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VANGUARDS OF DEMOCRACY: Juries as Forerunners of Representative Government

Nino C. Monea

ABSTRACT

Juries are the most diverse institution of government. Due to the random selection of members, ease of access, and procedural rights to challenge the exclusion of protected classes, juries reflect the diversity of America far better than legislatures, courts, the bar, and virtually every other civic institution. This Article aims to do two things. First, document how juries have become more diverse along the lines of income, gender, and race; and how each of these groups had to surmount the powers that be to take their place in American jury boxes. Second, demonstrate how juries allowed marginalized groups in each of these categories to exercise political power sooner and more solidly than other institutions of government. As a result, current declines in the use of jury trials mean less-representative decision-makers will have a larger role in our jurisprudence.

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INTRODUCTION

Juries are the most diverse institution of government. This was true in England in the 1600s,¹ and it remains true today. Going back to English antiquity, juries were geographically and religiously diverse, and even allowed foreigners to serve.² In fact, colonial juries could include Native Americans,³ disabled people served in the nineteenth century,⁴ and, during Lincoln's time, Midwestern juries allowed immigrants to serve.⁵

Juries are not normally thought of as institutions of government, but they should be.⁶ Though jurors do not receive fancy titles or large paychecks, they are, along with judges, the only Article III officials mentioned in the Constitution. And jury verdicts may rightfully be thought of as policy decisions. Criminal juries can exercise

1. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 588 (1993).

2. CHRISTOPHER WALDREP, *JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI* 10 (2010).

3. *Id.* at 19.

4. See *Deaf and Dumb Juror*, FREEMAN'S J. (Dublin) (Dec. 18, 1843), at 4, <https://www.newspapers.com/image/401289881>; *Live State News*, TIMES (Philadelphia) (Mar. 14, 1884), at 2, <https://www.newspapers.com/image/52187390/>.

5. See STACY PRATT McDERMOTT, *THE JURY IN LINCOLN'S AMERICA* 79 (2012).

6. See, e.g., Jason M. Soloman & Paula Hannaford-Agor, *Introduction: The Civil Jury as a Political Institution*, 55 WM. & MARY L. REV. 715 (2014).

their nullification powers to express their distaste for certain laws⁷ or to protest the over-policing of Black men.⁸ In civil cases, jury verdicts serve as signals and markers that influence the outcome of a vastly larger number of cases that are settled or dropped without a trial.⁹

This gemstone of American democracy was not something originally available, as jury service was once limited to a select few. Specifically, in the 18th century, various states prohibited Quakers and Catholics from serving on juries by statute—along with atheists and Jews.¹⁰ These restrictions were removed as states became more tolerant. By 1789, only atheists were barred from jury service and only in Maryland,¹¹ and, by 1826, the last religious exclusion was gone.¹² Many states now explicitly forbid excluding any juror on the basis of religion.¹³ If anything, people of faith may find the

7. RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 7 (1980) (noting how northern juries refused to enforce fugitive slave laws, and 1920s juries consistently nullified prohibition laws); *see also* RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 254 (2003) (noting that juries could frequently refuse to convict when they thought the punishment was too harsh for the crime). Conversely, racially homogeneous juries chose to acquit white defendants who attacked Black victims, expressing a policy preference for racial violence and terror. *See also supra* at 256.

8. *See* Paul Butler, *Opinion: Jurors Need to Take the Law into Their Own Hands*, WASH. POST (Apr. 5, 2016, 6:00 AM), https://www.washingtonpost.com/news/in-theory/wp/2016/04/05/jurors-need-to-take-the-law-into-their-own-hands/?utm_term=.141f8f225180 [<https://perma.cc/3PX2-7SSA>].

9. Marc Galanter, *Jury Shadows: Reflections on the Civil Jury and the "Litigation Explosion,"* in ASS'N OF TRIAL LAWYERS OF AM., *THE AMERICAN CIVIL JURY: THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY* 15, 21 (1987) (noting that expected jury verdicts serve as guidance for parties negotiating settlements).

10. Albert Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi L. Rev. 867, 877 n.52 (1994).

11. *Id.*

12. *Id.*

13. *E.g.* WYO. CONST. art. 1, § 18 (1899); WIS. STAT. § 756.001(3) (2019). Though laws barring religious groups from jury service are gone, questions about when individual adherents can be removed persist. *See* *Fernandez v. State*, 639 So.2d 658, 660 (Fla. Dist. App. 3d 1994) (barring religion-based peremptory challenges). *See also* *State v. Fuller*, 356 N.J. Super. 266, 279, 812 A.2d 389, 397 (App. Div. 2002); *State v. Purcell*, 199 Ariz. 319, 326, 18 P.3d 113, 120 (Ct. App. 2001); *Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998); *Casarez v. State*, 913 S.W.2d 468, 478-79 (Ct. Crim. App. Texas 1994) (en banc). *But see* *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (declining to bar religious peremptory challenges); *United States v. DeJesus*, 347 F.3d 500, 510 (3d Cir. 2003) (allowing peremptory strikes “based on the jurors’ heightened religious involvement rather than their religious affiliation”); *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (allowing strikes based on “religious beliefs” but not “religious affiliation.”).

opposite problem: being forced to serve. A Muslim in the United Kingdom, for example, who claimed his beliefs forbade him from jury duty was forced to serve by a judge.¹⁴

This Article aims to illustrate two points. First, document how juries have become more diverse along the lines of income, race, and gender; and illustrate how, to achieve this diversity, these groups had to fight to be truly included. Second, demonstrate how juries allowed marginalized groups, in each of these categories, to exercise political power sooner and more solidly than in other institutions of government. Some examples that will be explored below include how:

- the poor have been serving on juries in large numbers since the dawn of the jury system;
- women served on juries before virtually any other governmental office;
- Black jurors continued serving in the post-Reconstruction South; all-women and all-Black juries have existed for well over a hundred years;
- civil rights litigants were able to win court victories over jury discrimination long before other inequities.

The Article proceeds in four Parts. Part I assesses the diversity of juries, the benefits of diverse juries, and strategies for further improving the diversity of juries. Oftentimes, juries are representative of the communities they serve, which is not always true of government institutions. Such diversity further improves the decision-making abilities of juries.

