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How The Narrative About Louisiana's Non-Unanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South

by Angela A. Allen-Bell*

I. INTRODUCTION

Stories are central to what lawyers do; yet, to the average member of the legal community, they exist only inconspicuously. In actuality, all cases start with a story. As lawyers do their work, that initial story

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I am honored to have been an invited panelist for the 2015-2016 Mercer Law Review Symposium entitled "Justice in the Deep South: Learning from History, Charting our Future" on October 16, 2015. I was enriched by my participation, largely due to the obvious commitment of many individuals whose concern for a meaningful event was evident from inception to completion of the Symposium. Beyond this, I owe an immeasurable debt of gratitude to my research assistant, Candace Newell, who, despite the demands of her last year of law school, willingly indulged me in depleting philosophical discussions of this topic and who responded graciously to my numerous requests for sources, many of which required travel, calls, digging, and many long hours of reading. Without her support, skills, and dedication, this work would not have taken form as it did. I also salute Christine Wells, who willingly answered the call to provide pro bono, law student representation in a 2015 case involving the composition of a Louisiana jury, and who graciously reviewed this work. Lastly, I thank the Bell family, Julian Johnson, and Kacy Collins-Thomas for generally supporting this project, for entertaining questions, performing editorial functions, and sharing feedback.

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grows and evolves. When judges enter the picture, the story is revised and, ultimately, the final chapter is written; then, the process begins again with an entirely different cast of characters. This Article advocates against impersonal, mechanized systems of justice that are built upon defendants, dockets, cases, quotas, formulas, and rapidity. This Article calls for the justice community to see cases in a highly personal way—to see cases as stories written about humans. This Article also calls for a developed consciousness when it comes to stories, for stories do so much more than just shape our understanding about an event. Stories justify our empathy or lack thereof. When this thinking is applied to the practice of law and the administration of justice, the old, formula-driven, fast-paced, impersonal system becomes unacceptable. This is so because there is a recognition that the stories are in fact the people who are embedded into the social landscape along with each of us. This new model requires a cognizance about the fact that docket numbers and cases involve actual humans—just like us—who just happen to dwell in a different place in our local, national, or global environment and whose truths, pains, and burdens are as real as ours. Doing this work will not be for naught. The advocated method of administering justice will lead to more meaningful judicial outcomes and will result in a more trusting public and a society that is not marred with social unrest.

This Article will simultaneously explore two pivotal matters: Louisiana's non-unanimous jury system (in twelve-person juries in non-capital cases) and the role legal storytelling plays in the delivery of and the administration of justice.¹ My aim, as both a messenger and a story

1. This Article is limited to an evaluation of instances where twelve-person juries are allowed to cast a judgment with fewer than twelve individuals voting in favor of a finding of guilt in non-capital, criminal cases involving hard labor sentences. This Article does not address civil jury practices and also does not address criminal juries that are composed of less than twelve members. Notwithstanding this, it is noted that the United States Supreme Court has determined that a non-unanimous conviction by a six-person jury violated the defendant's right to a trial by jury as guaranteed by the Sixth and Fourteenth Amendments. See *Burch v. Louisiana*, 441 U.S. 130, 131-32, 137 (1979). The High Court has also "declared that there do exist size and unanimity limits that cannot be transgressed if the essence of the jury trial right is to be maintained." *Brown v. Louisiana*, 447 U.S. 323, 331 (1980). The United States Supreme Court has also upheld convictions pronounced by nine of twelve jurors. See *Johnson v. Louisiana*, 406 U.S. 356, 364-65 (1972). Yet, the Supreme Court has declared juries of five unconstitutional in criminal trials. See *Ballew v. Georgia*, 435 U.S. 223, 245 (1978). It is the position of the High Court that in the instance of state court, criminal trials, "the Constitution permits juries of less than 12 members, but . . . it requires at least 6." *Burch*, 441 U.S. at 137. In certain military criminal proceedings, five member juries are allowed. See *United States v. Palma*, No. 38638, 2015 CCA LEXIS 444, at *30-31 (A.F. Ct. Crim. App. Oct. 19, 2015). A number

teller, is to bring light where darkness has persisted and to challenge readers to embrace the narrative versus counternarrative approach to dispensing justice in the Deep South and beyond. After the introduction, this Article will progress in four parts. Section II will unveil the narrative aspects of this story about Louisiana's non-unanimous jury system. It will serve as the substantive starting point for this conversation about justice as it relates to Louisiana's non-unanimous jury system by providing a legal overview of the applicable protections that Louisiana citizens have been assured. In Section III, the concept of a counternarrative is explained and applied to this particular matter of justice (Louisiana's non-unanimous jury system in non-capital cases). This section will endeavor to deconstruct the narrative presented in Section II. The aim of Section IV is to, as the Symposium theme suggests, ensure that we learn from history and use that history to chart our future. This is done by examining the following: how a lawyer's professional obligations require that lawyer to act towards the end of justice in this instance; how the refusal of the various branches of government to correct this injustice can lead to public mistrust; and, how inaction can cause racial tensions and outright public unrest. The Article ends with a conclusion in Section V.

II. THE NARRATIVE ABOUT LOUISIANA'S NON-UNANIMOUS JURY LAW

When it comes to Louisiana's non-unanimous jury system in non-capital, criminal cases involving twelve-person juries, a narrative exists. Those who are idealistic about America's justice system and its accompanying narrative were not just born optimists. There are specific laws that entice citizens to believe in the integrity of the judicial and jury systems. The Sixth Amendment to the United States Constitution² states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.³

of states allow non-unanimous verdicts in civil trials. See J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1494 (1996).

2. U.S. CONST. amend. VI.

3. *Id.*

Louisiana's constitution follows suit. Louisiana's constitution guarantees impartial trials⁴ and promises the protection of life and liberty.⁵ It promotes the "welfare of the people," ensures "domestic tranquility," and promises to secure "the blessings of freedom and justice."⁶ The Louisiana Constitution continues:

All government . . . originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people.⁷

From its creation until the end of Reconstruction and the withdrawal of federal troops, Louisiana required unanimous jury verdicts.⁸ Majority or non-unanimous verdicts were introduced in Louisiana in 1880 when, at that time, defendants could be convicted by vote of only nine of twelve jurors.⁹ Non-unanimous verdicts made its way to the Constitution of 1898 by way of Article 116.¹⁰ The citizens of Louisiana did not vote to adopt the 1898 constitution.¹¹ A legislative act granted authority to officials to convene and create a constitution.¹² "Both the 1913 and 1927 Constitutions reproduced nearly verbatim the provisions of Article 116 of the 1898 Constitution relating to less-than-unanimous jury verdicts."¹³ "All other jury provisions, including the requirement that nine out of twelve jurors concur when the punishment is necessarily at hard

4. See LA. CONST. ANN. art. I, § 16 (2005).

5. See LA. CONST. ANN. pmbl. (2005).

6. *Id.*

7. LA. CONST. ANN. art. I, § 1 (2005).

8. See *Louisiana v. Hankton*, 122 So. 3d 1028, 1031-32 (La. Ct. App. 4th Cir. 2013).

9. See THOMAS AIELLO, *JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA* 12 (2015).

10. LA. CONST. art. 116 (1898); see *Hankton*, 122 So. 3d at 1033; see also AIELLO, *supra* note 9, at 9 (discussing Article 116 of Louisiana's 1879 constitution).

11. See OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA: HELD IN NEW ORLEANS, TUES., FEB. 8, 1898, at 384 [hereinafter LOUISIANA CONSTITUTIONAL CONVENTION] (at the end of the Convention, "The President . . . announced that one hundred and twelve delegates had signed the Constitution in open Convention and declared that the Constitution of 1898 had been duly signed by a majority of the delegates . . . and proclaimed the Constitution of 1898 duly adopted and ordained and delivered . . ."); see also *Hankton*, 122 So. 3d at 1038 (noting that "the general electorate of Louisiana did not vote on the approval the 1898, 1913, or 1927 Constitutions").

12. See LOUISIANA CONSTITUTIONAL CONVENTION, *supra* note 11, at 1 (referencing Act No. 52).

13. *Hankton*, 122 So. 3d at 1038.

labor, remained constant until the 1974 Constitution, which is the current version.¹⁴

The current version of Louisiana's constitution reads, in pertinent part:

A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. *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.* A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict.¹⁵

The state code also contains a complimentary piece of legislation. It reads, in pertinent part:

Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. *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.* Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.¹⁶

Oregon is much like Louisiana when it comes to legislation on non-unanimous juries.¹⁷ This practice is allowed there as well.¹⁸ A

14. See *id.* It appears this change was made as a result of the *Johnson v. Louisiana*, 406 U.S. 356 (1972), opinion.

15. LA. CONST. ANN. art. I, § 17 (2005) (emphasis added). This version of the constitution was passed in 1974. See *Hankton*, 122 So. 3d at 1038 (noting that the "last constitution that was approved by the people before the 1974 Constitution was in 1879"); see also LA. CONST. art. 116 (adopted May 12, 1898) (stating "cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom concurring may render a verdict").

