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How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana

Robert J. Smith and Bidish J. Sarma*

In the final analysis, though, I am bound to enforce the laws of Louisiana as they exist today, not as they might in someone's vision of a perfect world. That is what I have done. And that is what I must continue to do.

Reed Walters, district attorney in LaSalle Parish responsible for prosecuting the Jena Six (*Justice in Jena*, N.Y. TIMES, Sept. 26, 2007).

[These laws] do not on their face discriminate between the races, and it has not been shown that their actual administration was evil; only that evil was possible under them. It follows, therefore, that the judgment [upholding these laws] must be affirmed.

Unanimous opinion of the United States Supreme Court in *Williams v. Mississippi*, 170 U.S. 213, 225 (1898), which upheld property qualifications, educational qualifications, and other means explicitly designed to prevent African Americans from being qualified to vote.

INTRODUCTION

On May 12, 2010, we went to the Louisiana Supreme Court to argue on behalf of a death row inmate in *State v. Dressner*.¹ The case emerged from Jefferson Parish, Louisiana. At trial, the prosecution used its peremptory challenges to exclude seven of

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* A significant portion of this Article originates from three sources. See Bidish J. Sarma, *An Enduring (and Disturbing) Legacy: Race-Neutrality, Judicial Apathy, and the Civic Exclusion of African-Americans in Louisiana*, 1 HLR 49 (2011); G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425 (2010); G. Ben Cohen & Robert J. Smith, *Choosing Life or Death (Implicitly)*, in IMPLICIT RACE BIAS ACROSS THE LAW (forthcoming 2012). We view this Article as a culmination of our recent writing on race and the criminal justice system, and an opportunity to discuss our personal experiences as practicing death penalty lawyers in Louisiana.

1. Bidish Sarma and Robert Smith served as co-counsel for Dustin Dressner on direct appeal of his capital conviction.

nine qualified prospective black jurors.² Only one person of color ultimately sat on the jury, despite the fact that African-American residents constituted approximately 25% of the population in the Parish.³ Four years earlier, attorneys from our office urged the Louisiana Supreme Court to reverse another case out of Jefferson Parish where the State had struck every one of the five qualified prospective black jurors. The prosecutor in that case told reporters that it was his “O.J. [Simpson] case” and later pleaded with jurors not to let Allen Snyder get away with it like O.J. did.⁴

While briefing and arguing *Dressner*, we recognized that the distance between the post-Reconstruction legacy of racism in Louisiana and the present day administration of justice—much like the distance between the quote from the Supreme Court’s opinion in *Williams v. Mississippi* and the statement from Reed Walters—is not as far as one may wish to believe.⁵ The prosecutor at Mr. Dressner’s trial had gone so far as to suggest that he struck African-American prospective jurors because they espoused views that were friendly to the State. Nevertheless, the Louisiana Supreme Court denied the claims of prosecutorial race

2. See Unpublished Appendix at *8 n.8, *State v. Dressner*, 45 So. 3d 127 (La. 2010) (No. 08-KA-1366) (on file with authors).

3. See U.S. CENSUS BUREAU, *State & County QuickFacts: Jefferson Parish, LA*, <http://quickfacts.census.gov/qfd/states/22/22051.html> (last visited Oct. 13, 2011); see also RICHARD BOURKE, JOE HINGSTON & JOEL DEVINE, LA. CRISIS ASSISTANCE CTR., *BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY’S OFFICE* (2003), available at http://www.blackstrikes.com/resources/report/black_strikes_report_september_2003.doc.

4. See *State v. Snyder*, 942 So. 2d 484, 498–99 (La. 2006), *rev’d*, *Snyder v. Louisiana*, 552 U.S. 472 (2008). The Louisiana Supreme Court upheld Mr. Snyder’s conviction and rejected the claim of racial discrimination, but in *Snyder v. Louisiana*, a 7–2 opinion authored by Justice Alito, the Supreme Court of the United States reversed. *Snyder v. Louisiana*, 552 U.S. 472 (2008).

5. Indeed, in the atrium of the Louisiana Supreme Court, a portrait of Ernest Benjamin Kruttschnitt prominently hangs directly to the left of the main entrance. E.B. Kruttschnitt was the legal architect of a system that was designed to ensure the “supremacy” of the Anglo-Saxon race through terms that would avoid the scrutiny of “Massachusetts” judges. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA: HELD IN NEW ORLEANS, TUESDAY, FEBRUARY 8, 1898, at 381 (1898) [hereinafter LOUISIANA CONSTITUTIONAL CONVENTION JOURNAL]. In 1898, more than 25 years after the Reconstruction Amendments provided African-American citizens with the right to participate in their government, Louisiana held its second Constitutional Convention. Serving as its President, Kruttschnitt called into order what he deemed to be “little more than a family meeting of the Democratic party of the State of Louisiana.” *Id.* at 8–9. In the end, he vowed to “protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.” *Id.* at 381.

discrimination, rejecting them in an unpublished appendix.⁶ Yet, the question of whether the State continues to discriminate because of skin color ought not be buried or forgotten.⁷ Indeed, the racial disparities reflected across a number of criminal justice contexts in Louisiana warrant fresh inquiry.⁸

This Article seeks to add texture to the analysis of how and why race influences the criminal justice system. It considers three mechanisms that exclude black citizens from jury service at a disproportionate rate and thus dilute their influence: (1) non-unanimous jury verdicts; (2) discriminatory peremptory challenges; and (3) death-qualification. It details how African Americans are systematically disenfranchised from participating in the administration of justice and why these processes drive substantively unequal outcomes. The Article's aim is primarily descriptive. Part I provides the contemporary context, setting out the racial disparities that pervade Louisiana's criminal justice system. These outcomes are largely a result of the processes that are numbered above and explored in the four parts that follow. Part II explores how the laws enacted by nineteenth-century white supremacists continue to operate today, and do so—regardless of modern intent—in a way that executes their intended discriminatory purposes. Part III discusses the State's use of peremptory challenges. These challenges do not stem from discriminatory origins but nonetheless perpetuate racial exclusion. Part IV describes the racial impact that death-qualification has on juries' composition in capital cases. Part V concludes, observing that these factors are both interdependent and mutually reinforcing. Each factor causes negative feedback loops that inhibit the ability of minority group members to participate meaningfully in the justice system and exact political change.

6. See generally Unpublished Appendix, *Dressner*, 45 So. 3d 127 (La. 2010) (No. 08-KA-1366) (on file with authors).

7. See *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting from the denial of certiorari) (“The fact that the Court of Appeals’ opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the [jurisdiction] and surely is as important to the parties concerned as is a published opinion.”).

8. See *infra* Part I.

I. THE OUTCOMES TRIGGERING THE DEEPER INQUIRY: RACIAL DISPARITIES PERMEATE LOUISIANA'S CRIMINAL JUSTICE SYSTEM

In Louisiana, racial disparities permeate the criminal justice system.⁹ African-American citizens are significantly overrepresented in the criminal justice system.¹⁰ Within the subset of society's most serious criminal offenses—homicides (including first-degree murder, second-degree murder, and manslaughter)—prosecutors disproportionately seek the death penalty against African Americans, and juries disproportionately sentence African Americans (especially those accused of murdering white victims) to execution.¹¹ And, at the same time the system locks up and harshly sentences racial minorities, it also ensures they are underrepresented or unrepresented on criminal juries.¹² State action plays a significant role in creating and maintaining these racial disparities.

A. Incarceration Rates and Disparate Policing

The United States incarcerates a greater percentage of its citizens than any other country.¹³ Louisiana is the epicenter of the trend:¹⁴ it incarcerates 1 in every 55 adults, more than any other state in the nation.¹⁵ If one includes every person that is under the control of the corrections system in Louisiana, whether they be incarcerated, paroled, or on probation, the number climbs to 1 in

9. See discussion, *infra*, Part I.A–C.

10. See, e.g., LA. DEP'T OF PUBLIC SAFETY AND CORRECTIONS, CORRECTIONS SERVICES, *Fact Sheet: Demographic Profiles of the Adult Correctional Population* (June 30, 2011), available at <http://www.corrections.state.la.us/wp-content/uploads/stats/2a.pdf>.

11. See, e.g., Glenn L. Pierce & Michael L. Radelet, *Death-Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647 (2011).

12. See, e.g., *Snyder v. Louisiana*, 552 U.S. 472 (2008).

13. See, e.g., INT'L CENTRE FOR PRISON STUDIES, *Entire World—Prison Population Rates per 100,000 of the national population*, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited Oct. 12, 2011); NICOLE D. PORTER, THE SENTENCING PROJECT, *THE STATE OF SENTENCING 2010: DEVELOPMENTS IN POLICY AND PRACTICE 1* (Feb. 2011), <http://sentencingproject.org/doc/publications/publications/Final%20State%20of%20the%20Sentencing%202010.pdf>.

14. See David Crary, *Study: Louisiana Has the Highest Incarceration Rate*, ASSOCIATED PRESS (Mar. 18, 2008), available at http://www.pachiefprobationofficers.org/docs/panews3_28_8.pdf.

15. PEW CENTER ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* tbl. A-4 (Mar. 2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

every 26 adults.¹⁶ Before Hurricane Katrina, New Orleans itself had more people in its local prison per capita than any other major city in the United States.¹⁷ The increasing prison population is relevant because the State continues to disproportionately incarcerate racial minorities, especially its black citizens. Over 70% of all prisoners in Louisiana are African-American, despite the fact that African Americans constitute 32% of the State's population.¹⁸

These disparities can be seen in patterns of racialized policing. The now-deceased Jefferson Parish Sheriff Harry Lee¹⁹ famously told reporters: "We know the crime is in the black community. Why should I waste time in the white community?"²⁰ A March 2011 Department of Justice Report on the New Orleans Police Department noted "troubling disparities in [the] treatment of the City's African-American community," and concluded that the "NOPD has failed to take sufficient steps to detect, prevent, or address bias-based profiling and other forms of discriminatory policing on the basis of race . . ."²¹ A major consequence of racial profiling is the disproportionate arrest rate of black citizens—and

16. *Id.* at tbl. A-6.

17. NAT'L PRISON PROJECT OF THE ACLU, ABANDONED AND ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 13 (2006), <http://www.aclu.org/pdfs/prison/oppreport20060809.pdf>.

18. See William Arp III & Berlisha Morton, *A Political History and Analysis of Disenfranchisement and Restoration of the Black Vote in Louisiana*, 29 W.J. BLACK STUD. 629, 630 (2005) ("More than 72.9% of the incarcerated in Louisiana are Black, 26.9% are Whites, and 0.2 % represents the 'Other' category."); U.S. CENSUS BUREAU, *State & County QuickFacts: Louisiana*, <http://quickfacts.census.gov/qfd/states/22000.html> (last visited Oct. 24, 2011).

19. Sheriff Harry Lee is also largely responsible for the searing images of armed guards blocking New Orleans residents desperately trying to escape the floods of Hurricane Katrina from crossing the Crescent City Connection Bridge into Jefferson Parish. See, e.g., Bruce Egger, *Bridge Blockade After Katrina Remains Divisive Issue*, THE TIMES-PICAYUNE, Sept. 1, 2007, available at http://blog.nola.com/times-picayune/2007/09/bridge_blockade_after_katrina.html ("Not only did the blockade spawn state and federal investigations and five lawsuits targeting Gretna, its police force, Lawson, Jefferson Parish Sheriff Harry Lee and other law enforcement agencies, the episode vaulted the New Orleans area's historical struggle with race and class onto an international stage.").

20. See, e.g., John Burnett, *Larger-Than-Life Sheriff Rules Louisiana Parish*, NPR, Nov. 28, 2006, <http://www.npr.org/templates/story/story.php?storyId=6549329>. Sheriff Lee ordered his Deputies to stop and question "young blacks in rinky-dink cars" driving in white neighborhoods. See Brief of Amicus Curiae Louisiana Association of Criminal Defense Lawyers for Petitioner, *Snyder v. Louisiana*, 552 U.S. 472 (2008) (No. 06-10119).

21. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 35, 32 (Mar. 16, 2011), available at http://www.justice.gov/crt/about/spl/nopd_report.pdf.

thus higher absolute number of black citizens swept into the system—for drug crimes. One in four inmates (27.6%) in Louisiana is incarcerated for a drug offense.²² In New Orleans, drug use and other non-violent crimes account for as much as 45% of the population of pre-trial prisoners at the notoriously overcrowded Orleans Parish Prison at any given time.²³ Though drug use nationally is roughly consistent among white and black individuals,²⁴ black citizens are significantly over-represented for drug *arrests*.²⁵ This translates into more black citizens, and particularly young, black men, being arrested, taken away from their communities, and coming home with felon status that makes obtaining employment and voting incredibly difficult,²⁶ and serving on a jury impossible.²⁷ The problem is apparent not only in Orleans Parish and Jefferson Parish, but statewide.²⁸

22. LA. DEP'T OF PUBLIC SAFETY AND CORRECTIONS, CORRECTIONS SERVICES, *Fact Sheet: Demographic Profiles of the Adult Correctional Population* (30 June 2011), available at <http://www.corrections.state.la.us/wp-content/uploads/stats/2a.pdf>.

23. James Austin, Wendy Ware, & Roger Ocker, *Orleans Parish Prison Ten-Year Inmate Population Projection* tbl. 13 (Nov. 2010), www.ncjrs.gov/pdffiles1/nij/grants/233722.pdf (showing that drug possession represents 3.8%, drug sales represent 8.7%, theft, fraud and forgery represent 4.7%, “other property” represents 1.6%, and “other nonviolent” offenses represent 26.7%).

24. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, RESULTS FROM THE 2008 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 25 (2009), <http://www.oas.samhsa.gov/nsduh/2k8nsduh/2k8Results.pdf>.

25. HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 16 (Mar. 2009), http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf.

26. No person under an order of imprisonment for conviction of a felony can vote. LA. REV. STAT. ANN. § 18:102(A)(1) (Supp. 2011). Although Louisiana law provides for the restoration of voting rights to individuals convicted of felonies who are no longer under parole or probation, *see* LA. REV. STAT. ANN. § 18:177(A) (2004), the task of restoring the right to vote in practice is much more difficult than the law's text suggests. *See, e.g.*, Traci Burch, *Turnout and Party Registration among Criminal Offenders in the 2008 General Election*, 45 LAW & SOC'Y REV. 699, 707 (2011) (“[T]he economic and social burdens associated with criminal convictions severely restrict the ability of offenders to garner resources such as time, money, and civic skills that would help them participate in politics after they serve their time.”). Moreover, the state cannot provide any meaningful information about the restoration of rights. *See* Arp & Morton, *supra* note 18, at 636 (“The lack of data regarding restoration of felons' right to vote suggests Louisiana's indifference towards the restoration of voting rights.”).

27. *See, e.g.*, Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOL. 709, 716 (1998).

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

B. Death Row

Racial disparities also reach the administration of the ultimate punishment. Louisiana's death row is 65% black,²⁹ which means it has a greater percentage of African Americans than any other state with at least ten people sentenced to die by execution.³⁰ Recent research in two Louisiana parishes responsible for a significant percentage of the state's total death sentences indicates that the race of the victim is a statistically significant factor in determining who receives the death penalty.³¹ Although empirical evidence suggests that African Americans have committed a higher percentage of the homicides in Caddo and East Baton Rouge Parishes than whites, it also demonstrates that a very small percentage are sentenced to death for black-on-black killings, and a much higher percentage face the death penalty for interracial homicides.³² The disparities that defined Louisiana's death penalty history are not an artifact³³ but continue to haunt capital punishment in the state today.

C. Jury Participation

Black citizens continue to be excluded from jury service in Louisiana, especially in the most serious criminal cases. In capital cases, it is not uncommon for juries to include zero or one black person, despite dramatically higher African American representation in the parish population.³⁴ For instance, in an amicus brief to the United States Supreme Court in *Snyder v. Louisiana*, a group of African-American ministers observed that

29. See CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE FUND, *DEATH ROW U.S.A.* 35 (Winter 2010), http://www.deathpenaltyinfo.org/documents/DRUSA_Winter_2010.pdf; see also LOUISIANA DEP'T OF PUBLIC SAFETY AND CORRECTIONS, CORRECTIONS SERVICES, *Fact Sheet: Demographic Profiles of the Death Row Correctional Population* (30 June 2011), available at <http://www.corrections.state.la.us/wp-content/uploads/stats/2d.pdf>.

30. See CRIMINAL JUSTICE PROJECT, *supra* note 29, at 35–36.

31. See Pierce & Radelet, *supra* note 11; Tim Lyman, *Comparing Homicides to Capital Cases Caddo Parish, 1988–2008* (2011) (unpublished comment), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743712.

32. See Pierce & Radelet, *supra* note 11, at 658, 661; Lyman, *supra* note 31, at 2, 3.

33. See, e.g., Pierce & Radelet, *supra* note 11, at 652–54 (summarizing the racial history of Louisiana's death penalty).

34. See, e.g., *Snyder v. Louisiana*, 552 U.S. 472, 475–76 (2008) (all-white jury); Unpublished Appendix at *8, *State v. Dressner*, 45 So. 3d 127 (La. 2010) (No. 08-KA-1366) (on file with authors) (one African-American juror); *State v. Draughn*, 950 So. 2d 583, 604 (La. 2007) (one African-American juror); *State v. Harris*, 820 So. 2d 471, 475 (La. 2002) (one African-American juror).

race discrimination in Jefferson Parish capital cases was the norm rather than the exception:

In capital murder cases such as Snyder's, the problem has been particularly stark. As reflected in available decisions and Louisiana Supreme Court records, Jefferson Parish prosecutors struck all or all but one qualified African-American venirepersons in eleven capital cases, including Jacobs and Harris. These prosecutions occurred both before and after Allen Snyder's trial. In a twelfth case, the prosecutors attempted to strike all but one qualified African American, but the trial judge intervened and ordered that a second African-American venireperson be seated.³⁵

Similarly, a group of ministers in Caddo Parish recently objected to the repeated discrimination in jury selection in capital cases in that Parish, noting that black citizens represent almost 50% of the population but often times constitute only 25% of capital juries.³⁶ These trends also exist in non-capital cases. A recent report by the Equal Justice Initiative, for instance, documents that 80% of criminal trials in Jefferson Parish have no effective black representation given that non-unanimous verdict rules permit ten white jurors to effectively ignore the voice of one or two jurors who are members of racial minority groups.³⁷

The process by which black citizens are excluded is multifaceted. Residents who do not have a permanent address may not receive jury summons or meet the baseline residency requirement.³⁸ Those who cannot arrange transportation or find childcare may not arrive at the courthouse in the first place, or may be excused for hardship.³⁹ Residents who have been convicted of a felony and remain unpardoned are disqualified.⁴⁰ Black citizens

35. Brief of Nine Jefferson Parish Ministers as Amici Curiae for Petitioner at 8–9, *Snyder v. Louisiana*, 552 U.S. 472 (2008) (No. 06-10119).

36. See Motion of *Amici Curiae* for Leave to File Memorandum in Support of Defendant's Application for *Subpoena Duces Tecum*, *Louisiana v. Tucker*, No. 273,436 (La. 1st Jud. Dist. Ct. 2011) (seeking review of jury demographics to understand this disparity).

37. EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5* (Aug. 2010), <http://www.law.berkeley.edu/files/IllegalRacialDiscriminationJurySelection.pdf> [hereinafter *ILLEGAL RACIAL DISCRIMINATION*].

38. See LA. CODE CRIM. PROC. ANN. art. 401(A)(1) (Supp. 2011) (requiring residency).

39. See LA. CODE CRIM. PROC. ANN. art. 783(B) (2003) (allowing jurors suffering hardship to be excused at the trial court's discretion).

40. See LA. CODE CRIM. PROC. ANN. art. 401(A)(5) (Supp. 2011).

tend to be disproportionately represented in these circumstances.⁴¹ Once black citizens arrive at the courthouse, prosecutors often use challenges to eliminate a disproportionate number of black jurors.⁴² These varied factors result in limited participation of African-American jurors on criminal juries.

D. The Overall Picture

These racial disparities—consistent across a number of contexts, from striking jurors on the basis of their race to arrests for suspected drug crimes to imposition of death sentences—reflect that race continues to matter in Louisiana’s criminal justice system. This observation may not surprise people familiar with the incarceration statistics or who have personal experience with the system. But, the claim that official decision-makers either hold overt racial animosities or stand idly by knowing that the criminal justice system treats black residents differently than white residents has not inspired systemic change. Some skeptics downplay the significance of the claim.⁴³ These commentators characterize our nation as a “Post-Racial America,” and refer to counter-typical examples, like Barack Obama becoming the first black President of the United States,⁴⁴ or Bobby Jindal becoming the first non-white Governor of Louisiana since Reconstruction,⁴⁵ as evidence.⁴⁶

41. See generally Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 *DRAKE L. REV.* 761, 772–77 (2011).

42. See *infra* Part III.

43. See, e.g., Lydia Saad & Frank Newport, *Blacks and Whites Differ About Treatment of Blacks in America Today*, *GALLUP NEWS SERVICE* 58 (July 6, 2001), <http://www.gallup.com/poll/4585/blacks-whites-differ-about-treatment-blacks-america-today.aspx>.

44. See, e.g., Abigail Thernstrom & Stephan Thernstrom, Editorial, *Racial Gerrymandering Is Unnecessary*, *WALL ST. J.*, Nov. 11, 2008, at A15 (suggesting “the doors of electoral opportunity in America are open to all”).

45. Alex Spillius, *Is Bobby Jindal Presidential Material?*, *THE TELEGRAPH*, May 5, 2008, http://blogs.telegraph.co.uk/news/alexspillius/3934721/Is_Bobby_Jindal_presidential_material/ (“Jindal . . . is ‘post-racial’ in a very Obaman fashion.”).

46. Perhaps the mind boggling and extended “birther” debate about Obama’s birth certificate will put to rest any notion that his election marked the end of racial bias in American electoral politics. See, e.g., Eric Hahman et al., *Evaluations of Presidential Performance: Race, Prejudice, and Perceptions of Americanism*, 47 *J. EXPERIMENTAL SOC. PSYCHOL.* 430 (2011); Leonard Pitts Jr., *Birther Debate Has Racist Undercurrent*, *MIAMI HERALD*, Mar. 31, 2011 (decrying the debate as “profoundly racist claptrap”).

Bobby Jindal himself made a similar statement⁴⁷ on the night he became the first Indian Governor elected in the history of the United States: “In America, the only barrier to success is a willingness to work hard and play by the rules.”⁴⁸

Unfortunately, a willingness to work hard and play by the rules is not the only prerequisite for the type of civic engagement⁴⁹ that promotes positive intergenerational change.⁵⁰ The racial disparities in arrests and sentencing in Louisiana are real, as are the practices that dilute the participation of black citizens in the rendering of justice. A narrow understanding of how society works generally, and how the criminal justice system functions specifically, will not serve the state well. And, the issue is not primarily that Louisiana residents harbor explicitly racist views.⁵¹ To chalk up these recurring racial disparities solely to allegedly racist actions by legislators, police officers or prosecutors would be inaccurate and

47. Governor Jindal also once said of Louisiana, “You know, this has been a great place to grow up. The great thing about the people of Louisiana is that they accept you based on who you are.” Keshni Kashyap, *The Bobby Jindal Racism Issue*, THE DAILY BEAST (Mar. 4, 2009), <http://www.thedailybeast.com/blogs-and-stories/2009-03-04/the-bobby-jindal-racism-puzzle/>.

48. Billy Sothern, *Bobby Jindal: Not Much to Celebrate*, THE NATION, Oct. 29, 2007, available at: <http://www.thenation.com/article/bobby-jindal-not-much-celebrate>. In order for Governor Jindal to believe the words he spoke, he had to have

looked past the fact that many of the people exposed to that crisis [Hurricane Katrina] were willing to work and play by the rules; their road to success, however, was barred by an education system ranked among the worst in the country, streets filled with violent crime and few decent-paying jobs for those who did manage to escape all of the other snares of living poor in Louisiana.

Id.

49. See generally Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward a Community-Focused Theory and Practice*, 36 COLUM. HUM. RTS. L. REV. 241 (2004).

50. See generally Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259 (2009).

51. But see Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1068 (“The great contribution of the [Implicit Association Test] may be not that it captures a new type of bias, so much as that it employs a subtle and sophisticated means of measuring bias, which has become ever more elusive as research participants attempt to outsmart any test that would label them a racist.”); B. Keith Payne et al., *Why Do Implicit and Explicit Attitude Tests Diverge? The Role of Structural Fit*, 94 J. PERSONALITY AND SOC. PSYCHOL. 16–31 (2008) (“[M]easuring implicit responses is less like an archeological dig and more like fishing in a river. Implicit tests tap attitudes upstream, but explicit tests catch what flows downstream, muddied in the editing for public report.”).

misguided.⁵² However, to disregard or deny altogether the State's responsibility for these stark racial realities would be equally unwise.

II. NON-UNANIMOUS JURY VERDICTS

*Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.*⁵³

Perhaps the most meaningful way in which a person can participate in the criminal justice system is to serve on a criminal jury. The right to a trial by jury was enshrined in our Constitution in large part to check governmental overreaching.⁵⁴ Jurors—interposed between the government and the individual defendant—play the crucial role of determining whether the government has proved its charges, and whether punishment is warranted. In other words, a criminal juror possesses the solemn responsibility to render justice. Not only is jury participation a momentous way for minorities to participate in the administration of justice, but it is also one of the few roles readily and realistically available to them.⁵⁵

52. See Pierce & Radelet, *supra* note 11, at 671 (“[R]acial bias . . . can very well be unintended and not recognized by the individual decision makers themselves.”).

53. Taylor v. Louisiana, 419 U.S. 522, 530 (1975). See also Peters v. Kiff, 407 U.S. 493, 503 (1972) (“When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.”); Taylor, 419 U.S. at 530–31 (“[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.” (alteration in original) (citation omitted)).

54. See THE FEDERALIST No. 83, at 498 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”).

55. African Americans are severely under-represented as judges, district attorneys, and defense attorneys. ILLEGAL RACIAL DISCRIMINATION, *supra* note 37, at 41–43 (examining the lack of African Americans in these decision-making roles in Southern states).

African Americans are vastly under-represented on criminal juries in Louisiana.⁵⁶ The disproportionate removal of African-American citizens is not an accidental feature of the criminal justice system. Instead, it is the intentional result of discriminatory historical mandates, compounded today by seemingly neutral policies and practices that exacerbate already racially disparate outcomes.⁵⁷ To understand history's influence, one must revisit the Colfax Massacre that took place on Easter Sunday in 1873.