Part II examines socioeconomic diversity on juries. Although many states imposed property requirements on jury service in the past—along with other factors conspiring to make it harder for the poor to serve—poor people were actually a fixture of early juries. This is because the rich did not want to perform jury duty and would evade it or hire poor people to go in their place. The result was that the poor had a rare opportunity to make governmental decisions and, indeed, used that opportunity to excuse debtors and impoverished farmers.

Part III assesses gender diversity on juries. The first women served on juries during the 1870s in the Western territories and

14. Steve Doughty, *Jury Duty? It's Against My Religion, Claims Muslim: But Judge Tells Him He Has a Responsibility to Serve*, DAILY MAIL (May 11, 2015), <https://www.dailymail.co.uk/news/article-3076914/Devout-Muslim-fails-convince-Old-Bailey-judge-excuse-jury-service-religion-forbids-it.html> [<https://perma.cc/8UY6-2TJM>]; See also *In re Jenison*, 120 N.W.2d 515 (Minn. 1963) (woman incarcerated for refusing to serve on jury due to religious objections).

they did so before assuming any elected governmental office. They won praise for their redoubtable service on juries and noticeably changed how juries decided cases. In fact, over the next fifty years, women fought for the right to serve on juries, alongside the right to vote. Even when they won the right to be on juries, they had to fight for many more years against subtler ways of excluding women. Evidence suggests that women currently make up a greater percentage of jurors than any other governmental institution, even if not quite equal to their share of the population.

Part IV evaluates racial diversity on juries. Though the first Black jurors were seated in Massachusetts in 1860, they did not gain widespread access to juries until Reconstruction.¹⁵ While freedmen held many political offices in the South, juries were unique in that Black men continued serving on them after Reconstruction ended—admittedly at lower rates than during Reconstruction. Moreover, discrimination against Black jurors allowed the U.S. Supreme Court, for the first time, to become involved with state criminal due process issues, which laid the groundwork for many civil rights victories in the years to come.

Part V concludes by noting juries are becoming vanishingly rare—possibly *because* they are so diverse. As women and people of color started serving on juries, popular media started attacking jurors as overly emotional, pliant, stupid, lazy, and vindictive. This is unfortunate, not only because juries are excellent decision-makers, but because alternatives to juries are dramatically less diverse.

I. JURY DIVERSITY AND ITS BENEFITS

When compared to virtually any other governmental or legal institution, juries stack up well in terms of diversity. This is thanks to the dismantling of policies designed to exclude people from juries and the adoption of random selection to choose jurors. This is positive not only for representation's own sake, but because diverse juries perform their deliberative function better.

A. *Juries Are More Diverse than the Bench, Bar, Legislatures, or Executives*

Juries are the most diverse institutions of government. To demonstrate its variety, consider the following examples. Specifically, a statewide survey of New York's juries found that that jury

15. During Reconstruction, the government put in place policies that were designed to improve Black participation on juries. *E.g.* "Amalgamation" Jury, THE SO-WESTERN (Sept. 4, 1867), at 2, <https://www.newspapers.com/image/168273132>.

pools were roughly representative of Black and Hispanic¹⁶ populations, though still imperfect.¹⁷ Moreover, one 2010 study found that the jury pool for Hamilton County, Tennessee during the aughts was between 53 and 47 percent women, and between 16.6 and 16.8 percent were people of color—mostly Black.¹⁸ In comparison, population data from 2008 showed that the county population was about 52 percent women and about 25 percent people of color.¹⁹ Thus, juries in Hamilton County were unrepresentative for Black and Hispanic persons, but roughly mirrored the population for women and Asian-Americans.

Similarly, in Lucas County, Ohio, the population in 1995 was 84.7 percent white, 12.9 percent Black, and 2.4 percent Hispanic, and the percentages of jurors summoned matched this racial composition closely.²⁰ Specifically, the percentage served coming within two percentage points of each category with it being 88.6 percent white, 9.4 percent Black, and 2.0 percent Hispanic.²¹

Diversity on juries is, in large part, enabled by the random selection of jurors. This reduces bias—conscious or unconscious—from infecting the process, though lawyers may still meddle with the jury selection process.

Today, we have grown accustomed to the idea that anyone, at any time, can receive a jury summons. This summons process may be an inconvenience, and perhaps unwelcomed, but it beats the olden days.

Specifically, in the 19th century, the sheriff, or other local officials, would round up potential jurors before trial. This power to select jurors was “very extensive and very arbitrary,” in the words of Alexis de Tocqueville.²² Because the sheriff had carte blanche to control this process, they could select jurors who would be favorable

16. The term “Hispanic” is used throughout this Article to mirror the language used in the sources it relies upon.

17. Randy Moonan, *Jury Representativeness: It's No Joke in the State of New York*, CORNELL J.L. & PUB. POL'Y (Jan. 20, 2012), <http://jlp.org/blogzine/jury-representativeness-its-no-joke-in-the-state-of-new-york> [<https://perma.cc/S5VW-VF2R>].

18. Brandy L. Hemmer, *Are Juries Representative? An Examination of the Representativeness of Jury Panels in Hamilton County Tennessee* 21–22 (May 2010) (M.S. thesis, University of Tennessee at Chattanooga).

19. *Id.*

20. Ronald Randall, James A. Woods, and Robert G. Martin, *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 JUST. SYS. J. 71, 79 (2008).

