in the passage of [Ballot Measure] 302-33 [adopting nonunanimous verdicts in Oregon], and that the measure was intended, at least in part, to dampen the influence of racial, ethnic, and religious minorities on Oregon juries.” *Oregon v. Williams*, No. 15CR58698, at *16 (Multnomah Co. Cir. Ct. Dec. 15, 2016) (Opinion and Order), <https://olis.leg.state.or.us/liz/201711/Downloads/CommitteeMeetingDocument/138793> [<https://perma.cc/2G8B-MFXW>]. The judge stopped short of declaring the law unconstitutional, however, for want of “direct evidence of a disparate impact on minorities of non-unanimous juries” and “how minority viewpoint jurors under a 10-2 system equate to racial minority jurors.” *Id.* at *29. *But see infra* Part II.

illuminating way. In 199 serious felony “guilty” verdicts reached by racially mixed, nonunanimous juries, black jurors were vastly overrepresented among those jurors holding out for an acquittal. This research thus confirms a large body of social science literature suggesting that race matters in the jury box. It also provides proof of the “empty-vote” hypothesis, which posits that nonunanimous-decision rules quietly threaten “to deprive individuals with diverse views who actually serve on juries from exercising any real voting power.”²² The absence of a unanimity requirement continues to systematically weaken the voice of nonwhite jurors in contemporary criminal adjudication, just as it was originally intended.

Part III concludes by considering the doctrinal and policy implications of the foregoing analysis. At the most basic level, this study underscores the century-long failure of U.S. law to ensure racial equity in the jury box. While the Court has affirmed, in various formulations, the criminal defendant’s right “to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria” for over a century,²³ it has never developed a doctrinal framework that robustly protects this guarantee. Indeed, many of the same criticisms levied against *Batson v. Kentucky* and its progeny were made by civil rights advocates in the late nineteenth century. But judges alone are not to blame. Almost entirely overlooked in the voluminous literature on *Batson* and its progeny is the fact that the exclusion of jurors on the basis of race has been a federal crime since 1875, although it has been well over a century since anyone has been charged under the statute. This Part also explains that while Louisiana and Oregon’s nonunanimous jury systems have been challenged unsuccessfully on due process grounds,²⁴ the evidence amassed in this Article—original discriminatory intent coupled with contemporary disparate impact²⁵—points toward their invalidity under the Equal Protection Clause.

I. THE JIM CROW JURY, 1877–1900

In January 1900, Senator Samuel McEnery of Louisiana took to the Senate floor to defend his home state’s controversial new

22. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1263 (2000).

23. *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986).

24. See *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

25. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”).

constitution. Eighteen months earlier, while delegates in New Orleans were drafting its provisions, McEnery had cautioned his colleagues against overexuberance in their efforts to curtail black political power—predicting the “grossly unconstitutional” suffrage provisions would result “in our los[s] of representation in Congress.”²⁶ Now, the Senator rallied to the document’s defense. What Northern moralizers failed to appreciate, he argued, was the “hell-born dream” of Reconstruction, “the darkest and most shameful period in the history of the human race.”²⁷ Among the gravest indignities suffered under this “reign of terror” was that “[t]he courts as a rule were corrupt. Negro jurors were impaneled, and no white man had an opportunity in criminal cases for a fair trial.”²⁸

While McEnery’s fever dream of “negro domination” was hyperbole—at no time did Louisiana’s black majority wield the political clout he ascribed to it—his anxiety over black jurors is telling. Both black and white Southerners conceived black jury service “as a form of political officeholding,” and for many white Southerners the practice “was even more objectionable than black suffrage.”²⁹ For several decades, the battle to integrate the jury box was a critical and constant feature of Southern politics.

A. The Integrated Jury after Reconstruction

The Civil Rights Act of 1875,³⁰ the final and furthest reaching piece of Reconstruction civil rights legislation, represented an unprecedented encroachment of federal power into arenas that were previously the exclusive purview of the states. Historians and legal scholars sometimes write that the Act was invalidated by the *Civil Rights Cases* in 1883,³¹ but this description is imprecise. In those cases, the Court held unconstitutional Sections 1 and 2 of the Act, which had outlawed racial discrimination in public accommodations. It expressly

26. *Don't Adopt the Fifth Section*, TIMES-DEMOCRAT (New Orleans, La.), Mar. 18, 1898, at 4; accord U.S. CONST. amend. XIV, § 2.

27. 33 CONG. REC. 1063 (1900).

28. *Id.*

29. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 39 (2004); accord JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW 145 (2006).

30. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 335–37.

31. 109 U.S. 3 (1883). For such mischaracterizations, see, for example, James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 510 (1965) (“The Supreme Court . . . declared the Civil Rights Act unconstitutional in 1883.”); Judge Louis H. Pollak, *Foreword*, 94 MICH. L. REV. 533, 533 n.4 (1995) (“The Civil Rights Act of 1875 was held unconstitutional in *Civil Rights Cases*.” (citation omitted)).

left in place Section 4 of the Act,³² however, which outlawed racial discrimination in the selection of juries “in any court . . . of any State” on account of “race, color, or previous condition of servitude.”³³ As the Court held three years earlier in *Strauder v. West Virginia*,³⁴ the Fourteenth Amendment “bestow[ed] upon the national government the power to enforce” nondiscrimination guarantees in state courts.³⁵ Recognizing the pervasive and ongoing prejudice “against the manumitted slaves and their race,” the federal government wielded the authority to block efforts “intended to make impossible what Mr. Bentham called ‘packing juries,’ ”³⁶ the manipulation of juror arrays to produce pliant juries eager to convict.

In parts of the South, black jurors began serving on juries immediately after the Civil War;³⁷ elsewhere, progress moved more slowly. In New Orleans in the 1870s, black jurors served on federal grand juries in rough proportion to their overall population,³⁸ and in Washington County, Texas, where black residents made up half the population, approximately thirty-six percent of petit jurors were black until the late 1870s.³⁹ In places where Reconstruction had gained less purchase, however, such as Savannah, Georgia, “[t]here [was] not a single instance on record where a Colored juror ha[d] served upon any jury in this city or County” as of 1876.⁴⁰ Newspapers across the South regularly noted the summoning of the area’s first black jurors, many soon after the Court’s 1880 ruling in *Strauder*: Baltimore (1880),⁴¹

32. *Civil Rights Cases*, 109 U.S. at 24 (reaffirming constitutionality of Section 4).

33. *Id.* (quoting Civil Rights Act of 1875 § 4).

34. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) (invalidating West Virginia jury law under the Fourteenth Amendment); *see also Ex parte Virginia*, 100 U.S. 339, 349 (1880) (upholding the constitutionality of Section 4).

35. *Strauder*, 100 U.S. at 309.

36. *Id.*

37. Alschuler & Deiss, *supra* note 6, at 886 (noting how black jurors began serving in South Carolina and Louisiana in the 1860s and 1870s); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 50 (1990) (listing Georgia, Texas, North Carolina, South Carolina, and Louisiana as states where black jurors began to serve after the Civil War). Black juror service before the Civil War was equally rare in the North. Alschuler & Deiss, *supra* note 6, at 884 (“So far as we are aware, however, the first African-Americans ever to serve on a jury in America were two who sat in Worcester, Massachusetts, in 1860.”).

38. *See* Alschuler & Deiss, *supra* note 6, at 886.

39. Donald G. Nieman, *Black Political Power and Criminal Justice: Washington County, Texas, 1868–1884*, 55 J.S. HIST. 391, 399 (1989).

40. *Our Jury Commissioners*, COLORED TRIB. (Savannah, Ga.), June 3, 1876, at 2.

41. *The First Negro Jurors*, DAILY SHREVEPORT TIMES (Shreveport, Tex.), May 12, 1880, at 1.

Atlanta (1880),⁴² Louisville (1880),⁴³ Wilmington (1882),⁴⁴ and Birmingham (1883).⁴⁵ After black jurors were first empaneled in Dallas in 1885, the courthouse was “besieged by numbers of colored men anxiously awaiting to be summoned.”⁴⁶ A Louisiana newspaper shared bemused sympathy for outraged white Texans: “Evidently our neighbors have not had as large experience as we of Louisiana in the matter of negro jurors. We were ‘broke in’ to it immediately after the war.”⁴⁷

Integrating the jury box served several significant purposes—from affirming the citizenship of those called to serve⁴⁸ to countering impunity for white purveyors of racial violence⁴⁹—but securing fair treatment for black defendants was the predominant concern by the end of the nineteenth century.⁵⁰ As even white Louisiana publications

42. *The First Negro Juror Empaneled*, COLUMBUS DAILY ENQUIRER-SUN (Columbus, Ga.), July 8, 1880, at 1; *General News Items*, SW. CHRISTIAN ADVOC. (New Orleans, La.), July 15, 1880, at 1.

43. *Louisville: Negro Jurors for the First Time*, DAILY PICAYUNE (New Orleans, La.), Sept. 8, 1880, at 8.

44. *Colored Jurors in Delaware*, N.Y. TIMES, May 25, 1882, at 1 (reporting the first capital case in Delaware in which a black man acted as a juror).

45. *Birmingham*, HUNTSVILLE GAZETTE (Huntsville, Ala.), Apr. 28, 1883, at 3.

46. *Black Jurymen: Sensation Caused by the Action of a Texas Justice*, MILWAUKEE SENTINEL (Milwaukee, Wis.), Feb. 17, 1885, at 3.

47. *Negro Jurors in Texas*, DAILY SHREVEPORT TIMES (Shreveport, Tex.), Feb. 19, 1885, at 4.

48. Indeed, black newspapers would often publish the names of prominent community leaders empaneled as jurors. See, e.g., *Personal Mention*, WEEKLY PELICAN (New Orleans, La.), Apr. 4, 1887, at 1 (“Mssrs. J. T. Commagere, James Lewis and Wm. Vigers are on the petit jury for April in Judge Roman’s court.”).

49. See Forman, *supra* note 6, at 916 (“Yet while the need to ensure equal treatment for black defendants was substantial, the most frequent theme voiced by blacks and Republicans during the Reconstruction era was the need to protect blacks from becoming victims of crime.”); see also RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29–58 (1997) (discussing historical underenforcement of laws to protect black citizens); Colbert, *supra* note 37, at 41 (discussing complete impunity for white murder defendants in Texas in 1865 and 1866).

50. This marks a shift from the predominant view of the jury during Reconstruction that Professor James Forman explores. See *supra* note 49 and accompanying text. Unquestionably, the view of the jury as a safeguard against white violence remained, to some extent, during this later period. See, e.g., *Sentiment in Politics, No. 11*, DAILY CRUSADER (New Orleans, La.), May 30, 1895 (Xavier University, Desdunes Family Papers, Archives and Special Collections, New Orleans, La.):

The “war is indeed over,” when no white man be scarcely punished for deliberate murder of colored women; when we see seven culprits acquitted on the charge of having outraged a colored paralytic girl, and the press almost silent on the verdict.

The “war is indeed over” when, in a word, the colored man, who is not allowed to sit on a jury, has no protection either of life, liberty, property, or pursuit of happiness

But, for the most part, the emphasis seems to have shifted during the final years of the nineteenth century to a view of black representation on jurors as necessary for ensuring some modicum of fairness for black defendants. One possible explanation is that black jury service was so substantially curtailed by the 1880s and 1890s that realistically it could not provide a meaningful deterrent to white violence, even if a smaller number of black jurors still could influence the outcome in individual cases with black defendants.

candidly acknowledged, “It appears that in some of the parishes of the State the hostility to the negro is . . . such . . . that . . . juries in these benighted localities seem to think that it is their bounden duty to render a verdict of ‘guilty as charged,’ because the accused has black skin.”⁵¹ More often, though, Louisiana papers bemoaned how a single “obstreperous colored juror” could hold out for a compromise verdict,⁵² or how “the decent members of their race shield [the savages]” rendering “[a] law trial of . . . negro jurors . . . a farce.”⁵³

Black jurors frequently faced the accusation that they showed untoward leniency toward defendants. An 1894 South Carolina robbery trial of two black codefendants, for example, ended in a mistrial after the white jury foreman complained to the judge “that the [lone] colored member of the jury had drawn the color line” and was holding out for acquittal.⁵⁴ The judge became “aroused,” and delivered a pointed harangue that such conduct would “necessarily lead to the Jury Commissioners excluding colored people from acting as jurors,” since “[n]o colored man is qualified to serve as a juror who will allow himself to decide a case on a color line.”⁵⁵ Such juror misconduct was “a great misfortunate, especially in the interest of colored people, that a colored man should refuse to agree to a verdict because the party is a negro and he is one himself.”⁵⁶ Only after his dismissal was the black juror permitted to speak: he denied “rais[ing] the color line,” and had in fact voted to convict one of the defendants, but felt satisfied the other (who had called three alibi witnesses) was innocent.⁵⁷ In Mississippi, newspapers faulted “the baneful influence of secret societies among our colored people, when a member of one of them is on trial for a grave felony, or a capital crime.”⁵⁸ Such secretive alliances allowed black defendants to dodge justice “by putting upon the jury that tries him a member of his order, thus hanging the jury.”⁵⁹

Accusations of excessive leniency even extended to cases involving white defendants. In a high-profile 1889 murder trial in South Carolina, a white defendant accused of murdering a well-known newspaper editor (and Confederate war hero) raised eyebrows by opting

51. *Prejudiced Verdicts*, OPELOUSAS COURIER (Opelousas, La.), Oct. 26, 1895, at 1.

52. *On the Jury*, ST. LANDRY DEMOCRAT (Opelousas, La.), Jan. 25, 1890, at 1.

53. *Lynch Law*, WKLY. MESSENGER (St. Martinville, La.), Oct. 7, 1893, at 2.

54. *The Color Line Drawn: An Unusual Incident in the Court of Sessions*, TIMES & DEMOCRAT (Orangeburg, S.C.), Oct. 10, 1894, at 6.

55. *Id.*

56. *Id.*

57. *Id.*

58. *The Jury System*, DAILY COM. HERALD (Vicksburg, Miss.), June 29, 1887, at 2.

59. *Id.*

for a majority-black jury. When the trial ended in a prompt acquittal, black crowds cheered the defendant's release. A Louisiana paper howled that such acquittals were inevitable in jurisdictions where racial justice advocates "ha[d] been able to force the negro into the jury box. The creators of the negro juror [were] responsible for [the defendant's] acquittal."⁶⁰

To deflect such criticisms, black activists sometimes adopted a defensive posture, like in one 1899 editorial ("GIVE US A CHANCE AND SEE") assuring readers that "a jury of colored men would be just as ready to see a Negro guilty of a crime against a white woman punished as would a jury of white men."⁶¹ And, indeed, the historical record is replete with evidence of all-black juries demonstrating their willingness to convict black defendants.⁶² The pernicious canard of black indifference to black criminality (particularly as an answer to black insistence on equal justice) has a long and sordid history.⁶³ But other black activists bristled at the limited frame of such rhetoric: "But slow, we must not say too much, lest we be charged with being 'an apologist for crime,' even by colored 'leaders.' This at least we have reason to fear from our experience with the sample of Negro manhood that is becoming current in these days."⁶⁴

B. Fighting the Jim Crow Jury

Strauder's "adventurous holding and egalitarian rhetoric" marked a high-water point: almost immediately, federal courts retreated from enforcement of black jurors' rights.⁶⁵ Although courts

60. *The Best One Yet*, WKLY. TOWN TALK (Alexandria, La.), July 20, 1889, at 4. For more on the McDow trial, see *The Verdict in the McDow Case*, CHARLOTTE DEMOCRAT, July 5, 1889, at 3.

61. *Give Us a Chance and See*, SW. CHRISTIAN ADVOC. (New Orleans, La.), May 4, 1899, at 1.

62. See, e.g., H.R. REP. NO. 43-261, pt. 3, at 368 (1875) (Select Committee on the Condition of the South) ("[Rep. Marshall:] How were the juries composed [in Shreveport]? [Judge A. B. Levissee:] They were mixed juries, frequently about half and half. Sometimes I have seen a jury exclusively of negroes; and the only conviction unqualified that we ever reached in Caddo [Parish] in a murder case was by a negro jury. [Rep. Marshall:] Of what race was the party tried? [Judge A. B. Levissee:] He was a colored man; a very plain, clear case. [Rep. Marshall:] What became of the accused? [Judge A. B. Levissee:] Governor Warmouth commuted his sentence to the penitentiary for life. I have never been able to hang anybody.").

63. See JAMES FORMAN JR., LOCKING UP OUR OWN 11 (2017) ("Far from ignoring the issue of crime by blacks against other blacks, African American officials and their constituents have been consumed by it."); Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 916 (1997) ("[I]n my experience, black jurors are happy to send violent black criminals to prison, because these jurors, like most jurors, have good sense.").

64. *Untitled*, DAILY CRUSADER (New Orleans, La.), April 16–19, 1895 (Xavier University, Desdunes Family Papers, Archives and Special Collections, New Orleans, La.).

65. KLARMAN, *supra* note 29, at 40; see also Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 531–46 (contrasting the original intent of the Civil War Amendments and the exclusionary jury practices

during the *Plessy* era sporadically granted relief to defendants alleging racial discrimination in jury selection—typically when jury commissioners or judges expressly acknowledged the intentional exclusion of black jurors—more often they held that defendants failed to meet an impossibly stringent evidentiary burden of proving individual malice.⁶⁶ Steadily testing the limits of the courts’ credulity, the former confederate states in the 1880s and 1890s “developed and implemented strategies to disenfranchise blacks and to prevent them from sitting as jurors.”⁶⁷

But there was pushback. In Louisiana and across the South, retaining access to the jury box was a pressing priority for activists. Their mobilizations to secure equitable representation—which took place both inside and outside the courts—underscores the importance of criminal justice and the integrated jury box for civil rights activists in late nineteenth-century America. And, as argued in Part III, appreciating how white Louisianans sought to circumvent this activism is key to understanding the constitutional infirmity of nonunanimous juries today.

1. Louisiana

James Murray, nicknamed “Greasy Jim” by the local press, was arrested for the murder of a private watchman in New Orleans in 1894. An all-white petit jury was empaneled under a new law vesting judges and local jury commissioners with greater discretion to select “qualified” veniremen. When Murray initially objected to the absence of black jurors on his case, the trial judge reacted with annoyance. “Colored men are not discriminated against as a race or a class,” the judge asserted, “but because of their lack of intelligence and of moral

in the South following the Civil War); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1406–14 (1983).