16. LA. CODE CRIM. PROC. ANN. art. 782 (2003) (emphasis added).

17. See Andrew Cohen, *Will The Supreme Court Address Louisiana's Flawed Jury System?*, THE ATLANTIC (Apr. 23, 2014) <http://www.theatlantic.com/national/archive/2014/04/Louisiana/360726> ("Oregon requires a unanimous verdict in first-degree murder cases, an 11-1 verdict in all other murder cases, and of course doesn't have the history of racial disparity that has marked Louisiana law for centuries. So, alone in the nation, in a state notorious for racial disparities in its justice systems, Louisiana allows a defendant to be convicted and sentenced to life in prison without parole based upon a 10-2 vote.").

18. It also exists, in a limited way, outside of the United States. See Kelso, *supra* note 1, at 1493 ("Although England utilized unanimous verdicts for centuries, in 1967, Parliament passed legislation authorizing 10-2 majority verdicts in criminal trials as long as the jury deliberated for at least two hours. This legislation was passed after authorities learned that several defendants associated with organized crime had been bribing and

challenge to the Oregon system made its way to the United States Supreme Court in 1972. That case, *Apodaca v. Oregon*,¹⁹ has been consistently hailed a key precedent even to the present. *Apodaca* involved three defendants convicted by non-unanimous juries (two by a jury of eleven to one and one by a jury of ten to two) under a system that allowed non-unanimous juries in non-capital cases.²⁰ Their challenge was brought pursuant to the Sixth²¹ and Fourteenth Amendments.²² The Supreme Court held that these convictions did not violate the right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment.²³

The Supreme Court provided brief reasoning. The Court's analysis began with the parallel it drew between the *Apodaca* challenge and its 1970 ruling in *Williams v. Florida*,²⁴ raising the question of whether the Sixth Amendment required all juries to consist of twelve people. In reflection, the Court recalled that *Williams* concluded that a unanimous jury was not required.²⁵ After this contemplation, the Court took note of the fact that the requirement of jury unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the eighteenth century.²⁶ Next, the Court explored the legislative history of the Sixth Amendment of the United States Constitution and then the Court pondered the function of a jury in civilized society.²⁷ The Court said, "the purpose of trial by jury is to prevent oppression by the Government by providing a safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."²⁸ The court interpreted this to mean what was central to ensuring Sixth Amendment protections were the human interplay and commonsense judgments that flowed from the jury process and not necessarily the number of humans that partook in this process.²⁹ In the view of the Court, the Sixth Amendment is satisfied when there is "a group of laymen representative of a cross section of the community

intimidating members of their juries.").

19. 406 U.S. 404 (1972).

20. *Id.* at 405-06.

21. U.S. CONST. amend. VI.

22. U.S. CONST. amend. XIV.

23. *Apodaca*, 406 U.S. at 411-12.

24. 399 U.S. 78 (1970).

25. *Apodaca*, 406 U.S. at 406.

26. *Id.* at 407-08.

27. *See id.* at 410.

28. *Id.* at 409-10 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)) (internal quotation marks omitted).

29. *Id.* at 410-11.

who have the duty and the opportunity to deliberate, free from outside attempts at intimidation³⁰ The Court in *Apodaca* said there was no functional difference in a verdict rendered by a vote of eleven to one, ten to two, or a unanimous vote of twelve.³¹ Near the end of its analysis, the Court entertained the argument that unanimity was necessary to avoid convictions from happening without the acquiescence of minority elements within the community.³² This argument was rejected on two grounds.³³ First, the Court declared that the Constitution only forbids systematic exclusion of identifiable segments of the community.³⁴ Second, the Court suggested there was no merit to the thinking that a minority voice is not represented simply because that viewpoint might be outvoted in the end.³⁵

Interestingly, Justice Thurgood Marshall, a justice who spent the earlier part of his career attacking systemic racism in the South, dissented (along with others). Justice Marshall and the dissenters expressed that a unanimous verdict in the state court system was an essential element for ensuring Sixth Amendment protections.³⁶ It is also noteworthy that the Court was deeply divided over the vote in *Apodaca*, with four justices dissenting.³⁷

The narrative is a story or account of events that is widely believed to be true. The narrative can be misleading though. The narrative seems harmless, but, when really understood, one knows that the dominant narrative often reinforces oppression. In the case of Louisiana's non-unanimous jury system in non-capital cases, a narrative has been created. It was shaped by the existence of legitimate laws that appear to be race-neutral and purely written out of sheer concern for public protection and public well-being. At the same time the state of Louisiana and the federal government assure specific trial protections, Louisiana has laws on the books making it legal to convict a defendant

30. *Id.*

31. *Id.* at 411.

32. *Id.* at 412-13.

33. *Id.* at 413.

34. *Id.*

35. *Id.* at 413-14.

36. See generally *id.* at 414 (Stewart, Brennan & Marshall, JJ., dissenting).

37. See Cohen, *supra* note 17 ("In *Apodaca*, eight justices agreed that the Sixth Amendment applied identically to the federal and state criminal trials. Four of the eight concluded that there was no right to a unanimous jury either in federal or state prosecutions. Four more of the eight came to the precisely opposite conclusion—that both state and federal criminal cases had to include unanimous juries. Justice Powell split the baby—unanimous for federal criminal trials, non-unanimous for state criminal trials—without spending great energy explaining why.").

with less than a majority of persons on the jury voting in favor of a conviction.

III. THE COUNTERNARRATIVE: LEARNING FROM HISTORY

A counternarrative is a counter-story. The counternarrative is used to give voice to people whose voice is often muted or overshadowed by the narrative. It does not necessarily discredit the beliefs advanced by the narrative, it merely raises differing perspectives. In terms of assessing justice down South and charting our futures where justice is concerned, it is my position that justice can never be achieved without the counternarrative being a part of the equation. I espouse the view that those who genuinely seek to achieve justice must forever be wedded to the practice of ensuring, in every legal scenario, that no result is reached before the narrative and the counternarrative have been placed on par and each meaningfully considered. Using Louisiana's non-unanimous jury law, I will venture to illustrate how this is done. This will involve exploration of the historical context of this law, a look at the judicial response to this law, an examination of related studies and empirical data, and attention to some equitable considerations.

A. *Historical Context*

"Slavery had been introduced into the southern colonies in the 1600s with the argument that whites, operating alone, were incapable of large-scale cotton production."³⁸ President Abraham Lincoln issued the Emancipation Proclamation on January 1, 1863.³⁹ This was done while the Civil War was ongoing.⁴⁰ This proclamation intended to free the slaves in Southern Confederate states.⁴¹ It did not do that, nor did it end slavery. "A civil war had to be won first, hundreds of thousands of lives lost, and then—only then—were slaves across the South set free."⁴² Louisiana was openly hostile towards the federal government for encroaching upon its coveted social and economic enterprise: slavery. One manifestation of this came in the form of a 1863 Louisiana law that

38. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 26 (2008).

39. See *Proclamation No. 95, Regarding the Status of Slaves in States Engaged in Rebellion Against the United States*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=69880> (last visited Nov. 2, 2015).

40. The Civil War began on April 12, 1861 and ended on May 9, 1865. See generally MARGARET E. WAGNER, *THE LIBRARY OF CONGRESS ILLUSTRATED TIMELINE OF THE CIVIL WAR* (2011).

41. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDESS* 20 (2010).

42. *Id.*

imposed an additional oath upon lawyers practicing in the state.⁴³ If a lawyer did not comply, then that lawyer was not allowed to practice in the state.⁴⁴ The compliant lawyers proclaimed:

I [] do solemnly swear (or affirm,) that I have not at any time since the 26th day of January, 1861, taken an oath to support the Government or the Constitution of the United States, or in any way declared allegiance to the United States; nor have I given any information or support, aid or comfort to the United States, to any of its officers or soldiers, or to any other person for the benefit of the enemy; nor have I directly or indirectly bought or through any person gratuitously received a certificate of allegiance to the United States, without having taken the oath therefor, during the existence of the war waged against the Confederate States by the United States, so help me God.⁴⁵

In the following year, the Thirteenth Amendment⁴⁶ abolished slavery. It was ratified on December 6, 1865, several months after the Civil War had ended.⁴⁷ It reads, in pertinent part: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."⁴⁸ In the Deep South, legality has since been at a stalemate with practicality.

In the post-Civil War South, "recognition of freed slaves as full humans appeared to most white southerners not as an extension of liberty but as a violation of it, and as a challenge to the legitimacy of their definition of what it was to be white."⁴⁹ "The notion that their farms could be operated in some manner other than with groups of black laborers compelled by a landowner or his overseer to work as many as twenty hours a day was antithetical to most whites."⁵⁰ "The loss of slaves left white farm families . . . on expansive plantations . . . not just financially but intellectually bereft."⁵¹

"The Civil War settled definitively the question of the South's continued existence as a part of the United States, but in 1865 there was no strategy for cleansing the South of the economic and intellectual addiction to slavery" or the racial caste system that had governed life in

43. See Act No. 15, 1863 La. Acts 11.

44. See *id.*

45. *Id.*

46. U.S. CONST. amend. XIII.

47. See generally WAGNER, *supra* note 40.

48. U.S. CONST. amend. XIII, § 1 (emphasis added).

49. BLACKMON, *supra* note 38, at 41.

50. *Id.* at 26.