21. *Id.*

22. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 686 (Eduardo Nolla ed., 2012).

to law enforcement²³ or else remove jurors deemed to be “unworthy or incompetent.”²⁴ Other times, bystanders who loitered by the courthouse would be conscripted into jury service, which once resulted in a young Abraham Lincoln being scooped-up to serve on a jury.²⁵

A century later, some jurisdictions had improved, but only a little. In Alabama, facially neutral, yet biased, procedures kept juries monochromatic. Specifically, in each county, a clerk and jury commissioner were in charge of selecting jurors.²⁶ The clerk would briefly visit each precinct and speak with people she knew to get suggested names.²⁷ By and large, the clerk received white names as she did not know many Black people “out in the county” and she did not trouble herself to meet any.²⁸ The commissioners, too, would “ask around” their own neighborhoods for names of people to serve on jury duty.²⁹ But, the commissioners did not have any Black friends or belong to any clubs with Black members, so the names they scrounged-up were mostly white.³⁰ The U.S. Supreme Court upheld this form of segregation in 1970, despite acknowledging “overwhelming proof” that local officials abused their positions.³¹ Underrepresentation was so bad in Alabama that there was only a one-in-100-million-trillion (read as a “one” followed by 20 “zeros”) possibility that the lack of diversity in juries was the result of chance.³²

Fortunately, every American jurisdiction now draws jury pools at random;³³ a procedure recognized as one of the defining

23. See JONAKAIT, *supra* note 7, at 121.

24. DE TOCQUEVILLE, *supra* note 22, at 686.

25. McDERMOTT, *supra* note 5, at 86. This method still occasionally is employed when frustrated judges cannot get enough jurors through normal means. JAMES P. LEVINE, *JURIES AND POLITICS* 45 (Wadsworth, Inc. ed., 1992); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 24 (Hemisphere Publishing Corporation ed., 1988).

26. *Carter v. Jury Comm'n*, 396 U.S. 320, 324–25 (1970).

27. *Id.*

28. *Id.*

29. *Id.* at 325.

30. *Id.*

31. *Id.* at 335–66. Today, Alabama’s jurors are selected at random from a master list that is open for public inspection. CODE OF ALA. § 12–16–57 (1978); § 12–16–58. Discrimination remains a serious problem through the use of peremptory strikes. *E.g.*, EQUAL JUST. INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* (2010).

32. LEVINE *supra* note 25 at 42.

33. JEFFREY B. ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 99 (2000).

characteristics of juries.³⁴ This system is administratively simple, ensures that juries reflect the populations they serve and heightens the odds of a just result.³⁵

Random selection notwithstanding, in some jurisdictions, juries are less representative. A 2012 study of death penalty jury pools in North Carolina found that Latinos were greatly underrepresented, although Black people and Native Americans were only slightly underrepresented relative to their share of the population. Specifically, the jury pool was 81 percent white, even though whites made up 69 percent of the population; 16 percent Black, being 22 percent of the population; 1.1 percent Native American, while 1.4 percent of the population; and 0.3 percent Latino, despite being 8.4 percent of the population.³⁶

But unlike fixing disparities in other areas of civic life, the solution for juries is relatively easy. One simple reform is to require localities to update their juror lists regularly, to ensure it keeps up with demographic change.³⁷ Moreover, there is binding precedent forbidding jurors from being struck on the basis of race or gender.³⁸ Clever lawyers can make pretextual arguments to exclude people, but there is, at least, a well-established judicial process to police diversity among juries that can act as a foil to such pretextual reasons.³⁹ No analogous process exists for other governmental bodies.⁴⁰

Some courts are experimenting with other strategies to improve jury diversity. Most of them are quite simple, too. In the

34. Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 431 (1996).

35. See Part I.B, *infra*.

36. Catherine M. Grosso and Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1543 (2012) (showing juror data); U.S. CENSUS BUR., 2010 CENSUS: NORTH CAROLINA PROFILE (2010), https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_North_Carolina.pdf [<https://perma.cc/SL9W-MZ48>].

37. Carly Duvall & Elizabeth Neeley, *Recent Efforts to Make Nebraska Juries More Representative of Their Communities*, NEB. LAW. 8–9 (2006), <https://digitalcommons.unomaha.edu/cgi/viewcontent.cgi?article=1000&context=criminaljusticefacpub> [<https://perma.cc/W94T-KEYA>].

38. *Batson v. Kentucky*, 476 U.S. 79 (1986); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).

39. Reversing conviction where “prosecutors were motivated in substantial part by race” when they struck jurors. *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016); *accord Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019).

40. Theoretically, it could. In Kenya, the courts ordered that a third of the legislature must be comprised of women. Lily Kuo, *Kenya's High Court Has Ruled That a Third of Parliamentarians Must Be Women*, QUARTZ (Apr. 13, 2017), <https://qz.com/957712/kenyas-high-court-has-ruled-that-a-third-of-parliamentarians-must-be-women> [<https://perma.cc/4RR7-E7DY>].

Eastern District of Pennsylvania, the new chief judge has instituted a slate of reforms. First, the court doubled the master list of potential jurors to draw from, a change that was reported to be cheap and easy.⁴¹ Second, it quadrupled the frequency of address change checks for potential jurors.⁴² Third, if a potential juror failed to return a screener questionnaire, another is sent in its place in the same zip code, to ensure geographic consistency.⁴³ And fourth, more community outreach by churches, nonprofits, and the courts about the importance of jury service.⁴⁴ If policymakers want to make government more diverse, juries are probably the quickest and cheapest place to start.

Juries fare much better than the bench, bar, and legislatures in terms of diversity. Nationwide, the population is 50.8 percent women, 13.4 percent Black, 1.3 percent Native American, 5.9 percent Asian-American, 18.5 percent Hispanic or Latino, and 60.1 percent white.⁴⁵ Yet, in 2000, women were 29.7 percent of all attorneys, Black people were 5.7 percent, and Hispanics were 4.1 percent, with almost identical numbers for judges.⁴⁶ These numbers have hardly budged in the last decade-and-a-half where, in 2018, only 36 percent of lawyers were women, 5 percent were Black, and 5 percent were Hispanic.⁴⁷ A recent survey found that women were less than a third of state court judges, and people of color were less than a fifth.⁴⁸ In fact, not a single state court system is representative when both race and gender are accounted for, and only four are when looking at race alone.⁴⁹ Similarly, Congress was four-fifths male and four-fifths white in 2015—which still made it one of the most diverse in history.⁵⁰ Moreover, the average state legislature

41. Juan R. Sánchez, *A Plan of Our Own: The Eastern District of Pennsylvania's Initiative to Increase Jury Diversity*, 91 TEMP. L. REV. ONLINE 1, 18 (2019).

42. *Id.*

43. *Id.*

44. *Id.* at 19.

45. *QuickFacts*, UNITED STATES, U.S. CENSUS BUR., (last visited June 9, 2019), <https://www.census.gov/quickfacts/fact/table/US/RH1125219> [<https://perma.cc/9TFW-6655>] Error! Hyperlink reference not valid..