A. *The Historical Backdrop*

Nearly five years had passed since the country ratified the Fourteenth Amendment, granting citizenship and its privileges to every person born in the United States. And, just over three years had passed since the country ratified the Fifteenth Amendment, providing black citizens with the right to vote. These Amendments were direct attempts to heal the black eye that the *Dred Scott*⁵⁸ decision inflicted on the nation. The gospel of racial enlightenment had yet to make its way to the city of Colfax in Grant Parish, Louisiana, however. As Justice Thomas described in his concurring opinion in *McDonald v. Chicago*, on that Easter Sunday in 1873, “members of a white militia . . . brutally murdered as many as 165 black Louisianans congregating outside a courthouse . . .”⁵⁹ The story behind this tragedy, known as the “Colfax Massacre,” began with the Louisiana Governor’s race of 1872 and continued with the practical demise of the Reconstruction Amendments in the South.⁶⁰

After the violence, federal officials ultimately arrested 97 militia members.⁶¹ Federal prosecutors secured indictments under freshly

56. See, e.g., ILLEGAL RACIAL DISCRIMINATION, *supra* note 37, at 5, 14, 23–24; see generally Nijole Benokraitis, *Racial Exclusion in Juries*, 18 J. APPLIED BEHAV. SCI. 29 (1982).

57. See discussion *infra* Part II.A–D.

58. In *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the Court held that no person of African descent was a citizen under Article III. *Dred Scott*, 60 U.S. at 407 (upholding the history by which people of African descent had “no rights which the white man was bound to respect . . . [they] might justly and lawfully be reduced to slavery for [their] benefit . . . and treated as an ordinary article of merchandise and traffic . . .”).

59. *McDonald v. Chicago*, 130 S.Ct. 3020, 3060 (2010) (Thomas, J., concurring in part and concurring in judgment).

60. For a comprehensive history, see CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008).

61. Sonja R. West, *No Civilized System of Justice*, 11 GREEN BAG 2d 521, 526 (2008) (reviewing LANE, *supra* note 60) (noting that federal prosecutors

minted federal civil rights legislation aimed at enforcing the Fourteenth and Fifteenth Amendments.⁶² Nine militia members proceeded to trial, and juries returned guilty verdicts against three of them, including William Cruikshank, who, as Justice Alito noted in *McDonald*, “himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed.”⁶³ The defendants in the Colfax massacre were found guilty of conspiring to violate the privileges enjoyed by all citizens under the Fourteenth Amendment, including the privilege of associating together peaceably and the right to bear arms.⁶⁴

Cruikshank appealed to the U.S. Supreme Court, which granted certiorari to address whether the statute under which the convictions were secured violated the scope of federal power. The Court cited the ruling in the *Slaughter-House Cases*⁶⁵ when it held in *United States v. Cruikshank* that the Privileges and Immunities Clause did not provide the federal government with the authority to prosecute state residents with violations of individual constitutional rights unless those rights emanated directly from the Constitution (rather than from a source that predated the Constitution and its Amendments).⁶⁶ The upshot of the *Slaughter-House Cases* and *Cruikshank* was to render the Reconstruction Amendments and Civil Rights legislation unenforceable.⁶⁷

Writing in *United States v. Louisiana*, then-United States District Court Judge Wisdom recounted the sordid history that followed the Colfax Massacre:

In 1874 six white Republican officeholders of Red River Parish were killed, after they had surrendered and had agreed to leave the State. . . . Representative white citizens

initially secured indictments against 97 militia members on 32 counts under the Enforcement Act).

62. *Id.* at 525.

63. *McDonald*, 130 S. Ct. at 3030.

64. *Id.*

65. In the now infamous *Slaughter-House Cases*, the Court held that the Privileges and Immunities Clause contained in the Fourteenth Amendment did not constrain Louisiana from granting a monopoly to a single entity in Orleans and surrounding parishes to exercise the right to maintain slaughterhouses and cattle-yards to the exclusion of all other butchers and cattle-owners. *Slaughter-House Cases*, 83 U.S. 36 (1873).

66. *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1876).

67. See, e.g., Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1339–40 (1952); Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1079–80 (2009).

considered it a civic duty to belong first to The Knights of the White Camelia, a secret organization equivalent to the Ku Klux Klan in other states, and, later, to join the White League, a statewide organization which openly advocated white supremacy in a published platform. On September 14, 1874, the Crescent City (New Orleans) White League, which was organized militarily, led by influential citizens, successfully fought a pitched battle in New Orleans against 3000 of [Republican Governor] Kellogg's Negro militia, 1000 Metropolitan Police under General Longstreet, and several hundred federal troops. The White League took over complete control of the City, then the Capitol of Louisiana, and established in the Statehouse Acting [Democrat] Governor Penn and, later, [Democrat] Governor McEnery.⁶⁸

In the face of these erupting racial tensions, Northern political leaders abandoned their duty to protect black citizens. For example, in April 1877, President Rutherford Hayes, as part of the Hayes–Tilden compromise that landed him the Presidency after a hotly disputed election,⁶⁹ removed federal troops from Louisiana and recognized the Democratic Administration as the legal government of the state.⁷⁰ As Judge Wisdom wrote, these events foreshadowed subsequent infamous racial lowlights, such as “the lily white primary, [which] marked the emergence of the Democratic party in the south as the institutionalized incarnation of the will to White Supremacy”⁷¹

*B. The 1898 Constitutional Convention Implements the Non-
Unanimous Jury Verdict Policy*

After employing brute force to capture the Louisiana government in the 1870s, the Democrats used the 1898 Constitutional Convention to steal suffrage from African-American citizens.⁷² As the Convention's President, Ernest Benjamin Kruttschnitt revealed that the sinister purpose of the Convention

68. *United States v. Louisiana*, 225 F.Supp. 353, 366–68 (E.D. La. 1963) (footnotes omitted).

69. Theodore B. Olson, *The Supreme Court & the Presidency*, 9 GREEN BAG 2d 139, 145 (2006) (“The disputed election of 1876 had almost led to another civil war.”).

70. *See, e.g., United States v. Louisiana*, 225 F.Supp. at 368–69.

71. *Id.* at 368 (internal quotations omitted).

72. *See, e.g., Richard H. Pildes, The Canon(s) of Constitutional Law: Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 303 (2000).

was to create a racial architecture in Louisiana that could circumvent the Reconstruction Amendments and marginalize the political power of black citizens.⁷³ The Chairman of the Convention's Judiciary Committee, Judge Thomas Semmes, held nothing back: "We [are] here to establish the supremacy of the white race, and the white race constitutes the Democratic party of this State."⁷⁴ Or, as Judge Wisdom wrote, "[t]he Convention of 1898 interpreted its mandate from the [Louisiana] people to be, to disfranchise as many Negroes and as few whites as possible."⁷⁵

The Delegates achieved these anti-participation goals not only by restricting access to the ballot box but also by diluting the voice of members of racial minority groups by allowing non-unanimous jury verdicts in criminal cases.⁷⁶ The historical record from the Constitutional Convention demonstrates clearly that the delegates were preoccupied with disenfranchising African-American voters, but reflects little discussion on the non-unanimous jury policy.⁷⁷ However, contemporaneous accounts of how white supremacists in Louisiana responded to black jury participation during Reconstruction amply demonstrate what animated their decisions at the Convention.⁷⁸

The non-unanimous verdict policy enabled the state to prevent an African American from hijacking sentencing outcomes:

He [the freed slave] does not appear to much advantage in any capacity in the courts of law As a juror, he will follow the lead of his white fellows in causes involving distinctive white interests; but if a negro be on trial for any crime, he becomes at once his earnest champion, and a hung jury is the usual result. At a recent trial in Limestone County, Texas, a colored juror refused to send a murderer to State Prison for life, because, as he said, it looked too

73. LOUISIANA CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 5, at 380.

74. *Id.* at 374.

75. *United States v. Louisiana*, 225 F. Supp. at 371 (internal quotations and citations omitted).

76. See LA. CONST. OF 1898, art. 116 ("[C]ases in which the punishment is necessarily at hard labor, [shall be tried] by a jury of twelve, nine of whom concurring may render a verdict"); LA. CONST. OF 1974, art. I, § 17 ("A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict."); LA. CODE CRIM. PROC. art. 782 (2009) ("Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.").

77. See *supra* notes 72–75.

78. See *infra* notes 79–81 and accompanying text.

much like putting the man into bondage; but readily consented to a verdict of 99 years' imprisonment.⁷⁹

Moreover, black jurors were viewed as ignorant, incapable of determining credibility, and susceptible to bribery.⁸⁰ One commentator went so far as to claim that criminals would simply not be convicted because of the African-American presence in the jury box.⁸¹ These overtly racist views captured the beliefs of the Convention's delegates and set the backdrop for the Constitutional Convention, the non-unanimous jury verdict policy, and their ongoing effects today.

C. Non-Unanimous Jury Verdicts Today

Louisiana's policy of non-unanimous jury verdicts continues to limit meaningful African-American participation today. For example, in 2009, the foreman of Corey Miller's⁸² jury said the jurors had found him guilty of second-degree murder.⁸³ When the judge polled the jurors individually, however, he found nine jurors voted for conviction, two for acquittal, and one for a conviction "under duress."⁸⁴ The final vote rendered the verdict invalid. The judge refused to declare a mistrial, and sent the jury back for further deliberation.⁸⁵ Three hours later, and after 13 total hours of deliberation, the jury returned with a 10–2 guilty verdict, which meant Mr. Miller would be automatically sentenced to life without

79. *Future of the Freedman*, DAILY PICAYUNE, Aug. 31, 1873, at 5.

80. *See The Present Jury System*, DAILY PICAYUNE, Apr. 20, 1870, at 4; *see also Female Suffrage*, DAILY PICAYUNE, May 8, 1879, at 4 (arguing that women "should no longer be treated as aliens, as the State needs their votes now . . . to neutralize those of the vicious and ignorant, who have no financial or other interest in the community unless it be to rob the treasury").

81. *See The Present Jury System*, THE DAILY PICAYUNE, Apr. 20, 1870, at 4 ("[N]egroes . . . [are] capable only of being corrupted by bribes to espouse the side of criminals willing to pay for verdicts . . . [A]s things go now, criminals have but slight fear of losing their life or liberty on indictments and jury trials.").

82. Robert J. Smith, along with co-counsel Charles Ogletree, Ronald Sullivan and John Adcock, represents Mr. Miller on appeal.

83. This was the second time he faced trial on the same murder charge. The State failed to disclose exculpatory evidence at his first trial, and the Louisiana Supreme Court upheld the trial court's decision to grant a new trial in light of the State's misconduct. *See State v. Miller*, 923 So. 2d 625 (La. 2006).

84. *See, e.g., C.J. Lin, Metairie Woman Says She Voted to Convict C-Murder to End 'Brutal' Jury Deliberations*, TIMES-PICAYUNE, Aug. 26, 2009 [hereinafter *Brutal Deliberations*], available at: http://www.nola.com/crime/index.ssf/2009/08/metairie_woman_says_she_voted.html.

85. *See id.*; *see also C.J. Lin, C-Murder Guilty of Second-Degree Murder After Topsy-Turvy Jury Action*, TIMES-PICAYUNE, Aug. 11, 2009, available at: http://www.nola.com/news/index.ssf/2009/08/cmurder_verdict_1.html.

the possibility of parole.⁸⁶ Two weeks later, Mary Jacobs, the juror who switched her vote to guilty, told the Times-Picayune that she did not believe the State proved its case beyond a reasonable doubt, but voted guilty nonetheless under “brutal” pressure from other jurors directed at the dissenting jurors, and at one young black juror in particular.⁸⁷ Jacobs explained:

They [the other jurors] literally made this 20-year-old girl so violently ill . . . She was shaking so bad. She ran into the bathroom. She was throwing her guts up. She couldn't function anymore. That's when I decided, the judge don't want to listen to me, doesn't want to listen to us? I told them, “You want him to be guilty? He's guilty, now let's get the hell out of here.”⁸⁸

The public reaction to the news centered less on the juror that changed her vote than the decision—rule itself. Forty-eight states and the federal system require criminal juries to render unanimous jury verdicts. Louisiana is one of only two jurisdictions in the country that allows less-than-unanimous verdicts in criminal cases.⁸⁹ Somewhat surprisingly, the Times-Picayune published pieces about Mr. Miller's case with titles including: “*How [10–2] verdict policy hurts black defendants*,”⁹⁰ “*10–2 jury close enough for Louisiana*,”⁹¹ and “*C-Murder guilty of second-degree murder after topsy-turvy jury action*.”⁹² As the titles of those articles imply, there was a palpable racial component to the 10–2 rule in this case. Indeed, three black jurors served on Mr. Miller's jury—two voted to acquit him.⁹³

86. See Lin, *Topsy-Turvy Jury Action*, *supra* note 85 (“At the defense's request, the jury was polled and the vote was revealed to be 10–2 in favor of conviction. Ten of 12 votes are required for a second-degree murder conviction.”); LA. REV. STAT. ANN. § 14:30.1 (2009) (providing for mandatory life-without-parole sentence for second-degree murder).

87. See Lin, *Brutal Deliberations*, *supra* note 84.

88. *Id.*

89. See LA. CODE CRIM. PROC. art. 782 (2009); OR. REV. STAT. ANN. § 136.450 (Westlaw 2011).

90. Annette Sisco, *How Verdict Policy Hurts Black Defendants*, TIMES-PICAYUNE, Aug. 27, 2009, available at http://blog.nola.com/jamesgill/2009/08/how_verdict_policy_hurts_black.html.