51. *Id.*

the South for so long.⁵² “Beginning in the late 1860s . . . every southern state enacted an array of interlocking laws essentially intended to criminalize black life” or maintain the caste system that had long existed in the South.⁵³ In 1864, Louisiana enacted a law that allowed for a trial to take place within forty-eight hours of notice being given to the defendant.⁵⁴ In 1865, Louisiana centralized its prison operations by moving all inmates doing hard labor sentences to the state penitentiary in the capitol, Baton Rouge.⁵⁵ The 1865 legislature then created The Board of Control of Louisiana Penitentiary and gave them “direction and complete control” over the management of that facility and its inmate population.⁵⁶ The legislature declared:

Prisoners shall be made to labor from sunrise to sunset throughout the year, and shall be employed exclusively in rebuilding and repairing the prison, the manufacture of brick, such cotton and woolen stuffs as the present machinery can make, such mechanical pursuits as necessary for the use of the prison, and if the Board of Control deem it proper, a tannery may be established and operated within the enclosure.⁵⁷

In that same year, Louisiana passed laws making vagrancy a crime subject to up to six months at hard labor⁵⁸ and subjecting individuals to civil liability for persuading or enticing away, feeding, harboring, or secreting a person from the employer with whom he or she contracted.⁵⁹ The Louisiana legislature also made it legal to apprentice orphans.⁶⁰ In 1865, Louisiana also passed a law making it a crime to enter a plantation without permission of the owner.⁶¹ Perhaps this was how plantation owners would hide their continuation of slavery from the public.

The number of imprisoned African Americans increased from less than one percent before 1861 to as much as ninety percent in certain counties

52. *Id.* at 41.

53. *Id.* at 53.

54. *See* Act No. 42, 1864 La. Acts 60.

55. *See* Act No. 34, 1865 La. Acts 54.

56. *See id.*

57. *Id.* § 7; Tannery has been defined as the manufacturing and tanning of leather and the sale of these products. *See* 2 FLETCHER CORP. FORMS § 8:139 (4th ed. 2011).

58. *See* Act No. 12, 1865 La. Acts 18 (crimes and offenses).

59. *See* Act No. 16, 1865 La. Acts 24 (providing for the punishment of persons for tampering with, persuading or enticing away, harboring, feeding or secreting laborers, servants, or apprentices).

60. *See* Act No. 19, 1865 La. Acts 28, § 1.

61. *See* Act No. 11, 1865 La. Acts 16.

and states after 1865.⁶² The same pattern held true in Louisiana.⁶³ A Louisiana newspaper editorial speaks to the coincidental nature of this spike in crime. It says of the recently freed slaves: "His thefts, though countless in number, have been of the pettiest character, and the sum total of the thieving of the whole race since emancipation would not equal, in money value, the salary grab of the late Congress."⁶⁴ Another newspaper praised a certain Louisiana judge for the manner he disposed "of persons guilty of minor offenses" because he, instead of sentencing "them to the parish jail . . . sends them to the penitentiary."⁶⁵

"By the end of Reconstruction in 1877, every formerly Confederate state except Virginia had adopted the practice of leasing black prisoners into commercial hands."⁶⁶ Louisiana's convict leasing system has been described as: "a profit-based system that provided additional revenue to the state" that was also "a racial caste system that provided something resembling slavery for a crop of prisoners who were overwhelmingly black."⁶⁷ It is believed that Louisiana first leased state prisoners to private companies in 1866.⁶⁸ Louisiana officially participated in this convict leasing system until 1901.⁶⁹

What was taking form in Louisiana (insofar as plotting to transfer the newly freed slaves into the criminal justice system) did not just unfold. It was well orchestrated by respected leaders who felt so empowered to further their agendas that they did not feel the need to veil it. Instead, they spoke of their intentions in as public of a forum as the Louisiana 1898 Constitutional Convention (1898 Convention). Ernest Benjamin Kruttschnitt was a celebrated local leader and a distinguished member of the Louisiana bar who was also a white supremacist.⁷⁰ One of his greatest talents was his ability to circumvent "legal scrutiny through the

62. See DENNIS CHILDS, *SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY* 9 (2015).

63. See AIELLO, *supra* note 9, at 10 (mentioning that, in Louisiana, the "abolition of slavery changed the penitentiary from a predominately white institution to one that was majority black" and it changed the nature of "prison work from industrial to agricultural . . . as white politicians sought to reinstitute a form of control over its newly freed workforce.").

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

65. *Louisiana Opinions*, THE DAILY PICAYUNE, Mar. 8, 1897, at 12.

66. BLACKMON, *supra* note 38, at 56.

67. AIELLO, *supra* note 9, at 11-12.

68. See *Slavery By Another Name Timeline and Map*, PBS, <http://www.pbs.org/tpt/slaavery-by-another-name/slavery-timeline/#louisiana> (last visited Nov. 11, 2015).

69. See BLACKMON, *supra* note 38, at 351.

70. See Bidish Sarma, *An Enduring (and Disturbing) Legacy: "Race-Neutrality," Judicial Apathy, and the Civic Exclusion of African-Americans In Louisiana*, 1 HLRE 49, 49-50 (2011).

deployment of race-neutral language in the laws he drafted and the Constitution he helped create.⁷¹ Kruttschnitt was president of the 1898 Convention.⁷² "The 134 delegates in the 1898 Convention were all white."⁷³ This convention was held at a time when the state needed to be rebuilt as a result of the Civil War.⁷⁴ The pressing issues to be settled at the 1898 Convention were voting rights (suffrage), creation of a public education system, and criminal justice. Kruttschnitt and others involved with the authorship of the legislation that came out of the 1898 Convention "achieved their goal *with* the law, rather than against it."⁷⁵

The record of the 1898 Convention captures those in attendance expressing that they favored "radical change in the judicial system of the State."⁷⁶ As for what they wanted, they expressed: "We need a system better adapted to the peculiar conditions existing in our State."⁷⁷ They continued: "[E]fficiency should be the first and primary consideration; economy should be secondary."⁷⁸ During the 1898 Convention, they established the first-ever board of control over all charitable and correctional institutions.⁷⁹ Where corrections were concerned, this board placed tremendous powers in the hands of a few. At the end of the ninety-four-day convention, Thomas J. Semmes addressed the 1898 Convention and shared these trenchant closing remarks, in pertinent part:

Now then, what have we done? . . . Our mission was, in the first place, to establish the supremacy of the white race We have established . . . white manhood suffrage Now, what is section 5 [of the ordinance on suffrage]? . . . It is a declaration upon the part of this Convention, that no white man in this State—that's the effect but not the language—that no white man in this State who has heretofore exercised the right of suffrage shall be deprived of it, whether or not he can read or write, or whether he possesses the property qualification Now, why was this exception made? . . . Louisiana is one of the most illiterate States in the Union We, therefore, have in this

71. *Id.* at 50.

72. See LOUISIANA CONSTITUTIONAL CONVENTION, *supra* note 11, at 12.

73. *Hankton*, 122 So. 3d at 1034.

74. See LOUISIANA CONSTITUTIONAL CONVENTION, *supra* note 11, at 31 (On the conversation of public education, it was said that "[t]he most revolting scheme which was suggested and urged, most irritating and dangerous, was the proposition for mixed schools, the co-education of the races, the late masters and the late slaves, Caucasian and African, in the same schools and with the same teachers.").

75. Sarma, *supra* note 70, at 49, 54 (emphasis in original).

76. LOUISIANA CONSTITUTIONAL CONVENTION, *supra* note 11, at 76.

77. *Id.*

78. *Id.*

79. See *id.* at 378.

State a large white population whose right to vote would have been stricken down, but for the operation of section 5 Now these people, these simple, good people, whose ancestors have been living there for a hundred and fifty years, surrounded by circumstances which debared them from all the advantages of education, could any man with a heart in his breast be willing to strike them down and reduce them to the condition of the black race . . . ?⁸⁰

While much of the above-quoted language involves voting, an entirely different topic from non-unanimous juries, the text goes far in exposing intentions and even further in capturing the fact that there was a finesse about drafting what appeared to be race-neutral legislation, which was, in fact, legislation that was racist to the core. With this understanding, the conversation of non-unanimous juries cannot be trivialized or easily dismissed as the work of conspiracy theorists consumed with thoughts of racist plots.

In addition to the financial and social incentives for Louisiana's non-unanimous laws, there were also documented fears about blacks serving on juries. In the words of a Louisiana citizen who authored a post-emancipation editorial about African Americans serving on juries when another African American was on trial: "[H]e becomes at once his earnest champion, and a hung jury is the usual result."⁸¹ Another said the recently emancipated were "wholly ignorant of the responsibilities of jurors, unable to discriminate between truth and falsehood in testimony, and capable only of being corrupted by bribes."⁸²

B. Judicial Response

Prior to 1972, unanimity was a constitutional requirement.⁸³ As of 1972, the High Court gave its endorsement to non-unanimous verdicts, finding that they "did not interfere with the meaningful participation of any of the various segments of society, assuming that juries would continue deliberations until all issues were fully discussed."⁸⁴ In the case of this law and the state judicial branch, defendants and some lawyers have consistently approached the judicial system for help in post-*Apodaca* days.⁸⁵ Mindful of a 1979 United States Supreme Court

80. *Id.* at 374-75.