46. Sandra D. Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, 5 HOW. SCROLL SOC. JUST. L. REV. 1, 30 n.81 (2002).

47. AM. BAR ASS'N, ABA NATIONAL LAWYER POPULAR SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2020), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2010-2020.pdf [<https://perma.cc/2WN2-LP78>].

48. Tracey E. George & Albert H. Yoon, *The Gavel Gap*, AM. CONST. SOC'Y, <https://www.acslaw.org/analysis/reports/gavel-gap> [<https://perma.cc/QN8K-QYVZ>].

49. *Id.*

50. Philip Bump, *The New Congress is 80 Percent White, 80 Percent Male*,

is 29 percent women,⁵¹ 0.5 percent Native American, 1.3 percent Asian, 8.6 percent Black, 4.8 percent Hispanic/Latino, and 81.7 percent white.⁵² In 2018, six women were governors, 12 percent of the country, and three people of color were governors, which is only 6 percent of the country.⁵³

Therefore, the institutions creating, interpreting, enforcing, and arguing over the law are not only unrepresentative, they are less representative than a typical jury. It makes sense that juries would be more diverse: people do not have to pass a bar exam, win an election, or secure an appointment to serve on a jury.

B. *Diverse Juries Perform Better on a Range of Metrics*

Diversity is not merely a feel-good talking point; it measurably improves the quality of juries. The ancient philosopher Aristotle observed that the virtue of democracy was that by allowing for many perspectives, “each person brings in his share of virtue and wisdom” to a problem, achieving a better outcome than any one person could alone.⁵⁴

Modern research bears this out. Juries with diverse membership overcome prejudice and consider the implications of evidence better than individuals.⁵⁵ At the same time, jurors do not vote based on their identity alone, as “gender and other background characteristics are weak predictors of juror’s damage awards.”⁵⁶ No compelling evidence exists that diverse juries primarily decide cases on anything other than the facts.

and 92 Percent Christian, WASH. POST (Jan. 5, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/01/05/the-new-congress-is-80-percent-white-80-percent-male-and-92-percent-christian/?utm_term=.c45dc72d3d8d [<https://perma.cc/4YRY-3XTJ>].

51. *Women in State Legislatures for 2019*, NAT’L CONFERENCE STATE LEGISLATURES (Sept. 25, 2019), <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2019.aspx> [<https://perma.cc/FH59-EBB8>].

52. *Legislators’ Race and Ethnicity 2015*, NAT’L CONFERENCE STATE LEGISLATURES (2016), http://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Raceethnicity_Rev2.pdf [<https://perma.cc/3TVA-3CVT>].

53. Grace Sparks, *There Has Been Very, Very Little Diversity Among US Governors*, CNN (May 23, 2018), <https://www.cnn.com/2018/05/23/politics/racial-diversity-governors/index.html> [<https://perma.cc/CJ3L-C9GW>].

54. ARISTOTLE, A TREATISE ON GOVERNMENT, Ch. XI (William Ellis trans., 1912), available at <https://www.gutenberg.org/files/6762/6762-h/6762-h.htm>.

55. JONAKAIT, *supra* note 7, at 47; JOANNE DOROSHOW, CTR. FOR STUDY OF RESPONSIVE L., THE CASE FOR THE CIVIL JURY: SAFEGUARDING A PILLAR OF DEMOCRACY 24, <https://csrl.org/wp-content/uploads/2014/12/The-Case-for-the-Civil-Jury.pdf> [<https://perma.cc/MW69-C9AT>].

56. BRIAN H. BORNSTEIN & EDIE GREENE, THE JURY UNDER FIRE: MYTH CONTROVERSY, AND REFORM 212 (2017).

Compelling evidence does exist, however, that diverse juries are more thoughtful. A study by psychologist Samuel Sommers found that racially diverse juries do a better job of keeping racial prejudices in check, make white jurors less likely to voice a belief of guilt in advance of deliberations, and increase the exchange of information between jurors.⁵⁷ Diverse juries deliberate longer, discuss more facts, commit fewer errors, correct more inaccuracies, notice more missing evidence, raise more race-related issues, consider racism more often, and dismiss racism as irrelevant less often.⁵⁸ According to one study, in racially homogeneous juries, when racism was brought up, it was dismissed as unimportant 100 percent of the time.⁵⁹

Though the value of diversity has now been empirically verified, it has been observed for decades. Michigan granted women the right to serve on juries in 1918.⁶⁰ Around that time, a circuit judge noted that women brought a new perspective to cases: she brought “an element of sincerity, honesty and righteousness which was not present in the same extent before . . . The change has been greatly beneficial and what is more remarkable is that it has worked no inconvenience nor harm.”⁶¹

Given the value diversity adds, it should come as no surprise that empirical research has vindicated the work of juries time and time again.⁶² This is all the more remarkable when one appreciates the conditions juries operate under. They are told to bring their common sense, but not their preconceived notions. Jurors are expected to remember multiple days’ worth of information, sometimes without notes, not talk about the case until the end—even though the most natural way to process information is to discuss

57. Stacy L. Hawkins, *Batson for Judges, Police Officers & Teachers: Lessons in Democracy from the Jury Box*, 23 MICH. J. RACE & L. 1, 12 (2018).

58. *Id.*

59. *Id.*

60. Burnita Shelton Matthews, *The Woman Juror*, 15 WOMEN LAW. J. 15 (1927).

61. *Id.* at 16.

62. SIMON, *supra* note 7, at xiii. (after years of research, “it became clear that the jury had passed empirical examination with high marks.”); Neil Vidmar, *Juries, Judges, and Civil Justice*, in ROSCOE POUND INST., *THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE: REPORT OF THE 2001 FORUM FOR STATE APPELLATE COURT JUDGES*, 9–10 (2001). *See also* Brian H. Bornstein & Timothy R. Robicheaux, *Crisis, What Crisis? Perception and Reality in Civil Justice in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES 2* (Brian H. Bornstein, et al. eds., 2008). Non-diverse juries are more likely to fall victim to racial stereotyping, which could poison recollection of testimony. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1291–92 (2000).

it immediately—and make sense of inscrutable jury instructions.⁶³ Paid next to nothing, jurors must put the rest of their life on hold.⁶⁴ They are deprived of various pieces of information that the law has deemed inadmissible—information that judges get to know about in bench trials and attorneys learn about in settlement discussions. Unlike most other government institutions, juries typically must reach unanimous decisions. Lastly, only the trickiest cases reach the jury; many cases go to trial precisely because they are so unpredictable to litigants.⁶⁵

Facing such long odds, juries fail to reach a verdict in only three out of 100 cases, and when they do reach consensus, these decisions remain consistent.⁶⁶ No other government official must reach unanimity in such a short span of time on matters of such great importance, with so little information, and with so little prior rapport with each other. Yet juries lack the dignity of office and are able to do well.