91. Annette Sisco, *10-2 Jury Close Enough for Louisiana*, TIMES-PICAYUNE, Aug. 15, 2009, available at http://blog.nola.com/jamesgill/2009/08/102_jury_close_enough_for_loui.html.

92. See Lin, *Topsy-Turvy Jury Action*, *supra* note 85.

93. See Sisco, *supra* note 90 (“Two of the three black jurors in the Miller case held out for acquittal.”).

D. The Detrimental Impact that Non-Unanimous Jury Verdicts Have on Justice and Meaningful Participation

In *Apodaca v. Oregon*,⁹⁴ the United States Supreme Court upheld the practice of non-unanimous jury verdicts in non-capital cases. The *Apodaca* plurality largely based its decision on the belief that the decision rule had no practical effect on jury deliberations.⁹⁵ The Court held that the Sixth Amendment right to a jury trial requires only that the defendant have “the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him” and that such an interest is “equally well served” by non-unanimous juries.⁹⁶ Similarly, in *Apodaca*’s companion case, *Johnson v. Louisiana*, the Court held that 9-3 jury verdicts do not violate the Due Process clause of the Fourteenth Amendment, and expressed “our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt.”⁹⁷

The dissenters disagreed, arguing that allowing non-unanimous juries “eliminates the circumstances in which a minority of jurors (a) could have rationally persuaded the entire jury to acquit, or (b) while unable to persuade the majority to acquit, nonetheless could have convinced them to convict only on a lesser-included offense.”⁹⁸ The dissent also criticized the majority’s speculation that non-unanimous jury verdicts produced the same quality of deliberations as unanimous verdicts, noting how “human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity.”⁹⁹ The dissenters expressed fear that the first arguments to be ignored would be those expressed by members of identifiable minority groups.¹⁰⁰

Social science research produced since *Apodaca* and *Johnson* bolsters the view of the dissenters. Decision rules have an impact on both the quality and outcome of the deliberation: unanimous

94. 406 U.S. 404 (1972).

95. *Id.* at 411 (“[W]e perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one.”); *id.* at 410 (finding that a unanimity requirement “does not materially contribute to the exercise of this common sense judgment”).

96. *See id.* at 411.

97. *See Johnson v. Louisiana*, 406 U.S. 356, 360 (1972) (plurality opinion).

98. *Id.* at 388 (Douglas, J., dissenting).

99. *See id.* at 389 (Douglas, J., dissenting).

100. *See id.* at 399 (Stewart, J., dissenting); *id.* at 402 (Marshall, J., dissenting).

juries deliberate longer,¹⁰¹ discuss and debate the evidence more thoroughly,¹⁰² reach more reliable conclusions (as measured by the percent of votes consistent with the judge's view of the evidence),¹⁰³ and are more tolerant and respectful of dissenting voices.¹⁰⁴ Jurors who participated in trials where a unanimous verdict was required report being more satisfied with their experience than jurors who operated under a non-unanimity rule.¹⁰⁵

There is also evidence that the non-unanimous decision rule operates to silence the view of minority group members.¹⁰⁶ In *Empty Votes in Jury Deliberations*, Professor Kim Taylor-Thompson explained that the views of minority group members often are excluded from serious consideration when they are in the minority (number) of jurors.¹⁰⁷ She writes,

[b]ecause our system of justice charges the jury with evaluating the conduct of the accused, the jury can benefit from the observations and comments of individuals who share at least one socializing characteristic or who may have had some common experiences with the accused. These jurors can offer narratives to guide the jury's understanding—or perhaps rejection—of the accused's interpretation of events.¹⁰⁸

Housing patterns in many cities consist of neighborhoods with a high concentration of minority group members.¹⁰⁹ These

101. See REID HASTIE ET AL., *INSIDE THE JURY* 60 tbl. 4.1 (1983).

102. See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272–73 (2000); AM. JURY PROJECT, AM. BAR ASS'N, *PRINCIPLES FOR JURIES AND JURY TRIALS* 24, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/american_jury/final_commentary_july_1205.authcheckdam.pdf.

103. See Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberations*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001).

104. See, e.g., Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 230 (2006).

105. See Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 41 (1997).

106. See, e.g., Hon. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1028–29 (2008); *PRINCIPLES FOR JURIES AND JURY TRIALS*, *supra* note 102, at 24.

107. See Taylor-Thompson, *supra* note 102.

108. *Id.* at 1279.

109. See generally Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55 (2002); William H. Carter et al., *Polarisation, Public Housing, and Racial Minorities in US Cities*, 35 URBAN STUDIES 1889 (1998).

neighborhoods often also suffer from concentrated poverty and violence.¹¹⁰ So the perspective that is missing in cases where defendants or victims are minority group members is not only that which comes from sharing a culture or group identity but often the one that comes from living in areas where crime is a fact of life. Richard Wright's *Native Son* captures an extreme form of this dynamic.¹¹¹ A wealthy white woman from Chicago tells the protagonist, a poor, black man named Bigger Thomas that, though she has traveled around the world, she has no knowledge of how people live in the poorer, blacker neighborhoods of the city just blocks from where she grew up. Wright says that Bigger Thomas knew then that he could never explain to a white person of privilege why he committed murder because "the telling of it would have involved the explanation of his entire life."¹¹²

One practical example of where this difference in perspective could arise is in the believability of testimony that a police officer planted evidence. Following the O.J. Simpson trial, 78% of black respondents believed the jury reached the correct verdict, while fewer than 50% of white respondents thought so.¹¹³ Post-O.J. trial polling also revealed that nearly three of four black respondents as compared to one in four white respondents believed the criminal justice system is biased.¹¹⁴

These divergent perspectives on law enforcement have deep roots. A study conducted by Professor Jen Crocker found that 84% of black participants (but just 4% of white participants) agreed that it "might possibly be true" or "definitely [is] true" that "the government deliberately makes sure that drugs are available in

110. See e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 125–42 (1993); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 20–108 (1987).

111. RICHARD WRIGHT, *NATIVE SON* (1940).

112. *Id.* at 356.

113. Darnell M. Hunt, *(Re)Affirming Race: "Reality," Negotiation, and the "Trial of the Century"*, 38 *SOC. Q.* 399, 400 (1997); see also Richard Morin, *Poll Reflects Division Over Simpson Case: Trial Damaged Image of Courts, Races Agree*, *WASH. POST*, Oct. 8, 1995, at A31 (citing poll that found 55% of white Americans thought Simpson was guilty and 85% of African Americans thought he was innocent); Leland Ware, *Essays on Race Reach Beyond the Superficial*, *ST. LOUIS POST-DISPATCH*, Feb. 18, 1996, at 5D ("[T]he reaction to the verdict proves, beyond any doubt, that white and black Americans view the same events from vastly different perspectives").

114. Russell Robinson, *Perceptual Segregation*, 108 *COLUM. L. REV.* 1093, 1100 (2008) (citing CBS News/New York Times O.J. Simpson Poll #2, July 1994) ("In 1994, a CBS News/New York Times poll found that roughly 40% of blacks, compared to 15% of whites, believed that the criminal justice system was biased against Simpson.").

poor Black neighborhoods.”¹¹⁵ Interpreting Crocker’s results, Professor Russell Robinson suggests that differing levels of historical understanding could account for the disparity.¹¹⁶

Another set of concerns goes to the core of reliable trial verdicts. The viewpoint of racial minorities who are in the minority position on a criminal jury is particularly important in instances where eyewitness identification is the primary type of evidence. Evidence that cross-racial identifications are more error-prone than same-race identifications is overwhelming,¹¹⁷ and more recent evidence suggests that the phenomenon can be traced to the neurological level.¹¹⁸ As Professor Sheri Lynn Johnson explains:

[F]or most people, when they are observing faces, there is greater activity in the fusiform region of the brain (which is the region in which face recognition takes place) when a person tries to recognize a person of the same race as when he or she tries to recognize a person of another race. This probably explains much of why cross-racial identifications are less reliable; the brain just isn’t working as hard.¹¹⁹

Minority group members may be particularly adept at distinguishing between, for example, the description of an intruder

115. *Id.* At 1110 (citing Jennifer Crocker et al., *Belief in U.S. Government Conspiracies Against Blacks Among Black and White College Students: Powerlessness or System Blame?*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 941, 946 app. A (1999)).

116. *See id.* at 1111 (“One possible explanation for these disparities, which the authors recognized, was differential knowledge of historical instances of racial discrimination . . .”).

117. *See, e.g.*, Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1493 (“The phenomenon of unreliable cross-racial identifications is universally accepted as fact by psychologists.”).

118. Professor Matthew Lieberman and colleagues conducted an experiment using functional magnetic resonance imaging (fMRI) technology to measure the level of amygdala activity of participants after seeing a black versus a white face. The amygdala is a region of the brain that mediates emotional responses, including perceived threats. Lieberman found that amygdala activity in both white and black participants increased when shown a black face versus a white face. The authors concluded that the most plausible explanation for this universal increase in amygdala activity is due to the activation of “culturally learned negative associations regarding African-Americans.” Matthew D Lieberman et al., *An fMRI Investigation of Race-related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCIENCE 720, 722 (2005), available at <http://www.scn.ucla.edu/pdf/nature%20neuroscience%20press/nn1465.pdf> (last visited October 19, 2011).

119. Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUMAN RIGHTS L. REV. 178, 193–94 (2007).

or attacker made to the police and a black defendant who has similar Afrocentric features but is not the offender.

It is also plausible that minority group members would be better able to contextualize and evaluate culturally specific language or actions. Two studies from the implicit social cognition literature suggest that the race of the defendant affects the way jurors remember events and interpret ambiguous evidence. Professor Justin Levinson conducted an elegant experiment to test whether implicit race bias impacted jurors' memories of case facts.¹²⁰ Levinson provided jury-eligible participants with a fictional story about a confrontation between two men. Some jurors read about "William" the white defendant, while others read about "Tyrone" the black defendant. The rest of the story remained constant. But, when Levinson asked jurors to remember pertinent facts from "the confrontation," he found that the race of the defendant impacted how participants recalled the story's details. Participants more frequently remembered aggressive details when Tyrone, rather than William, was the defendant. Levinson concluded "that the race of a civil plaintiff or a criminal defendant can act implicitly to cause people to misremember a case's facts in racially biased ways."¹²¹ The participants appeared to remember "facts" that did not appear in the story more often when those facts were stereotype-consistent, such as facts that portray black males as aggressive.¹²²

In another study, Professor Levinson and Danielle Young tested whether implicit race bias impacts jurors' interpretation of

120. Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making, and Misremembering*, 57 DUKE L.J. 345 (2007). On the strength and scope of implicit bias generally, see Jerry Kang and Mahzarin Banaji, *Fair Measures: a Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063 (2006) ("Seventy-five percent of Whites (and fifty percent of Blacks) show anti-Black bias These results contrast sharply with the views expressed on explicit surveys. These data, as well as the findings in dozens of experiments that meet the criteria of replicability and peer-review, demonstrate that we are not color or gender blind, and perhaps that we cannot be."); *id.* at 1072 ("As disturbing as this evidence [of implicit bias] is, there is too much of it to be ignored. Moreover, recent discoveries regarding malleability of bias provide the basis to imagine both individual and institutional change."). The two paragraphs discussing Justin Levinson's studies were originally published in footnotes in Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, n. 243 (2010).

121. Levinson, *supra* note 120 at 350.

122. *Id.*; see also Justin Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 614–15 (2009).

ambiguous evidence.¹²³ They provided a group of jury-eligible participants with a brief background story of a fictional Mini Mart robbery and then had the participants view three pictures from the crime scene for four seconds each.¹²⁴ The first and second pictures were innocuous. The third picture—the centerpiece of the study—displayed one masked assailant reaching over the counter with a gun in his left hand. The only identifiable race-cue for the assailant is a small section of visible flesh on his forearm. Levinson altered the skin-tone of the assailant, showing half the participants a light-skinned suspect and the other half a dark-skinned suspect. After watching the short video, suspects were told that a suspect was caught, and then provided with a series of ambiguous evidence about the suspect.¹²⁵ Levinson asked the participants to rate the probative value of each piece of ambiguous evidence.

The study produced several results. First, participants shown the photo of the dark-skinned suspect were significantly more likely to find ambiguous evidence more probative of guilt.¹²⁶ Participants who viewed the dark-skinned defendant were also more likely to believe that the suspect was guilty, both on a scale of 1-100 and by a traditional guilty / not guilty measure.¹²⁷ As the authors concluded, these results undermine the foundational assumption that guilt is weighed solely based on the probative strength of the evidence.¹²⁸

123. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010).

124. This is the background story:

The defendant has been charged with armed robbery. The incident occurred at 11pm on December 18, 2008, when the Quick Stop Mini Mart was robbed by two armed men wearing masks. According to the police report, the owner of the Mini Mart had just closed the store when two armed men barged into the store. One of the men pointed the gun at the owner while the other walked behind the counter to the cash register. The owner obeyed all of the men's commands and was not injured. The men left the store with approximately \$550 in cash. They fled in a dark blue 4-door full sized sedan.

Id. at 331–32.

125. For example, (1) the defendant used to be addicted to drugs; (2) the defendant has been served with a notice of eviction from his apartment; (3) the defendant is left-handed; (4) the defendant was a youth Golden Gloves boxing champion in 2006; (4) the defendant is a member of an anti-violence organization; (5) the defendant does not have a driver's license or car. *Id.* at 332–33.

126. *Id.* at 337.