81. *Future of the Freedman*, *supra* note 64.

82. *The Present Jury System*, THE DAILY PICAYUNE, Apr. 20, 1870, at 4.

83. See Kelso, *supra* note 1, at 1493.

84. *Id.* at 1494.

85. See, e.g., *Louisiana v. Belgard*, 410 So. 2d 720, 726, 727 (La. 1982) (convicted of second degree murder by a verdict of eleven to one and sentenced to twelve years at hard labor).

decision,⁸⁶ holding that a conviction by a non-unanimous six person jury for a non-petty offense violates an individual's right to a trial by jury, some have tried to have that holding extended to twelve-person juries in non-capital cases.⁸⁷ Some have contended Louisiana's non-unanimous jury laws are illegal because they are contrary to the obligation Louisiana assumed upon admission into the Union⁸⁸ or because they compromise ample consideration of a case.⁸⁹ Some have complained Louisiana's laws increase "the likelihood of a wrongful conviction and remove a crucial safeguard against convicting innocent men and women."⁹⁰ Others have claimed their non-capital convictions by non-unanimous juries amount to "cruel, excessive or unusual punishment."⁹¹ Some have asserted general constitutional challenges.⁹² Some have specifically argued the law violates the right to a trial by jury guaranteed by the Sixth Amendment to the United States Constitution or violates either the Due Process Clause⁹³ or the Equal Protection Clause, or both,⁹⁴ as guaranteed by the Fifth⁹⁵ and Fourteenth Amend-

86. In *Burch*, the Court held that unanimity is constitutionally required where a jury is composed of only six persons. 441 U.S. at 137.

87. See *Louisiana v. Green*, 390 So. 2d 1253, 1260-61 (La. 1980) (where a man convicted of armed robbery raised a constitutional challenge and argued that the reasoning in *Burch* applied to a twelve person jury as well); *Louisiana v. Jones*, 381 So. 2d 416, 418 (La. 1980) (in this case, a man convicted of armed robbery by a verdict of ten to two, the court distinguished the unanimity required of a six person jury).

88. See *Louisiana v. Carey*, 506 So. 2d 813, 815 (La. 1987) (deeming that "an act for the admission of the State of Louisiana into the Union, does not require that the . . . state constitution and statutes be identical with the federal unanimous jury requirements" (quoting *Louisiana v. Hodges*, 349 So. 2d 250, 260 (La. 1977))).

89. See *Louisiana v. Blow*, 46 So. 3d 735, 751 (La. Ct. App. 2d Cir. 2010) (convicted of solicitation of murder by a verdict of ten to two and sentenced to fifteen years at hard labor).

90. Brief for Innocence Project New Orleans as Amici Curiae in Support of Petitioner at 1, *Jackson v. Louisiana*, 135 S. Ct. 2321 (2015) (No. 14-8850), 2014 U.S. S. Ct. Briefs LEXIS 1462, at *1.

91. *Louisiana v. Morning*, 149 So. 3d 925, 931 (La. Ct. App. 2d Cir. 2014) (convicted of aggravated rape by a verdict of ten to two and sentenced to a mandatory term of life imprisonment).

92. See *Louisiana v. Robinson*, 106 So. 3d 1028, 1031, 1031-32, 1035 (La. Ct. App. 2d Cir. 2012) (convicted of armed robbery by a verdict of ten to two and sentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence); *Louisiana v. Blanchard*, No. 2010 KA 0014, 2010 La. App. Unpub. LEXIS 417, at *1, *2 (La. Ct. App. 1st Cir. July 8, 2010) (convicted of several counts of indecent behavior with a juvenile).

93. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

94. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

95. U.S. CONST. amend. V.

ments to the United States Constitution.⁹⁶ Some have, rather cleverly, argued that two of twelve jurors declining to convict constitutes proof that reasonable doubt exists.⁹⁷ Some defendants have even directly challenged these laws based on their racist roots.⁹⁸ In almost all of

96. See *Louisiana v. Brown*, 173 So. 3d 1262, 1266, 1268 (La. Ct. App. 5th Cir. 2015) (convicted of armed robbery and aggravated flight from an officer by a verdict of eleven to one and a seventy-seven year sentence was imposed); *Louisiana v. Odowd*, No. 2013 KA 1107, 2014 La. App. Unpub. LEXIS 175, at *2, *10 (La. Ct. App. 1st Cir. Mar. 24, 2014) (convicted of two counts of aggravated incest and sentenced to twenty-five years at hard labor without the benefit of parole); *Louisiana v. Williams*, 93 So. 3d 830, 832, 836 (La. Ct. App. 2d Cir. 2012) (convicted of second degree murder by a verdict of eleven to one and sentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence); *Louisiana v. Barnett*, 70 So. 3d 1, 2, 4 (La. Ct. App. 2d Cir. 2011) (convicted of one count of second degree murder and one count of attempted second degree murder by a verdict of ten to two and sentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence); *Louisiana v. Johnson*, 57 So. 3d 1087, 1089, 1098-99 (La. Ct. App. 2d Cir. 2011) (convicted of second degree murder by a verdict of ten to two and a life sentence was imposed); *Louisiana v. Juniors*, 918 So. 2d 1137, 1138, 1147 (La. Ct. App. 3d Cir. 2005) (convicted of second degree murder by a vote of eleven to one and sentenced to a mandatory sentence of life imprisonment at hard labor); *Louisiana v. Williams*, 747 So. 2d 1256, 1261 (La. Ct. App. 2d Cir. 1999) (convicted of armed robbery and second degree kidnapping by a ten to two vote); *Louisiana v. Conway*, 556 So. 2d 1323, 1324, 1329-30 (La. Ct. App. 3d Cir. 1990) (convicted of aggravated rape by a verdict of ten to two and sentenced to a mandatory sentence of life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence); *Louisiana v. Simmons*, 414 So. 2d 705, 706, 707 (La. 1982) (unanimously convicted of manslaughter and sentenced to six years at hard labor); Brief of Amicus Curiae for The Houston Institute for Race and Justice in Support of Petitioner at 2, *Louisiana v. Lee*, 555 U.S. 823 (2008) (No. 07-1523), 2008 WL 2682524, at *2.

97. See *Johnson v. Louisiana*, 406 U.S. at 359; *Johnson*, 57 So. 3d at 1098 (La. Ct. App. 2d Cir. 2011); *Louisiana v. Shanks*, 715 So. 2d 157, 164 (La. Ct. App. 1st Cir. 1998) (convicted of second degree murder by a verdict of ten to two); *Louisiana v. Stott*, 395 So. 2d 714, 715 (La. 1981) (two defendants convicted of simple burglary of a pharmacy and sentenced to fifteen years and eight years at hard labor without the benefit of parole, probation, or suspension of sentence); see also Ralph Slovenko, *Control Over the Jury Verdict in Louisiana Criminal Law*, 20 LA. L. REV. 657, 681 (1960).

98. See *Louisiana v. King*, No. 2013 KA 0135, 2014 La. App. Unpub. LEXIS 409, at *62, *64 (La. Ct. App. 1st Cir. July 10, 2014) (arguing that a 2010 United States Supreme Court decision “left no doubt that all of the incorporated Bill of Rights protections have identical application against state and federal governments” and, upon this reasoning, asserted that *Apodaca* is no longer good law), *rev’d*, 172 So. 3d 639 (La. 2015); *Odowd*, 2014 La. App. Unpub. LEXIS 175, at *10 (contending that “racial discrimination was a substantial and motivating factor behind enactment” of the state constitutional provision); *Louisiana v. Dorsey*, 137 So. 3d 651, 654 (La. Ct. App. 1st Cir. 2014) (arguing that the applicable legislative enactments were “motivated by an express and overt desire to discriminate and has had a racially discriminatory impact since its adoption”); *Louisiana v. Bertrand*, 6 So. 3d 738, 738, 742 (La. 2009) (arguing that “the use of non-unanimous verdicts have an insidious racial component, allow minority viewpoints to be ignored, and is likely to chill participation by the precise groups whose exclusion the Constitution has proscribed”); see

these instances, the courts have responded identically and have been consistently dismissive. The courts have refused to probe or entertain challenges, and the reviewing courts have done so by way of opinions that induce a belief that a quick, impersonal, and routine judicial formula was applied. The equation would look something like this: mention race and Louisiana's non-unanimous jury system in non-capital case = reply with a quick reference to the 1972 *Apodaca v. Oregon*⁹⁹ case = deny relief. This is what "justice" has looked like for years when it comes to this issue. Of the few cases that have been considered by the Louisiana courts, two command attention: *Louisiana v. Bertrand*¹⁰⁰ and *Louisiana v. Hankton*.¹⁰¹

In *Bertrand*, cases brought by two separate defendants who were sentenced to hard labor were consolidated for consideration of their respective constitutional challenges to Louisiana Code of Criminal Procedure Article 782.¹⁰² These challenges were raised by motions to declare the statute unconstitutional on Fifth, Sixth, and Fourteenth Amendment grounds.¹⁰³ The district court granted their motions and, in so doing, declared Louisiana's laws unconstitutional.¹⁰⁴ The Louisiana Supreme Court reversed this decision.¹⁰⁵

In its analysis, the Louisiana Supreme Court relied on the above-referenced state legislation along with the applicable state and federal jurisprudence.¹⁰⁶ The Louisiana Supreme Court was rather explicit in its criticism of the district court for its "nonexistent" reasoning.¹⁰⁷ After doing so, the court revealed that it had located a related lower court ruling to consult for insight, then the supreme court complained that those "reasons consisted of a rambling diatribe with no discernable legal analysis. . . ."¹⁰⁸ The court then raised a concern over the fact that the district court had, prior to its ruling in *Bertrand*, consistently upheld the constitutionality of Louisiana's laws in the face of the

also Motion for Unanimous Jury Verdict, at 3 n.4, *Louisiana v. Woodfox*, No. 15-WFLN-088 (20th Jud. Dist. Sept. 21, 2015) (on file with the author); Reply Brief for the Petitioner at 6, *Louisiana v. Miller*, 133 S. Ct. 1238 (2013), 2012 WL 5375602 (arguing that "Louisiana's law . . . is a vestige of Jim Crow politics").