II. INCOME

For centuries, juries have been socioeconomically diverse, though not always on purpose. Often, the poor only served on juries because the rich were able to scheme or legislate their way out of jury duty. Many states also passed laws that were designed to keep non-elites off the jury. This produced the odd result of the poor serving on juries for centuries, and yet still having to fight to be placed on juries by *design*, not merely by *accident*.

A. *How the Poor Found Their Way onto Juries*

The rich have always been eager to help themselves to the benefits of citizenship. Overwhelmingly, the rich are the ones who can take advantage of America's world-class schools,⁶⁷ more likely to be

63. See Jordan, *supra* note 47, at 23–25.

64. BUR. JUST. STAT., STATE COURT ORGANIZATION 2004, at 223–26 (2006).

65. See Galanter, *supra* note 9, at 21.

66. Nancy Jean King, *The American Criminal Jury*, 62 L. & CONTEMPORARY PROBLEMS 41, 60 (1999).

67. Daniel A. Gross, *How Elite US Schools Give Preference to Wealthy and White 'Legacy' Applicants*, GUARDIAN (Jan. 23, 2019), <https://www.theguardian.com/us-news/2019/jan/23/elite-schools-ivy-league-legacy-admissions-harvard-wealthier-whiter> [<https://perma.cc/MF8R-R2VT>] (the wealthy are overrepresented at Harvard by a factor of six); Yale University, N.Y. TIMES: THE UPSHOT, <https://www.nytimes.com/interactive/projects/college-mobility/yale-university> [<https://perma.cc/RZ93-CR7K>] (last visited June 9, 2019) (the median income of a Yale student is \$192,000 and 69 percent from the top quintile).

able to access our court system,⁶⁸ purchase influence in elections,⁶⁹ hold high office,⁷⁰ and take advantage of government benefits.⁷¹

But when it comes to the obligations of citizenship, the rich are less eager. They serve in the military at a lower rate,⁷² are more likely to dodge paying their taxes,⁷³ and provide a smaller portion of their income to charity.⁷⁴

Jury service is no different. In Elizabethan England, the rich arranged to have the poor take their place on juries.⁷⁵ In Liverpool and Wigan, freeholders argued that local laws exempted them from jury service altogether.⁷⁶ Hundreds of years later in America, the rich were still buying exemptions from jury duty.⁷⁷

68. See MASS. HOUSING CT. DEP'T., HOUSING COURT DEPARTMENT, FISCAL YEAR 2016 STATISTICS, <https://www.mass.gov/files/documents/2016/11/ux/2016-self-represented-represented-litigants-by-court-location.pdf> [https://perma.cc/W3BM-RB8T] (showing that 93 percent of tenants being evicted do not have a lawyer in Massachusetts, and 63 percent of landlords filing the eviction do); Kim Stott, *Quality of Justice Better For Wealthy Than Poor, City Attorneys Agree*, OKLAHOMAN (June 12, 1983), <https://oklahoman.com/article/2028266/quality-of-justice-better-for-wealthy-than-poor-city-attorneys-agree> [https://perma.cc/TD6W-MRXX] (noting that the rich are more likely to be able to hire an attorney, post bond, and obtain expert and character witnesses).

69. Lee Drutman, *The Political One Percent of the One Percent*, SUNLIGHT FOUND. (Dec. 13, 2011), <https://sunlightfoundation.com/2011/12/13/the-political-one-percent-of-the-one-percent> [https://perma.cc/Y8L7-64ZJ].

70. *Why Do Only the Rich Run for Office?*, DUKE TODAY (Aug. 27, 2018) <https://today.duke.edu/2018/08/why-do-only-rich-run-office> [https://perma.cc/3W6G-APQT].

71. Paul Buchheit, *The Absurd Amount of Entitlements That Go to Rich People*, COMMON DREAMS (May 1, 2017), <https://www.commondreams.org/views/2017/05/01/absurd-amount-entitlements-go-rich-people> [https://perma.cc/3GS2-H5SM].

72. Amy Lutz, *Who Joins the Military? A Look at Race, Class, and Immigration Status*, 36 J. POL. & MIL. SOCIOLOGY 167, 167 (2008) (noting that the economic elite is underrepresented in the armed services).

73. Paul Kiel & Jesse Eisinger, *The Golden Age of Rich People Not Paying Their Taxes*, ATLANTIC (Dec. 11, 2018), <https://www.theatlantic.com/politics/archive/2018/12/rich-people-are-getting-away-not-paying-their-taxes/577798/> [https://perma.cc/U6DD-AT5C].

74. Ken Stern, *Why the Rich Don't Give to Charity*, ATLANTIC (Apr. 2011), <https://www.theatlantic.com/magazine/archive/2013/04/why-the-rich-don't-give/309254/> [https://perma.cc/TU7P-59SL].

75. Landsman, *supra* note 1, at 588–89, 588 n.57.

76. Poll D. Helm, LANCASTER GAZETTE (Aug. 28, 1822), at 4, <https://www.newspapers.com/image/395994048/>.

77. *Gath*, CHI. TRIBUNE (Feb. 14, 1883), at 7, <https://www.newspapers.com/image/349287996/> (noting a recent scandal of the rich buying exemptions to jury duty). This was similar to how the rich could once buy their way out of military service. Lloyd Dobyns, *Fighting . . . Maybe for Freedom, but Probably Not*, COLONIAL WILLIAMSBURG FOUND. (2007), <https://research.colonialwilliamsburg>.