127. *Id.*

128. *Id.* at 339.

When life experiences cause viewpoints to differ on critical issues that arise during a trial,¹²⁹ a non-unanimous decision rule allows the majority to bypass meaningful consideration of a perspective that might be difficult to swallow (and thus take time to explain and understand), based on their respective life experiences.¹³⁰ As the Louisiana Supreme Court explained in *State v. Collier*, “[b]ecause only ten votes were needed to convict defendant . . . the prosecutor could have assumed, contrary to *Batson*’s admonition that it was unacceptable to do so, that all black jurors would vote on the basis of racial bias and then purposefully discriminated by limiting the number of blacks on the jury to two.”¹³¹ U.S. Supreme Court Justice Potter Stewart put it more

129. The Supreme Court, in *Turner v. Murray*, put the point as follows:

A juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether the petitioner’s crime involved the aggravating factors specified under Virginia law. Such a juror might be less favorably inclined toward . . . mitigating [evidence]. . . . Fear of blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.

476 U.S. 28, 35 (1986); *see also* R. Richard Banks, Jennifer L. Eberhardt, & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1172 (2006) (“Psychologists have documented and explored the longstanding stereotype of African Americans as violent and prone to criminality. Indeed, this is the stereotype most commonly applied to Blacks— or at least to young Black males.”).

130. *See* Robinson, *supra* note 114, at 1093 (“While many whites expect evidence of discrimination to be explicit, and assume that people are colorblind when such evidence is lacking, many blacks perceive bias to be prevalent and primarily implicit.”); *id.* (“[O]utsiders and insiders tend to perceive allegations of discrimination through fundamentally different psychological frameworks. A workplace may be spatially integrated and yet employees who work side by side may perceive an allegation of discrimination through very different lenses because of their disparate racial and gender identities.”); *id.* at 1120 (“[R]acialized pools [of information] are evident at many levels, including the family, media sources, and the workplace. Stories of perceived discrimination are often told in all-black settings, sometimes as a means of group therapy, sometimes as a means of entertainment, and sometimes as a little bit of both.”).

131. 553 So. 2d 815, 819–20 (La. 1989); *see also* *State v. Cheateam*, 986 So. 2d 738, 745 (La. App. 5 Cir. 2008) (“[The defense] pointed out that it appeared the prosecutor was attempting to ensure that only two African-Americans would serve on the jury. And in order to convict, the prosecutor needed only 10 votes.”); *but see* *State v. Tart*, 672 So. 2d 116, 141 (La. 1996) (“In *Collier* . . . the presence of two African-Americans on the defendant’s jury did not necessarily defeat an inference of discrimination because the verdict only required a 10-2 vote. By contrast, in this capital case, the jury’s finding had to be unanimous.”).

directly: “Nine jurors can simply ignore the views of their fellow panel members of a different race or class.”¹³²

When delegates at the 1898 Constitutional Convention assembled the legal architecture to restrict the participation of black citizens in government, in part by allowing non-unanimous jury verdicts in criminal cases, the simple explanation was the belief that black people were inferior to white people and their participation in government risked degrading the quality of civic life.¹³³ Today, Louisiana law still allows non-unanimous jury verdicts in all but death penalty cases. The justifications for the rule offered today, to the extent that they are offered at all, are not race-salient, but instead focus on perceived efficiency advantages (e.g. avoiding deadlock) and the fear of the runaway juror who will vote to acquit against the evidence. In reality though, the law still operates to discount the jury service of ordinary black citizens who, based on divergent experience and an apparent inherent neurological ability to more accurately identify members of their own race, may, on the margins, arrive at a different interpretation of the evidence than would the average white juror.¹³⁴ In other words, if you eliminate intent and focus solely on impact, non-unanimous juries today serve the same purpose that white supremacists intended them to serve when they designed the system more than a century ago.¹³⁵

III. PEREMPTORY STRIKES

Lawyers can remove prospective jurors from the jury pool through either a cause or a peremptory challenge.¹³⁶ Both parties possess an unlimited number of cause challenges because no biased juror should participate in the trial. Whereas cause

132. *Johnson v. Louisiana*, 406 U.S. 356, 397 (Stewart, J., dissenting) (referring to a 9-3 decision rule).

133. *See, e.g., supra* text accompanying notes 73–82.

134. *See McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) (“Warren McCleskey’s evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.”).

135. *See Banks & Ford, supra* note 51, at 1055 (“Racial injustice inheres in the entrenched substantive racial inequalities that pervade our society. These disparities are not primarily a consequence of contemporary racial bias.”).

136. *See Carol A. Chase & Colleen P. Graffy, A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 *LOY. L.A. INT’L & COMP. L.J.* 507, 507 (1997).

challenges must be justified and explained,¹³⁷ lawyers can use peremptory strikes to exclude anyone they wish for almost any reason, and they need not explain the basis for these strikes.¹³⁸ However, under the Fourteenth Amendment Equal Protection Clause, a party's peremptory strike against a prospective juror cannot be motivated by race or gender.¹³⁹

A. *The Historical Backdrop*

Although the non-unanimous jury verdict policy has apparently racialized historical foundations, the common-law rule providing the parties with peremptory strikes appears to pre-date the founding of this country (and its race-related quandaries). In England, individuals charged with a crime possessed 35 peremptory strikes, and the Crown had none.¹⁴⁰ The availability of these strikes did not apparently emerge out of a concern with racial minorities "degrading" politics; instead, they arose to display "tenderness and humanity to prisoners. . . ."¹⁴¹

In the United States, peremptory challenges were based on the "common law" tradition established in England.¹⁴² As early as 1790, Congress passed laws providing for peremptory strikes in criminal trials, and the States followed suit.¹⁴³ Even though peremptory challenges were not necessarily predestined to racially discriminate, it is clear that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"¹⁴⁴

B. *Peremptory Strikes in Practice Today*

Abundant empirical evidence indicates that peremptory strikes disproportionately exclude African Americans in criminal trials in Louisiana. Tulane University Sociology Professor Joel Devine

137. See *id.* at 507–08.

138. See *Swain v. Alabama*, 380 U.S. 202, 220 (1965) ("The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.").

139. See *Batson v. Kentucky*, 476 U.S. 79 (1976) (prohibiting strikes on the basis of race); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (prohibiting strikes on the basis of gender).

140. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *347 (1769).

141. *Id.* at *346.

142. *Swain*, 380 U.S. at 212–16.

143. See *id.* at 214–16.

144. *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

worked with the Louisiana Capital Assistance Center¹⁴⁵ to analyze the juror-strike patterns of Jefferson Parish Prosecutors across some 390 trials (involving over 12,000 jurors). The results, published in a study titled “Blackstrikes,” document a highly significant statistical correlation between a juror’s race and the State’s use of peremptory challenges.¹⁴⁶ The study revealed that Jefferson Parish prosecutors struck qualified African-American prospective jurors at over three times the rate as qualified white prospective jurors.¹⁴⁷

Prosecutors in other parishes also exclude African Americans from criminal juries at an alarming rate. In St. Tammany Parish, the strike rate against African Americans appears comparable to that uncovered in Jefferson Parish. “In a review of first-degree and second-degree murder cases from a recent fifteen-year span, defense attorneys found that the prosecutors in that jurisdiction had peremptorily struck 68% of qualified African-American jurors compared to 19% of qualified white jurors.”¹⁴⁸ And, “the records from two recent death-penalty cases in Caddo Parish show that the trend may also occur there: the State struck 73% (11 of 15) of qualified African-Americans from those two jury pools.”¹⁴⁹ Although research from other parishes is desirable, the trend is reflected across the South generally,¹⁵⁰ and it reflects serious anti-participation effects to the prosecutors’ use of peremptory challenges.

145. The Louisiana Capital Assistance Center was formerly named the Louisiana Crisis Assistance Center. See *About the Louisiana Capital Assistance Center*, THEJUSTICECENTER.ORG, <http://www.thejusticecenter.org/lcac>.

146. RICHARD BOURKE, JOE HINGSTON & JOEL DEVINE, LA. CRISIS ASSISTANCE CTR., BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY’S OFFICE (2003), available at http://www.blackstrikes.com/resources/report/black_strikes_report_september_2003.doc.

147. *Id.*

148. Bidish Sarma, *An Enduring (and Disturbing) Legacy: Race-Neutrality, Judicial Apathy, and the Civic Exclusion of African-Americans in Louisiana*, 1 HLRE 49, 56 n.30 (citing Petition for Writ of Habeas Corpus at 214, Hoffman v. Cain, Civil Action No. 2007-1913 (La. 12/12/08)).

149. *Id.* (citing State v. Coleman, 970 So. 2d 511, 513 (La. 2007) (“[T]he defendant based his *Batson* challenge on the fact that the prosecution used six of its eight peremptory challenges to strike African-American prospective jurors.”), and Brief of Petitioner-Appellant on Appeal at 39, State v. Dorsey, No. 2010-KA-0216 (La. 2010), 2010 WL 6775737 (“[F]ive of the seven African-Americans available were struck by the State.”)).

150. See generally ILLEGAL RACIAL DISCRIMINATION, *supra* note 37.

C. The Lack of Meaningful Judicial Enforcement

Under the Supreme Court's decision in *Batson v. Kentucky*, trial courts engage in a three-step analysis when a party alleges that the other side has discriminated against prospective jurors on the basis of race.¹⁵¹ At step one, the court must decide if the party alleging discrimination has made a prima facie case. The burden to establish a prima facie case is a light one.¹⁵² If the trial court finds that a prima facie case exists, at step two the party striking jurors must provide race-neutral reasons for the strike.¹⁵³ Even if the reasons are ridiculous, they will pass muster at step two so long as they are neutral.¹⁵⁴ Finally, if race-neutral reasons are provided, the trial court must determine at step three whether the reasons are credible and whether the party alleging discrimination has carried its burden of persuasion.¹⁵⁵ The *Batson* framework should provide litigants in Louisiana sufficient Fourteenth Amendment protection, but it does not.

Take, for example, the Louisiana Supreme Court's treatment of the Black Strikes study. Although the U.S. Supreme Court has held that statistical and historical evidence is highly relevant,¹⁵⁶ the Louisiana Supreme Court has dismissed such damning evidence of discrimination in jury selection.¹⁵⁷ It has effectively cabined the significance of this evidence to the trial court's step-one determination of a prima facie case, and precluded it from informing the final inquiry of discriminatory intent. Relying only on the race-neutrality of a prosecutor's explanations given at step two, the Louisiana Supreme Court functionally terminates the process and forecloses the relevance of statistical and historical

151. See *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1976).

152. See *Johnson v. California*, 545 U.S. 162, 169–70 (2005).

153. See *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam).

154. *Id.* at 767–68 (“The second step of [Batson] does not demand an explanation that is persuasive, or even plausible. . . . ‘Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race-neutral.’”) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (plurality opinion)).

155. *Id.* at 767.

156. See, e.g., *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) [hereinafter *Miller-El I*] (“[T]he statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors.”).

157. See, e.g., Unpublished Appendix at *10, *State v. Dressner*, 45 So. 3d 127 (La. 2010) (No. 08-KA-1366) (on file with authors) (setting aside statistics and history altogether because “a review of the voir dire record as a whole indicates the State articulated race and gender-neutral reasons for each of the eight challenges about which defendant now complains”).

evidence.¹⁵⁸ It rubber-stamps the State's step-two reasons in the step-three analysis, and denies the criminal defendant's claim.¹⁵⁹ Contrary to the Louisiana Supreme Court's approach, however, statistics and history are meant to inform the ultimate question concerning the prosecutor's intent and credibility.¹⁶⁰ Instead, in Louisiana, a simple race-neutral explanation—even a fantastic or demonstrably false one—overwhelms the significance of this evidence.¹⁶¹

For all practical purposes, the Louisiana Supreme Court has refused to consider a defendant's claims of discrimination against African-American jurors except in extraordinary cases where the prosecutor's racial bias is downright obvious. For example, in *State v. Coleman*, the Louisiana Supreme Court reversed where the State's reason for striking a black juror was simply not race-neutral.¹⁶² There, the prosecutor explained that it struck a prospective juror who served as a "captain with the fire department in Bossier City, [because he] filed a lawsuit against the city alleging institutional discrimination. . . . There is a black defendant in this case. There are white victims."¹⁶³ Similarly, in *State v. Harris*, a capital case from Jefferson Parish, the Louisiana

158. *Id.*; see also *State v. Jacobs*, 32 So. 3d 227, 236–33 (La. 2010) (rejecting the power of statistical evidence that "the state used 87% of its peremptory strikes to challenge non-white prospective jurors, in a venire where non-white prospective jurors comprised less than 19% of the prospective jurors" by looking at the merits of every individual *Batson* challenge).

159. Over twenty years ago, Justice Lemmon warned that such an approach would devastate *Batson*. See *State v. Collier*, 553 So. 2d 815, 821 (La. 1989) ("'Rubber stamp' approval of any non-racial explanation, no matter how whimsical or fanciful, would destroy *Batson*'s objective to ensure that no citizen is disqualified from jury service because of his race.").

160. See *Miller-El I*, 537 U.S. at 342 (noting that statistical evidence could uphold an ultimate finding of discrimination); *Miller-El v. Dretke*, 545 U.S. 231, 240–41 (2005) [hereinafter *Miller-El II*] (considering statistical evidence and comparative juror analysis in its step-three discussion); *McCleskey v. Kemp*, 481 U.S. 279, 293 (noting that the Supreme Court "has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district").