66. KLARMAN, *supra* note 29, at 39, 41; Colbert, *supra* note 37, at 69. Focusing exclusively on U.S. Supreme Court jurisprudence, many studies erroneously conclude that such challenges uniformly failed. But state courts frequently granted relief, too—albeit generally only when jury commissioners expressly conceded intentionally excluding black grand or petit jurors. *See, e.g.*, *Smith v. State*, 69 S.W. 151 (Tex. Crim. App. 1902) (reversing murder conviction for exclusion of black grand jurors); *Leach v. State*, 62 S.W. 422 (Tex. Crim. App. 1901) (same); *Kipper v. State*, 62 S.W. 420 (Tex. Crim. App. 1901) (reversing murder conviction for exclusion of black jurors from both grand jury and petit jury); *Whitney v. State*, 59 S.W. 895 (Tex. Crim. App. 1900) (quashing grand jury indictment for exclusion of black jurors). For a further discussion of such cases, see Gilbert Thomas Stephenson, *Race Distinctions in American Law: The Negro in the Court-Room*, 43 AM. L. REV. 869, 881–83 (1909) (collecting cases).

67. Colbert, *supra* note 37, at 75; *see also* MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908 (2001).

standing.”⁶⁸ (These remarks are conspicuously absent from the Louisiana and U.S. Supreme Court opinions, which disclaimed any intentional racial discrimination in Murray’s case.⁶⁹) The jury returned a “guilty” verdict after ten minutes of deliberation.⁷⁰

The *Comité* took up Murray’s cause. In a February 1895 meeting, the group declared that “THE JIM CROW JURY SHOULD BE FOUGHT TO THE DEATH,” and began raising funds to assist Murray’s lawyer.⁷¹ Updates on the case and their campaign regularly appeared in *The Daily Crusader*, the English-French newspaper edited by *Comité* member and lawyer Louis Martinet (who, alongside Albion W. Tourgée, was the chief architect of the *Plessy* challenge).⁷²

Each week, a new polemic appeared discussing aspects of the case or advancing different critiques of lower court rulings. The authors took pains to ensure

that such a crying evil as the partial composition of juries on race lines [did] not pass unnoticed. The jury system is said to be the “palladium” of our liberty; if that expression means anything, it should be a symbol of safety and not a “Jim Crow” arrangement where race prejudice sits in judgment over the destinies of men⁷³

Regardless of Murray’s factual innocence or guilt—and there seems to be little doubt he killed the watchman⁷⁴—the haste of the all-white jury’s deliberations reflected an indifference to the value of black lives: “Such a [ten-minute] verdict is simply murder under legal forms, and serves to show what little consideration the average white juror in Louisiana has for even life, when the possessor is colored.”⁷⁵ Noting the robust turnout at a memorial service in New Orleans for the recently deceased Frederick Douglass, the *Daily Crusader* exhorted its readers to heed well Douglass’s observation that “the liberties of the American

68. *The Question of Colored Jurors*, DAILY PICAYUNE (New Orleans, La.), Mar. 2, 1895, at 3; accord *The Monitor and the Greasy Jim Question*, DAILY CRUSADER (New Orleans, La.), May 6, 1895 (Xavier University, Desdunes Family Papers, Archives and Special Collections, New Orleans, La.) (discussing the judge’s statements).

69. See *Murray v. Louisiana*, 163 U.S. 101, 108 (1896); *State v. Murray*, 47 La. Ann. 1424, 1426 (1895).

70. *Come Forward*, DAILY CRUSADER (New Orleans, La.), Mar. 13, 1895 (Xavier University, Desdunes Family Papers, Archives and Special Collections, New Orleans, La.).

71. *Citizens’ Committee*, DAILY CRUSADER (New Orleans, La.), Feb. 14, 1895 (Tulane University, Amistad Research Center, Charles B. Rousseve Papers, 1842–1994, New Orleans, La.).

72. CAROLYN L. KARCHER, *A REFUGEE FROM HIS RACE: ALBION W. TOURGÉE AND HIS FIGHT AGAINST WHITE SUPREMACY* (2016).

73. *Sentiment in Politics, No. 6*, DAILY CRUSADER (New Orleans, La.), May 22, 1895 (Xavier University, Desdunes Family Papers, Archives and Special Collections, New Orleans, La.).

74. Activists expended considerable energy responding to criticism that Greasy Jim’s case was a poor vehicle for advancing their cause due to the strong evidence against him. Their response: “What happened to James Murray may happen to one less guilty, and even less obnoxious.” *Come Forward*, *supra* note 70.

75. *Id.*

people were dependent upon the ballot box, the jury box, and the cartridge box; that without these no class of people could live and flourish in this country.”⁷⁶

Black activists had no trouble identifying and critiquing the emerging Equal Protection framework as inadequate to ensure equitable black participation on juries. While *Strauder* struck down a West Virginia law expressly barring black jurors, the Court did not announce standards for assessing claims of black juror exclusion by other methods (e.g., administrative decisions screening potential jurors for adequate “moral standing” or “intelligence”).⁷⁷ Particularly when faced with facially neutral laws vesting discretionary power with judges and jury commissioners, the courts evinced extreme reluctance to examine the overall effects of discriminatory practices.⁷⁸ The Court initially hinted that statistical disparities between the overall black population (or registered black voters) and black jurors might suffice to establish a *prima facie* case of discrimination,⁷⁹ but over the 1880s and 1890s this mode of analysis all but vanished. This doctrinal approach augured ill for meaningful integration of juries, as black activists recognized from early on:

The evil . . . lay[s] not in the law, but in the danger of its being used for the benefit of certain individuals, to the detriment of rights . . . and by affinity, against the public good and general prosperity. . . . Men of a certain color are excluded from the jury service; that is the case. . . . The law having been made to serve unconstitutional ends, it must be unconstitutional, or there is no justice in the land.⁸⁰

In denying Murray relief, the court was elevating “phraseology and . . . private opinions” over constitutional rights, turning a blind eye to the practical effects of the law and the cumulative impact of biased individual decisions on overall jury integration.⁸¹

76. FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS, WRITTEN BY HIMSELF 420 (1882); see also *Come Forward*, *supra* note 70; *Jim Murray and Sam Mitchell*, DAILY CRUSADER (New Orleans, La.), July 22, 1895 (Xavier University, Desdunes Family Papers, Archives and Special Collections, New Orleans, La.).

77. See KLARMAN, *supra* note 29, at 41–42.

78. *Id.*

79. See *Neal v. Delaware*, 103 U.S. 370, 397 (1880):

[T]hat no colored citizen had ever been summoned as a juror in the courts of the State,—although its colored population . . . in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand,—presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States.

80. *Not Quite*, DAILY CRUSADER (New Orleans, La.), Mar. 6, 1895 (Xavier University, Desdunes Family Papers, Archives and Special Collections, New Orleans, La.).

81. *Id.*

Murray's appeal failed and his execution promptly followed, but the fight against the Jim Crow jury continued. In 1897, several potential black jurors were dismissed from a high-profile federal criminal trial involving the collapse of a bank in New Orleans. One of these jurors was a light-skinned Creole man named Henry Thezan who, erroneously "supposed to be a Cuban by those in court," initially made it onto the jury panel.⁸² According to a Democratic paper, the other prospective jurors soon recognized "that there 'was a nigger in the woodpile'" and, fearing that they "would have to sit down at table and sleep in the same room with any negro who might be selected" during the long trial, passed a note to the judge.⁸³ The court then addressed the defense and prosecution and, with the consent of both, told Thezan that "he 'was excused.'" ⁸⁴

The *Comité* sprang into action, convening a "red-hot" meeting to plan an appropriate response.⁸⁵ Louis Martinet "declared for 'friction,'" pushing an aggressive response to the latest indignity.⁸⁶ "We are killed and lynched and we don't say a word," Martinet insisted.⁸⁷ "Let us have a little friction. It may be better for us if it comes along."⁸⁸ An "olive soap colored" reverend concurred: "God only knows when one of us may have to stand before that court for trial, and God help us if our own race cannot sit in judgment on us."⁸⁹

But there were divisions at the meeting, too, as the social meaning of the jury within the black and Creole communities was shaped by class.⁹⁰ Lafayette Tharp, the leader of the Colored Laboringmen's Alliance,⁹¹ was unlike many of the more refined Creole leaders at the meeting:

I am not educated as much as you are, but I am as mouthy as a worm. I am a nigger, and I don't like no mixed breed in blood or politics. I'm a nigger, and I'll never get on that jury

82. *The Old Story of Negroes on the Jury—Leads to an Agitation by Some Colored People*, DAILY PICAYUNE (New Orleans, La.), July 9, 1897, at 3.

83. *Negroes After Gurley*, TIMES-DEMOCRAT (New Orleans, La.), July 9, 1897, at 9.

84. *Id.* This account anticipates a more brutal incident in Alabama around 1905. There, a "Negro was drawn as a grand juror (by mistake) who appeared and insisted upon the court's impaneling him with other jurors . . . [H]e served two days, when he was taken out at night and severely beaten, and was then discharged on his own petition by the court." Stephenson, *supra* note 66, at 885.

85. *Negroes After Gurley*, *supra* note 83, at 9.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Accord* Alschuler & Deiss, *supra* note 6, at 868 ("Our central theme is that as the jury's composition became more democratic, its role in American civic life declined. We suggest neither cause nor effect, merely irony.")

91. *See Levee Labor*, DAILY PICAYUNE (New Orleans, La.), Aug. 17, 1896, at 3.

list—I'm gone, and I don't hev to be tole so. But I don't like it. It's not right, and I'm goin' to tell McKinley.

Tharpe recognized the surpassing importance of the integrated jury box—perhaps because his agitation as a labor activist brought him into regular contact with the courts⁹²—though he harbored no illusions that he was likely to be called upon to serve. For both white and black alike, jury service in the late nineteenth century was restricted to a certain class of “respectable” citizen. (Among those within the black community occupying a social position sufficiently elevated to serve as a juror in the 1890s: Homer Plessy.⁹³)

The proposal to “tell McKinley” prevailed, with the group opting to lodge a protest in Washington. In January 1898, Martinet traveled north, where he delivered a formal “Protest of Citizens of Louisiana”⁹⁴ and met with Senator William Chandler of New Hampshire (a prominent Republican and longtime champion of the rights of black Southerners). The Protest was signed by twenty-one leading residents and the Baptist Ministers’ Conference, which represented forty-five churches and twelve thousand members. Ensuring equal representation on Southern juries, the signatories argued, was “necessary, Mr. President . . . to check the tide of oppression rising anew against the citizen of color of our common country.” The letter included a warning about the context in which the political fight over jurors was unfolding: “We are here upon the eve of a constitutional convention [in Louisiana], the avowed purpose of which is to disfranchise the colored citizens”

2. Nationwide

Such activism was not confined to Louisiana. Even as legal challenges to “the Jim Crow jury” encountered limited success, civil

92. See, e.g., *Lafayette Tharp Lectured: Escapes Severe Punishment from Recorder Hughes*, TIMES-DEMOCRAT (New Orleans, La.), Oct. 7, 1902, at 14; *Negro Money Lender Fined*, TIMES-DEMOCRAT (New Orleans, La.), Aug. 12, 1903, at 1; *Screwmen in Trouble*, TIMES-DEMOCRAT (New Orleans, La.), Feb. 9, 1895, at 7.

93. An 1893 article summarizing courthouse news mentions that juror Homer Plessy was fined five dollars for returning late from lunch. *Contempt of Court*, TIMES-PICAYUNE (New Orleans, La.), May 27, 1893, at 6. The case was a civil suit brought by a widow whose husband was killed on a road owned by the Illinois Central Company. Plessy and the other jurors returned a \$5,000 verdict against the railroad. See *Damages for Plaintiff*, TIMES-DEMOCRAT (New Orleans, La.), May 27, 1893, at 10 (noting that the “jury was out only a short while and returned a verdict of \$5000 for plaintiff” Delia Jackson); *New Suits*, TIMES-PICAYUNE (New Orleans, La.), Apr. 13, 1893, at 8 (noting Delia Jackson lawsuit). No mention of Mr. Plessy’s then-ongoing battle against a different railroad is included in the newspaper’s coverage.

94. JOHN W. GRIGGS, PROTEST OF CITIZENS OF LOUISIANA, ETC., S. DOC. NO. 55-114 (2d Sess. 1898) (enclosing original *Comité* protest and responding to the Committee on the Judiciary).

rights activists across the South organized and pressured authorities to continue integrating the jury box.

In the fall of 1894, Nacogdoches County, Texas was “in a political broil” over “the question of negro jurors, which has recently been hotly agitated.”⁹⁵ Under concerted pressure and facing re-election, the local sheriff summoned five leading members of the black community to serve as jurors, achieving the first mixed-race jury in the area since the end of Reconstruction.⁹⁶ When a local district court judge responded “that the colored man is not mentally and legally competent” for jury service, black activists convened a mass meeting inside the courthouse focused on the upcoming election and “emphasiz[ing] the demands of the colored voters that the negro be allowed his rights to serve on the jury.”⁹⁷

Black activists were organizing across Alabama at the same time. In April 1894, “colored citizens from all parts” met in Montgomery, where they began drafting a petition to the Governor. Of their seven requests for relief, five were criminal-justice related: an anti-lynching law; a colored assistant chaplain for state prisoners; a separate house of correction “for prisoners of immature years”; the appointment of a black representative on the Board of Prison Inspectors; and the appointment of “colored jurors, especially in those cases where the direct interests of colored citizens are being adjudicated, so that, in the deliberations of the jury, both sides of the issue may receive fair and impartial consideration.”⁹⁸ (The other two demands addressed funding for black schools and the desegregation of rail cars.) A leading white newspaper commended the overall “tone and temper” of the petition, but expressed marked ambivalence as to the final demand: “The question of jurors should be left with the officers of the law, who are best informed as to the situation and surroundings in their counties.”⁹⁹

And in 1899, the country’s first national civil rights organization, the Afro-American Council, issued a call for a nationwide

95. *Color Line in Politics*, GALVESTON DAILY NEWS (Galveston, Tex.), Oct. 19, 1894, at 4.

96. *Id.*; see also *Colored Jurors*, GALVESTON DAILY NEWS (Galveston, Tex.), Oct. 4, 1894, at 3 (“No negro has served as a juror in this county since the Davis administration.”).

97. *Nacogdoches County Politics*, GALVESTON DAILY NEWS (Galveston, Tex.), Oct. 23, 1894, at 4; see also *Color Lines in Politics*, DALLAS MORNING NEWS (Dallas, Tex.), Oct. 20, 1894, at 3 (noting that “the question of negro jurors . . . has recently been hotly agitated”).

98. *A Petition of Several Prominent Colored Citizens to Governor Oates in Reference to Certain Matters*, MONTGOMERY ADVERTISER, Dec. 15, 1894, at 3.

99. *The Colored Men’s Petition*, MONTGOMERY ADVERTISER, Dec. 15, 1894, at 4.

“day of fasting and prayer” to protest racial injustice.¹⁰⁰ The group’s proclamation denounced the advent of “‘Jim-Crow’ cars” and the accumulated indignities of “hundreds of minor inconveniences,” but focused mainly on the evils of lynching and the exclusion of black men from criminal juries:

We are dragged before the courts by thousands and sentenced to every form of punishment, and even executed without the privilege of having a jury composed in whole or part of members of our own race, while simple justice should guarantee us judges and juries who could adjudicate our case free from the bias, caste and prejudices incident to the same in this country.¹⁰¹

The Council’s call was taken up around the country, from New York to Knoxville.¹⁰²

C. The Adoption of Nonunanimous Juries

When New Orleans activists met in 1897 to plan their response to Thezan’s exclusion from the “bank wreckers” trial, a white state senator urged moderation. Public agitation addressing “the old race question” would “fan into a flame all the bitter feelings which are lying dormant.” Most importantly, “the Constitutional convention is to be voted upon soon, and if you stir up this matter there can be but one effect, and that effect will not be to the liking of any colored man in Louisiana.”¹⁰³ The warning proved prescient. From February to May of the following year, Louisiana delegates drafted and ratified a new constitution with voting restrictions that decimated black suffrage.¹⁰⁴ While doing so, they also overhauled the state’s judiciary and enacted a new provision establishing the validity of nonunanimous verdicts for serious noncapital felonies.

100. *Afro-American Proclamation, Solemn and Extraordinary*, SW. CHRISTIAN ADVOC. (New Orleans, La.), May 11, 1899, at 1; *see also* SHAWN LEIGH ALEXANDER, AN ARMY OF LIONS: THE CIVIL RIGHTS STRUGGLE BEFORE THE NAACP 108–16 (2012).

101. *Afro-American Proclamation, Solemn and Extraordinary*, *supra* note 100.

102. *Day of Fasting and of Prayer: All the Colored Churches in This Country Asked to Pray for Relief*, CHILlicothe GAZETTE (Chillicothe, Ohio), June 2, 1899, at 3; *Fasting and Prayer for Negroes*, INDIANAPOLIS NEWS, June 3, 1898, at 3; *Freedom from Mob*, ARK. DEMOCRAT (Little Rock Ark.), June 2, 1899, at 7; *News Bits for Busy Readers*, DECATUR HERALD (Decatur, Ill.), at 2 (“Colored people in various parts of the country observed a season of fasting and prayer for freedom from mob violence.”); *Proclamation by Black Men*, WASH. TIMES, June 3, 1899, at 5; *The Wrongs of the Colored People*, DEMOCRAT AND CHRONICLE (Rochester, N.Y.), June 2, 1899, at 6 (reporting fasting in New York City and other locations). *But see Our Remedy*, ATLANTA CONST., June 8, 1899, at 6 (dismissing protests as contained to “negroes . . . in some of the states of the north”).

103. *Negroes After Gurley*, *supra* note 83, at 9.

104. From 1897 to 1904, the number of registered white voters in Louisiana fell from 164,000 to 91,716; the number of registered black voters fell from 130,000 to 1,342. *See* Michael L. Lanza, *Little More than a Family Matter: The Constitution of 1898*, in IN SEARCH OF FUNDAMENTAL LAW: LOUISIANA’S CONSTITUTIONS, 1812-1974, 93 (Warren M. Billings & Edward F. Haas eds., 1993).