99. 406 U.S. 404 (1972).

100. 6 So. 3d 738 (La. 2009).

101. 122 So. 3d 1028 (La. Ct. App. 4th Cir. 2013).

102. LA. CODE CRIM. PROC. ANN. art. 782.

103. See *Bertrand*, 6 So. 3d at 738-39 (deeming the Fifth Amendment challenge waived because the issue had not been argued or briefed).

104. *Id.* at 739.

105. *Id.* at 741.

106. See *id.*

107. *Id.*

108. *Id.* (referring to the reasoning in *State v. Wilkins*, No. 2008-KA-0887).

identical challenges.¹⁰⁹ Next, the court considered the two arguments before it, the first argument being the questionable validity of *Apodaca* in light of recent Sixth Amendment rulings.¹¹⁰ The final argument it considered was the insidious racial component in the use of non-unanimous verdicts, allowing minority viewpoints to be ignored, and likely chilling participation by the precise groups whose exclusion the Constitution has proscribed.¹¹¹ After framing the conversation in such a detailed way, the court abruptly ended the discussion by doing exactly what it complained of at the start of its analysis.¹¹² It did not attempt a particularized response to these arguments.¹¹³ It gave no analysis whatsoever.¹¹⁴ It simply concluded the discussion by saying that these same arguments have been unsuccessfully raised in the past.¹¹⁵

This case is instructive for reasons far beyond traditional judicial indicators. This case showcases the level of probing that has taken place in response to an argument that involves the most quintessential traits of humanity: value for life and liberty. Though not expressly said, the court seemed to have taken the position that an associated prior ruling precluded any further discussion of the topic, ever. If this were the case, one is left to wonder how expansion of law could ever happen. Oliver Wendell Holmes spoke to this when he said:

The life of the law has not been logic, it has been experience The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as though it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.¹¹⁶

In the words of the United States Supreme Court, "when governing decisions are unworkable or are badly reasoned," courts can depart from precedent.¹¹⁷ "*Stare decisis* is not an inexorable command; rather, it

109. *Id.* at 742.

110. *Id.* at 741-42.

111. *Id.* at 743.

112. *Id.*

113. *Id.*

114. *See id.*

115. *Id.*

116. ALFRED H. KNIGHT, *THE LIFE OF THE LAW: THE PEOPLE AND CASES THAT HAVE SHAPED OUR SOCIETY, FROM KING ALFRED TO RODNEY KING 1* (1996) (alteration in original) (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* (Boston, Little, Brown & Co. 1881)).

117. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

'is a principle of policy and not a mechanical formula of adherence to the latest decision."¹¹⁸

Even more concerning is the fact that the court in *Bertrand*, when confronted with a challenge to the insidious racial component of Louisiana laws, suggested there was no need to have that conversation because that question was settled in *Apodaca*. How could this be when *Apodaca* did not even involve Louisiana's law and *Apodaca* never considered the unique issues surrounding the timing of Louisiana's law and the accompanying affairs in the South relating to the loss of a free labor system? How could *Apodaca* have considered this legal issue in a meaningful way when much of the data at our disposal did not even exist in 1972 when *Apodaca* was decided?¹¹⁹ Additionally, if *Apodaca* is not factually analogous, how can it be exalted as binding precedent? As such, did the *Bertrand* court have grounds to distinguish the cases and, in turn, act in the interests of justice? Did the *Bertrand* court see only the narrative (and ignore the counternarrative)?

The next Louisiana case of concern is *Hankton*. *Hankton* involves the 2013 appeal of a man convicted by ten of twelve jurors. One aspect of that appeal involved Telly Hankton's challenge to Louisiana's non-unanimous jury scheme on Sixth Amendment and equal protection grounds.¹²⁰ Specifically, he argued that "racial animus and discrimination toward African Americans were the substantial or motivating factors in Louisiana's introduction and first-time adoption of the non-unanimous jury provisions in 1898."¹²¹ Determining that Hankton did not request an evidentiary hearing at the trial court and, by way of this omission, failed to preserve the issue for appellate review, the court of appeals decided not to evaluate Hankton's constitutional challenge.¹²² After its ruling, the court spent the next fourteen pages of the opinion doing what appears to be an evaluation of the issue it said it would not consider.¹²³ It reached a conclusion, though it said it was never hearing the issue, that Hankton failed to meet his initial burden of proof on demonstrating disparate impact (by not showing any evidence that the law, as applied to him, has a disparate impact).¹²⁴

118. *Id.* at 828 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

119. *See Ballew*, 435 U.S. at 230 ("[R]ecognizing that by 1970 little empirical research had evaluated jury performance . . .").

120. *See Hankton*, 122 So. 3d at 1029.

121. *See id.*

122. *Id.* at 1032.

123. *See generally id.* at 1032-42.

124. *Id.* at 1041-42.

The court immediately stated, because of *Bertrand*, it was foreclosed from so much as considering the Sixth Amendment challenge.¹²⁵ However, the court indicated that was not the case when arguing that Louisiana's scheme violates the Equal Protection Clause of the Fourteenth Amendment.¹²⁶ The court explained, had the issue been before it for consideration, the starting point would be with the reality that constitutional provisions are presumed constitutional.¹²⁷ The court said it would first look to see if Hankton met his initial burden of overcoming the presumption of constitutionality.¹²⁸ The court next explained exactly what Hankton would have to show in order to successfully prevail as to an equal protection challenge: *both* a racially disproportionate impact *and* a discriminatory motive on the part of the lawmaker.¹²⁹ The court remarked, if Hankton met his burden, the burden would then shift to the State to show that the same provision would have been enacted absent the established discriminatory intent.¹³⁰

Next, the court turned its attention to some of the specifics surrounding the 1898 Convention, such as, in the view of the court, the candid racist intentions of many of those involved.¹³¹ The court found it significant that voting statistics were considered in determining the number of concurring jurors needed to return a verdict—as this law was envisioned—insofar as the 1898 Convention numbers of registered voters hinted to the number of blacks that might serve on juries and, in the minds of state officials, cast favorable votes for African American defendants.¹³² The court did not silence the fact that an aspect of this lawmaking involved the concern over “white majority control over jury verdicts. . . .”¹³³ The court characterized the 1898 Convention as an “atmosphere of hate” and observed that the legislation at issue was enacted in this environment “as part of a raft of deliberately discriminatory measures.”¹³⁴ Bearing all this in mind, the court speculated that

125. *Id.* at 1032.

126. *See id.* at 1035.

127. *Id.* at 1032.

128. *Id.*

129. *Id.* Hankton took issue with this legal standard. In his view, a showing of disparate impact was not needed to establish an equal protection violation. *See* Brief for Appellant at 5-6, *Louisiana v. Hankton*, 122 So. 3d 1028 (La. Ct. App. 4th Cir. 2013) (No. 2012-KA-0375), 2012 WL 2924450, at *5-6.

130. *Hankton*, 122 So. 3d at 1033.

131. *Id.* at 1034.

132. *Id.* at 1035.

133. *Id.*

134. *Id.* at 1028, 1033, 1035.

the burden of showing a racial motivation for the law could be met, which would then shift the burden to the State to show that the non-unanimous jury scheme would have passed were there no racial motivation.¹³⁵ Meeting this burden, in the view of the court, would have required the use of experts by Hankton and the request for a hearing on the part of Hankton, which was not done.¹³⁶

The court, though it said it was not reviewing Hankton's constitutional challenge, entertained Hankton's argument that he should prevail because in *Hunter v. Underwood*¹³⁷ an Alabama law, with the same post-reconstruction racial history, was struck down.¹³⁸ The court disagreed with this attempt to have a Louisiana court, on the face of the Alabama opinion, render a finding of unconstitutionality.¹³⁹ The court observed what it deemed material differences and those were that Alabama's district court had testimony and opinions of historians before it, along with statistics and official records that were considered at the trial court level in Alabama's *Hunter* case, and that Alabama was still using the tainted 1901 constitution at the time of the challenge (whereas Louisiana had adopted other versions of its constitution since the 1898 version passed).¹⁴⁰

The court, though still not reviewing Hankton's constitutional challenge, responded to his argument that subsequent constitutions have not changed the less-than-unanimous scheme, so the original racial animus continues to this day.¹⁴¹ The court took an extensive look at the history surrounding Louisiana's 1974 constitution and rested on the fact that a 1973 debate over the unanimous jury system took place wherein opposing viewpoints were aired (and a change from the prior system of nine to the current system of ten to convict took place).¹⁴² The court even noted there was no mention of race during the 1973-1974 process.¹⁴³ The court noted that state officials, during the 1973-1974 process, said their motivation for maintaining the non-unanimous jury system was judicial efficiency.¹⁴⁴ These things, in the view of the court, somehow suggested that something more genuine took place and what was done in the past was not just furthered with bad intentions or

135. *Id.* at 1035-36.