161. In the *Dressner* opinion, the Louisiana Supreme Court asserted that the Jefferson Parish prosecutors' ability to give race-neutral reasons indicated that they had "a clear intent . . . to distance themselves from the errors of their office in the past." Unpublished Appendix at *35, *State v. Dressner*, 45 So. 3d 127 (La. 2010) (No. 08-KA-1366) (on file with authors). But, even the court's opinion acknowledged that when confronted with the historical and statistical evidence gathered in the Black Strikes study, the prosecutor said, it was a "'sham of a study by the Louisiana Crisis Assistance Center' included here to 'keep it in the forefront.'" *Id.* at *34.

162. *State v. Coleman*, 970 So. 2d 511 (La. 2007).

163. *Id.* at 514.

Supreme Court reversed where the prosecutor provided as a reason to justify a peremptory strike of an African-American juror that he was “the only single black male on the panel with no children.”¹⁶⁴ Beyond these remarkable cases, the Louisiana Supreme Court has refused to issue ultimate findings of discrimination. Indeed, in the case of Allen Snyder, the U.S. Supreme Court reversed the Louisiana Supreme Court because it failed to identify race discrimination in jury selection even though the prosecutor’s explanation for striking an African American was implausible.¹⁶⁵ The Louisiana high court’s begrudging approach¹⁶⁶ insulates much discrimination from meaningful scrutiny because cases in which prosecutors spill the beans by supplying a non-race-neutral explanation are few and far between.¹⁶⁷

The Louisiana Supreme Court has not only resisted finding discrimination, but it has also actively reversed lower courts that have tried to remedy racial bias. After the second trial of Lawrence Jacobs, the Louisiana Fifth Circuit Court of Appeal reversed the conviction.¹⁶⁸ After a thoughtful review of the precedent and the voluminous record, the court found that the prosecution’s stated reasons for striking two African-American jurors were “implausible” and unsupported by the record.¹⁶⁹ The Louisiana Supreme Court took the case as part of its discretionary docket, reversed the intermediate court, and reinstated the conviction.¹⁷⁰ The message to lower courts that they should not overturn criminal convictions or undermine prosecutors’ explanations was clear. In fact, the Fifth Circuit recently heeded the message and denied the

164. *State v. Harris*, 820 So. 2d 471, 474 (La. 2002).

165. *See Snyder v. Louisiana*, 552 U.S. 472 (2008).

166. In *Snyder*, the Louisiana Supreme Court’s approach replicated the trial court’s approach. According to the trial court, the prosecutor’s comparison of Allen Snyder (an African-American defendant) to O.J. Simpson was not racially significant because the prosecutor had not mentioned the race of the defendant or the race of O.J. Simpson. *State v. Snyder*, 750 So. 2d 832, 846 (La. 1999). At oral argument at the U.S. Supreme Court, Justice Souter asked, “Now that is not a critical mind at work, is it?” Oral Argument at 36, *Snyder v. Louisiana*, 552 U.S. 472 (2007) (No. 06-10119) available at a http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-10119.pdf.

167. *See* Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993) (“If prosecutors exist who . . . cannot create a ‘racially neutral’ reason for discriminating on the basis of race, bar examinations are too easy.”).

168. *State v. Jacobs*, 13 So. 3d 677 (La. Ct. App. 5th 2009), *rev’d per curiam*, 32 So. 3d 227 (La. 2010).

169. *Id.* at 691–92 (La. Ct. App. 5th 2009).

170. *State v. Jacobs*, 32 So. 3d 227, 234 (La. 2010) (*per curiam*).

numerous *Batson* issues that lingered after the Louisiana Supreme Court's remand and reprimand.¹⁷¹

D. Strikes Justified by Disparate Questioning and Racially Disparate Responses Attributable to State Action

Prosecutors are able to reduce the number of African American citizens who sit on juries by use of ever more sophisticated questions. For example, in *State v. Miller*, the prosecution asked the jurors to rate their feelings of the Jefferson Parish Sheriff's Office on a scale of 1-10. The State struck four prospective black jurors, but no prospective white jurors, based on the differing responses to this question.¹⁷² This question is race-neutral on its face, but, as prosecutors know, distrust of the police is more prominent among black citizens than white citizens.¹⁷³ Part of the discrepancy stems from first-hand encounters with law enforcement that the black citizen interpreted to be racist, either explicitly (e.g., use of terms with racial meaning, such as "nigger" or "boy") or vicariously (e.g., being stopped for "driving while black").¹⁷⁴ Second-hand stories also account for some of the attitude differential between white and black citizens, as an African-American "victim [of discriminatory policing] frequently shares the account with family and friends in order to lighten the

171. See *State v. Jacobs*, 67 So. 3d 535 (La. Ct. App. 5th 2011) (rejecting remaining *Batson* claims on direct appeal).

172. See Record at 2578, 2665–66 *State v. Miller*, 2005-1111 (La. 3/10/06), 923 So. 2d 625 (La. 2006) (striking black prospective juror based on a 5 (of 10) rating of the Jefferson Parish Sheriff's Office); *id.* at 2904 (same); *id.* (same); *id.* (same, except based on a 7 rating).

173. See, e.g., Peter A. Lyle, Note, *Racial Profiling and the Fourth Amendment: Applying the Minority Victim Perspective to Ensure Equal Protection Under the Law*, 21 B.C. THIRD WORLD L.J. 243, 246 (2001) ("This combined feeling of anger and dread still resonates deep within the heart of the black community. In fact, African Americans have endured an uneasy relationship with American law enforcement for decades."); U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, xix of Executive Summary (Mar. 16, 2011), available at http://www.justice.gov/crt/about/spl/nopd_report.pdf ("[C]ommunity members, especially members of racial, ethnic, and language minorities . . . expressed to us their deep distrust of and sense of alienation from the police.")

174. See DAVID A. HARRIS, AM. CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999), available at <http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways>; see also Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 795 (2011) (noting that "calling an African-American man a 'boy' can be racially derogatory").

burden.”¹⁷⁵ This sharing can “create a domino effect of anguish and anger rippling across an extended group.”¹⁷⁶ The social science literature also suggests that these negative attitudes toward the police tend to be cumulative, with the initial impression providing a durable frame with which future interactions are viewed, and influenced by place, with a strong correlation between negative police attitudes and neighborhood disadvantage.¹⁷⁷

175. Joe R. Feagin et al., *The Many Costs of Discrimination: The Case of Middle Class African-Americans*, 34 *IND. L. REV.* 1313, 1331 (2001).

176. *Id.* at 1355; see also Rod K. Brunson, “Police Don’t Like Black People”: African American Young Men’s Accumulated Police Experiences, 6 *CRIMINOLOGY & PUB. POL’Y* 71, 74 (2007) (“Specifically, African-Americans and Hispanics were more likely to acquire adverse vicarious information from family, friends, and neighbors, whereas whites were apt to receive such reports from the media. In addition, [researchers] note that respondents’ original assessments of police not only played an important role in how they interpreted subsequent personal and vicarious experiences but also helped shape their long-term attitudes toward police.”).

177. Negative attitudes towards the police appear to be strongest among black youth. In an effort to explore why, Professors Rod Brunson and Ronald Weitzer interviewed forty black teenagers from an inner-city neighborhood marked by concentrated poverty. See Brunson, *supra* note 176, at 71. He found that “83% of study participants reported having experienced harassment themselves, and 93% reported that someone they knew had been harassed or mistreated.” *Id.* at 80 n.8. Not only did the black youth report feeling over-policed, but the interactions themselves were a source of animosity, as respondents reported harsh and demeaning verbal treatment, and over-aggressive compliance techniques, such as making the youth lie down on the pavement and submit to being searched during routine pedestrian and traffic stops. *Id.* at 83–85. Brunson quotes three of the adolescent respondents who collectively shape a troubling portrait of the relationship between those sworn to protect and the citizens whom they are supposed to serve:

“I don’t trip off the police ‘cuz I know they ignorant.” Jermaine replied, “It make me feel mad that just looking suspicious will get you pulled over.” And Andrew explained, “I start feeling violated sometimes, but then I think, nah, that’s something I should expect ‘cuz that’s just the police. I figure since they got some authority and can do whatever they want to do, they gonna do it.”

Id. at 87 (emphasis in original).

The Department of Justice Report on the NOPD echoes this lack of respect for the public. See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, xix of Executive Summary (Mar. 16, 2011), available at http://www.justice.gov/crt/about/spl/nopd_report.pdf (“Outside the Department, community members, especially members of racial, ethnic, and language minorities, and the LGBT communities, expressed to us their deep distrust of and sense of alienation from the police.”); *id.* at 102 (“Minority community groups nearly uniformly said that the police rarely reach out to them, for any purpose. One member of a Vietnamese community organization reported that ‘[a] lot of the young Vietnamese people who get shot in this community, we know who shot them but the New Orleans police don’t do anything. They don’t talk to us. They don’t build community

Racialized policing in Louisiana contributes to minority group members feeling differently about law enforcement.¹⁷⁸ In March 2011, the United States Department of Justice released its findings from an extensive civil investigation of the New Orleans Police Department (“The Report”). Orleans Parish is just across the Crescent City Connection from Jefferson Parish. Orleans is a majority-minority community, with a 60.2% black population.¹⁷⁹ “Far too often,” the DOJ Report began, “officers show a lack of respect for the civil rights and dignity of the people of New Orleans. . . . [T]oo many officers of every rank either do not understand or choose to ignore the boundaries of constitutional policing.”¹⁸⁰ The Report emphasized the “troubling disparities in [the] treatment of the City’s African-American community,”¹⁸¹ and concluded that the “NOPD . . . failed to take sufficient steps to detect, prevent, or address bias-based profiling and other forms of discriminatory policing on the basis of race”¹⁸²

relationships.”) (alteration in original); *id.* (citing an anonymous member of NOPD’s leadership: “I’m trying to get officers to understand that the public just wants to know why they are being detained, the purpose of the citation, what are my recourses and just show me some professionalism, and some courtesy, and some respect. The public is hungry for this type of interaction.”).

178. Racialized policing in New Orleans is not limited to the city’s black residents. The DOJ report noted that “NOPD’s lack of a formal and comprehensive plan to serve individuals who have limited English proficiency results in the provision of inferior and, in some instances, no police assistance to a growing segment of the City’s population.” U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 41 (Mar. 16, 2011), *available at* http://www.justice.gov/crt/about/spl/nopd_report.pdf; *see also id.* at 41–42 (“No one in the Department was able to articulate how NOPD serves LEP residents when one of the “unofficial” interpreters is off-duty, in court, or otherwise unavailable.”); *id.* at 42 (“At one community meeting, a monolingual Spanish speaker reported calling police on four different nights regarding domestic violence, but receiving a response only once. She attributed the lack of response to the Department’s failure to understand her. At another meeting, a participant said that she was arrested in front of her small child after failing to comprehend and follow an officer’s orders.”).

179. U.S. CENSUS BUREAU, *State and County Quick Facts: Orleans Parish, Louisiana*, <http://quickfacts.census.gov/qfd/states/22/22071.html> (last visited Oct. 13, 2011).

180. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, v of Executive Summary (March 16, 2011), *available at*: http://www.justice.gov/crt/about/spl/nopd_report.pdf.

181. *Id.* at 35.

182. *Id.* at ix of Executive Summary.

E. The Detrimental Effects of Prosecutorial Exclusion of African Americans

Discriminatory exclusion impacts not only the stricken jurors and the defendant on trial but also “the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”¹⁸³ Research indicates that the public loses confidence in the system when minorities are unfairly excluded from juries. In 2006, Professor Sam Sommers conducted a mock jury experiment aimed at measuring the impact of juror diversity on jury deliberations and outcomes.¹⁸⁴ He used 200 jury-eligible participants, who, with the help of local judges and jury-pool administrators, were recruited largely at a Michigan courthouse where the jurors had arrived for jury service.¹⁸⁵ Sommers first divided participants into two types of juries: homogeneous juries (six white jurors) and heterogeneous juries (four white jurors and two black jurors).¹⁸⁶ He then provided each jury with either a race-neutral or race-salient voir dire questionnaire.¹⁸⁷ Next, he showed each jury a 30-minute Court-TV video trial summary of a black defendant in a sexual assault case.¹⁸⁸ Each jury then heard an experimenter read jury instructions and remind the jurors that their objective was to reach unanimity.¹⁸⁹ Finally, Sommers asked each jury to deliberate for 60 minutes.¹⁹⁰

Before deliberations, 41% of participants indicated that they felt the defendant was guilty.¹⁹¹ 30.7% of jurors on heterogeneous juries returned guilty verdicts compared to 50.5% of jurors on all-white juries.¹⁹² In the study, white jurors assigned to diverse juries returned guilty verdicts less frequently than white jurors serving on all white juries.¹⁹³ Heterogeneous juries also performed better across every measure of thoroughness and accuracy: The four white and two black juries deliberated longer (50.67 minutes

183. *Batson v. Kentucky*, 476 U.S. 79, 87 (1976).

184. Sameul R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY AND SOC. PSYCHOL. 597–612 (2006), available at <http://ase.tufts.edu/psychology/documents/pubssommersonracialdiversity.pdf>.

185. *Id.* at 602.

186. *Id.* at 601.

187. *Id.*

188. *Id.* at 602.

189. *Id.*

190. *Id.* at 603.