The overriding purpose of the convention was not a secret—the Democratic Party advertised that it sought “the elimination of the vast mass of ignorant, illiterate and venal negroes from the privileges of the elective franchise”¹⁰⁵—and followed the example set by similar conventions in Mississippi (1890) and South Carolina (1895).¹⁰⁶ Recent scholarship questioning the origins and validity of Louisiana’s nonunanimous jury has highlighted this fact as proof that the adoption of nonunanimous juries was racially motivated.¹⁰⁷ But the *Official Journal of the Convention of 1898* contains almost no direct discussion of the issue; the few references to judiciary reforms obliquely reference “efficiency” and “economy” as justifying the changes.¹⁰⁸ The broader political context, however, helps demonstrate how the adoption of nonunanimous verdicts in particular was motivated by racial bias.

* * *

Modern proposals to abandon the rule of jury unanimity in criminal trials date at least to Bentham in the early nineteenth century,¹⁰⁹ but the endorsement of such a proposal in Louisiana first came in 1893. On January 20, 1893, Convent, Louisiana—“[a] quiet little town” about fifty miles up the Mississippi River from New Orleans—was “thrown into a state of wild excitement.”¹¹⁰ Masked riders approached the parish jail and, with little difficulty, seized “three terrified negroes” (Robert Landry, Alfred Jewell, and Jack Davis) awaiting trial for murder and robbery. The mob hanged Landry and Jewell from the rafters of a nearby shed. According to witnesses,

105. *The Following Resolutions*, DAILY PICAYUNE (New Orleans, La.), Jan. 4, 1898, at 9 (publishing Louisiana Democratic Party resolution concerning Convention).

106. See *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (noting Constitutional Convention of 1901 in Alabama “was part of a movement that swept the post-Reconstruction South to disenfranchise blacks”); see also J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974) (discussing the Southern political environment); PERMAN, *supra* note 67 (studying the steps taken in several southern states to disenfranchise African American voters).

107. See *supra* note 18 and accompanying text.

108. OFFICIAL JOURNAL, *supra* note 19, at 76.

109. See JEREMY BENTHAM, *ELEMENTS OF THE ART OF PACKING: AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW* (1821) (arguing nonunanimity reduces corruption). Indeed, not all who promoted the abandonment of the unanimity requirement were motivated by racial bias. For a provocative and thoughtful rereading of the *Insular Cases* as the product of Progressive reform and shifting attitudes toward the jury in the Gilded Age (and not just racial chauvinism), see Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375 (2018).

110. *Triple Lynching*, DAILY PICAYUNE (New Orleans, La.), Jan. 22, 1893, at 1; see also *Judge Lynch: A Mob Visits the Convent Jail of St. James Parish*, SHREVEPORT TIMES (Shreveport, Tex.), Jan. 22, 1893, at 1; *Lynching in St. James*, TIMES-DEMOCRAT (New Orleans, La.), Jan. 22, 1893, at 2 (discussing the lynching of three men).

horsemen then placed a rope around Davis's neck and rode into the darkness, his dragged body "bump[ing] into stumps, fall[ing] into ditches and roll[ing] over and over in the muddy road." His corpse was not recovered.¹¹¹

While stopping short of condemning the Convent lynching (because "only one side of the question has been published"), the *Daily Picayune's* response was noteworthy: it endorsed the adoption of nonunanimous verdicts as a way of placating those intent on committing extralegal forms of racial violence.¹¹² Lynching generally was deplorable, the paper opined, because "nine times out of ten" jury verdicts obviated the need for "popular justice."¹¹³ Occasionally, however, the courts failed to mete out appropriate punishment "due to the juries themselves."¹¹⁴ Juries "too often" returned "not guilty" verdicts or forced mistrials:

If a criminal can get one partisan on the jury that tries him he can always accomplish a "hanging" of that body . . . [N]ine jurors should be competent to bring in a verdict, and so overthrow the power of a single person to disappoint or obstruct justice.¹¹⁵

Courtroom "efficiency," in other words, might obviate the need for less tasteful forms of racial violence.¹¹⁶

Other newspapers across the South similarly linked the unanimity requirement with lynching. In 1894, a Mississippi newspaper published its proposed "Remedy for Lynching":

The first and most important thing to do, is to reform our weak and contemptible jury system. We believe as firmly as we believe that these lynchings have occurred, that if the jury system be so reformed that a majority may bring in a verdict, that lynching will be absolutely prevented.¹¹⁷

A North Carolina paper in 1899 made the same point:

The jury system is a dead failure . . . the one-man power is permitted to come in and to set aside the decisions of courts, and to turn out red-handed murderers and beastly rapists

111. *Judge Lynch: A Mob Visits the Convent Jail of St. James Parish*, *supra* note 110. *But see A Black Thief and Assassin*, DAILY PICAYUNE (New Orleans, La.), Feb. 26, 1893, at 2 (reporting Davis, or someone alleged to be him, had been rearrested after escaping the Convent lynching).

112. *Put a Stop to Bulldozing*, DAILY PICAYUNE (New Orleans, La.), Feb. 1, 1893, at 4.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Cf. Jury Reforms Up to Voters*, *supra* note 21 (highlighting "epidemic of lynchings"—and immigrants—as rationale for abandoning Oregon's jury unanimity requirement). For excellent studies of the phenomenon of lynching, see W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930* (1993); PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNNING OF BLACK AMERICA* (2001); and AMY LOUISE WOOD, *LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890-1940* (2009).

117. *The Remedy for Lynching*, DAILY COM. HERALD (Vicksburg, Miss.), Sept. 11, 1894, at 2.

free and ready to begin again their hellish, fiendish work. . . . Hence, the increase in lynchings.¹¹⁸

At precisely the same moment that Southern white politicians labored to curtail democratic opportunities for black voters at the ballot box, they invoked the rhetoric of democratic self-governance to justify the disempowerment of black Southerners in the criminal law. On this view, jury reform was needed to prevent “the total destruction of the *majority* principle, which is the principle on which a government of the people is founded.”¹¹⁹

Such calls for jury reform sometimes left implied that it was black jurors who wielded “the one-man power” to thwart convictions; more often it was explicit. One of the first calls for the adoption of nonunanimity in the South came from a Mississippi newspaper, which began championing a two-thirds majority rule in criminal cases as early as 1887.¹²⁰ “In the present condition of affairs,” the newspaper explained, “with two races to select from, it is next to impossible to get twelve men to convict.”¹²¹ While the time-honored tradition of jury unanimity might make sense in some locales,

[t]he people of the Southern States [were] contending with difficulties such as no people on earth ever contended with before. We have among us a race of people entire dissimilar in every respect from the race which furnished our juries before the war. . . . [T]he jury system, with juries chosen from both races and unanimous verdicts required, is a failure¹²²

Likewise, newspapers in North Carolina complained, “You can put one negro on a jury in such a case and he will tie the jury every time and prevent a verdict. . . . Why not have nine of the twelve agreed rather than all?”¹²³ By the end of the nineteenth century, at least in those states where black jurors were still occasionally empaneled, many white Southerners agreed that “[t]he jury system must be radically changed in the south if the negroes are to be continued as jurymen.”¹²⁴

118. *The Georgia Baptists on Lynchings and Crimes*, SEMI-WKLY. MESSENGER (Wilmington, N.C.), Apr. 14, 1899, at 2; *accord A Reform Needed*, VICKSBURG DISPATCH (Vicksburg, Miss.), Feb. 9, 1898, at 2 (“[W]e do assert, that lynching, as well as all other forms of lawlessness, could be reduced to the smallest limits, if the jury system was founded on common sense . . .”).

119. *Must be Reformed*, DAILY COM. HERALD (Vicksburg, Miss.), Jan. 4, 1887, at 2; *see also* Levinson, *supra* note 14, at 1321 (discussing the historical purpose of a jury).

120. *See Doubly Injured*, DAILY COM. HERALD (Vicksburg, Miss.), Mar. 19, 1887, at 2.

121. *Id.*; *accord Must Be Reformed*, *supra* note 119 (promoting nonunanimity while noting “[t]he Reconstruction Acts gave the right of suffrage and the right to serve on juries to a densely ignorant population”).

122. *Jury Trials*, DAILY COM. HERALD (Vicksburg, Miss.), Apr. 3, 1887, at 4.

123. *Criticised as to the Jury System*, SEMI-WKLY. MESSENGER (Wilmington, N.C.), Aug. 4, 1899, at 4.

124. *A Most Important Matter for the South*, SEMI-WKLY. MESSENGER (Wilmington, N.C.), Jan. 7, 1898, at 4.

It was in this context that Louisiana delegates met in 1898 to rewrite the state's constitution. The Constitutional Convention of 1898, like similar conventions held throughout the South during this period,¹²⁵ was convened with a single overriding goal: “[T]o protect the purity of the ballot box, and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.”¹²⁶ The chief point of contention was how best to craft a suffrage law to achieve these ends. At the outset, the convention's president, Ernest B. Kruttschnitt,¹²⁷ signaled his flexibility: “I favor the plan which will eliminate the largest number of negroes and the smallest number of white men from the electorate of this State.”¹²⁸ Eventually delegates struck a compromise between competing proposals that combined literacy and property requirements with a “grandfather clause”—a proviso preserving the franchise of those Louisianans “entitled to vote” on or before January 1, 1867 and their male descendants¹²⁹—thus ensuring that poor and illiterate white men could still vote. Closing the convention, Thomas Semmes,¹³⁰ the Judiciary Committee's chairman, celebrated the body's work:

What have we done? We met here to establish the supremacy of the white race, and the white race constitutes the Democratic Party of this State. . . . Our mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done.¹³¹

125. See C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913*, 321–49 (1971) (discussing the jury system of the South from the end of Reconstruction to the beginning of World War I).

126. E.B. Kruttschnitt, President, Closing Address at the Louisiana Constitutional Convention of 1898, in *OFFICIAL JOURNAL*, *supra* note 19, at 381; E.B. Kruttschnitt, President, Opening Address at the Louisiana Constitutional Convention of 1898, in *OFFICIAL JOURNAL*, *supra* note 19, at 10:

May this hall, where, thirty-two years ago, the negro first entered upon the unequal contest for supremacy, and which has been reddened with his blood, now witness the evolution of our organic law which will establish the relations between the races upon an everlasting foundation of right and justice. (Applause.)

127. Kruttschnitt was a leading Democratic political figure in Louisiana. As a younger man, he participated in the Battle of Liberty Place as a member of the paramilitary organization, the White League, that violently overthrew Louisiana's Reconstruction government for several days in 1874. See Lawrence N. Powell, *Reinventing Tradition: Liberty Place, Historical Memory, and Silk-Stocking Vigilantism in New Orleans Politics*, in *FROM SLAVERY TO EMANCIPATION IN THE ATLANTIC WORLD* 127 (Sylvia R. Frey & Betty Wood eds., 1999).

128. *Democracy's Campaign*, *DAILY PICAYUNE* (New Orleans, La.), Jan. 4, 1898, at 8.

129. LA. CONST. of 1898, art. 197, § 5.

130. Semmes was a leading legal figure in Louisiana and the President of the American Bar Association in 1886. During the Civil War, he helped draft Louisiana's articles of secession and served as a Louisiana senator in the Senate of the Confederate States of America. See *DEMOCRATIC STATE CENT. COMM. OF LA., THE CONVENTION OF '98: A COMPLETE WORK ON THE GREATEST POLITICAL EVENT IN LOUISIANA'S HISTORY* 38–39 (1898).

131. *OFFICIAL JOURNAL*, *supra* note 19, at 375. All but two (one Republican and one Populist) of the convention's 134 delegates were Democrats. See Lanza, *supra* note 104.

Or as Kruttschnitt put it: “Whilst not every line of it has met my approval . . . [d]oesn’t it let the white man vote, and doesn’t it stop the negro from voting, and isn’t that what we came here for?”¹³²

But convention delegates operated within some (minimal) legal constraints. Louisiana Democrats were acutely aware that an outright ban on black voters or black jurors would not withstand constitutional scrutiny, and that race-neutral language could be deployed to achieve similar ends.¹³³ Even taking such precautions, delegates worried their efforts had gone too far. In March, the convention nearly ground to a halt when Louisiana’s U.S. Senators, both Democrats, warned that the draft suffrage provision was unconstitutional.¹³⁴ Senator Donelson Caffery warned that the “grandfather clause” was infirm “because in fact it discriminates against the colored people of Louisiana”; Senator McEnery predicted that “if adopted the effect will be to lose in our representation in Congress and in the electoral vote of the State.”¹³⁵ The senators ultimately underestimated the willingness of their colleagues and the courts to accommodate even the most thinly veiled racial discrimination.¹³⁶ But the convention’s careful attention to deploying “race-neutral” language to accomplish black disempowerment is telling.

It was not only with respect to suffrage that Democrats feared federal involvement; racial discrimination in Louisiana jury selection, in particular, was also under federal scrutiny at the time. After Martinet’s visit with Senator Chandler in January 1898, the latter forwarded the *Comité’s* protest to the Senate Judiciary Committee. On January 26, 1898, Chandler introduced a resolution on the Senate floor directing the Attorney General of the United States “to inform the Senate whether or not the records of the Department of Justice show that in the State of Louisiana there have been recent violations of the Constitution of the United States by the exclusion from service on juries in the United States court of duly qualified citizens on account of color,” and if there was such evidence, “what action has been taken or is in

132. OFFICIAL JOURNAL, *supra* note 19, at 380.

133. *Id.*:

[W]e have not drafted the exact Constitution that we should like to have drafted; otherwise we should have inscribed in it, if I know the popular sentiment of this State, universal white manhood suffrage, and the exclusion from the suffrage of every man with a trace of African blood in his veins. We could not do that, on account of the fifteenth amendment to the Constitution of the United States, and, therefore, we did what has been [required by] the Supreme Court of the United States.

134. *Don’t Adopt the Fifth Section*, *supra* note 26, at 4.

135. *Id.*

136. *Cf.* Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 HARV. L. REV. 279, 293 (1899) (concluding suffrage provision “will be declared unconstitutional” and recommending repeal of Fifteenth Amendment to facilitate disenfranchisement effort).

contemplation by the Department.”¹³⁷ The resolution passed by unanimous consent.¹³⁸ These stands reinforced Chandler’s status as a hero of many black Louisianans, some of whom, barely literate, wrote to share that they too had been kept off of Louisiana juries.¹³⁹

Such meddling earned Chandler the enmity, however, of Louisiana’s Democrats. Baton Rouge’s leading newspaper disclaimed the existence of racial discrimination in jury selection but emphasized the abhorrence of black jury service:

[T]he Attorney General would be warmly applauded in this State should he politely refer Mr. Chandler and his resolution to a clime hotter than this. If Mr. Chandler is really anxious to have negroes serve on juries he ought to encourage the importation of negroes to New Hampshire and then nobody here would object if he composed his juries entirely of negroes all the time. It is unfortunately too true that too many negroes serve on juries in this State and the interests of justice are not subserved thereby. . . . Negroes do serve as jurors in this State, Mr. Chandler, all to [*sic*] often for the good of the State, but we hope eventually to do better and to leave negro juries as an institution to be fostered in New Hampshire¹⁴⁰

New Orleans’s newspapers similarly denounced Chandler as “hater[] of the Southern people,” eager “to turn loose the Federal power on the whites of this section.”¹⁴¹ The “exclusion of negroes, as such” did not exist in Louisiana. Instead, their names “are put in the wheels from which the panels of jurors are drawn,” and if rejected by the parties, “it is for reasons peculiar to every such condition.”¹⁴²

The convention’s Judiciary Committee met in February and March, at which time updates from Washington on the federal inquiry regularly appeared in Louisiana papers.¹⁴³ Martinet and the *Comité* remained in correspondence with Chandler, who spoke out again in April as the convention announced its suffrage plan.¹⁴⁴ But Martinet’s correspondence took on a despondent, and even bitter, tone as the convention progressed: “All the rights and privileges that make

137. 31 CONG. REC. 1019 (1898) (“Service on Juries in Louisiana”).

138. *Id.*

139. *See, e.g.*, Letter from John Taylor, Sr. to the President of the United States and Congress (May 1, 1898) (on file with Library of Congress, Manuscript Division, William E. Chandler Papers, 1863–1917, Washington, D.C.); *see also* Letter from W. C. Hill to Hon. W. E. Chandler (Jan. 31, 1898) (on file with Library of Congress, Manuscript Division, William E. Chandler Papers, 1863–1917, Washington, D.C.).

140. *Begin in Time*, DAILY ADVOC. (Baton Rouge, La.), Jan. 28, 1898, at 2, *reprinted in The Judiciary*, LAFAYETTE GAZETTE (Lafayette, La.), Feb. 5, 1898, at 3.

141. *Negroes on Juries*, DAILY PICAYUNE (New Orleans, La.), Jan. 27, 1898, at 4.

142. *Id.*

143. *See, e.g.*, *Another Ambassador: Alleged Exclusion of Negroes from Jury Service*, SEMI-WKLY. TIMES-DEMOCRAT (New Orleans, La.), Feb. 8, 1898, at 7; *News From Washington*, DAILY PICAYUNE, Mar. 8, 1898, at 1.

144. *Attacking Our Suffrage Ordinance*, SEMI-WKLY. TIMES-DEMOCRAT (New Orleans, La.), Apr. 8, 1898, at 4.

American citizenship desirable or worth anything”—including the right to sit on juries—are “being taken one by one from the colored American in the South.”¹⁴⁵ The convention’s work was “[a] monumental fraud, abominable injustice, glaringly unconstitutional.”¹⁴⁶ If the Attorney General and the Senate Judiciary Committee took any further action on the *Comité*’s protest, no evidence of it was left behind.

By early May, the convention had finalized its suffrage proposal and its overhaul of the state’s judiciary. In addition to directing the legislature to develop a system for “select[ing] competent and intelligent jurors,” Article 116 of the new constitution eliminated jury trials for misdemeanors, established a “jury of five” for low-level felonies, and provided that “cases in which the punishment is necessarily at hard labor” (i.e., more serious noncapital felonies) would be tried “by a jury of twelve, nine of whom concurring may render a verdict.”¹⁴⁷ The Judiciary Committee’s chairman Thomas Semmes avoided any explicit reference to the issue of black jurors when defending the new measures, but in a nod to the earliest calls for nonunanimity, his explanation for the changes directly referenced the practice of lynching: “We have so also so changed the judicial system that the delays which have so often resulted in a man being hung by a mob will disappear.”¹⁴⁸

The radical new provisions were too much even for some white Democratic delegates, who warned against adopting a measure that “abrogates the right of trial by jury—the very bulwark of our liberties.”¹⁴⁹ In the end, though, the measure passed by a vote of 72 to 27.¹⁵⁰

* * *

Ascertaining conclusively the motives of historical actors, particularly those who labored to insulate their conduct from federal

145. Letter from L.A. Martinet to the Hon. Attorney General (Feb. 8, 1898) (on file with National Archives, Records of the U.S. Senate, Record Group 46, Committee Papers, Senate Judiciary Committee, 55A-F15, Washington, D.C.).