Lawyers could further weed-out rich jurors if they thought it would help their clients through the use of peremptory challenges. In one trial the judge cleared out the room to browbeat the offending lawyer, saying: "It is a travesty on justice for a man who is willing to give his time to do jury service to be excused in every case simply because he has money."⁷⁸

Further, various occupational groups—often white-collar—have been exempted from jury service by statute, meaning more spots were available for blue-collar workers. From near the Founding Era, states exempted those whose "lucrative employment . . . do[es] not render [jury] service acceptable."⁷⁹ Over time, lawyers, doctors, nurses, pharmacists, school teachers, clergy, mail carriers, ship officers, airline pilots, firefighters, police officers, sole proprietors of businesses, salespeople on commission, embalmers, legislators, and others, would be exempted.⁸⁰ Wyoming exempted dentists, county officers, federal workers, and militiamen.⁸¹ On one hand, these exemptions reveal an ugly truth: those who worked in offices were too important to be forced to miss work, while those who worked in fields, factories, and streets were not. On the other hand, high-income earners' ability to shirk jury duty through these exemptions more easily allowed greater low-income earners to serve.

All this had the incidental benefit of ensuring that lower-income groups were not shut out of jury service. A study of jury rolls in Georgia, in 1853, showed that jurors were of below-average income.⁸² Men of modest property holdings became the mainstay of juries.⁸³ In England, the rich man's de facto exemption "overloaded the jury panels with poorer freeholders."⁸⁴ For example, in the landmark trial of John Peter Zenger, which helped establish the principle that the government could not punish its citizens for free

org/Foundation/journal/Autumn07/slaves.cfm [https://perma.cc/47JS-CT36]; Timothy J. Perri, *The Evolution of Military Conscription in the United States*, 17 INDEP. REV. 429, 430-431 (2013).

78. *Judge Denounces Practice of Barring Rich as Jurors*, INTER OCEAN (Mar. 11, 1913), at 3, <https://www.newspapers.com/image/34578802/>.

79. *Communication*, VT. REPUBLICAN & AM. J. (Feb. 20, 1826), at 3, <https://www.newspapers.com/image/491170850/>.

80. Albert W. Alschuler, *Jury: Legal Aspects*, ENCYCLOPEDIA.COM (2002), at Exemption, <https://www.encyclopedia.com/law/legal-and-political-magazines/jury-legal-aspects> [https://perma.cc/PDQ5-LB4M].

81. *McKinney v. State*, 3 Wyo. 719, 30 P. 293, 295 (1892).

82. Alschuler & Deiss, *supra* note 10, at 882.

83. Landsman, *supra* note 1, at 588-89.

84. James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 147 (1983).

speech, the jury included a mariner, a brewer, a vintner, an artisan, a baker, a merchant, a blacksmith, a carpenter, a currier, a tradesman, and a clerk.⁸⁵

This did not mean the poor were always welcome. As far back as the thirteenth century, there were complaints that “every member of a jury was poor and incompetent.”⁸⁶ In fact, jurors were often criticized for being part of the unwashed masses. Rural Virginian jurors were decried as “idle loiterers about the court . . . the most unfit persons to decide upon the controversies of suitors.”⁸⁷ Various newspapers called jurors “miserable wretches,” “vagabonds,” “idle and dissolute persons,” and “loafers and drunkards.”⁸⁸ This coded language was almost certainly aimed at poor jurors, and the frequency of these attacks suggest a large number of poor jurors were prevalent throughout history.

Sometimes, jurors could be quite poor indeed. One English juror was an old man so lowly he had to skip meals.⁸⁹ Taking pity on him, his fellow jurors pooled their resources to send him home with a few shillings.⁹⁰ Though his situation was tragic, in what other context would a governmental body have as a voting member someone who knew firsthand the pangs of hunger?

Most of the time, the opposite was true. The Founding Fathers were wealthier and better educated than the average citizen of the day.⁹¹ Around the turn of the 20th century, big business was running roughshod over legislatures. Railroad companies become so powerful and corrupt that several states had to place anti-bribery provisions into their constitutions.⁹² Pennsylvanians joked that the Standard Oil Company did everything to the state legislature except refine it.⁹³ Further, judges were often willing to cement these large companies’ dominance or shield them from liability.⁹⁴ Due to the

85. King, *supra* note 67, at 41.

86. Oldham, *supra* note 85, at 153.

87. Alschuler & Deiss, *supra* note 10, at 881.

88. *Id.*

89. *A Pauper Juror*, HAMPSHIRE ADVERTISER (Aug. 8, 1846), at 3, <https://www.newspapers.com/image/401850042/>.

90. *Id.*

91. Tom Kertscher, *Were The Founding Fathers ‘Ordinary People’?*, POLITIFACT Wis. (July 2, 2015), <https://www.politifact.com/wisconsin/article/2015/jul/02/founding-fathers-ordinary-folk> [<https://perma.cc/VD7F-N64G>].

92. Va. Const. of 1902, § 161; Ala. Const. of 1901, arts. XII, § 243–246; Wash. Const. of 1889, art. 12, § 20.

93. ROBERT CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 29 (1982).

94. *Haring v. N.Y. & Erie R.R. Co.*, WL 5224 at 15–16 (N.Y. Gen. Term. 1852); *Bloodgood v. Mohawk*, 18 Wend. 9 (N.Y. 1837); *New Orleans, Baton Rouge, Vicksburg & Memphis R.R. Co. v. Drake*, 60 Miss. 621, 626 (1882);

humble composition of juries, on balance, they were able to inject some working-class values into the justice system. For instance, in the mid-1700s, debtor cases exploded in Virginia.⁹⁵ These cases had once been resolved by summary judgment, but the jury—unwilling to enforce the rigid rules of debt collection—would often act sympathetically towards debtors.⁹⁶ Similarly, impoverished western farmers on juries refused to convict their countrymen charged with evading whiskey taxes.⁹⁷ Modern research shows that the rich had an inordinate influence on government policy,⁹⁸ but through juries, the lowly were made lordly.

B. *How the Law Kept the Poor off of Juries*

Though the poor did find themselves serving on juries, this occurred in spite of the best efforts to stop them. When the Bill of Rights was ratified, every state limited jury service to men, and every state, except Vermont, limited it to property owners or taxpayers.⁹⁹ Being a property owner typically meant being a landowner, or a landowner with a sufficiently valuable estate.¹⁰⁰ These restrictions likely excluded about a third of white men.¹⁰¹ That women and people of color were excluded goes without saying.