191. *Id.*

192. *Id.*

193. *Id.*

versus 38.49 minutes), discussed more case facts (30.48 versus 25.93), made fewer factually inaccurate statements (4.14 versus 7.28), had fewer factual inaccuracies left uncorrected (1.36 versus 2.49), cited more “missing” evidence (1.87 versus 1.07), raised more race-related issues (3.79 versus 2.07), discussed possible racism more freely (1.35 versus .93), and displayed less resistance at the very mention of racism (22% of comments met with resistance versus 100%) than all-white juries.¹⁹⁴ While black jurors raised race-related issues (e.g. the role of race in police investigations) most often, white jurors on diverse, heterogeneous juries raised these issues much more frequently than white jurors on all-white juries.¹⁹⁵ Interestingly, white jurors serving on diverse juries raised the possibility of racism more than both black jurors and white jurors on all-white juries.¹⁹⁶

Sommers’s results converged with other findings on the effects of racial diversity on jury outcomes. Professor William Bowers studied 74 capital jury trials involving a black defendant and a white victim, and found that juries with four or more white jurors have a much higher death sentencing rate than juries with two or more black jurors.¹⁹⁷ Simply adding a single black male altered the deliberation outcomes: juries with no black male members imposed death sentences in over 71% of cases.¹⁹⁸ When at least one black person served on the jury, that number plummeted to 42.9%.¹⁹⁹

Nevertheless, given the trajectory of Louisiana’s *Batson* jurisprudence, prosecutors will remain free to discriminate on the basis of race, so long as they do not divulge a race-based reason on the record.²⁰⁰ The anti-participation impact appears significant where, in many Louisiana parishes, prosecutors are excluding African Americans at three or four times the rate of white jurors.²⁰¹ Even though the availability of peremptory challenges was not originally intended to dilute the participation of racial minorities, it has that effect today.

194. *See id.* at 605.

195. *Id.*

196. *See id.* at 605–606.

197. William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look At The Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1501 (2004).

198. William J. Bowers 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, 193 (2001).

199. *Id.*

200. *See supra* Part III.C. The issue becomes even more troublesome because there is evidence that prosecutors strike African-American jurors as a result of unconscious bias. *See infra* Part IV.D.

201. *See supra* Part III.B.

IV. DEATH-QUALIFICATION

In cases in which the State seeks the death penalty, prospective jurors are “death-qualified.” Experts have summarized the process of death-qualification:

Jury selection in capital cases includes the process of “death qualification.” Unless a prospective juror can be death qualified s/he will be excluded from the jury. During “death qualification” a potential juror is questioned about her/his attitudes toward the death penalty. When a potential juror’s views on the death penalty will preclude her/him from rendering a verdict based on the law and the evidence, the juror cannot be “death qualified” and is excluded.²⁰²

In short, death-qualification weeds out those prospective jurors whose views on the death penalty—pro or anti—will impair them from fairly considering the evidence put forth by the parties.

A. The Historical Backdrop

A conscientious objection to a particular law or form of punishment was not a basis for a citizen to be excluded from jury service either in England or at the formation of the Common Law in the United States.²⁰³ The formation of the practice of excluding jurors who oppose capital punishment from juries in death penalty cases has a strong racial component. The 1859 Virginia trial of abolitionist John Brown reflects one of the earliest recorded instances of “death qualifying” the jury pool.²⁰⁴ Times had changed, and slavery states had to fight vigorously against the abolitionist movement. John Brown and other “evil-minded and traitorous persons” faced trial for “maliciously and feloniously advis[ing] slaves to rebel and make insurrection against their masters and owners, and against the Government and the Constitution and laws of the Commonwealth of Virginia.”²⁰⁵ The following question was put to potential jurors: “Have you any conscientious scruples against convicting a party of an offense to

202. Rick Seltzer et al., *The Effect of Death-Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 HOW. L.J. 571, 573–74 (1986).

203. See, e.g., G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87 (2008).

204. *Id.* at n.42 (citing *The Trial of John Brown, in THE LIFE, TRIAL AND EXECUTION OF CAPTAIN JOHN BROWN KNOWN AS “OLD BROWN OF OSSAWATOMIE” WITH A FULL ACCOUNT OF THE ATTEMPTED INSURRECTION AT HARPER’S FERRY 55–59* (Mnemosyne Publishing Co. 1969) (1859)).

205. *Trial of John Brown, supra* note 204, at 55–58.

which the law assigns the punishment of death, merely because that is the penalty assigned?"²⁰⁶ The trial judge and the parties must have understood that the "conscientious scruples" of a would-be abolitionist sympathizer juror could derail the inevitable death sentence against John Brown and send the wrong message to abolitionists.

B. Death-Qualification Today

The scope of death-qualification has narrowed since the trial of John Brown. The U.S. Supreme Court, in *Witherspoon v. Illinois*, held that a "sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."²⁰⁷ Today the process of death-qualification means eliminating from the jury any citizen who would be "substantially impaired in his or her ability to impose the death penalty under the state-law framework."²⁰⁸ Despite the modification in scope, modern death-qualification functions to eliminate a disproportionate number of black citizens from jury duty in capital cases.

Death-qualified jurors generally tend to be white.²⁰⁹ This is not solely a function of the greater population of white residents, as black people are more likely to be eliminated through death-qualification than are white people based upon attitudes toward capital punishment.²¹⁰ Anecdotal and statistical evidence from two recent capital trials in two different Louisiana parishes supports that the proposition is true in Louisiana. In *State v. Dorsey*, a 2009 capital trial out of Caddo Parish—a parish with a population that is

206. *Id.* at 63.

207. *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968).

208. *Uttecht v. Brown*, 551 U.S. 1 (2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

209. See Alicia Summers et al., *Death Qualification as Systematic Exclusion of Jurors With Certain Religious and Other Characteristics*, 40 J. APPLIED SOC. PSYCHOL. 3218 (2010).

210. See Melynda Price, *Performing Discretion or Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 103–04 (2009) ("[P]ersons who oppose the death penalty are not evenly distributed throughout the population. As a result, African Americans are more likely to be disqualified from service based on attitudes toward the death penalty."); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & HUM. BEHAV. 31, 46 (1984) (finding that death-qualified juries are more likely to exclude women and African-American men).

49% white and 47% African-American²¹¹—only 8 of 36 (22%) *Witherspoon*-qualified jurors were African-American.²¹² In *State v. Dressner*, out of Jefferson Parish, 25% of black jurors were *Witherspoon*-disqualified compared to 20% of prospective white jurors.²¹³

The anti-participation effects of death-qualification on black citizens is particularly troubling given the centrality of citizen-jurors to the evolving Eighth Amendment jurisprudence. As Justice Scalia wrote, dissenting in *Roper v. Simmons*, “juries maintain a link between contemporary community values and the penal system that [the] Court cannot claim for itself.”²¹⁴ Not only are black citizens more likely to be excluded from death penalty juries²¹⁵; also, because black citizens constitute a minority (number) of citizens, the majority of black citizens who oppose capital punishment are unable to exact policy change in legislatures.²¹⁶ What makes the dilution of the black community’s

211. U.S. CENSUS BUREAU, *State & Country QuickFacts: Caddo Parish, Louisiana*, <http://quickfacts.census.gov/qfd/states/22/22017.html> (last visited Oct. 24, 2011).

212. Brief for Appellant at 39, *State v. Dorsey* (No. 2010-KA-0216) (on file with Louisiana Supreme Court and with authors).

213. Brief for Appellant at ___, *State v. Dressner*, 45 So. 3d 127 (La. 2010) (No. 08-KA-1366) (on file with authors).

214. *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (internal quotation omitted); see also *Uttecht v. Brown*, 551 U.S. 1, 35 (2007) (Stevens, J., dissenting) (highlighting that “[m]illions of Americans oppose the death penalty” and that “[a] cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases”); *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) (“The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.”); Cohen & Smith, *supra* note 203, at 120–21 (“Death-qualification eliminates from juries those citizens who would find a death sentence to be cruel and unusual either generally or in a particular context. As a result, when appellate courts review the frequency with which juries impose a death sentence for a certain class of capital crimes, that measure is necessarily an inaccurate thermometer for determining how much a society has chilled to the idea of executing a certain class of offenders.”).

215. Even when African-American prospective jurors are death-qualified, their responses during death-qualification, which may indicate some hesitation towards handing out capital punishment, render them susceptible to being struck preemptorily. See Price, *supra* note 210, at 100–01.

216. See Adam M. Clark, *An Investigation of Death Qualification as a Violation of the Rights of Jurors*, 24 BUFF. PUB. INT. L.J. 1, 49–50 (2006) (“Taken together, the unequal numbers in executions, and in excludable death penalty beliefs, mean that the most powerful members of society are deciding whether the death penalty should be allowed, who should be executed, and who should be allowed to participate in the decision process. Those who are opposed

voice even more troubling is that the fact that black citizens in Louisiana—and nationally—tend to disapprove of capital punishment relative to white citizens is not accidental or random: African Americans who remember slavery and lynching, or who live in areas where racial profiling and police intimidation are still the norms, are often reticent to impose a death sentence.²¹⁷

C. The Reasons Many African Americans Are Not Death-Qualified are Attributable to State Action

The link between the death penalty and historical lynching likely influences the attitudes of black citizens on capital punishment. Between 1882 and 1968, close to 5,000 Americans were lynched, overwhelmingly in Southern states.²¹⁸ Three out of every four victims were black.²¹⁹ There were 95 reported lynchings in Louisiana between 1889 and 1896, the victim was black in roughly 85% of those cases.²²⁰ The noose evokes images of fear, intimidation, brutality, hatred, bigotry, mob rule, and lawlessness—the ugliest aspects of a racial past we would like to believe we have overcome. The powerful images of lynching continue to surface today. In September 2007, the nation’s attention turned to the small town of Jena, Louisiana where 20,000 people assembled to protest the prosecution of six young black men. Many heralded the moment as an opportunity to revitalize the civil rights movement and to reawaken a new generation to the racial bias and unequal treatment that continues to taint our

to the death penalty are not only in a minority group by belief, but in the power to effect change in society. They are deprived of the legislative means to end the death penalty due to social weakness, and then also deprived of access to the jury, the last forum which could be of use to them.”)

217. See, e.g., Price, *supra* note 210, at 103–04; see also 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, 19 n.40 (2001).

218. Charles J. Ogletree, *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15 (2002) (noting that “the Tuskegee Institute estimates that nearly 5,000 lynchings took place between 1882 and 1968”).

219. See, e.g., Sarah A. Soule, *Populism and Black Lynching in Georgia, 1890–1900*, 71 SOC. F. 431, 431 (1992–1993) (noting that 78% of lynching victims across the United States between 1889–1900 were black).

220. James M. Inverarity, *Populism and Lynching in Louisiana, 1889–1896: A Test of Erikson’s Theory of the Relationship between Boundary Crises and Repressive Justice*, 41 AM. SOC. REV. 262, 263 tbl. 1 (1976).

society.²²¹ The incident began when a group of white students hung several hangman's nooses under a tree in the high school yard.²²²

Racial tensions at the high school already were high. After white students allegedly hurled racial epithets at black students, a fight broke out, and a white student was kicked and punched by a group of six black students. The white student briefly lost consciousness. These black students—a bunch that included honors students and star athletes—were initially prosecuted for attempted murder. No charges were pressed against the white students who placed the noose in the yard. In an op-ed piece published in the *New York Times* the local District Attorney, Reed Walters, acknowledged the source of the outrage, writing “I can understand the emotions generated by the juxtaposition of the noose incident with the attack on Mr. Barker and the outcomes for the perpetrators of each.”²²³ He continued:

I cannot overemphasize how abhorrent and stupid I find the placing of the nooses on the schoolyard tree in late August 2006. If those who committed that act considered it a prank, their sense of humor is seriously distorted. It was mean-spirited and deserves the condemnation of all decent people. But it broke no law. I searched the Louisiana criminal code for a crime that I could prosecute. There is none.²²⁴

A joke is exactly how two Jefferson Parish assistant district attorneys described their actions when, in 2003, they wore neckties depicting a hangman's noose and grim reaper to the death penalty

221. See, e.g., Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1292 (2008); Joseph Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.–C.L. L. REV. 477 (2009).

222. Jeannine Bell, *The Hangman's Noose and the Lynch Mob: Hate Speech and the Jena Six*, 44 HARV. C.R.–C.L. L. REV. 329, 329 (2009) (“The controversy in Jena, Louisiana began innocently enough. On August 30, 2006, administrators at Jena High School held an assembly to discuss rules and policies for the upcoming year. According to reports, at the end of the assembly one Black student asked the assistant principal whether Black students were allowed to sit under the tree in the center of campus. In a description of the events, a reporter from *The Jena Times* noted that the question was asked in a joking manner and that all students, both Black and White, recognized the question as a joke and laughed. The vice principal told them that they could sit where they want. The next day, nooses were found hanging from a tree in the center of the high school's campus.”) (internal citations omitted).

223. Reed Walters, Editorial, *Justice in Jena*, N.Y. TIMES (Sept. 26, 2007), <http://www.nytimes.com/2007/09/26/opinion/26walters.htm>.

224. *Id.*

trial of a boy who was only sixteen years old at the time of the crime. The father of the defendant found the ties, especially the noose, to be clearly racist, saying “I mean, who else got strung up?”²²⁵

The noose is not the only symbol that reopens the wounds of racialized violence and inequality. In the four decades since he arrived in Louisiana, Carl Staples had not been called for jury duty a single time.²²⁶ On May 11, 2009, Mr. Staples appeared at the court, after finally being called to serve.²²⁷ Outside the main entrance to the courthouse, the Confederate flag welcomed visitors and veterans of the court alike.