146. Telegram from L.A. Martinet to the Hon. Wm. E. Chandler (Apr. 5, 1898) (on file with Library of Congress, Manuscript Division, William E. Chandler Papers, 1863–1917, Washington, D.C.).

147. LA. CONST. of 1898, art. 116. In cases involving the possibility of capital punishment, however, the constitution still required that “all [twelve jurors] must concur to render a verdict.” *Id.* art. 1 § 17.

148. Thomas Semmes, Address, *supra* note 19, at 379.

149. *Id.* at 355.

150. *Id.* at 354.

intervention, is tricky.¹⁵¹ But even the limited record here permits several observations from which logical inferences may be drawn. First, those who adopted nonunanimous verdicts carefully and methodically worked to dilute the political and civil rights of black Louisianans within a legal framework that demanded at least lip service to the fiction of race neutrality. These decisionmakers were overwhelmingly concerned about the specter of federal nullification of their efforts. Second, eliminating black jury service was a project of surpassing importance for many white Southerners, but these efforts were creating unwanted controversy in Louisiana at the time of the convention in 1898, drawing unwanted scrutiny from a prominent U.S. Senator and the Attorney General. And third, although black jury service was significantly curtailed by 1898, legal and political realities—including continued agitation from the *Comité* and other activists—did not yet permit its complete eradication. (Indeed, black jurors continued to serve sporadically throughout Louisiana and some other parts of the South for at least another decade, much later than most scholars have recognized.¹⁵²) It should thus come as no surprise that, although there were similar calls to abandon unanimity in other Southern jurisdictions,¹⁵³ it was only in Louisiana—the center of activism against the Jim Crow jury and home to a relatively sizeable black bourgeoisie—that such inventive reforms took purchase. Understood in this context,

151. *Cf.* *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (“Proving the motivation behind official action is often a problematic undertaking. When we move . . . to a body the size of the Alabama Constitutional Convention of 1901, the difficulties in determining the actual motivations of the various legislators that produced a given decision increase.”).

152. In 1901 in Opelousas, for example, “two of our bright and promising young lawyers stopp[ed] short the wheels of justice,” forcing a term of court to be cancelled, “because the names of no negroes were placed in the venire box,” a situation the local paper “regretted.” *Negro Jurors*, CLARION (Opelousas, La.), Dec. 28, 1901 (letter from jury commissioner explaining majority of parish residents “do not want . . . any more negroes on the jury”); *Negro Jurors*, CLARION (Opelousas, La.), Nov. 2, 1901, at 2; *see also Untitled*, RICE BELT J. (Welsh, La.), May 5, 1905 (“Stephen Lowe is on trial at Monroe. A negro man is one of the jurors.”).

In 1909, a lawyer wrote to the clerks of court in over three hundred majority-black counties throughout the South to inquire how often black jurors actually participated in trials. Four Louisiana parishes responded: Parish No. 1 (3,900 white people, 12,700 black people)— “[W]e now have no Negroes to serve on the jury here at all”; Parish No. 2 (8,800 white people, 11,300 black people)— “[T]he number is very limited . . . Out of the 300 names in the jury-box . . . there are about a dozen Negroes”; Parish No. 3 (11,000 white people, 17,800 black people)— “[I]n this parish Negroes have served on both our grand and petit juries ever since the Civil War . . . [T]hey usually constitute about one-half of the panel on the petit jury and on the grand jury they are always represented, but in a much smaller proportion.”; Parish No. 4 (2,000 white people, 13,700 black people)— “[W]e have had one Negro on the petit jury the last criminal term of court in a murder case of another Negro. He is the only Negro that has sat on the jury for two or three years in our parish.” *See* Stephenson, *supra* note 66, at 888–90. While the reliability of such self-reported data warrants skepticism, the evidence of at least minimal black jury participation post-1898 is substantial.

153. *See supra* note 106 and accompanying text.

the discriminatory motive for the adoption of nonunanimous verdicts in 1898 becomes clear: it ensured that black votes in the jury box (like black votes at the ballot box) would be diluted to the point of irrelevance.¹⁵⁴

II. THE JIM CROW JURY TODAY

The Jim Crow jury never fully fell. While the methods of racial exclusion have changed over the years—peremptory challenges, for example, “did not become a primary tool for excluding black jurors until 1935”¹⁵⁵—equitable representation on criminal juries has not existed since the height of Reconstruction (and only then in limited areas). Put differently, across American jury boxes today there are thousands of missing nonwhite jurors. Instead, these seats are filled by white jurors that, absent systemic racial exclusion, a nonwhite juror would be occupying. In kind, if not degree, it has always been so since Congress outlawed racial discrimination in jury selection 143 years ago.

The exclusion of black jurors matters for a host of reasons. Depending on one’s political orientation, meaningful diversity in criminal juries can help ensure the “legitimacy” of criminal convictions¹⁵⁶ or it can facilitate the “subversion of American criminal justice, at least as it now exists”¹⁵⁷ through race-based jury nullification. Representativeness is also critical insofar as jury service “affords ordinary citizens a valuable opportunity to participate in a process of government,”¹⁵⁸ educating jurors “from the various represented groups about the nature and importance of civic participation.”¹⁵⁹ A full exploration of these various perspectives on the

154. This dilution approach prefigured the white response, many decades later, when black jurors began serving on juries again in the post–World War II era. Well before petit juries were reintegrated, many Southern jurisdictions tolerated black service on grand juries—larger bodies without unanimity requirements where black jurors’ votes “could be nullified through supermajority voting rules or intimidation.” See KLARMAN, *supra* note 29, at 268.

155. Colbert, *supra* note 37, at 12; see *Norris v. Alabama*, 294 U.S. 587 (1935) (holding that the systematic exclusion of African Americans from a jury by which an African American is indicted or convicted solely based on race violates the Equal Protection Clause).

156. See Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1033 (2003).

157. See Paul Butler, *Racially Based Jury Nullification*, 105 YALE L.J. 677, 680 (1995) (“My goal is the subversion of American criminal justice, at least as it now exists. Through jury nullification, I want to dismantle the master’s house with the master’s tools.”).

158. *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting).

159. Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries through Community Representation*, 52 VAND. L. REV. 351, 361 (1999); see also Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995) (linking discrimination against particular age groups during jury selection with discrimination of voter participation in the same age groups).

jury is beyond the scope of this Article. But black jurors matter for a more basic reason—one with direct ties to the rise of the Jim Crow jury a century prior—that warrants further discussion: they tend to vote differently than white jurors. This simple fact animated efforts to exclude black jurors in the 1880s and 1890s and it continues to animate efforts to exclude black jurors today.

In this Part, I present an overview of new data on the enduring centrality of race in both criminal jury selection and criminal jury deliberations. Over several years, investigative journalists in Louisiana compiled a dataset (“the *Russell-Simerman* dataset”) containing information from over 5,000 criminal jury trials conducted in Louisiana from 2011 to 2017.¹⁶⁰ The quality and detail of the data vary from parish to parish—a limitation attributable to the diversity of recordkeeping practices of minute clerks, clerks of court, and district attorneys in different jurisdictions. Nonetheless, the dataset contains vast amounts of information about the race of jurors and the use of peremptory strikes in Louisiana.¹⁶¹ For instance, it includes demographic information on over 40,000 potential and empaneled jurors (10,995 of whom were empaneled, 7,665 of whom were peremptorily struck by defendants, and 5,664 of whom were peremptorily struck by prosecutors¹⁶²). This sample size is significantly larger than any previous study on the use of peremptory strikes.¹⁶³ It also identifies over 700 nonunanimous verdicts in Louisiana over the time period, and in 199 of these, the race of the juror casting each vote is ascertainable by cross-referencing preserved polling slips with other public information.¹⁶⁴ The data thus offer a novel way to assess how real-world jurors of different races, viewing the exact same evidence, evaluate guilt and innocence.

The findings are disquieting, if unsurprising. Prosecutors wield both peremptory strikes and for-cause challenges¹⁶⁵ to eliminate black

160. For the collection methodology and raw data for the *Russell-Simerman* dataset, see Jeff Adelson, *Download Data Used in The Advocate’s Exhaustive Research in ‘Tilting the Scales’ Series*, ADVOCATE (New Orleans, La.) (Apr. 1, 2018), https://www.theadvocate.com/new_orleans/news/courts/article_6f31d456-351a-11e8-9829-130ab26e88e9.html [<https://perma.cc/UEX3-B652>].

161. *Id.*

162. The balance of the individuals in the dataset were “surplus” potential jurors who, although summoned to the courthouse, did not end up serving or being struck.

163. See *infra* notes 178–180 and accompanying text.

164. In 1974, the provision of the Louisiana Constitution allowing a verdict upon the concurrence of nine jurors was modified to require the concurrence of ten jurors. Current law is otherwise identical to the rule adopted in 1898: it allows for nonunanimous verdicts in all serious noncapital felony cases (i.e., “[a] case in which the punishment is necessarily confinement at hard labor”). See LA. CONST. art. I, § 17.

165. Counsel generally may challenge any potential juror “for cause” if that individual has indicated they may be biased or otherwise disqualified from serving. Peremptory strikes, which are authorized in federal trials and in all fifty states, allow counsel to remove a fixed number of

potential jurors at an extraordinarily disproportionate rate, and they do so with greater frequency when prosecuting black defendants. A black potential juror is overwhelmingly more likely to be struck by a prosecutor than by defense counsel, particularly when a black defendant is on trial.¹⁶⁶ And, it turns out, this race-based selection strategy, however odious, is far from irrational; black jurors are significantly overrepresented among those jurors casting ballots for “not guilty” verdicts while white jurors are significantly underrepresented. Criminal law scholar Kim Taylor-Thompson has argued that the Supreme Court’s acceptance of nonunanimous verdicts in criminal trials “showed little appreciation of a possible relationship between this practice and the Court’s long history of battling exclusions of groups from the jury process.”¹⁶⁷ Drawing mainly on social cognition theory and mock-trial studies,¹⁶⁸ Professor Taylor-Thompson presciently warned that “nonunanimous decisionmaking in criminal trials could jeopardize the limited victories that historically excluded groups have won in cases challenging barriers to jury service.”¹⁶⁹ The data confirm this “empty-vote” hypothesis. Because the overwhelming majority of nonunanimous verdicts are nonunanimous *convictions* as opposed to *acquittals*, the discrepancies mean that the nonunanimous-verdict rule continues to operate today as it was designed to operate during the *Plessy* era—black jurors are more likely than white jurors to cast “empty votes” (i.e., dissenting votes that are overridden by supermajority verdicts). Nonunanimity also appears to accrue to the disadvantage of black defendants more frequently than white defendants; defendants in the former group are more likely than the latter to be convicted by nonunanimous votes, which in other jurisdictions would result in a mistrial (or, at minimum, prolonged deliberations).

The discussion below is intended only to introduce the *Russell-Simerman* dataset; other scholars will undoubtedly dive deeper into

“otherwise qualified” potential jurors for any reason, provided the rationale is not “discriminatory” within the meaning of *Batson* and its progeny. See Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?* 92 COLUM. L. REV. 725, 726 n.3 (1992).

166. *But see* *Batson v. Kentucky*, 476 U.S. 79, 137–38 (1986) (Rehnquist, J., dissenting):

In my view, there is simply nothing “unequal” about the State’s using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on.

167. Taylor-Thompson, *supra* note 22, at 1265.

168. *Id.* at 1290–95.

169. *Id.* at 1264.

this invaluable resource.¹⁷⁰ (Further data from Louisiana, however, will probably not be forthcoming. In May 2018, in response to the initial release of the data upon which this article is based, Louisiana lawmakers unanimously enacted a new law to facilitate the sealing of juror records.¹⁷¹) But even a cursory review of the numbers provides a striking reminder that the Jim Crow jury endures. Despite the lofty pronouncements of the Supreme Court that race-based exclusion from jury service is “at war with our basic concepts of a democratic society and a representative government,”¹⁷² the practice has been central to criminal adjudication throughout American history. It remains so now.

A. Race-Based Challenges

Over thirty years ago, the Supreme Court held in *Batson v. Kentucky* that prosecutors’ privilege to wield peremptory challenges was subject to the commands of the Equal Protection Clause.¹⁷³ The Court established a now-familiar framework for evaluating such claims:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination.¹⁷⁴

Since *Batson*, however, the Courts’ failure to meaningfully enforce the prohibition on racial discrimination in jury selection has come under withering criticism, with many scholars concluding the Court has been “anxious to render its own decision as meaningless, ineffective, and unthreatening as possible.”¹⁷⁵ The Court’s most recent opinion on racial

170. For example, this Article does not address sex discrimination in jury selection, though it is an area of extensive research and scholarship. The *Russell-Simerman* dataset also includes information on jurors’ sex, defendants’ charges, for-cause challenges, trial outcomes, sentencing, length of deliberations, and other related information. See Adleson, *supra* note 160.

171. See 2018 La. Acts 335. Proponents of the measure said that the new law was needed to ensure juror privacy; critics complained that it was designed to make Louisiana’s jury system even more opaque and to thwart further efforts to study racial disparities. See Gordon Russell, *Bill To Keep Split Jury Votes Secret Becomes Law Despite Push for Jury Unanimity in Louisiana*, ADVOCATE (New Orleans, La.) (May 20, 2018, 5:01 PM) https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_f0fd4186-5a23-11e8-a202-2b7a4b652452.html [<https://perma.cc/R6AG-Y4KW>].

172. *Swain v. Alabama*, 380 U.S. 202, 204 (1965) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

173. 476 U.S. 79, 86, 89 (1986).

174. *Snyder v. Louisiana*, 552 U.S. 472, 475 (2008).

175. Leonard L. Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501 (1999). *But see* Jonathan Abel, *Batson’s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713 (2018) (emphasizing *Batson* doctrine’s relative virtues in appellate and postconviction litigation).

discrimination in jury selection in 2016, *Foster v. Chatman*,¹⁷⁶ was a fact-bound decision that did little to mollify critics.¹⁷⁷

But to what extent is racial exclusion still a core feature of jury selection in the post-*Batson* world? Seven empirical studies have appeared in scholarly journals seeking to assess *Batson*'s efficacy, all but one examining peremptory strikes only in capital trials.¹⁷⁸ These studies range in size from thirteen jury panels¹⁷⁹ to several hundred jury panels,¹⁸⁰ and they vary significantly in terms of design and statistical rigor. All concur in the basic finding, however, that

176. 136 S. Ct. 1737 (2016).

177. See Nancy S. Marder, *Foster v. Chatman: A Missed Opportunity for Batson and the Peremptory Challenge*, 49 CONN. L. REV. 1137 (2017); see also *infra* notes 242–243 and accompanying text.

178. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001). The other six are Ann M. Eisenberg et al., *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373 (2017); Ann Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. U. L.J. 299 (2017); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 L. & HUM. BEHAV. 695, 697 (1999); Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61 (1986); and Bruce J. Winnick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982). Researchers for nonprofit organizations have published an additional three reports containing empirical findings on race and jury selection. RICHARD BOURKE ET AL., BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE (2003) (on file with author); URSULA NOYE, BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE CADDO PARISH DISTRICT ATTORNEY'S OFFICE (Aug. 2015), https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf [<https://perma.cc/EE7P-HUXJ>]; EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (Aug. 2010), <https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/3MRZ-XPfJ>]. Other noteworthy empirical studies on jury selection that do not address race include Michael O. Finkelstein & Bruce Levin, *Clear Choices and Guesswork in Peremptory Challenges in Federal Criminal Trials*, 160 J. ROYAL STAT. SOC'Y, SERIES A 275 (1997); and Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978).

A series of important studies on race, jury selection, and trial outcomes is forthcoming from a group of scholars at Wake Forest University who have launched the Jury Sunshine Project. These researchers have built a large database collecting detailed information from the “strong majority” of all felony trials conducted in North Carolina in a single year. See Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994288 [<https://perma.cc/7FZB-LZHQ>] (introducing research and providing some preliminary findings); see also Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J.L. & ECON. (forthcoming 2018), <http://ipl.econ.duke.edu/seminars/system/files/seminars/1872.pdf> [<https://perma.cc/8BRY-RP7C>].

179. Rose, *supra* note 178.

180. Baldus et al., *supra* note 178, is comfortably the largest, examining jury selection in 317 capital murder cases in Philadelphia between 1981 and 1997.

prosecutors disproportionately use peremptory strikes to exclude black jurors.

The *Russell-Simerman* dataset provides the latest and most robust support for this observation to date, demonstrating that racial exclusion remains central to the selection of criminal juries. The dataset identifies the race of over 40,000 potential jurors summoned in nearly 1,000 Louisiana jury trials; this includes information concerning 16,323 white potential jurors and 6,406 black potential jurors who were dismissed by a prosecution peremptory strike, dismissed by a defense peremptory strike, or empaneled (Table 1.1). The overall racial breakdown of this group of jurors is provided in Table 1.2.