136. *Id.*

137. 471 U.S. 222 (1985).

138. *Hankton*, 122 So. 3d at 1037.

139. *Id.*

140. *Id.*

141. *Id.* at 1037-38.

142. *Id.* at 1038.

143. *Id.*

144. *Id.*

without concern for the best of the people of Louisiana.¹⁴⁵ The court concluded, “Even if racial bias was the original motive behind the less-than-unanimous jury verdict’s introduction in 1898, the motive in 1973 was clearly judicial efficiency.”¹⁴⁶

Though none of the court’s discussion is binding since, technically, it never considered Hankton’s constitutional challenge, some aspects of this opinion carry tremendous weight when it comes to questions of future justice. The first is the court’s naive reasoning that the absence of racial references in the 1973-1974 process somehow suggests an absence of bad intentions or the sanitizing of a treacherous past. This is alarming. The absence of a transcript that explicitly captures racist lawmakers acting out a racist plot could mean the absence of racism as much as it could mean the presence of lawmakers who act with greater sophistication where their intentions are concerned. It appears the court overlooked this, and this is no small detail. Second to this concern is the legal standard that the court imposed on a man convicted of second degree murder. The subliminal message communicated was that there is a burden of proof and it is virtually impossible to prove by a free person with unlimited resources, but there is an expectation that if a cure to a flawed practice is to be found, it rests on the shoulders of prisoners and not upon the shoulders of officials who are duty-bound to protect citizens and act in their best interest. This is not to suggest defendants should not bear burdens of proof and courts should not hold defendants to them. This is to call attention to how comfortable it can be to close a “case” when a “case” involves a “defendant.”

Lastly, the court seemingly was comforted by the official record of the 1974 constitution indicating that Louisiana’s non-unanimous jury system is in place to achieve judicial efficiency. The court seemed to have found this more palatable than an expressed racial motivation (as was the case in 1898). I do not. In fact, I see this as a difference without a distinction because the delegates at the 1898 Convention, as previously noted, prefaced their actions with these words: “efficiency should be the first and primary consideration.”¹⁴⁷ I also find this the same conversation given the fact that the majority of Louisiana’s prison population is African American.¹⁴⁸ In this regard, judicial efficiency suggests the

145. *Id.* at 1039.

146. *Id.* at 1041.

147. LOUISIANA CONSTITUTIONAL CONVENTION, *supra* note 11, at 76.

148. As of March 2015, The Louisiana Department of Public Safety and Corrections reported 67.8% of its population of offenders as being African American, 31.4% as being Caucasian, and 0.8% as being other. See *Demographic Profiles of the Adult Correctional Population: Fact Sheet*, OFFICE OF MANAGEMENT & FINANCE INFORMATION SERVICES (Mar.

aim is to obtain disposition of criminal cases faster. In a state like Louisiana where sentences are harsh, this is as offensive as an explicit racial slur on the official records. This is a discussion about criminal law, which means a “person’s” liberty is being discussed. At no time should these things ever be discussed in the same sentence with judicial efficiency.

C. *Studies and Empirical Data*¹⁴⁹

This is not much to do about numbers. In the case of jury deliberations, the size of a jury really does matter.¹⁵⁰ “[N]on-unanimous jury verdicts in criminal cases create a qualitatively lesser form of justice and hold the potential to marginalize the views of women and people of color as they fulfill their obligations to serve on juries.”¹⁵¹ “A twelve-headed decision-maker has an astonishing memory, a vast fund of common experience, hugely versatile analytic skills, and the counterpressures of opposed extremes of opinion, which drive its judgments toward the middle ground of rational moderation.”¹⁵² Scientific research furthers this view.

In a 1977 study by psychologist and law professor Michael J. Saks, Ph.D., designed to explore group decision-making—participants were put in mock juries of six or twelve, shown a videotaped trial, and asked to

31, 2015), <http://www.doc.la.gov/quicklinks/statistics/statistics-briefing-book/#pe>; see also *State of Black New Orleans: 10 Years Post-Katrina* 35, URBAN LEAGUE OF GREATER NEW ORLEANS, <http://www.urbanleagueneorleans.org/ul/> (last visited Nov. 13, 2015) (“Of the 50 states, Louisiana is number one in incarceration rates.”).

149. This section seeks to enlighten the reader of research that induces a belief that a non-unanimous jury system is not the best manner of achieving a fair process for the defendant. This section does not purport to contain all of the research on the topics of juror persuasion or group decision-making, nor does it seek to explore research suggesting a contrary finding. That research does exist. It has been omitted because the aim was not to recognize the fact that different views of research exist. The aim was to recognize the view that some research suggests that the voice of one or two individuals on a jury can matter when it comes to deliberations.

150. See *Brown v. Louisiana*, 447 U.S. 323, 332 (1980); *Ballew*, 435 U.S. at 230-39 (extensively discussing empirical data that compared smaller and larger juries); Michael H. Glasser, *Letting The Supermajority Rule: Nonunanimous Jury Verdicts In Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 671 (1997) (discussing a study that found six differences between unanimous-rule juries and majority-rule juries); AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS: AMERICAN JURY PROJECT at 18-20, www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf (last visited Nov. 12, 2015); Reply Brief for Petitioner at 6, *State v. Miller*, 133 S. Ct. 1238 (2013), 2012 U.S. S. Ct. Briefs, at *11-12 (discussing a number of studies and findings).

151. Brief of Amicus Curiae for the Houston Institute for Race and Justice in Support of Petitioner, *supra* note 96, at *2.

152. KNIGHT, *supra* note 116, at 254.

deliberate to a verdict.¹⁵³ This study determined that members of smaller groups shared more equally in the discussion, found the deliberations more satisfying, and were more cohesive.¹⁵⁴ It found that larger groups were more contentious, debated more vigorously, collectively recalled more evidence from the trial, and made more consistent and predictable decisions.¹⁵⁵ The lesson learned from this study was that “as juries grow smaller, in criminal cases they will make more errors of acquitting the guilty and convicting the innocent.”¹⁵⁶ A later study by three social scientists that led to a book entitled, *Inside the Jury*,¹⁵⁷ reached similar results.¹⁵⁸ Specifically, *Inside the Jury* found:

[B]ehavior in unanimous rule juries contrasts with typical behavior in majority rule juries in six respects: deliberation time (majority rule juries take less time to render verdicts), small faction participation (members of small factions are less likely to speak under majority rules), faction growth rates (large factions attract members more rapidly under majority rules), holdouts (jurors are more apt to be holdouts at the end of deliberation under majority rules), time of voting (majority rule juries tend to vote sooner), and deliberation style (majority rule juries are slightly likelier to adopt a verdict-driven deliberation style in contrast to the evidence-driven style). . . . Verdict driven juries vote early and organize discussion in an adversarial manner around verdict-favoring factions, as opposed to evidence-driven juries which defer voting and start with a relatively united discussion of evidence, turning to verdict categories later in deliberation.¹⁵⁹

Consistent with this, “modern empirical research has demonstrated that unanimous juries are more careful, more thorough, and return verdicts that are more in line with what experienced observers of the criminal justice system . . . view to be the correct verdict.”¹⁶⁰

153. See *Are Six Heads as Good as Twelve?*, AM. PSYCHOL. ASS'N (May 28, 2004), <http://www.apa.org/research/action/jury.aspx>.

154. *Id.*

155. *Id.*

156. *Id.*

157. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983).

158. *Id.* at 229 (finding that “the unanimous rule appears preferable to majority rules”).

159. Stephen Saltzburg, *Understanding The Jury With The Help of Social Science*, 83 MICH. L. REV. 1120, 1129 (1985) (alterations in original).

160. Brief of Amicus Curiae for the Houston Institute for Race and Justice in Support of Petitioner, *supra* note 96, at *4.

D Equitable Considerations

Interestingly in federal criminal proceedings, jury verdicts must be unanimous.¹⁶¹ Though not discussed in the opinion, one of the practical implications of *Apodaca* is that the Sixth Amendment now has a different meaning under the state criminal system than it does under the federal criminal system where juror unanimity is required. From an equitable standpoint, this means the same acts can result in a conviction in state courts that can end in freedom in the federal courts. This defies logic. A wrong should be a wrong based on reason and not based upon a geographical or systematic gamble. When it comes to a six-person state criminal jury, it must be unanimous in order to satisfy constitutional safeguards.¹⁶² In resolving the question of whether non-unanimous juries should be allowed in the instance of a six-person jury, the Supreme Court aired this concern:

It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.¹⁶³

From an equitable standpoint, is it logical for the attention to be on the differing two states, or would it be more sound to focus the analysis of the cohesive actions of the other forty-eight states? It would seem that the actions of the forty-eight states would be more of an indicator of the pulse of the nation and certainly a basis for judicial action.