By 1850, following a wave of Jacksonian populism, many—but not all—of these property requirements were gone.¹⁰² In 1882, New York required jurors to own at least \$250 worth of real or personal property, or else be married to a woman who owned that amount.¹⁰³ This statute was still on the books decades later.¹⁰⁴ These laws

Johnson v. Bos., 125 Mass. 75, 79 (1878); *Chi., Burlington & Quincy R.R. Co. v. Stumps*, 69 Ill. 409, 414 (1873).

95. Landsman, *supra* note 1, at 594.

96. *Id.* Note that this is different from modern day accusations of juries ignoring the law. Back in the 18th century, juries were recognized as being able to *interpret* the law, not merely apply it. See MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 111 (2015).

97. See JONAKAIT, *supra* note 7, at 28.

98. Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSPECTIVES ON POLITICS* 564, 573 (2014).

99. Alschuler, *supra* note 81.

100. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 *AM. UNI. L. REV.* 65, 179 n.542 (2003).

101. *Id.* at 179 n. 543.

102. *Id.* at 179.

103. *In re Wood*, 140 U.S. 278, 284 (1891).

104. *Fay v. N.Y.*, 332 U.S. 261, 266-67 (1947). Around the time of *Fay v. N.Y.*, states cooked up new schemes to try to keep the riffraff off of juries. Chief among them were “blue ribbon” juries. When New York used “blue ribbon” juries—whose members were handpicked by the government, rather than drawn at random—stark inequities emerged. Professionals, businessmen, clerical, and

played into the belief that in “the general course of the World,” a man should be judged “according to their Estate.”¹⁰⁵ Rich men, the thinking went, were less likely to be corrupt since they already had great wealth.¹⁰⁶

Further, the cost of jury service could be burdensome on the poor. Before other transportation options existed, poor jurors might have had to walk several miles,¹⁰⁷ maybe as many as twenty miles.¹⁰⁸ Or perhaps they would have to travel so far that they would need to board themselves during the session of court.¹⁰⁹ They might be paid some humble wage, perhaps \$2 per day, but, in the event of a hung jury, they would not be paid at all.¹¹⁰ This meant that a juror’s convictions could stand in opposition to his pocketbook, and the pocketbook usually won. In addition to these hardships, late jurors could be slammed with fines.¹¹¹ To add insult to injury, the court officials presiding over this oppressive system continued to draw “fat salaries.”¹¹²

sales workers were over-represented on these “blue ribbon” juries, while service workers, laborers, and farmers were completely shut out. *Fay v. N.Y.*, 332 U.S. at 298 (Murphy, J., dissenting). This was no accident, as the whole point of these juries was to find people with “superior educational and professional attainments.” Richard C. Backer, *In Defense of the “Blue Ribbon” Jury*, 35 IOWA L. REV. 409, 409 (1950).

105. Oldham, *supra* note 85, at 144.

106. *Id.* at 145.

107. *Local Intelligence*, DEL. CNTY. DAILY TIMES (Dec. 2, 1878), at 5, <https://www.newspapers.com/image/9658219>.

108. *A Pauper Juror*, *supra* note 90, at 3.

109. *The Last Legislature*, ORANGEBURG DEMOCRAT (Jan. 17, 1879), at 2, <https://www.newspapers.com/image/61329412/>.

110. *The Trial by Jury*, S.F. CHRONICLE (Feb. 26, 1869), at 2, <https://www.newspapers.com/image/27509927/>.

111. Untitled, BOLIVAR BULLETIN (Dec. 19, 1868), at 2, <https://www.newspapers.com/image/70813834>. In other countries, they might not get paid at all. *Jurors*, SYDNEY MORNING HERALD (Dec. 11, 1844), at 4, <https://www.newspapers.com/image/122344145>. In hard times, American jurors could be paid with worthless notes known as jury tickets. *The Last Legislature*, *supra* note 110, at 2. At best, jurors might find a merchant who would accept these jury tickets for 75 cents on the dollar or a newspaper that would give a subscription in exchange for them. *Honigsberger & Brothers*, SUMTER CNTY WHIG (Feb. 13, 1844), at 4, <https://www.newspapers.com/image/320796468>; *Barter and Trade!*, SUMTER CNTY WHIG (Dec. 19, 1843), at 3, <https://www.newspapers.com/image/320795673/>.

112. *The Last Legislature*, *supra* note 110. The relative opulence of judges was a frequent bone of contention for jurors. One complained of the “large, well-furnished rooms” in the court for everyone except jurors. *Serving on a Jury*, CHI. TRIBUNE (Mar. 14, 1880), at 3, <https://www.newspapers.com/image/349847833>. Tapping into this anger, a New York gubernatorial candidate railed “The judge was the tycoon and autocrat of the Court; he was paid a big salary to sit on the bench, while the poor juror . . . got a pittance for his services.”

Courts also upheld exclusionary jury policies multiple times. Take “special” juries, which are staffed by the upper classes alone.¹¹³ New York’s high court approvingly described special juries as selecting men “more particularly ascertained.”¹¹⁴ The U.S. Supreme Court was untroubled by the fact that the juries were disproportionately drawn from the wealthy.¹¹⁵ In fact, in *Moore v. New York*, where a defendant challenged the “special” jury system, the Supreme Court treated the “special” jury as so well settled it did not bother to probe it.¹¹⁶

The issue of juries and class was also litigated in *Thiel v. So. Pacific Co.* in 1946.¹¹⁷ In this case, a personal injury plaintiff moved to strike the jury because it was “mostly business executives or those having the employer’s viewpoint,” as a result of a local policy to exclude daily wage, meaning low-income, earners from jury duty.¹¹⁸ In its ruling, the Court held daily wage earners could not be precluded from serving on a jury.¹¹⁹ Using forceful language, the Court refused to see the jury become an “instrument of the economically and socially privileged” or allow “the subtle undermining of the jury system.”¹²⁰

Today, all jurisdictions use random selection to generate jury rolls, which guarantees that rich and poor alike have the opportunity to serve.¹²¹ If jurisdictions use voter or driver lists, however, they are likely leaving many low-income jurors from the rolls.¹²² Some jurisdictions are making efforts to improve socioeconomic diversity on juries, suggesting they still see it as a goal worth pursuing.¹²³

Untitled, FORT SCOTT WEEKLY MONITOR (Oct. 9, 1879) <https://www.newspapers.com/image/67713655>.