TABLE 1.1: TOTAL VENIRE, RAW NUMBERS
(EXCLUDING CAUSE STRIKES AND UNUSED JURORS)

	Prosecution Strike	Defense Strike	Empaneled	Total
<i>White</i>	2,644	6,263	7,416	16,323
<i>Black</i>	2,617	860	2,929	6,406
<i>Other Nonwhite</i>	314	342	511	1,167
<i>Unknown</i>	89	100	139	328
Total	5,664	7,665	10,995	24,224

TABLE 1.2: TOTAL VENIRE, OVERALL RACIAL COMPOSITION
BY PERCENTAGE
(EXCLUDING CAUSE STRIKES AND UNUSED JURORS)

	Total
<i>White</i>	67.4%
<i>Black</i>	26.4%
<i>Other Nonwhite</i>	4.8%
<i>Unknown</i>	1.4%
Total	100.0%

Prosecutors disproportionately use their peremptory strikes against black potential jurors. Although there are a host of ways to think about race disparities in the use of peremptory strikes, the most revealing measure is to compare the percentage of a prosecutor's (or defense counsel's) peremptory challenges used to strike targeted-group members with the percentage of targeted-group members in the overall

venire.¹⁸¹ (This, of course, tells us nothing about whether the venire is a representative cross-section of the population in the first instance, but for now our focus is on discrimination in the exercise of peremptory strikes.¹⁸²) Here, the overall pool of potential jurors (n=24,224) was mostly white to begin with (67% white, 26% black); if prosecutors used their peremptory strikes in a “racially balanced” way—that is, if the use of peremptory strikes and race were entirely uncorrelated—we would expect the racial breakdown of their peremptory strikes to mirror those demographics. In other words, we would expect 100 prosecution peremptory strikes to eliminate 67 white jurors and 26 black jurors. Instead, prosecutors split their strikes, in absolute terms, about evenly between white (n=2,644) and black (n=2,617) potential jurors. For every 100 strikes, prosecutors eliminated 47 white jurors and 46 black jurors (and 6 additional nonwhite jurors). Measuring the frequency of prosecutors’ strikes of target-group members relative to the target-group members’ representation in the venire, however, generates stark results (Table 2.1): prosecutors strike white jurors with 69% of the frequency we would expect if they were striking in a racially balanced way and strike black jurors with 175% of the frequency we would expect if acting in a racially balanced way.

TABLE 2.1: PROSECUTION PEREMPTORY STRIKES,
ALL DEFENDANTS

	White	Black	Other Nonwhite
<i>Composition of Juror Pool</i>	67.4%	26.4%	4.8%
<i>Prosecution Peremptory Strikes</i>	46.7%	46.2%	5.5%
<i>Disparity Ratio</i>	0.693	1.747	1.151

This is not to say that all disproportionate strikes identified above are pretextual and should be considered unlawful under *Batson*. The problem with existing law is not just that it makes it painfully easy

181. For an excellent overview of courts’ use—and misuse—of data when evaluating *Batson* challenges, see Kenneth Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996).

182. See generally Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing it with Equal Protection*, 64 HASTINGS L.J. 141 (2012) (exploring the “doctrinal distortion” within the jurisprudence of the Sixth Amendment’s cross-section guarantee).

to cloak even the most overt forms of racism through pretextual race-neutral justifications, although it does.¹⁸³ Rather, the problem is that it also places the Court's imprimatur on the sincerely "colorblind"¹⁸⁴ elimination of jurors whose views (e.g., mistrust of law enforcement and prosecutors),¹⁸⁵ personal experiences (e.g., having an incarcerated friend or family member),¹⁸⁶ or moral convictions (e.g., reluctance to impose capital punishment)¹⁸⁷ are highly correlated with and deeply embedded in the lived experience of race in America.¹⁸⁸ Yet if prosecutors are assiduously honoring, rather than attempting to subvert, the imperative of "colorblindness"—while nevertheless eliminating black jurors at 175% of the expected rate—existing Fourteenth Amendment jurisprudence may be even more infirm than cynics allege.¹⁸⁹

But a closer look at the data provides reasons to suspect that the more overt variety of racially motivated exclusions—the narrow type of racially discriminatory action *Batson* aimed to ferret out—also remain common. One way to measure this is to control for the race of the defendant. If a prosecutor's racially disproportionate use of peremptory strikes is genuinely tied to some "race-neutral" attribute of black potential jurors, the frequency with which strikes are used to eliminate minority jurors should remain roughly constant in prosecutions against black and white defendants. "Race-neutral" attributes correlated with

183. See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 162–63 (2010) (providing examples of such implicit bias).

184. See generally Ian F. Haney López, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2006) (discussing the emergence of "reactionary colorblindness" in the U.S. legal system).

185. See William J. Powers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 180 nn.41–43 (2001).

186. See Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 414 (2017).

187. See Baldus et al., *supra* note 178, at 19 n.40 ("Disparities in opinion polls are most marked along racial lines. When asked in a 1997 poll if they believe in or are opposed to the capital punishment, 80% of whites said they believe in it, compared to 46% of blacks.").

188. For a compelling argument that existing doctrine invites, if not requires, "proactive, creative, and assertive" scrutiny of race-neutral justifications that disparately impact particular groups, see Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS. L. REV. 1359 (2012). Professor Anna Roberts finds that courts tend to engage in this sort of rigorous review, however, exclusively in cases involving the exclusion of white jurors.

189. *But see* KENNEDY, *supra* note 49, at 236 (acknowledging that "[r]acial disparities stemming from the operation of nonracial criteria do often reflect the vestiges of past racial discrimination" but arguing against those who "[i]n their rebellion against illicit selection schemes . . . have gone to the untenable extreme of denouncing virtually all criteria in favor, apparently, of unbounded representation on juries").

the potential juror's race should be the same no matter the defendant's race. If, on the other hand, it is race qua race that drives the disparity, we would expect to see greater efforts by prosecutors to eliminate black potential jurors when black defendants are tried.

It turns out the latter hypothesis is correct: prosecutors disproportionately strike black jurors no matter who they are prosecuting, but the disparity between the racially balanced expected result and the observed result is significantly greater when a black defendant stands accused. In cases involving white defendants (Table 2.2), the initial racial breakdown of the venire skewed more heavily white, with 74% white potential jurors and 20% black potential jurors. Despite this composition, prosecutors used 29% of their strikes (n=329) against black potential jurors and 64% of their strikes (n=722) against white potential jurors. That means that prosecutors struck black jurors with 144% of the frequency we would expect if acting in a racially balanced way.

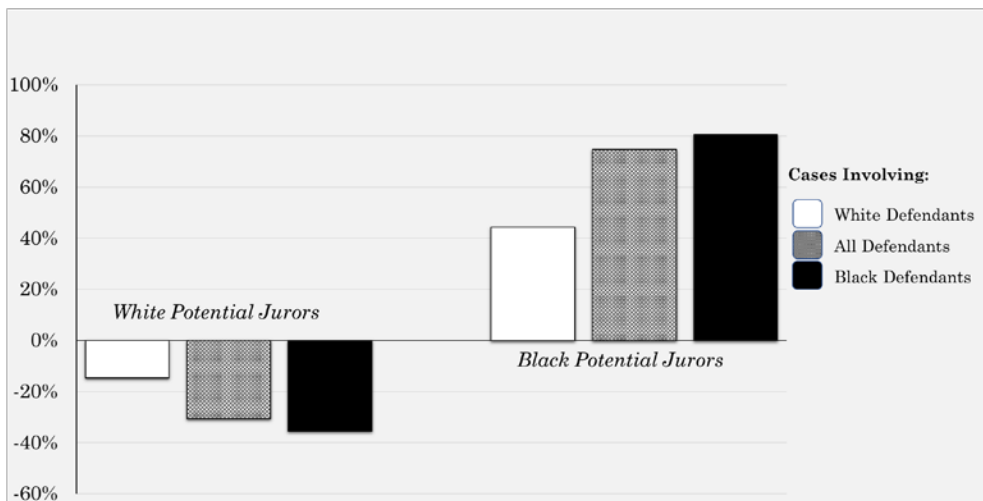
TABLE 2.2: PROSECUTION PEREMPTORY STRIKES,
WHITE DEFENDANTS ONLY

	White	Black	Other Nonwhite
<i>Composition of Juror Pool</i>	74.4%	20.1%	4.8%
<i>Prosecution Peremptory Strikes</i>	63.6%	29.0%	6.9%
<i>Disparity Ratio</i>	0.854	1.443	1.429

With black defendants, however, prosecutors demonstrated greater eagerness to remove potential black jurors from the venire (Table 2.3). In cases involving black defendants, beginning with an initial pool of 66% white and 28% black jurors, prosecutors used 42% of their strikes (n=1,872) against white potential jurors, and 51% of their strikes (n=2,253) against black potential jurors. The frequency of strikes against black potential jurors was 181% of what we would expect if strikes were doled out in a racially balanced manner. The disparities documented in Tables 2.1–2.3 are visually represented in Figure 1 below.

TABLE 2.3: PROSECUTION PEREMPTORY STRIKES,
BLACK DEFENDANTS ONLY

	White	Black	Other Nonwhite
<i>Composition of Juror Pool</i>	65.8%	28.3%	4.8%
<i>Prosecution Peremptory Strikes</i>	42.5%	51.1%	5.2%
<i>Disparity Ratio</i>	0.646	1.806	1.070

FIGURE 1: DISPARITY BETWEEN PROSECUTION STRIKES AND
REPRESENTATION IN VENIRE

As Figure 1 illustrates, prosecution strikes against white potential jurors (represented by the first three columns) occur less frequently than expected based on white jurors' representation in the venire. This is true in all cases, but it is particularly true in cases involving black defendants. The negative values here correspond with a "disparity ratio" less than 1.0—the expected disparity ratio if the proportion of preemptory strikes aligned with the racial composition of the venire—in Tables 2.1–2.3. The larger absolute values reflect a greater disparity between the "expected" and "observed" results. For example, the "disparity ratio" of 0.854 for white potential jurors in cases involving white defendants (*see supra* Table 2.2) is represented here with the value -14.6% in the far-left column. Prosecution strikes against black potential jurors (represented by the last

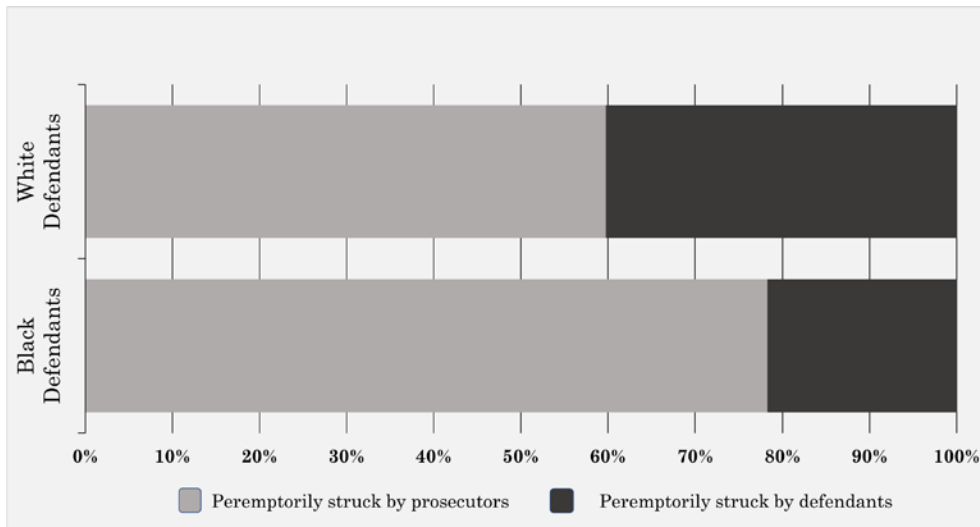
three columns), on the other hand, occur much more frequently than expected based on black jurors' representation in the venire. The disparity is, again, greatest in cases involving black defendants. The positive values here correspond with a "disparity ratio" greater than 1.0 in Tables 2.1–2.3. Thus, the "disparity ratio" of 1.806 for black potential jurors in cases involving black defendants (*see supra* Table 2.3) is represented here with the value +80.6% in the far-right column.

The disparities are even greater in prosecutors' use of "for-cause" challenges, a topic most of the existing literature on racial bias in jury selection overlooks. Excluding from the sample those for-cause challenges where the prosecution and defense agree on the juror's dismissal—that is, looking only at contested for-cause challenges—prosecutors overwhelmingly use for-cause challenges to eliminate black potential jurors. Of the 975 potential jurors that prosecutors successfully challenged for cause, over 58.5% (n=570) were black jurors while only 34.2% (n=333) were white jurors. This disparity is significantly larger than the (already sizable) racial disparity observed in prosecutors' use of their peremptory strikes (*see supra* Table 2.1). Conversely, defendants disproportionately struck white potential jurors with for-cause challenges, but these figures hewed more closely to overall representation of the respective groups in the initial pool: of defendants' 727 successful for-cause challenges, 74.2% (n=540) targeted white potential jurors while 21.0% (n=153) targeted black potential jurors.

There are several different ways to think about the impact of such numbers. One is to consider it from the perspective of a potential juror who has just been dismissed with a peremptory strike (Figure 2). If that individual is black, the odds that the State of Louisiana, as opposed to the defendant, was responsible for striking the juror are 3:1. (If we limit our sample to only those cases where a black defendant is on trial, the odds jump to 3.6:1; when a white defendant is on trial, the odds are "only" 1.5:1.) These ratios are particularly dramatic since, in absolute terms, the dataset includes about 35% more peremptory strikes made by defendants than by prosecutors.¹⁹⁰

190. One possible explanation for this disparity is that defendants have a unique incentive to exhaust all of their peremptory strikes; failure to do so forfeits any appellate claim that the trial court erroneously denied a for-cause challenge. *See, e.g., State v. Mitchell*, 674 So. 2d 250, 254 (La. 1996) ("[W]e need not reach the issue of whether there was an erroneous denial of defendant's challenge for cause, since the record reveals that defendant failed to use all his peremptory challenges.").

FIGURE 2: PARTY USING PEREMPTORY STRIKES AGAINST
BLACK POTENTIAL JURORS



Or one could view the effect of these peremptory strikes on the racial composition of the jury pool before and after prosecutors use strikes. In this case, the comparison is between the racial composition of the final empaneled jury and the racial composition of “otherwise qualified” jurors who would be empaneled but for the existence of prosecution peremptory strikes (i.e., those who have not been dismissed for cause, survived the defendant’s peremptory strikes, and are otherwise “in line” to be empaneled).¹⁹¹ In cases involving a white defendant (Table 3.1), the prosecution’s peremptory strikes eliminated

191. There are important limits to this measure. By looking only to “otherwise qualified” jurors (as I have described the group) and the final empaneled jury, these figures fail to “credit” prosecutors for black jurors they initially accepted but were subsequently struck by defense counsel (and likewise fail to “credit” them for white jurors who prosecutors might have struck, but were dismissed by the defendant first). Louisiana uses a unique “backstrike” system, however, that allows each party to exercise a peremptory strike on a juror at any time, even if both sides initially accepted that juror, provided the party still has peremptory strikes remaining. *See* LA. CODE. CRIM. PROC. ANN. art. 799.1 (2018); *State v. Lewis*, 112 So. 3d 796, 801 (La. 2013) (explaining Louisiana law “explicitly condones a juror selection strategy in which counsel may defer a final decision on accepting one or more jurors until counsel has viewed the entire panel of provisionally selected jurors, before they are sworn in by the court”). This “backstrike” rule supports limiting the inquiry to “otherwise qualified” jurors, insofar as prosecutors often do make their strike decisions examining just the pool of “otherwise qualified” jurors described in the data. It also provides a clearer view of the effect of eliminating only prosecution strikes or asymmetrically allocating peremptory strikes between prosecutors and defense counsel, proposals some academics have championed. *See, e.g.,* Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503 (2014); Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163 (2014).

30% of the white potential jurors and 42% of the black potential jurors from the “otherwise qualified” pool. When the defendant is black (Table 3.2), however, the prosecution’s peremptory strikes eliminate just 25% of the white potential jurors and 48% of the black potential jurors. These results are represented in Figure 3.

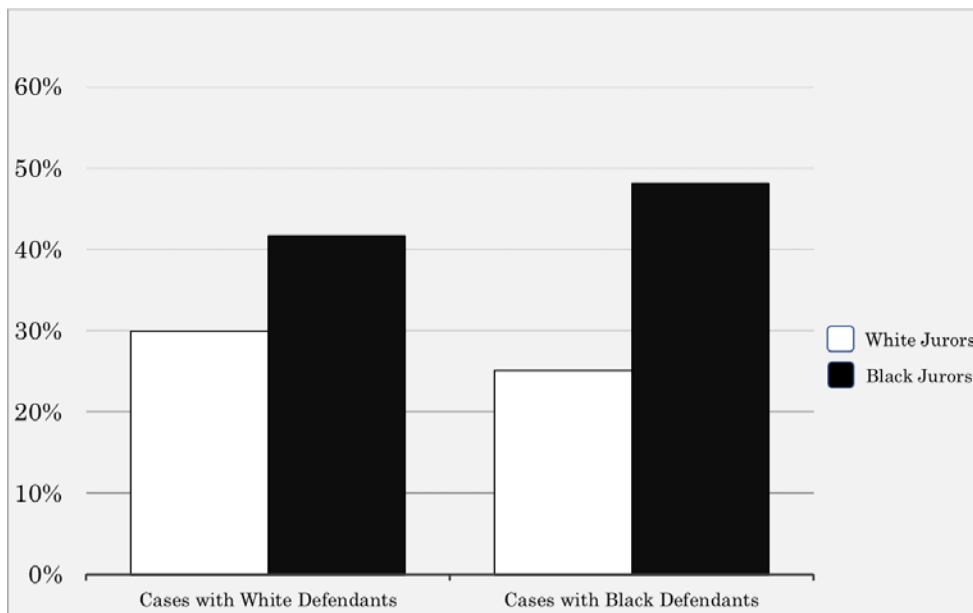
TABLE 3.1: PROSECUTORS’ ELIMINATION OF “OTHERWISE QUALIFIED” JURORS, WHITE DEFENDANTS ONLY

	White	Black	Other Nonwhite
<i>“Otherwise Qualified” Jurors</i>	2,415	789	180
<i>Empaneled Jury</i>	1,693	460	102
<i>Elimination Rate</i>	29.9%	41.7%	43.3%

TABLE 3.2: PROSECUTORS’ ELIMINATION OF “OTHERWISE QUALIFIED” JURORS, BLACK DEFENDANTS ONLY

	White	Black	Other Nonwhite
<i>“Otherwise Qualified” Jurors</i>	7,473	4,671	628
<i>Empaneled Jury</i>	5,601	2,418	401
<i>Elimination Rate</i>	25.1%	48.2%	36.1%

FIGURE 3: PROSECUTION ELIMINATION RATE OF
“OTHERWISE QUALIFIED” JURORS



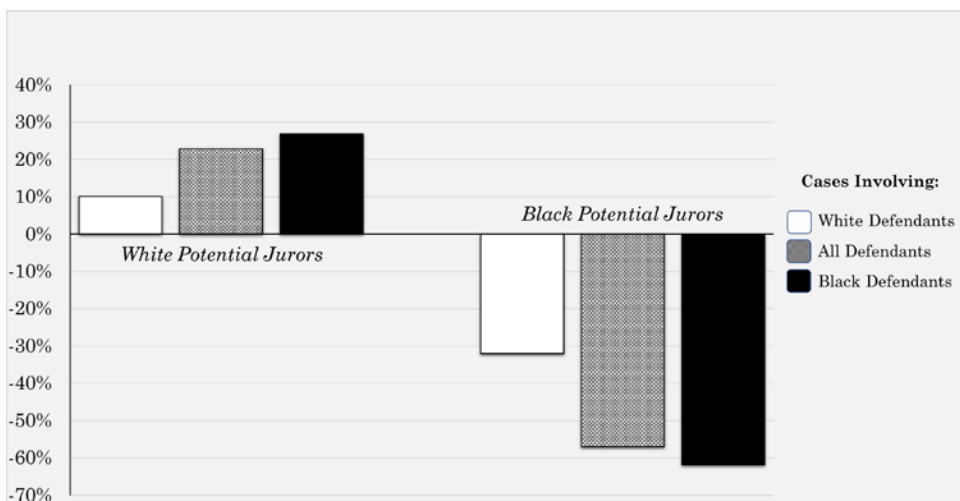
There is another important insight from the *Russell-Simerman* dataset that adds to the debate over one common proposal for reform: the complete elimination of peremptory strikes.¹⁹² While the statistics demonstrate substantial racial disparities in how prosecutors wield their peremptory strikes, peremptory strikes (in toto) are not necessarily the primary drivers of black underrepresentation on juries, at least in those jurisdictions with sizeable nonwhite populations in the first instance.¹⁹³ The simple explanation is that defendants’ peremptory

192. See, e.g., Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369 (1992); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Use of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1993).