There have been suggestions that, in making charging decisions, prosecutors often consider Louisiana's non-unanimous jury law.¹⁶⁴ The thinking is that prosecutors see it as easier to convince less than a majority of jurors to convict. Practically speaking, under the current system, "[a]nyone charged with a crime in Louisiana is more likely to be convicted than in any other state, save Oregon."¹⁶⁵ The terms "United" and "States" actually mean something when used together. Together,

161. See FED. R. CRIM. P. 31(a).

162. See *Burch*, 441 U.S. at 138.

163. *Id.* (footnote omitted).

164. See *State v. Edwards*, 420 So. 2d 663 (La. 1982) (wherein a woman convicted of manslaughter by a verdict of eleven to one and sentenced to ten years at hard labor unsuccessfully argued, on appeal, that the district attorney intentionally requested an indictment for second degree murder in order to avoid the unanimous verdict requirement in a prosecution for first degree murder).

165. AIELLO, *supra* note 9, at xi.

they suggest that we are united as interconnected nations where our values are concerned. The current practice in Louisiana calls this into question as it simultaneously communicates to the other states that the liberties of their citizens will not be as carefully guarded in the state of Louisiana. This cannot be good for public relations or for alliance building.

One might also conclude that Louisiana's non-unanimous jury system in non-capital cases contributes to racist jury practices. In the words of Louisiana lawyer Christopher Aberle,

This is so because a prosecutor, or a defendant for that matter, who is of a mind to strike black jurors need only strike enough black jurors to make sure that ten white jurors remain. In other words, the nonunanimous-jury system readily facilitates effective *Batson* violations while making it easy to conceal discriminatory intent.¹⁶⁶

In a state where laws are supposed to be made by the legislature, these Louisiana lawyers have created their own local exception to United States Supreme Court jurisprudence governing discrimination in jury selection. Practically speaking, they are legislating when no one voted them into office to perform this task. Not only does this undermine the legislative process, this is bad for every citizen wishing to serve on a Louisiana jury and even worse for Louisiana citizens whose fate depends on the integrity of the jury that decides their case.

All these considerations shape the counternarrative, and the counternarrative balances and completes the story. When given parity with the counternarrative, the narrative is a person of interest in this case against justice.

IV. CHARTING OUR FUTURE: JUSTICE ON TRIAL

The insights to be gained from this story are abounding. Those who are serious about charting our futures as a justice community should begin with an understanding of how few people are in a position, under our scheme of government, to address this particular injustice. With

166. Reply Brief for Appellant at 4, *Louisiana v. Hankton*, 122 So. 3d 1035 (2013) (No. 2012-KA-0375), 2012 WL 2924450, at *4; see also Brief of Amicus Curiae for the Houston Institute for Race and Justice in Support of Petitioner, *supra* note 96, at *4. (“[P]ermitting non-unanimous criminal verdicts can serve as a *de facto* means of allowing majorities of jurors to prevent minority jurors from jury participation, thereby undermining important Constitutional principles regarding equality in jury service that this Court has taken considerable measures to protect in recent years.”); Cohen, *supra* note 17 (“[P]rosecutors can comply with their constitutional obligations to permit blacks and other minority citizens to serve as jurors but then effectively nullify the votes of those jurors should they vote to acquit.”).

that understanding, it is of paramount importance that those entrusted with power realize why they have it and also realize the consequences of not using it or of abusing it. When it comes to justice, transgressing by abusing power is as bad as transgressing by not using power. Dr. Martin Luther King warned of this:

More and more I feel that the people of ill will have used time much more effectively than have the people of good will. We will have to repent in this generation not merely for the hateful words and actions of the bad people but for the appalling silence of the good people. Human progress never rolls in on wheels of inevitability; it comes through the tireless efforts of men willing to be co-workers with God, and without this hard work, time itself becomes an ally of the forces of social stagnation. We must use time creatively, in the knowledge that the time is always ripe to do right.¹⁶⁷

I begin with a look at who has power to fashion a solution to this injustice. The federal government distributes government powers amongst only three branches of government: judicial, legislative, and executive.¹⁶⁸ The state of Louisiana follows an identical structure.¹⁶⁹ This suggests a solution might likely rest within one of these branches.

Louisiana's legislative branch is unique. Unlike other states, Louisiana is not a common law jurisdiction. Louisiana is a civil law jurisdiction.¹⁷⁰ In a civil law jurisdiction, a high premium is placed on laws and legislation, and on ensuring that lawmaking is the exclusive function of the legislature (as opposed to the executive or judicial branches).¹⁷¹ "In civil law jurisdictions, legislation is superior to every other source of law."¹⁷² According to Louisiana law, legislative instruments are presumed constitutional.¹⁷³ While Louisiana's civil code system envisions a system of law that is steady and constant, it also contemplates the expansion and evolution of law. In those instances, conventional wisdom suggests "a sufficient safeguard is found in the legislative faculty of amending the law."¹⁷⁴ Given the tremendous

167. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 74 (Signet Classic 2000) (1964).

168. See U.S. CONST. art. I-art. III.

169. See LA. CONST. ANN. art. II, § 1 (2005).

170. See generally LA. CIV. CODE (2013).

171. See LA. CIV. CODE XLV (2013) (referencing Louisiana Supreme Court Justice Chas E. Fenner, Address at the Louisiana Bar Association Meeting: The Civil Code of Louisiana as a Democratic Institution (May 7, 1904)).

172. LA. CIV. CODE LXVIII (2013) (citing A. N. YIANNPOULOS, 2008 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA (2008)).

173. See *State v. Webb*, 144 So. 3d 971, 976 (La. 2014).

174. LA. CIV. CODE XLV (referencing Louisiana Supreme Court Justice Chas E. Fenner, Address at the Louisiana Bar Association Meeting: The Civil Code of Louisiana as a

weight of legislation and the legal impediments to challenging the constitutionality of laws, it would seem that the responsibility of addressing Louisiana's non-unanimous jury system would best lie with the legislature, but it has done nothing in the way of correcting a flawed and infected legislative scheme.

Insofar as the judicial branch is concerned, there is the issue of courts and then there is the separate issue of individual lawyers. The United States Supreme Court has been consistently approached in the post-*Apodaca* days. The court simply refused to involve itself with this issue. Even after the American Bar Association (ABA) filed a recent amicus brief explaining, amongst other things, that an *Apodaca* concurrence referenced a 1968 ABA standard, which lent support to non-unanimous criminal juries in state trials that had, after the emergence of additional data, been amended in 1976 to indicate that criminal verdicts in state proceedings should be unanimous, the Supreme Court remained silent.¹⁷⁵ This notion was previously expressed when malevolent Louisiana legislation was under attack before the United States Supreme Court. At times where southern states are acting out racist tendencies through the use of "sinister legislation . . . to place [certain citizens] in a condition of legal inferiority, . . . [s]uch a system . . . may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land"¹⁷⁶ In spite of, or because of, inaction by the High Court, state courts could contribute to a solution. They can fulfill their roles as interpreters of law by giving a meaningful look at the challenges brought before it. Instead, state courts have impulsively and ritualistically repeated a script to defendants suggesting they cannot help because of prior jurisprudence.

Insofar as lawyers acting on behalf of the state, many have defended the practice and all have ignored the implications of the specific racial implications of Louisiana's laws. Some have defended the practice as a way of furthering the goals of federalism by ensuring diversity is "fostered and encouraged for the health and resiliency of our society."¹⁷⁷ Shockingly, officials have even defended non-unanimous juries "because of the time this procedure saves everyone connected with the

Democratic Institution (May 7, 1904)).

175. See Debra Cassens Weiss, *ABA Amicus Brief Backs Unanimous Verdicts in Criminal Cases*, ABA J. (Jan. 3, 2011), http://www.abajournal.com/news/article/aba_amicus_brief_backs_unanimous_verdicts_in_criminal_cases/.

176. *Plessy v. Ferguson*, 163 U.S. 537, 563-64 (1896) (Harlan, J., dissenting).

177. Brief for Respondent at 14, *Burch v. Louisiana*, 441 U.S. 130 (1979) (No. 78-90), 1978 WL 206959, at *14.

criminal justice process.”¹⁷⁸ Interestingly, Walter Reed, a former district attorney for the 22nd Judicial District covering St. Tammany and Washington parishes, who has defended Louisiana’s law¹⁷⁹ is now under federal indictment for wire fraud, money laundering, mail fraud, and tax evasion charges.¹⁸⁰ It would be interesting to see his reaction to his case being heard by a non-unanimous jury, but we will never gain that insight because, in the same America in which the unsuccessful defendants live, he will be afforded different protections since he is being prosecuted in federal court where unanimous juries are required.

The executive has stayed clear of the opportunity to act out a leadership role for the people of Louisiana despite that being the very nature of this post.¹⁸¹ Most of what has been spoken on behalf of this branch in the days after *Apodaca* has come from the various state attorney generals who have vigorously opposed constitutional challenges.¹⁸² In Louisiana, the attorney general is “the chief legal officer of the state.”¹⁸³ This means several of the chief legal officers have defended legislation designed by racists with bad intentions that currently has documented adverse implications. If that is the practice of the chief legal officers, something is to be said when it comes to notions of justice in this southern state.