During jury selection in a death penalty case, Mr. Staples explained to the court why that Confederate flag left him unable to take part in the administration of justice:

[The flag is] a symbol of one of the most, to me, one of the most heinous crimes ever committed to another member of the human race and I just don't see how you could say . . . you're here for justice and then again you continue to overlook this great injustice by continuing to fly this flag which continues to . . . put salt in the wounds . . . of people of color. I don't buy it. I don't buy it.²²⁸

The Assistant District Attorney successfully moved to strike Mr. Staples from the jury for cause (meaning that his opinion rendered him unqualified to serve as a juror).²²⁹ These symbols, the noose and the Confederate flag, remind black citizens of the savage inequalities that the state and federal government tolerated (and even promoted).²³⁰ Unfortunately, these insults are not

225. Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, N.Y. TIMES, Jan. 5, 2003, at A14.

226. See, e.g., Cecelia Trencosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 125 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734397## (describing the reaction of Carl Staples, a black resident of Shreveport, Louisiana, to seeing the Confederate flag in front of the Caddo Parish district courthouse as he reported for jury duty on May 11, 2009).

227. *Id.*

228. *Id.* at 37–38 (SSRN Pages).

229. *Id.* 38.

230. Exposure to these hateful symbols does not only reopen old wounds but also can be detrimental to a black citizen's mental and physical health. Elizabeth Brondolo et al., *Perceived Racism and Blood Pressure: A Review of the Literature and Conceptual and Methodological Critique*, 25 ANNALS OF BEHAVIORAL MEDICINE 61 (2003) (“Findings from CVR studies are clearer. These studies suggest that acute exposure to racism is associated with increases in cardiovascular activation. In addition, past exposure to racism may influence

isolated events, but the type of pain that is likely to be experienced over and over again throughout one's life.²³¹

D. The Detrimental Effects of Excluding African-American Jurors from Death Penalty Trials

The exclusion of black citizens from juries is likely to blame, at least in part, for the disparities that continue to exist in criminal sentencing in Louisiana. Justice Scalia has referred to the “undeniable reality” that “all groups tend to have particular sympathies and hostilities—most notably, sympathies toward their own group members.”²³² This phenomenon is known as ingroup bias. Professor Jerry Kang writes that “[i]ngroup bias is so strong that people explicitly report liking ‘ingroups’ even when they are randomly assigned to them . . . [and] even when the groups are made up.”²³³ The lack of representation of one's own race on a jury can be detrimental in two ways. First, white jurors might sympathize with white victims more than they do black victims. This might contribute to the race of the victim effect recently documented in Caddo and East Baton Rouge Parishes. It might also inhibit white jurors from experiencing an empathic response to mitigating evidence presented by black defendants.

There is some experimental evidence to bolster the explanation. A recent study used transcranial magnetic stimulation (TMS) to measure corticospinal activity level in participants who were shown short video clips of a needle entering into the hand of

current CVR to race-related and other stressors.”); *id.* (“Frequent, negative, and potentially race-related interpersonal exchanges can have a cumulative toll on health because they may elicit repeated demands for both anger and active coping. Attributional processes may influence the degree to which individuals anticipate these encounters and believe they can cope with them.”).

231. Richard Delgado & Jean Stefanic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 367 (2009) (“Like water dripping on stone, racist speech impinges on one who has heard similar remarks many times before. Each episode builds on the last, reopening a wound likely still to be raw.”); *Id.* at 368 (“Hate speech warps the dialogic community by depriving its victims of credibility. Who would listen to one who appears, in a thousand scripts, cartoons, stories, and narratives as a buffoon, lazy desperado, or wanton criminal? Because one consequence of hate speech is to diminish the status of one group vis-à-vis all the rest, it deprives the singled-out group of credibility and an audience, a result surely at odds with the underlying rationales of a system of free expression.”).

232. *Powers v. Ohio*, 499 U.S. 400, 424 (1991) (Scalia, J., dissenting).

233. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, n.37 (2010).

either a white or black target.²³⁴ Consistent with the ingroup empathic bias explanation, researchers here found that region specific brain activity levels are higher when a white participant views the clip of a white participant experiencing pain than when a white target sees a clip of a black target being subjected to pain.²³⁵ Significantly brain activity level ratings in response to witnessing outgroup member pain correlates with a participant's score on the Implicit Association Test, which the authors interpreted as evidence that this neuro-response is culturally learned rather than automatic.²³⁶

The second disadvantage that flows from the exclusion of black jurors in capital trials is that white jurors might treat black defendants more harshly. Thus, as Justice Thomas explained in *Georgia v. McCollum*, “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.”²³⁷ One reason why black citizens receive harsher punishments is because of the perception that blacks are both less than human and prone to violence.²³⁸ Prosecutors play into these stereotypes by referring to defendants in animalistic terms. For example, in *Darden v. Wainwright*,²³⁹ the Court noted the prosecution’s reference to the capital defendant in that case as an “animal” that “shouldn’t be out of his cell unless he has a leash on him.” Other instances include references to “animals” who armed themselves to shoot “white honkies,”²⁴⁰ a “blood crazed animal who hovered over [the victim’s] grave,”²⁴¹ and a “pervert, a weasel and a moron” “who raped his mother’s friend, would rape a dog and would rape each and every member of the jury.”²⁴² In a recent Louisiana case,²⁴³ the

234. Alessio Avenanti, *Racial Bias Reduces Empathic Sensorimotor Resonance with Other Race Pain*, 20 CURRENT BIOLOGY 1018 (2010), available at http://www.alessioavenanti.com/pdf_library/Avenanti_2010CurrBiol_MainText.pdf.

235. *Id.*

236. *Id.*

237. *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring).

238. See e.g. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 6 (2004) (noting the stereotypical belief that black citizens are hostile, violent and prone to criminality); Philip A. Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 306 (2008) (discussing the historical belief—and present day implicit bias—that black citizens are less human than white citizens).

239. 477 U.S. 168, 192 (1986).

240. *State v. Wilson*, 404 So.2d 968, 969 (La. 1981).

241. *People v. Martinez*, 377 N.E.2d 1222, 1229 (Ill. Ct. App. 1978).

242. *People v. Garreau*, 189 N.E.2d 287, 391 (Ill. 1963).

prosecution referred to the black capital defendant as “[a]nimals like that (indicating)” and implored the jury to “be a voice for the people of this Parish” and to “send a message to that jungle.”²⁴⁴

The use of animal imagery in reference to the accused stirs up the exact type of emotional response that the Supreme Court indicated trial courts should take pains to avoid: the kind that allows citizens to stop pondering the accused as an individual human being.²⁴⁵ Again, there is experimental evidence that non-human references to capital defendants influences the severity of the punishment imposed. Working from a dataset of more than 600 capital cases that proceeded to the penalty phase in Philadelphia, Pennsylvania between 1979 and 1999, Professors Philip Goff and Jennifer Eberhardt measured the frequency of dehumanizing, animalistic references to black capital defendants with similar references to white death-eligible defendants.²⁴⁶ The results are disturbing. Press coverage of black capital defendants (from the Philadelphia Inquirer) included, on average, nearly four times the number of dehumanizing references *per article* than articles covering white capital defendants. More disturbing still, there is a direct and strong correlation between the number of times an animalistic reference was made and the likelihood that the defendant was sentenced to death.²⁴⁷ The increased presence of black jurors could help offset the destructive impact.

V. THE INTER-RELATEDNESS OF NON-UNANIMOUS JURY VERDICTS, PEREMPTORY CHALLENGES, AND DEATH QUALIFICATION

Each of the policies discussed above, as well as the practices that continue in part because of the residual impact of those policies, independently denigrate the quality of justice administered in

243. *State v. Harris*, 820 So. 2d 471 (La. 2002) (transcripts containing the prosecutor’s references are on file with the Louisiana Supreme Court and the authors).

244. As another example of this line of thinking, “[o]ne of the officers who participated in the Rodney King beating of 1991 had just come from another incident in which he referred to a domestic dispute involving a Black couple as ‘something right out of *Gorillas in the Mist*.’” Goff et al., *supra* note 238, at 292.

245. *See id.* (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 340, n.7 (1985)) (discussing the “highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves”).

246. *See* Goff et al., *supra* note 238, at 292.

247. *Id.* at 304; *id.* at 305 (“despite the fact that we controlled for a substantial number of factors that are known to influence criminal sentencing, these apelike representations were associated with the most profound outcome of intergroup dehumanization: death”).

Louisiana by disproportionately excluding the voice of black citizens. Worse, these policies and practices are mutually reinforcing, creating cycles of exclusion. The most powerful voices in the legislature—and most of the time their most powerful constituents—do not live in areas of concentrated poverty and violence. The legislature makes laws, many fear-based, to punish and protect against violence that occurs in many of the areas where the legacy of slavery and second-class citizenship have created intergenerational poverty among citizens of color. Citizens are called to judge defendants charged with violating these laws, but prosecutors successfully eliminate many people of color through discriminatory jury selection even though many live in the areas where the crimes are committed, understand the police conduct in those areas, and live with the situational pressures and constraints that define such locations.

Consider how the cycle of exclusion feeds itself. Suppose a particular neighborhood is disproportionately poor. Historical discrimination has resulted in intergenerational poverty, low levels of education, and high unemployment rates among African Americans. These disadvantages result in a clustering of African Americans in the neighborhood. The comparative socioeconomic disadvantage of the neighborhood drives elevated crime rates. In turn, law enforcement increases patrolling of the area. Although blacks and whites use drugs at comparable rates, the increased police presence results in more arrests of black citizens from drug offenses.

In Louisiana, possession of marijuana is a misdemeanor offense.²⁴⁸ However, if a person is arrested for marijuana possession, second offense, the district attorney possesses the discretion to choose whether to charge the crime again as a “first offense,” resulting only in a misdemeanor conviction, or the prosecutor can choose to charge the same possession as a marijuana “second offense,” which is a felony that carries a maximum of five years imprisonment.²⁴⁹ This discretion exists regardless of the amount of marijuana involved. When the prosecutor is faced with the decision of whether to charge the marijuana possession as a misdemeanor or a felony, the point that the offender comes from a neighborhood of concentrated crime likely weighs on her mind. Furthermore, as the prosecutor reviews the case file of the black offender, stereotypes of blacks as crime-

248. LA. REV. STAT. ANN. §40:966 (Supp. 2011)

249. *Accord* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2586 (2010) (commenting that “state criminal codes, like the federal scheme, afford similar deference to prosecutorial discretion when prescribing recidivist enhancements”).

prone and dangerous, might influence the decision of how to charge the crime.

After the offender is charged with marijuana second and convicted of a felony, the felon juror exclusion rule operates to cabin the influence of black citizens in the jury box. Louisiana law prohibits a citizen who has been “convicted of a felony for which he has not been pardoned” from serving as a juror on a criminal jury.²⁵⁰ Although the Louisiana constitution mandates full restoration of the “rights of citizenship” upon “termination of state and federal supervision following conviction for any offense,”²⁵¹ the Louisiana Supreme Court does not consider jury service to be a right of citizenship.²⁵² Thus, skewed enforcement of criminal laws (for example, disproportionate arrests for drug possession crime despite equal rates of drug use) has the collateral consequence of excluding a disproportionate number of black citizens from jury service.

Those black citizens that are not excluded from jury service by felon exclusion laws, and are able to find the transportation and childcare to get to the district courthouse, are often excluded by prosecutors through peremptory challenges or death-qualification. Even if a black juror or two is selected onto the jury, the 10-2 verdict rule effectively silences their vote in most Louisiana Parishes. When the convicted defendant is sent away, families struggle to make up for lost income and support. When he has served his time and is released, the convicted citizen will face seemingly insurmountable obstacles in finding even the most menial of work. The cycle of poverty and instability persists, and with a felony record, ex-offenders cannot participate to effectuate change by sitting in judgment of another defendant on a criminal jury. Discrimination by design has contributed to self-sustaining structural inequality.

Rather than fight these battles one-by-one, we should seriously consider how to effect systemic change. The most obvious suggestions are to eliminate non-unanimous jury verdicts, eliminate felony enhancement provisions for status or other minor offenses, craft effective mechanisms for eliminating race-motivated jury selection (or else abolish peremptory challenges), and restore the right to serve on a jury, a basic right of citizenship,

250. See *State v. Jacobs*, 904 So. 2d 82, 91 (2005) (“LSA-C.Cr.P. art. 401 A(5) provides that in order to qualify as a juror, a person must ‘[n]ot be under indictment for a felony nor have been convicted of a felony for which he has not been pardoned.’”).

251. LA. CONST. Art. I, § 20.

252. See *Jacobs*, 904 So. 2d at 91.

to all ex-offenders. A few discrete alterations cannot solve the race disparity problems in Louisiana; the larger project requires massive shifts in the economic, social, and cultural landscape that could only be accomplished in the long term. Yet, these potential remedies are cost-effective ways to move in the right direction.

Closing the 1898 Constitutional Convention, E.B. Kruttschnitt provided solace for those terrified of what the Reconstruction Amendments meant for the supremacy of the white race in Louisiana:

I say to you, that we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.²⁵³

As residents of states across the nation pat themselves on the back for maintaining justice systems that at least pretend to operate on a different plane than justice systems in the Deep South, we ask the same question that Kruttschnitt asked more than a century ago: *Who will take responsibility for striking down the system?*

253. LOUISIANA CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 5, at 381.