193. Some caution about this observation is warranted. One-third of the detailed juror data in the *Russell-Simerman* dataset comes from three parishes (East Baton Rouge, Caddo, and Orleans) where black residents comprise an unusually large percentage of the population (between 45% and 60%), registered voters (between 44% and 57%), and initial venires (between 33% and 51%). In such jurisdictions, it is harder for prosecutors to make a sizeable dent in the overall percentage of black jurors in the venire through peremptory strikes, particularly when counteracted by similarly racially skewed strikes by defendants. In jurisdictions with fewer black residents, the same number of peremptory strikes can eliminate a larger share of the potential black jurors (while similarly disproportionate strikes targeting white jurors will have a negligible effect on that much larger group’s overall representation). Two of the parishes where peremptory strikes had the largest proportional effect in reducing the representation of black jurors were parishes with a

strikes also reflect dramatic racial disparities, though in the opposite direction. Overall, defendants use 83% of their peremptory strikes (n=6,263) against white potential jurors and 11% of their peremptory strikes (n=860) against black potential jurors. Given the racial composition of the initial juror pool, this means defendants struck white jurors with 123% of the frequency we would expect based on racially balanced striking and black jurors with just 43% of the frequency we would expect with racially balanced striking. As with prosecutors' peremptory strikes, the disparity (between the racially balanced expectation and the observed reality) widens when a black defendant is on trial. These disparities, a mirror image of the disparities discussed in Figure 1, are represented in Figure 4.

FIGURE 4: DISPARITY BETWEEN DEFENSE STRIKES AND REPRESENTATION IN VENIRE



For a description of this figure, refer to the explanatory note accompanying Figure 1.

Defenders of the existing doctrinal framework should be particularly troubled by the finding that defendants' racially skewed strikes effectively balance out prosecutors'. Under current law, racially motivated strikes by defendants against overrepresented white jurors are no less offensive to the Fourteenth Amendment than race-motivated

smaller overall black population—namely, Terrebonne Parish (19.1% black population) and Ascension Parish (23.1% black population).

strikes by prosecutors targeting underrepresented minority jurors.¹⁹⁴ The overall equilibrium is not evidence that the system is working; rather, it reflects systemic, mirror-image violations of both black and white jurors' constitutional rights.

But those with fewer qualms about the systematic exclusion of white jurors by nonwhite defendants should be concerned by the overall data presented, too. Notwithstanding the "offset effect" identified above, the *Russell-Simerman* dataset illuminates the enduring relevance of race in jury selection today, and it shows how prosecutors' use of both for-cause and peremptory strikes drastically curtails the participation of underrepresented minority jurors in criminal adjudication. A jury selection system that actually barred such racially disproportionate strikes would visibly and dramatically remake the color of America's juries. More than a century after the initial fights over the Jim Crow jury, black jurors remain systematically excluded from American jury boxes.

B. Measuring the Impact of Race on Jury Deliberations and the Disparate Impact of Nonunanimity

The Jim Crow jury also endures when our focus shifts to jury deliberations. Undergirding the movement to impose (and resist) the Jim Crow jury in the nineteenth century was the basic assumption that black jurors might return different verdicts than white jurors if allowed into the jury box. This basic intuition has become controversial, however, particularly in light of the Court's overarching commitment to "colorblindness"—that is, its insistence that race has no rational relationship with one's work as a juror—in its *Batson* jurisprudence.¹⁹⁵ Does jurors' race actually matter inside the jury box? By examining the racial composition of nonunanimous verdicts, this Article demonstrates in a novel way how race continues to shape the way jurors assess guilt and innocence.

The extent to which jurors' race and racial prejudices influence jury deliberations has been the subject of scholarship and debate for

194. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (holding that "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges"); see also *Batson v. Kentucky*, 476 U.S. 79, 108 (1986) ("The potential for racial prejudice, further, inheres in the defendant's challenge as well."); Audrey M. Fried, *Fulfilling the Promise of Batson: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U CHI. L. REV. 1311 (1997).

195. See *infra* Part III; see also Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 122–23 (1996).

decades.¹⁹⁶ Research on race and jury deliberations generally falls into one of three categories: (1) archival analysis of verdicts in actual cases, (2) post-trial interviews with jurors, or (3) mock trial studies in controlled settings.¹⁹⁷ Archival analysis generally represents the “ideal way to study the relationship between race and jury verdicts,” but “[t]he difficulty inherent in this type of investigation is that criminal trials vary along a wide range of dimensions.”¹⁹⁸ Even the best designed archival analyses “face the interpretive difficulties of controlling for confounding variables and the limitations posed by a correlational research design.”¹⁹⁹ For that reason, there is a dearth of field research on the role of juror race in real-world jury deliberations (particularly outside the capital context).²⁰⁰

But the *Russell-Simerman* dataset provides a unique way to control for many of these variables: it tells us how black and white jurors—evaluating the exact same evidence in real-life settings—view guilt and innocence. For a limited but still sizeable number of jury verdicts, the race of the jurors and the votes cast by those jurors are now known.

These cases demonstrate that the nonunanimous-decision rule operates today just as it was intended to 120 years ago—to dilute the influence of black jurors. The dataset contains detailed information on jurors’ race and jurors’ votes for 199 nonunanimous verdicts delivered by racially mixed juries.²⁰¹ The nonunanimous verdict was “guilty” in 190 of these verdicts and “not guilty” in 9. Let’s consider first the “guilty” verdicts. In these cases, decided by 11-1 or 10-2 votes, white jurors cast 64.1% of the total votes (n=1,461) and black jurors cast

196. See generally Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 67–105 (1993); Jeffrey E. Pfeifer, *Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?* 69 NEB. L. REV. 230, 233 (1990) (arguing “[t]he available data regarding the role of racism in jury decisionmaking does not support the contention that juror objectivity is adversely affected by the inability to set aside personal prejudices”); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003); Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171 (2007).

197. Sommers & Ellsworth, *supra* note 196, at 997.

198. *Id.* at 998.

199. *Id.* at 1000.

200. See DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* 116–18 (2012).

201. The dataset also includes 8 nonunanimous verdicts returned by all-white juries, but these are omitted for present purposes since they provide no information on the basic question of whether white and black jurors evaluate the same evidence differently.

31.3% of the total votes (n=714).²⁰² If race were not correlated with a juror’s vote—that is, if white and black jurors tended to weigh the same evidence the same way—we would expect to see a similar racial distribution of votes among both the total number of “guilty” votes cast (n=1,999) and “not guilty” votes cast (n=281). Since white jurors cast 64% of the total votes, we would expect them to cast around 64% of the total “guilty” votes and 64% of the total “not guilty” votes (again, assuming that race did not correlate with jurors’ assessment of the evidence). Instead, white jurors were responsible for casting just 43.4% (n=122) of the “not guilty”—or holdout—votes (n=281), while black jurors—who made up just 31.3% of the initial pool of total jurors in these cases—cast 51.2% (n=144) of these votes (n=282). In other words, black jurors found themselves casting “empty votes”—that is, “not guilty” votes overridden by the supermajority vote of the other jurors—with 164% of the frequency we would expect if jurors voted “guilty” and “not guilty” in a racially balanced manner. Put slightly differently, compared to their white counterparts, black jurors were about 2.5 times as likely to be casting “empty votes” to acquit at the close of deliberations.²⁰³ This is represented in Figure 5.

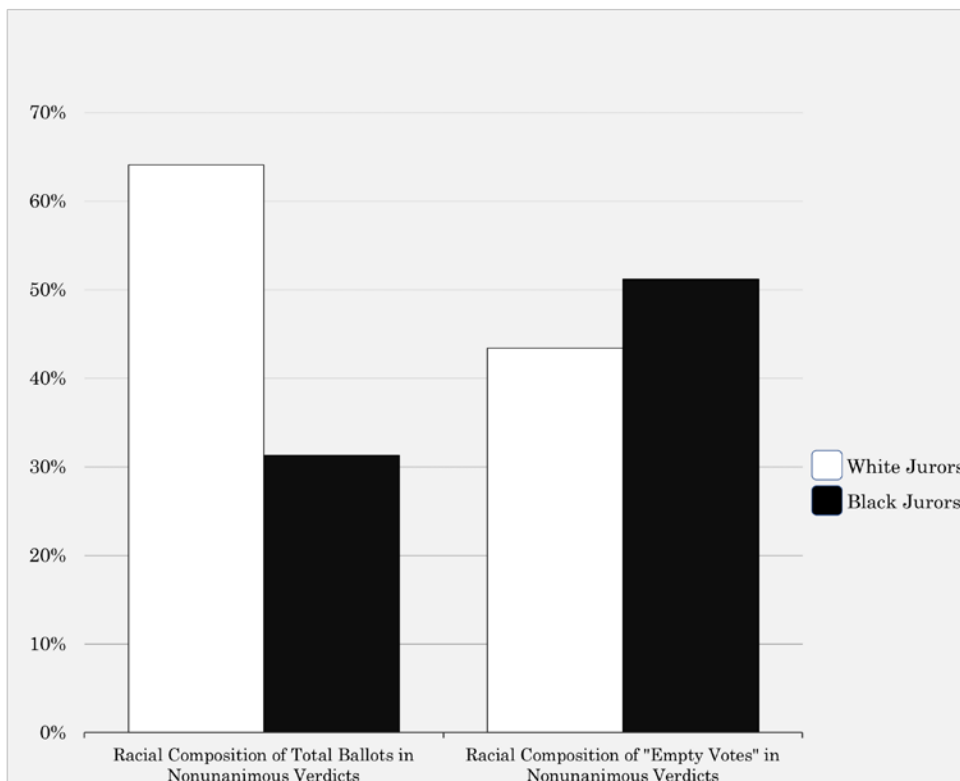
TABLE 4: RACIAL DISPARITIES IN CASTING “EMPTY VOTES”

	White	Black	Other Nonwhite
<i>Ballots Cast in Nonunanimous Cases</i>	64.1%	31.3%	2.2%
<i>Breakdown of “Not Guilty” Ballots</i>	43.4%	51.1%	2.8%
<i>Disparity Ratio</i>	0.68	1.64	1.27

202. Other nonwhite voters cast a total of 51 votes, and 54 votes were cast by jurors whose race was not definitively known.

203. It does not automatically follow that each of these same jurors, deliberating in an alternative jurisdiction that required unanimity, would necessarily vote in the same way. It could be that, with further deliberations and encouragement from the court, many of those casting “empty votes” for acquittal would eventually adopt the majority’s position (or switch their votes to “guilty” as part of a compromise verdict on a “lesser-included” charge). See Marla Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 L. & HUM. BEHAV. 175, 191–92 (1995) (arguing that first-ballot votes often predict final jury verdicts). Or, perhaps, some jurors cast “empty votes” as a form of protest precisely *because* they know that such votes will not be outcome determinative; on this view, dissenting jurors in a nonunanimous regime might be akin to voters who feel more empowered to vote for a third-party candidate in jurisdictions that are safely “blue” or “red” than in swing states. See, e.g., D. Sunshine Hillygus, *The Dynamics of Voter Decision Making Among Minor-Party Supporters: The 2000 Presidential Election in the United States*, 37 BRIT. J. POL. SCI. 225 (2007) (discussing lower “loyalty rates” of early Nader supporters in competitive jurisdictions).

FIGURE 5 – “EMPTY VOTES” IN NONUNANIMOUS CONVICTIONS



The overrepresentation of nonwhite jurors among the group casting “empty votes” for acquittal appears both in parishes where black jurors are relatively scarce and in parishes where black jurors serve in significant numbers. In the 28 nonunanimous convictions in Orleans Parish for which data is available, for example, white jurors ($n=155$) and black jurors ($n=168$) served in roughly equal numbers. Yet black jurors cast more than twice the number of “empty votes” for acquittal ($n=25$) than did white jurors ($n=12$). Nonunanimity serves to mute the impact of nonwhite jurors even when such jurors are not, in numerical terms, “minorities.”²⁰⁴

The data also suggest that in addition to disproportionately silencing the voices of black jurors, nonunanimous verdicts

204. The 9 nonunanimous acquittals did not yield such radical disparities. In these cases, white jurors cast 65% of total votes ($n=70$) and black jurors cast 33% of total votes ($n=36$). Black and white jurors cast “not guilty” votes in roughly proportional numbers (white jurors cast 63% ($n=60$) and black jurors cast 35% ($n=34$) of the “not guilty” ballots). White jurors were overrepresented among the holdout votes for “guilty,” casting ten of the twelve votes, but such a small sample precludes the drawing of meaningful conclusions.

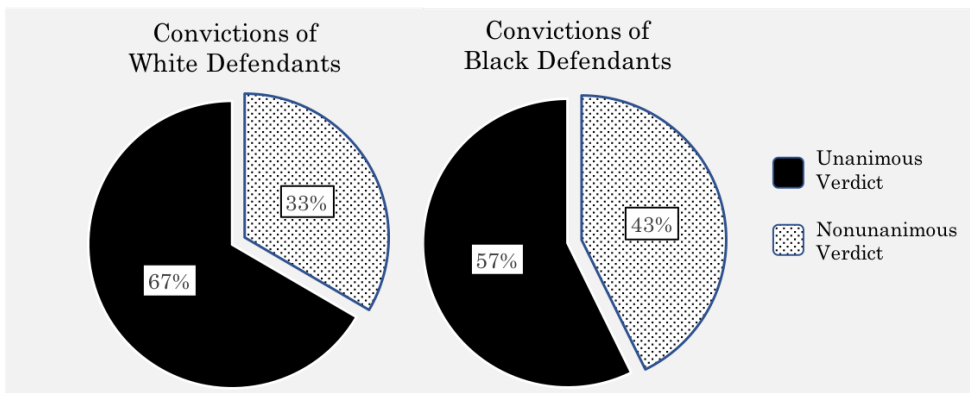
disproportionately disadvantage black defendants: black defendants were more likely to be convicted in cases where at least one or two jurors harbored doubts.²⁰⁵ While the *Russell-Simerman* dataset contains the racial breakdown of votes for 199 nonunanimous verdicts, it also includes more rudimentary information on a vastly larger number (n=1,807) of unanimous (n=1,071) and nonunanimous (n=736) “guilty” verdicts returned by twelve-person juries. But these convictions were not split proportionately between black and white defendants. Rather, black defendants made up 75% (n=1,355) of all convictions, but 79% (n=579) of the total nonunanimous convictions and 72% (n=776) of the total unanimous convictions. White defendants’ convictions, both unanimous and nonunanimous (n=413), skewed in the opposite directions. Thus, while white defendants accounted for 23% of the total convictions where one or more jurors harbored doubts regarding the defendant’s guilt, they were overrepresented (26%, n=275) among unanimous convictions and underrepresented (19%, n=138) among nonunanimous convictions.

The full impact of these numbers is best appreciated from the perspective of the convicted defendant. When a conviction is obtained against a black defendant, there is a 43% chance that the verdict was nonunanimous (or, conversely, a 57% chance the verdict was unanimous). When the convicted defendant is white, there is only a 33% chance the verdict was nonunanimous (and thus a 67% chance the verdict was unanimous).²⁰⁶ Figure 6 illustrates how black defendants are disproportionately likely to find themselves convicted by operation of the nonunanimous-verdict rule as compared to their white counterparts.

205. That one or two jurors voted “not guilty” at the moment a supermajority achieved ten or eleven votes does not mean that the trial necessarily would have resulted in a mistrial or acquittal, of course, had unanimity been required. Many of these juries would have eventually reached unanimity with further deliberations, and most of these would have ended with convictions. But it seems safe to assume that at least some of them would have resulted in mistrials or convictions for lesser offenses.

206. This difference in the rate of nonunanimous convictions between black and white defendants is significant at the .001 level.

FIGURE 6 – CONVICTION TYPE BY DEFENDANT’S RACE



Do nonunanimous verdicts then make it more likely that innocent defendants—and particularly innocent black defendants—will be wrongfully convicted?²⁰⁷ The dataset provides no clear answer, although it does reveal that (at least for prison sentences of more than a few years) there are thousands of people serving hard labor sentences who were convicted when one or two jurors still had reasonable doubts. And perhaps the voices of those dissenters should be credited more often. Since 1990, there have been twenty-five individuals exonerated in Louisiana after convictions for felony offenses subject to the nonunanimous-verdict rule—that is, for serious noncapital felonies. Of those twenty-five, eleven were sent to prison by nonunanimous juries.²⁰⁸

III. THE FUTURE OF THE JIM CROW JURY

The Fourteenth Amendment’s guarantee of “equal protection of the laws,” the Supreme Court explained in *Batson*, guarantees a defendant the right “to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.”²⁰⁹ Time and again, the Court has affirmed that “permitting racial prejudice in the jury system

207. For a debate in the political science literature on this issue, compare Timothy Feddersen & Wolfgang Pesendorfer, *Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts Under Strategic Voting*, 92 AM. POL. SCI. REV. 23 (1998), with Peter J. Coughlan, *In Defense of Unanimous Jury Verdicts: Mistrials, Communication, and Strategic Voting*, 94 AM. POL. SCI. REV. 375 (2000).