The Bar also shares responsibility. This situation was largely originated by lawyers. It has continued because of the efforts of some lawyers and on the watch of lawyers. This is significant. A lawyer is “an officer of the legal system and a public citizen having special

178. *Id.*

179. *See, e.g., Odowd*, 2014 La. App. Unpub. LEXIS 175, at *1-2 (convicted of two counts of aggravated incest and sentenced to twenty-five years of hard labor without the benefit of parole).

180. *See* Robert Rhoden, *Trial of Former North Shore DA Walter Reed Pushed Back to April*, NOLA.COM: THE TIMES-PICAYUNE (Oct. 27, 2015), http://www.nola.com/crime/index.ssf/2015/10/trial_of_former_north_shore_da.html#incart_river.

181. Louisiana’s executive branch consists of the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, superintendent of education, commissioner of elections, and all other executive offices, agencies, and instrumentalities of the state. *See* LA. CONST. ANN. art. IV, § 1 (A) (2005).

182. *See, e.g., Bertrand*, 6 So. 3d at 738 (Attorney General James D. “Buddy” Caldwell); *Williams*, 747 So. 2d at 1256 (Attorney General Richard Ieyoub); *Simmons*, 414 So. 2d at 705 (Attorney General William J. Guste); *Louisiana v. Green*, 390 So. 2d 1253 (La. 1980) (Attorney General William J. Guste); *King*, 2014 La. App. Unpub. LEXIS 409, at *1 (Attorney General James D. “Buddy” Caldwell).

183. LA. CONST. ANN. art. IV, § 8 (2005).

responsibility for the quality of justice.”¹⁸⁴ Under the Model Rules of Professional Conduct,¹⁸⁵ lawyers have a duty to challenge the “rectitude of official action.”¹⁸⁶ A lawyer should seek improvement of the law, as well as to the administration of justice, and should also help the bar regulate itself in the public interest.¹⁸⁷

Some defendants, lawyers, judges, historians¹⁸⁸ and reporters¹⁸⁹ have cried out for justice. Even the ABA has gone on record to say that “unanimous verdict[s] should be required in all criminal cases.”¹⁹⁰ To date, these cries have not been heard. In our silence, we have placed upon the poor and vulnerable the duty of addressing a problem they did not create and are no way prepared to correct. What is the explanation for the strong will to defend a practice or ignore a wrong? Could state officials feel motivated by policy concerns suggesting that an open acknowledgement about the need for change could open the floodgates of litigation?¹⁹¹ Perhaps there is fear that the countless citizens who have fallen victim to this system will call upon the courts yet again. Perhaps there are fears of what the families of those who died in custody as a result of this miscarriage of justice will ask of this state. Perhaps there are reservations about the financial implications of reducing the prison population in a state like Louisiana, who is the forerunner when it comes to mass incarceration.

184. MODEL RULES OF PROF'L CONDUCT pmb., cmt. 1 (2015).

185. See MODEL RULES OF PROF'L CONDUCT (2015).

186. MODEL RULES OF PROF'L CONDUCT pmb., cmt. 5.

187. MODEL RULES OF PROF'L CONDUCT pmb., cmt. 6.

188. See generally AIELLO, *supra* note 9.

189. James Gill, *Jury Rules Aid Sloppy Judicial Process in Louisiana*, BATON ROUGE ADVOCATE (Apr. 3, 2014), available at 2014 WLNR 10713701; see also Cohen, *supra* note 17.

190. See Weiss, *supra* note 175.

191. As troubling as this may seem, this is not an imagined thought. In a recent Louisiana case where Albert Woodfox challenged his conviction on the grounds of racial discrimination in the grand jury process, state officials actually made this plea of the court:

Perhaps more significantly, though, a ruling in Woodfox's favor would by definition be based on a finding of systemic discrimination in West Feliciana between 1980-93. This would consequently call into question every criminal conviction based on indictments issued during this period. The impact of the resulting flood of habeas petitions on the State and the court system would be substantial, to say the least.

State's Post-Hearing memorandum at 39, *Woodfox v. Cain*, No. 3:06-cv-00789-JJB-DLD (M.D. La. Nov. 2, 2012). The court declined the State's request to, in essence, engage in a cover up. *Woodfox v. Cain*, 772 F.3d 358, 375, 383 (5th Cir. 2014). Instead, the court relied on the law and rendered a ruling in Mr. Woodfox's favor as to the grand jury claim. See *id.* at 383.

tion.¹⁹² Perhaps there is uneasiness about being associated with causes that champion the rights of convicts in a state where convicts are often poor and African American. Might inaction be motivated by fears of the reprisals that have come to those who champion causes seen to be associated with civil rights or African Americans?

Perhaps, under the weight of selfish concerns, we failed to notice that there are risks inherent in our lack. First, there are the harms that flow from a public that has lost faith in the justice system:

[T]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.¹⁹³

Additionally, injustices like this further racial tensions. In *Plessy v. Ferguson*,¹⁹⁴ this reality was noted by Justice Harlan as he critiqued his judicial colleagues in upholding Louisiana's separate railcar seating law.¹⁹⁵ In his dissent, Justice Harlan said, "State enactments . . . cunningly devised to defeat legitimate results of the [Civil War], under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned."¹⁹⁶

Lastly, there is the risk of citizens practicing self-help and, in doing so, creating what I term a fictitious "fourth branch of government." The orchestrators of Louisiana's non-unanimous jury law were not naive about this. At the same convention where they gave birth to this law, it was said:

Whatever is unjust, carries in itself the seeds of defeat and decay. Justice is irrepressible. No matter how you may trample it, no matter with what fortifications you may surround the structure which you build up in opposition to that great principle, its voice is never silent. It clamors from day to day with a force that is irresistible, until at last its voice will be heard and the structure, whose foundations rest upon its violation, will crumble into ruin, a

192. See *Jailers in Chief? Criminal Justice and Politics*, THE ECONOMIST (July 15, 2015) ("Louisiana's incarceration rate remain[s] steady at around 850 people per 100,000 residents—or over 1.1% of the state's adult population, the highest rate in the country.")

193. *Payne*, 501 U.S. at 834 (Marshall, J., dissenting) (quoting *Flood v. Kuhn*, 407 U.S. 258, 293 n.4 (1972)).

194. 163 U.S. 537 (1896).

195. *Id.* at 560 (Harlan, J., dissenting).

196. *Id.* at 560-61.

corroboration of the maxim that; “Nothing is settled until it is settled right.”¹⁹⁷

When one operates with an understanding of the narrative only, one sees what appears to be race-neutral laws and an anticlimactic story. When one deconstructs the narrative, the story expands and changes form to something between a dramatic story and a horror story. To achieve justice moving forward, members of the legal community must do this with every story in law. And when revisions are needed, we must revise. When character changes need to be made, we must remove the old ones and add new ones. We must resist the will to attain situational muteness and selective blindness so others will be forced to address what it is that we are uniquely positioned to do. This is a shared duty of the legal community and it is one that we have been derelict in when it comes to this particular injustice. The pursuit of justice is the reason we have been given power. Failure to use that power or using that power abusively furthers injustices.

V. CONCLUSION

Louisiana’s non-unanimous jury laws were invented and implemented in an era where “the seizure and sale of a black man—even a black child—was viewed as neither criminal nor extraordinary.”¹⁹⁸ The passage of time may make memories distant, but it does not make them nonexistent. A tainted system simply cannot be untainted by the passage of time. Justice Harland insightfully penned these words in his dissent to the *Plessy v. Ferguson*¹⁹⁹ case: “I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States.”²⁰⁰ That was true then and it remains true today (insofar as its non-unanimous jury system in non-capital cases).

“For only a unanimous jury . . . can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear.”²⁰¹ According to the A.B.A., “unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions—ones that

197. LOUISIANA CONSTITUTIONAL CONVENTION, *supra* note 11, at 36.

198. BLACKMON, *supra* note 38, at 9.

199. 163 U.S. 537 (1896).

200. *Id.* at 563 (Harlan, J., dissenting).

201. *Johnson*, 406 U.S. at 398 (Stewart, Brennan & Marshall, JJ., dissenting).

address and persuade every juror.”²⁰² The Blue Ribbon Commission on Jury System improvement even opposes this practice. This commission “reached a virtual consensus that unanimity should continue to be required for criminal cases in which the punishment is death, life without a possibility of parole, or life with a possibility of parole (the so-called ‘life top’ cases).”²⁰³

In this story about justice in the Deep South, justice is the victim. Injustice is the villain. The narrative is the suspect—a person of interest. The counternarrative is the hero. This is so because it expands the plot and adds the rich cast of characters whose truths and views would have been written out of the story were the narrative allowed the center stage she often craves. When it comes to Louisiana’s non-unanimous jury system in non-capital cases, I hope this is the final chapter and not just the last word in the first book of a forthcoming series.

202. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS, AMERICAN JURY PROJECT, SL044 ALI-ABA 653, 682 (2005).

203. Kelso, *supra* note 1, at 1496.