208. Emily Maw & Jee Park, Opinion, *Do Non-unanimous Verdicts Discriminate?*, TIMES-PICAYUNE (New Orleans, La.), Oct. 5, 2017, https://www.nola.com/opinions/index.ssf/2017/10/jury_verdicts.html [<https://perma.cc/U9X5-6SFD>] (urging better data collection by court authorities to assess whether this figure was disproportionately high).

209. *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986).

damages ‘both the fact and the perception’ of the jury’s role as ‘a vital check against the wrongful exercise of power by the State.’”²¹⁰ But the data presented here show that, far from being “at war with our basic concepts of a democratic society and a representative government,”²¹¹ racial prejudice has always infected America’s criminal jury system.

In this Part, I want to situate our current legal framework’s permissive approach toward racial bias in the jury system within the much broader arc of U.S. jury-discrimination law. Despite recent pronouncements to the contrary, our “maturing legal system” simply is not “understand[ing] and . . . implement[ing] the lessons of history.”²¹² To the contrary, the Court’s two most recent encounters with racial prejudice and the jury (*Foster v. Chatman*²¹³ and *Peña-Rodriguez v. Colorado*²¹⁴) fit comfortably within the Court’s long tradition of halting gestures toward countering racial bias, despite delivering legal victories to the individual nonwhite defendants seeking relief. But if the past century’s efforts have failed to abolish the Jim Crow jury, where do we go next? In one sense, the project seems daunting: so long as racism permeates American life, the long view teaches, it will be impossible to extirpate it from our flawed and imperfect jury system. And yet, the history and data presented in Parts I and II suggest the necessity of reforms—including an abolition of nonunanimous verdicts and perhaps the adoption of affirmative race-conscious measures to ensure the racial representativeness of juries—that could erode the Jim Crow jury’s enduring hold on the operation of American criminal justice.

* * *

While legal frameworks have changed radically since the 1890s, what is most striking about the editorials in the *Daily Crusader* is not how distant the past appears, but rather how incisively nineteenth-century activists identified doctrinal shortcomings that still plague our jury-discrimination law. Consider, for example, two of the most frequently advanced critiques of *Batson* and its progeny. First, under existing law, a prosecutor’s race-neutral justification for striking a juror may be “silly or superstitious”; the Court does not even require “a

210. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

211. *Swain v. Alabama*, 380 U.S. 202, 204 (1965) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

212. *Peña-Rodriguez*, 137 S. Ct. at 871.

213. 136 S. Ct. 1737 (2016).

214. *Peña-Rodriguez*, 137 S. Ct. 855.

reason that makes sense,” provided the reason is race-neutral.²¹⁵ Predictably, only the “unapologetically bigoted or painfully unimaginative” seem to be ensnared in *Batson’s* net.²¹⁶ Second, by shunning a “statistically based approach to exclusionary peremptory challenges” in favor of “scrutiny of individual actions,” the Court has rendered itself ill equipped “to confront the pervasive effects of racism in any meaningful way.”²¹⁷ Racial justice activists waging the initial fight against “the Jim Crow jury” advanced both of these same critiques 120 years ago. Then, as now, legal claims alleging jury discrimination occasionally prevailed, but only when “unapologetically bigoted or painfully unimaginative” officials effectively conceded the issue.²¹⁸ Then, as now, courts demonstrated indifference to widespread patterns of racial exclusion, crediting instead the perfunctory race-neutral justifications offered by state jury commissioners and judges. On this

215. *Purkett v. Elem*, 514 U.S. 765, 769 (1995); *accord* *Pruitt v. McAdory*, 337 F.3d 921, 928 (7th Cir. 2003) (explaining “[a]ny neutral reason, no matter how implausible or fantastic, even if it is sill or superstitious, is sufficient to rebut a prima facie case of discrimination”).

216. Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1102–05 (2011).

217. Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1811–12 (1992) (analogizing to *McCleskey v. Kemp*, 481 U.S. 279 (1987)). For an early and influential argument on the utility of statistical tools, see Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

218. Bellin & Semitsu, *supra* note 216, at 1102–05; *see supra* note 66 and accompanying text; *see also* *State v. Wilkins*, 94 So. 3d 983, 991–92 (La. Ct. App. 3d Cir. 2012) (overturning murder conviction where prosecutor’s “race-neutral” explanation for peremptory strikes of black jurors in racially charged case, accepted by the trial court, was “I have one [reason] that I am uncomfortable putting on the record, but I will put it on the record. . . . [T]he fact that the juror is an African-American, I didn’t want to run the risk of putting her on the jury—and it applies to the rest of them also. . . . I am just not comfortable putting a bunch of African-Americans on the jury. . . . I think blacks would be a little bit more inflamed by that word [‘nigger’] than others.”). Over the past decade, Louisiana courts vacated just six other convictions on *Batson* grounds. (A federal district court also granted habeas relief in one case.) Only four of the Louisiana cases involved the improper denial of a defendant’s *Batson* challenge; the other two held that the trial court erroneously granted prosecutors’ “reverse-*Batson*” challenges, denying defense counsel the use of their peremptory strikes against white jurors. *See* *Trotter v. Warden*, 718 F. Supp. 2d 746 (W.D. La. 2010) (granting habeas relief); *State v. Harris*, 217 So. 3d 255 (La. 2016); *State v. Broussard*, 201 So. 3d 400 (La. Ct. App. 3d Cir. 2016); *State v. Maxwell*, 17 So. 3d 505 (La. Ct. App. 4th Cir. 2009); *State v. Cheateam*, 986 So. 2d 738 (La. Ct. App. 5th Cir. 2008); *State v. Nelson*, 85 So. 3d 21 (La. 2012) (reverse-*Batson* challenge); *State v. Pierce*, 131 So. 3d 146 (La. Ct. App. 4th Cir. 2013) (reverse-*Batson* challenge). For a recent case illustrating the courts’ overwhelming tendency to deny relief, *see* *State v. Williams*, 199 So. 3d 1222, 1237 (La. Ct. App. 4th Cir. 2016) (holding no prima facie case of discriminatory intent had been established where the prosecutor used all eleven peremptory strikes on black jurors).

view, *Batson* is not “failing”; it is succeeding at doing what U.S. law has consistently done for the past century.²¹⁹

Indeed, in certain ways, we are less clear-eyed in countering racial bias in the jury system today than we were at the dawn of the Jim Crow jury. Although it is almost entirely forgotten now—overlooked even by scholars of jury discrimination²²⁰—it remains a federal misdemeanor (punishable by a \$5,000 fine) for “an officer or other person charged with any duty in the selection . . . of jurors [to] exclude[]” a potential juror “on account of race, color, or previous condition of servitude.”²²¹ The offense first became law with the Civil Rights Act of 1875.²²² Four years later, at least nine Virginia judges were indicted under the statute for excluding black jurors from their courtrooms.²²³ On the same day that the Court decided *Strauder* (invalidating West Virginia’s jury-discrimination law under the Fourteenth Amendment), it rejected a habeas petition filed by one of these Virginia judges in *Ex Parte Virginia*.²²⁴ But since then there have been no reported criminal prosecutions under Section 4 of the Act. As the data reported in Part II illustrates, however, there is almost certainly a crime wave occurring throughout America’s courtrooms today (though federal authorities are loathe to treat it as such).²²⁵

219. Cf. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016) (discussing the problems associated with U.S. law and the U.S. criminal justice system).

220. Even scholars who have explored alternative remedies for *Batson* violations and harsher sanctions (e.g., contempt) to discourage such discrimination seem unaware of Section 243’s existence. E.g., Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9 (1997); Jason Mazzone, *Batson Remedies*, 97 IOWA L. REV. 1613 (2012); Ogletree, *supra* note 192, at 1119–34; Justice Kennedy’s overview in *Peña-Rodriguez* of historical efforts to counter “state-sponsored racial discrimination in jury selection” also tellingly omits the Civil Rights Act of 1875. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) For one of the very few articles to recognize the potential utility (or even existence) of Section 243, see Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1291–94 (2017) (arguing “[t]he Court’s use of the Equal Protection Clause at the expense of 18 U.S.C. § 243 has led to many problems in the Court’s juror-exclusion doctrine”).

221. 18 U.S.C. § 243 (2012).

222. Civil Rights Act of 1875, ch. 114, 28 Stat. 335, 335–37.

223. See *Five Judges Indicted in Judge Rives’s Court*, STAUNTON SPECTATOR (Staunton, Va.), March 4, 1879, at 3. Subsequent news reports list additional indictments; see, e.g., *Indicted Judges*, CHI. TRIB., March 18, 1879, at 9; *More Judges Indicted*, N.Y. DAILY HERALD (New York City, N.Y.), March 21, 1879, at 3.

224. 100 U.S. 303, 347 (1880).

225. Indeed, attorneys are almost never subject even to professional disciplinary sanctions for *Batson* violations today, let alone criminal charges. Despite the apparent prevalence of the practice, see *supra* Part II, the racially motivated use of peremptory strikes has resulted in only one Louisiana attorney being disciplined in recent decades; it was a black attorney who, in addition to a host of other professional misconduct, admitted to striking white jurors “because of racial reasons.” *In re Nelson*, 146 So. 3d 176, 179 (La. 2014); see also Mazzone, *supra* note 220 (noting minimal sanctions for attorneys).

Another way in which our jury-discrimination law seems to have regressed is in how the courts understand the role of race within jury deliberations. In *Strauder*, the Court had little trouble recognizing that the reliability of a jury's verdict was necessarily suspect when black jurors were systematically excluded. Such "jury packing" was harmful because "[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."²²⁶ But the majority view in *Batson* and its progeny has insisted that race and gender are not just normatively improper categories upon which to base juror selection, but also are "flatly irrational predictors of juror perspective."²²⁷ While initially proceeding from the more modest position that an individual's race is "unrelated to his fitness as a juror,"²²⁸ the Court has gone on to reason that race-conscious peremptory challenges must reflect an attorney's "open hostility" toward or irrational "hidden and unarticulated fear" of the juror's race.²²⁹ Accordingly, the Court refused to give *Batson* retroactive effect, because there was no good reason to think "the new rule ha[d] such a fundamental impact on the integrity of factfinding as to compel retroactive application."²³⁰ And when extending *Batson* to include gender-based peremptory challenges, the Court rejected the "quasi-empirical claim" that gender might predict jurors' views toward the relevant issues, crediting instead "the majority of studies [that] suggest gender plays no identifiable role in jurors' attitudes."²³¹ (Ironically,

226. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880); see also *Georgia v. McCollum*, 505 U.S. 42, 60–61 (1992) (Thomas, J., concurring in the judgment):

In *Strauder* . . . we observed that the racial composition of a jury may affect the outcome of a criminal case. . . . We thus recognized, over a century ago, the precise point that Justice O'Connor makes today. Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial. I do not think that this basic premise of *Strauder* has become obsolete.;

Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 188–91 (1989) (assuming same); Forde-Mazrui, *supra* note 159, at 372–73 (arguing this understanding of bias was the core holding of *Strauder*); Herman, *supra* note 217, at 1820 ("*Strauder* may legitimately be read as drawing a plausible connection between racial discrimination in jury selection and a defendant's right to be free from discriminatory jury verdicts.>").

227. Muller, *supra* note 195, at 101; see also Forde-Mazrui, *supra* note 159, at 372–73 (discussing same trend toward "colorblind" view of jurors).

228. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

229. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991).

230. *Allen v. Hardy*, 478 U.S. 255, 259 (1986). *But see id.* at 259 (acknowledging "the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial").

231. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.9 (1994).

Batson's critics on the Court have “openly embrace[d] the idea . . . that attorneys may rationally infer that members of discrete groups bring unique perspectives to the jury.”²³²)

Recognizing that racial composition of juries matters when it comes to jury deliberations and trial outcomes does not guarantee stronger anti-discrimination protections—the Court’s immediate post-*Strauder* jurisprudence illustrates as much—but such candor is a necessary first step. First, as several scholars have noted, acknowledging that “jury demographics matter” and that “different [more diverse] juries will reach different results on the same evidence” militates in favor of a more robust Sixth Amendment fair cross-section jurisprudence.²³³ Present enforcement of this Sixth Amendment guarantee is “anemic” at best,²³⁴ but if verdicts are, “at least in part, socially rather than scientifically determined” and “experientially constructed judgments rather than findings of immutable historical fact,”²³⁵ the harm of unrepresentative juries—even those composed of otherwise “impartial” jurors—is necessarily acute.²³⁶ Second, this insight also provides the empirical grounding for some of the more ambitious race-conscious proposals to counter today’s Jim Crow jury; if race has nothing to do with the behavior of real-world jurors or trial outcomes, it is hard to imagine the Court recognizing a “compelling interest” advanced by any race-conscious reform.²³⁷ To be clear, many of these proposals (discussed below) will face an uphill fight regardless, but demonstrating the real-world impact of unrepresentative juries on defendants is a prerequisite for establishing the legitimacy and viability of any such reform measures.²³⁸

Whatever strategies to counter the Jim Crow jury one embraces, they must represent bolder changes than those announced by the Court in recent years. In *Foster v. Chatman*, the Court reviewed a Georgia court’s denial of habeas relief to Timothy Foster, a black man sentenced to death three decades earlier by an all-white jury.²³⁹ Foster alleged that race discrimination tainted the selection of his petit jury, and by a

232. Muller, *supra* note 195, at 105.

233. Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 995–96 (1998); accord Muller, *supra* note 195, at 136.

234. Chernoff, *supra* note 182, at 149.

235. Muller, *supra* note 195, at 136.

236. Leipold, *supra* note 233, at 960–64.

237. Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 757–59 (1993).

238. See *infra* notes 260–267 and accompanying text; see also Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704 (1995); Forde-Mazrui, *supra* note 159; King, *supra* note 237.

239. 136 S. Ct. 1737, 1743 (2016).

6-2 vote, the Court agreed that prosecutors were motivated in substantial part by race when removing two black potential jurors.²⁴⁰ But the Court's opinion did little to solve *Batson's* inadequacy, as it turned in significant part on the uncommonly compelling evidence supporting Foster's habeas petition. Through a series of Georgia Open Records Act requests, Foster had obtained prosecutors' notes from the jury selection process.²⁴¹ These documents, which revealed prosecutors' color-coded system for flagging black jurors, were "as close to a 'smoking gun' as one is likely to find in a *Batson* challenge."²⁴² In reversing the judgment of the state habeas court, the Court "reassure[d] the public that a blatant violation of *Batson* will not be ignored," but did nothing to expand, clarify, or tweak the much-criticized *Batson* framework.²⁴³

Peña-Rodriguez v. Colorado broke new ground by recognizing a defendant's constitutional right to adduce evidence that racial animus tainted jury deliberations in his or her case.²⁴⁴ But at first blush, the opinion also appears crafted to aid only the narrowest class of defendants.²⁴⁵ Relying on the Sixth Amendment's "impartial jury" guarantee, the Court held by a 5-3 vote that Colorado's no-impeachment rule, which ordinarily prohibits jurors from impeaching their previous verdicts, must yield where there is compelling evidence that racial animus was a motivating factor in one or more jurors' deliberations.²⁴⁶ In refreshingly frank terms, the Court acknowledged that racial bias in the jury system is "a familiar and recurring evil" that "implicates unique historical, constitutional, and institutional concerns."²⁴⁷ But perhaps because of the pervasiveness of such evil,²⁴⁸ the Court quickly cabined its holding, requiring proof of "clear statement[s] that indicate[] . . . racial stereotypes or animus,"²⁴⁹ "the most grave and

240. *Id.*

241. *Id.* at 1744.

242. Marder, *supra* note 177, at 1148.

243. *Id.* at 1157.

244. 137 S. Ct. 855, 869 (2017).

245. *Id.*

246. *Id.* at 861.

247. *Id.* at 868.

248. The Court's reticence to make cognizable more quotidian forms of racial bias in jury deliberations has a basic logic, of course. As Justice Powell wrote with refreshing candor in *McCleskey v. Kemp* (the Term after he authored the Court's opinion in *Batson*), for the judiciary to reckon directly with the stark racial disparities that pervade the criminal law would "throw[] into serious question the principles that underlie our entire criminal justice system." 481 U.S. 279, 315 (1987). For insightful readings of the *McCleskey* and *Batson* opinions alongside one another, see Herman, *supra* note 217; and Levinson, *supra* note 14. See also STEIKER & STEIKER, *supra* note 11, at 106 (arguing "the Court's reliance on *Batson* as a means of preventing racial discrimination in capital sentencing was profoundly misplaced").

249. *Peña-Rodriguez*, 137 S. Ct. at 869.

serious statements of racial bias,”²⁵⁰ or evidence of “blatant racial prejudice.”²⁵¹ In other words, the Court erected precisely the sort of high evidentiary standard that, as a practical matter, is required to prevail on a *Batson* claim, and that has been required of nonwhite defendants challenging racial bias in the jury system since the earliest days of the Jim Crow jury. Only in this sense can the *Peña-Rodriguez* opinion be characterized as the work of “a maturing legal system . . . understand[ing] and . . . implement[ing] the lessons of history.”²⁵²

That said, *Peña-Rodriguez*’s acknowledgement that racial bias in the jury system implicates unique constitutional concerns may bolster more ambitious efforts to confront the Jim Crow jury. Consider the Court’s discussion of why Colorado’s no-impeachment rule, despite its long and venerable pedigree, must contain a Sixth Amendment exception for evidence of racial bias in particular:

All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.²⁵³

Such “disparate treatment” for racial bias claims, the dissent correctly noted, is almost unheard of in the Sixth Amendment context.²⁵⁴ *Peña-Rodriguez* certainly expands upon the Court’s recent Sixth Amendment jurisprudence (including recent cases rejecting a Sixth Amendment exception to the no-impeachment rule for evidence of nonracial juror bias)²⁵⁵ and “suggest[s] that the Sixth Amendment recognizes some sort of hierarchy of partiality or bias.”²⁵⁶ At minimum, the Court appears to have recognized that the Sixth Amendment’s guarantees give rise to a compelling interest in countering the perception of a jury system tainted by racial bias.

So what would a more robust effort to confront the Jim Crow jury look like? In the 1990s, there was a flurry of academic interest in (and some actual experiments with) countering racial underrepresentation in the criminal jury system.²⁵⁷ The more

250. *Id.* at 864.

251. *Id.* at 871.

252. *Id.*

253. *Id.* at 869.

254. *Id.* at 879 (Alito, J., dissenting).

255. *Id.* at 878–79 (discussing *Tanner v. United States*, 483 U.S. 107 (1987) and *Warger v. Shauers*, 135 S. Ct. 521 (2014)).

256. *Id.* at 883.

257. See Forde-Mazrui, *supra* note 159, at 355 (identifying high-profile trials of O.J. Simpson and police officers who beat Rodney King as having “greatly increased public awareness

ambitious proposals to improve the racial representativeness of criminal juries included the use of racial quotas,²⁵⁸ “affirmative selection” measures,²⁵⁹ and “jural districting” regimes (akin to electoral districts that group “communities of interest”).²⁶⁰ But given the overall trend in the Court’s equal protection jurisprudence—that is, its application of strict scrutiny to all state-initiated racial classifications, “benign” or otherwise—many worried that these measures may be constitutionally infirm.²⁶¹

These concerns are certainly no less germane two decades later, but given the deep, historical roots of racial bias and the American jury system (and the growing evidence of how racial composition of the jury still shapes determinations of guilt and innocence), such dramatic experiments remain essential. Importantly, explicit race-conscious efforts to build more representative jury panels are not wholly foreign to American criminal justice. As Professor Jack Chin and Kendra Clark have highlighted,²⁶² the Uniform Code of Military Justice (“UCMJ”) allows the convening authority, when assembling the jury panel for a court-martial, to take race and gender into account “when seeking in good faith to make the panel more representative of the accused’s race or gender.”²⁶³ Article 25 of the UCMJ also authorizes jury quotas, of a

of . . . problem of underrepresentative juries and precipitated a crisis of confidence in the jury system”).

258. *E.g.*, Alschuler, *supra* note 238 (examining several different racial quota systems).

259. *E.g.*, Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177 (1994); King, *supra* note 237; Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and Proposal for Change*, 74 B.U. L. REV. 777 (1994); Tracy L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781 (1986).

260. Forde-Mazrui, *supra* note 159.

261. King, *supra* note 237, at 730; *accord* Forde-Mazrui, *supra* note 159, at 358–59 (arguing “affirmative selection” measures face “serious and possibly fatal” obstacles under recent Sixth and Fourteenth Amendment cases, though drawing on electoral districting approaches may provide a work around).

262. Gabriel J. Chin & Kendra Clark, *Towards an Unbiased Jury: Courts-Martial and the Right of the Accused to Jurors of One’s Own Race* (May 24, 2018) (unpublished manuscript) (on file with author).

263. *United States v. Riesbeck*, 77 M.J. 154, 163 (C.A.A.F. 2018); *accord United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988):

Appellant is black; and if the convening authority had intentionally selected black officers as members of the court-martial panel, *Crawford’s* holding would apply. Moreover, if appellant were a female whose case had been referred for trial and the convening authority had appointed female members, the rationale of *Crawford* would apply. In short, we infer from *Crawford* that a convening authority is not precluded by Article 25 from appointing court-martial members in a way that will best assure that the court-martial panel constitutes a representative cross-section of the military community.;

United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964).

sort: “Any enlisted member [may insist that he] not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court”²⁶⁴ Perhaps analogous innovations should be imported into civilian courts.²⁶⁵ If maximizing the appearance of racial fairness in criminal jury proceedings is a compelling government interest (as suggested in *Peña-Rodriguez*), and the demographic composition of the jury has been inextricably tied to racial fairness for the past 120 years (as suggested in Parts I and II), similar measures in civilian courts could pass constitutional muster as “reasonably necessary” to promote at least the perception of fairness in contemporary criminal adjudication.²⁶⁶

Recognizing the continuity between the Jim Crow jury of the 1890s and the Jim Crow jury of today brings one final point into focus. In 1972, in a pair of fractured 4-1-4 opinions, the Court held that the Sixth and Fourteenth Amendments do not mandate unanimity in state jury trials.²⁶⁷ While the cases (*Apodaca v. Oregon* and *Johnson v.*

264. See 10 U.S.C.A. § 825(c)(1) (West 2018) (prescribing procedures for court-martial panel eligibility and selection).

265. Courts-martial include a number of other overlooked jury-selection rules that could more easily be adopted by civilian courts. For example, military courts recognize the “implied bias” doctrine, which allows the defendant to dismiss a prospective juror—even one who genuinely could serve impartially—when “most people similarly situated to the court member would be prejudiced or when an objective observer would have substantial doubt about the fairness of the accused’s court-martial panel.” Joshua J. Wolff, *Good Staff Work: Achieving Efficiency with Candid Panel Selection Advice*, ARMY LAW., Apr. 2016, at 3 (citing U.S. DEP’T OF ARMY, MILITARY JUDGES’ BENCHBOOK 43 (Sept. 9, 2014)). Additionally, because military courts have “the primary responsibility of preventing both bias and the appearance of bias involving court members,” judges must follow the “liberal grant mandate,” which provides that “in close cases military judges are enjoined to liberally grant [defense] challenges for cause.” *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007). This rule “is part of the fabric of military law.” *Id.*

266. Here my argument merely updates that advanced two decades ago by Professor Nancy King, who proposed that the Court explicitly recognize a “compelling interest” in maximizing the appearance of fairness of criminal jury proceedings, using language that prefigures the snippet of *Peña-Rodriguez* highlighted above. See King, *supra* note 237, at 762:

I propose a modest three-part caveat to the harsh lessons of the Court’s most recent cases: even if strict scrutiny is the appropriate method for evaluating these policies, courts that apply such scrutiny should recognize (1) that maximizing the appearance of fairness of criminal jury proceedings is a compelling government interest, (2) that fair racial representation on juries is vital to the appearance of fairness in criminal jury proceedings, and (3) that in some circumstances race-conscious selection practices may improve, not impair, this appearance.

267. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). Eight Justices agreed that the Sixth Amendment applied equally in state and federal courts, but only four Justices held that the Sixth Amendment’s guarantee of a jury trial required that the jury’s vote be unanimous. *Johnson*, 406 U.S. at 359; *id.* at 397 (Stewart, J., dissenting). Justice Powell agreed with the dissenters that the Sixth Amendment required unanimity in federal criminal trials, but rejected the “incorporationist” view that this requirement was equally binding on the states, thus providing the fifth vote to allow nonunanimity in state courts. *Id.* at 369 (Powell, J., concurring).

Louisiana) were not primarily briefed or argued on Equal Protection grounds²⁶⁸—instead turning on the interaction of the Sixth Amendment and the Fourteenth Amendment’s Due Process Clause—the *Johnson* dissenters recognized that nonunanimity might exacerbate racial bias in the jury system:

The guarantee against systematic discrimination in the selection of criminal court juries is a fundamental of the Fourteenth Amendment. That has been the insistent message of this Court in a line of decisions [involving race discrimination] extending over nearly a century. The clear purpose of these decisions has been to ensure universal participation of the citizenry in the administration of criminal justice. Yet today’s judgment approves the elimination of the one rule that can ensure that such participation will be meaningful—the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today’s judgment, nine jurors can simply ignore the views of their fellow panel members of a different race or class.²⁶⁹

Citing *Strauder*, the dissenters continued that only unanimity “can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear.”²⁷⁰ And, importantly, “community confidence” in the jury system was threatened when “a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines.”²⁷¹ The plurality opinion downplayed these concerns (“[minority groups] will be present during all deliberations, and their views will be heard”)²⁷², but the history and statistics provided in Part II vindicate the dissenters’ critique.

Even if nonunanimous criminal juries remain permissible under the Sixth and Fourteenth Amendments—and there is a strong argument against this, given the Court’s subsequent incorporation doctrine jurisprudence²⁷³—they can no longer withstand Equal Protection scrutiny. The closest parallel in this regard is *Hunter v. Underwood*, in which the Court in 1985 unanimously invalidated a provision of the Alabama Constitution disenfranchising felons and those convicted of misdemeanor “crime[s] . . . involving moral turpitude.”²⁷⁴ The Alabama measure was enacted during Alabama’s

268. There was an Equal Protection claim posed in the Louisiana case, although not the one discussed here. There, the defendant argued that Louisiana’s practice of allowing nonunanimity for *some* types of criminal cases, but not others (i.e., lesser felonies tried before six-person juries and capital offenses) was a classification without rational basis. The Court had little trouble rejecting this argument. See *Johnson*, 406 U.S. at 368.

269. *Id.* at 397 (Stewart, J., dissenting) (citations omitted).

270. *Id.* at 398 (citing *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879)).

271. *Id.*

272. *Apodaca*, 406 U.S. at 413.

273. See Aliza B. Kaplan & Amy Saack, *Overturing Apodaca v. Oregon Should be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1 (2016).

274. 471 U.S. 222, 223, 225 (1985).

Constitutional Convention of 1901, three years after Louisiana's nonunanimous jury provision was approved. As the Court noted in *Hunter*, the gathering “was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.”²⁷⁵ The Court allowed that additional motivations probably influenced the adoption of Alabama's challenged suffrage measure—many convention delegates were eager to strip the franchise from poor white Alabamans, too—but nevertheless recognized that “discrimination against blacks . . . was a motivating factor for the provision.”²⁷⁶ In reaching this conclusion, the Court was unbothered by the argument that “there was little or no debate at the Constitutional Convention of 1901 concerning this [disenfranchisement] section and little or no evidence concerning its passage.”²⁷⁷ Applying the Equal Protection framework established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,²⁷⁸ the Court held that the provision violated the Fourteenth Amendment: “[I]ts original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect.”²⁷⁹ (The present-day disparate impact on black Alabamans had been conceded.²⁸⁰)

The parallels are striking. As with Alabama's disenfranchisement provision, Louisiana's nonunanimous jury provision was first adopted at a convention where “zeal for white supremacy ran rampant.”²⁸¹ As in *Hunter*, the official record from the convention is sparse, as other concerns dominated the debate. But, in such circumstances, the Court has instructed that “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes” and “[t]he specific sequence of events leading up to the challenged decision” are “subjects of proper inquiry in determining whether racially discriminatory intent existed.”²⁸² The story of the fight against the Jim Crow jury fills that

275. *Id.* at 229 (citing SHELDON HACKNEY, *POPULISM TO PROGRESSIVISM IN ALABAMA* 147 (1969); and WOODWARD, *supra* note 125, at 321–22).

276. *Id.* at 231.

277. Brief for Appellants at 12, *Hunter*, 471 U.S. 222 (No. 84-76), 1984 WL 565799, at *9.

278. 429 U.S. 252 (1977); *see also* *Washington v. Davis*, 426 U.S. 229 (1976).

279. *Hunter*, 471 U.S. at 233.

280. *Id.* at 227.

281. *Id.* at 229. As noted earlier, *see supra* note 21, a trial court in Oregon has already found that “race and ethnicity was a motivating factor in the passage of [Ballot Measure] 302-33 [adopting nonunanimous verdicts in Oregon], and that the measure was intended, at least in part, to dampen the influence of racial, ethnic, and religious minorities on Oregon juries.”

282. *Arlington Heights*, 429 U.S. at 266–68.

gap.²⁸³ The “historical background of the decision,” coupled with “[t]he specific sequence of events leading up to the challenged decision,” make clear that racial bias motivated Louisiana’s decision to abandon unanimity. Disparate impact is also now established: whether viewed from the perspective of the juror or the defendant,²⁸⁴ nonunanimity continues to have a racially disparate impact today. Such overt vestiges of Jim Crow should be struck down.

CONCLUSION

Or Louisiana voters may act on their own. In May 2018, the Louisiana legislature endorsed a constitutional amendment—subject to voter approval—that would abolish nonunanimous verdicts for offenses committed on or after January 1, 2019.²⁸⁵ The proposal will be on the November 2018 ballot.²⁸⁶ Although the vast majority of Louisiana’s sixty-four district attorneys opposed the proposal, the politically powerful Louisiana District Attorneys Association remained neutral; the organization does not take a public stance on important matters unless its membership is unanimous.²⁸⁷

Although initially “seen as a long shot,”²⁸⁸ the unexpected passage of the proposal emerged from years of agitation and organizing

283. A possible rejoinder is that although a discriminatory motive may have influenced the initial adoption of nonunanimous verdicts in Louisiana, subsequent constitutional conventions (in 1913, 1921, and 1974) readopting the measure—and partial amelioration of the rule by shifting from 9-3 verdicts to 10-2 verdicts in 1974—were not so infected with racial prejudice. Notably, though, the Court rejected a variation of this argument in *Hunter*. There, Alabama argued that “events occurring in the succeeding 80 years”—specifically, court rulings narrowing the scope of the disenfranchisement provision—“had legitimated the provision.” *Hunter*, 471 U.S. at 233. The Court’s answer: “Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to have that effect.” *Id.*; see also *United States v. Fordice*, 505 U.S. 717, 728 (1992):

[A] State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation. Thus, we have consistently asked whether existing racial identifiability is attributable to the State and examined a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system.

(citations omitted).

284. Muller, *supra* note 195, at 118–19 (exploring confusion in Court’s jurisprudence as to who is the “victim” of a *Batson* violation—the defendant, the excluded juror, or the community).

285. 2018 La. Act 722.

286. Gordon Russell, *Momentum Builds to Put Unanimous-Jury Issue on Ballot; Applause Erupts as Bill Advances*, *ADVOCATE* (New Orleans, La.) (Apr. 25, 2018), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_fb0be142-48a7-11e8-a628-23e6e2ee3226.html [<https://perma.cc/PS8X-2W9L>].

287. *Id.*

288. *Id.*

by activists, scholars, legal workers, defendants, and the formerly incarcerated. Notably, momentum for the bill grew amidst a political climate—in both Louisiana and across the United States—in which the operation of U.S. criminal law has once again become a focus for racial justice advocates. In 2016, Louisiana witnessed its largest mass protests in decades following the police killing of black Baton Rouge resident Alton Sterling;²⁸⁹ in 2017, pushed by a broad coalition including racial justice groups, the state passed a series of criminal-justice reforms that have dislodged Louisiana from its perennial status as the United States’ (and the world’s) “prison capital.”²⁹⁰ Unsurprisingly, race played a salient role in the legislative debate surrounding the constitutional amendment, too: a pivotal moment came when a prominent white opponent of the measure, to the outrage of supporters, blithely conceded that nonunanimity was a “vestige[] of slavery. . . . [I]t is what it is.”²⁹¹ The proposal eventually garnered bipartisan backing, but it would have fallen short of the two-thirds vote needed to advance to the November ballot if not for the unanimous support of the state’s Legislative Black Caucus.²⁹²

This Article has sought to provide historical context for this moment, not only for the existence of nonunanimous verdicts in Louisiana, but also for the manifold ways in which race enters into our jury system and the efforts taken outside of the courtroom to reform the institution. Activists today, like those a century before them, are emphasizing that the criminal law plays a central role in perpetuating and deepening racial subordination. And the jury box, just as it was in the late nineteenth century, has become a site of social contestation. Whether Louisiana voters approve or reject the constitutional

289. See Campbell Robertson & Frances Robles, *Escalating Discord Between the Police and Protesters Strains Baton Rouge*, N.Y. TIMES, July 12, 2016, at A14.

290. John Simerman, *‘Prison Capital’ No More: Louisiana Sheds Long-Held Title, but Remains Above U.S. Incarceration Rate*, ADVOCATE (June 20, 2018, 5:00 PM), https://www.theadvocate.com/baton_rouge/news/article_65844992-6b53-11e8-ac2d-97c9311b1424.html [<https://perma.cc/5EZG-PP9M>].

291. James Gill, *Louisiana’s Considering Unanimous Jury Shift as Other Countries Abandon Practice*, ADVOCATE (New Orleans, La) (May 6, 2018), https://www.theadvocate.com/new_orleans/opinion/james_gill/article_501a5382-4ee1-11e8-b429-d35c9544b293.html [<https://perma.cc/9JTJ-RCQ6>].

292. See SBS 3rd Reading and Final Passage: SB 243 by Morrell, LA. STATE SENATE (Apr. 4, 2018, 4:54:44 PM), <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=1083013> [<https://perma.cc/T6K4-B8TD>] (Louisiana Senate roll call vote: 27-10-2); SBS 3rd Reading and Final Passage: SB 243 by Morrell, LA. HOUSE REPRESENTATIVES (May 14, 2018, 5:13:56 PM), <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=1096716> [<https://perma.cc/RNE4-B2C6>] (Louisiana House roll call vote: 84-15-6); *Members*, LA. LEGIS. BLACK CAUCUS, http://www.llbc.louisiana.gov/index_members.aspx (last visited Sept. 17, 2018) [<https://perma.cc/6H3D-7W2Q>] (showing nine House members and twenty-five Senate members of the Louisiana Legislative Black Caucus).

amendment, it would be a mistake to view the measure simply as a referendum on an unusual quirk of one state's criminal procedure. Rather, it represents the resumption of a political struggle that would be altogether legible to Louis Martinet, Homer Plessy, and the other activists of the *Comité des Citoyens* a century ago.

In April 2017, New Orleans contractors wearing face masks and bulletproof vests removed a massive stone obelisk celebrating the White League's violent 1874 insurrection against Louisiana's Reconstruction government.²⁹³ In the following weeks, three other Confederate monuments came down, as well, leaving behind empty pedestals at prominent locations throughout the city.²⁹⁴ The monuments' removal was not just the work of enlightened municipal officials,²⁹⁵ but rather the culmination of decades of activism,²⁹⁶ and represents a demonstration of grassroots "collective will to address entrenched systemic oppression."²⁹⁷ But other, less tangible relics from the same era remain.

293. Campbell Robertson, *Robert E. Lee Brought Down From Lofty 133-Year Perch*, N.Y. TIMES, May 20, 2017, at A10.

294. Robertson, *supra* note 293.

295. See Frank Bruni, *This Is Eloquence. Remember That?*, N.Y. TIMES, May 24, 2017, at A24 (lauding remarks on the monuments' removal by New Orleans mayor Mitch Landrieu).

296. See, e.g., *Bricks Thrown at Two Klansmen at Lee Circle; 3 Facing Charges*, TIMES-PICAYUNE (New Orleans, La.), Jan. 20, 1972.

297. *Open Letter to the Residents of New Orleans*, TAKE 'EM DOWN NOLA COALITION, <http://takeemdownnola.org/why-it-matters/> (last visited Sept. 17, 2018) [<https://perma.cc/M6KW-QNRP>].