113. *People v. Dunn*, 157 N.Y. 528, 534 (1899).

114. *Id.* at 538.

115. *Fay*, *supra* note 105, at 291.

116. *Moore v. People of State of N.Y.*, 333 U.S. 565, 566 (1948).

117. *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946).

118. *Id.* at 217, 219, 221 (1946).

119. *Id.* at 217, 219, 222 (1946).

120. *Id.* at 224-25.

121. ABRAMSON, *supra* note 33, at 99.

122. Voting correlates with income. Randall Akee, *Voting and Income*, ECONOFACT (Feb. 7, 2019), <https://econofact.org/voting-and-income> [<https://perma.cc/A8UL-KJEQ>]. Vehicle ownership also tends to correlate with income, though not always. Henry Grabar, *Where Rich People Don't Own Cars*, SLATE (May 17, 2019, 3:01 PM), <https://slate.com/business/2019/05/maps-car-ownership-income-population-density-green-new-deal.html> [<https://perma.cc/EQ85-QJE5>].

123. *E.g. Courts Seek to Increase Jury Diversity*, U.S. CTS. (May 9, 2019), <https://www.uscourts.gov/news/2019/05/09/courts-seek-increase-jury-diversity> [<https://perma.cc/EC7J-EKC2>]; Stephanie Domitrovich, *Jury Source Lists and*

However, exemptions, which once unintentionally helped the poor get on juries, can work to exclude them today. For instance, courts provide exemptions for financial hardship and lack of child-care, both of which contribute to keeping lower-income jurors off the jury.¹²⁴ Of course, the solution is not to force poor people to serve despite the hardship; instead, it is to raise juror pay so that serving is not financially ruinous. Right now, juror pay is abysmal. In 2004, the most any state paid was \$50 per day, and many paid only \$10.¹²⁵ Best case scenario, an eight-hour workday on the jury would yield \$6.25 per hour—minus transportation and parking costs in a big city.

Nevertheless, whatever faults the jury system may have in drawing low-income jurors, it is leaps and bounds better than the alternative: trial by judges. Judges have, do, and probably always will occupy the upper end of the social strata. In 1885 Supreme Court Justices made about \$10,000; Court of Claims judges \$4,500; circuit and district judges between \$6,000 and \$3,500; and territorial justices \$3,000.¹²⁶ This would have put them well above the average worker, who earned about \$2.50 a day, or around \$900 a year if the worker was paid for 365 days of labor.¹²⁷ In 1979, the average salary for state judges was, adjusted for inflation, about \$41,000—enough to put them in the top quintile of that era.¹²⁸ In 2019, federal district judges were paid \$210,900.¹²⁹ Again, this places them solidly in the top quintile.¹³⁰ Jury trials, in other words, bear the risk of neglecting the voices of the working class. Bench trials guarantee it.

the Community's Need to Achieve Racial Balance on the Jury, 33 DUQ. L. REV. 39, 95 (1994).

124. William Caprathé, et al., *Assessing and Achieving Jury Pool Representativeness*, 55 JUDGES' J. 16, 19 (2016).

125. BUR. JUST. STAT., *supra* note 65, at 223–26. Colorado and Connecticut were tied for the highest juror pay at \$50 per day. *Id.* at 223.

126. U.S. DEP'T OF JUSTICE, REGISTER OF THE DEP'T OF JUSTICE AND THE JUD. OFFICERS OF THE U.S., § 9, 10; § 16138 (1885).

127. U.S. DEP'T OF LABOR, BULL. OF THE DEP'T OF LAB., No. 18—Sept. 1898, at 668, (1898).Error! Hyperlink reference not valid.

128. Judicial salaries from Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 124 n.300 (1980). Inflation calculation based on *CPI Inflation Calculator*, BUR. LABOR STAT. <https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=41000&year1=197909&year2=201109> [<https://perma.cc/63Z3-V4AN>] (accessed Aug. 22, 2018); *Average Family Income, by Income Group, 1947–2010 (2011 Dollars)* ECON. POL'Y INST. (May 20, 2012), <http://www.stateofworkingamerica.org/chart/swa-income-table-2-5-median-family-income> [<https://perma.cc/3UAE-84VQ>].

129. *Judicial Compensation*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-compensation> [<https://perma.cc/DNB7-YLZ8>] (last visited Apr. 30, 2019).

130. *Household Income Quintiles*, TAX POL'Y CENTER (May 3, 2017), <https://>

III. GENDER

In Shakespeare's *Merchant of Venice*, the lady Portia—disguised as a man—argues as a lawyer in court.¹³¹ For centuries thereafter, the idea of a woman in court was largely just like Shakespeare's play: a fiction. Though it took eons to reach the point where women can serve on juries on equal terms with men, they did have a few opportunities to serve well before women were able to hold government offices. Roman women could serve on juries in cases involving pregnancy and English women started serving—sporadically at least—as far back as the 11th century.¹³² In the 13th century, an all-women panel known as a matrons' jury could be called to determine if a woman found guilty of a capital crime was currently pregnant—thus postponing the execution.¹³³

But, in most cases, women were shut out. Sir William Blackstone declared “so great a favourite is the female sex of the laws of England,”¹³⁴ due to restrictions on women that were said to be for their own protection. This was in spite of the fact that his Commentaries noted that women were excluded from the jury box because of the “defect of sex.”¹³⁵

Women in the United States first served on juries in the Western frontier. Specifically, the Wyoming territory experimented with female jurors, in part to entice women to move there. After a smattering of successes around the country, the movement to gain jury rights for women was catalyzed by the passage of the Nineteenth Amendment. But, even though most women got the right to vote before they could serve on juries, they were able to serve on juries long before other political offices. In spite of laws that sought to keep women off juries, for decades, juries comprised entirely of women have existed.

A. *Frontier Successes*

The date of the first American female juror is disputed. By one claim, the first female juror was seated in a Kentucky case in

www.taxpolicycenter.org/statistics/household-income-quintiles [https://perma.cc/55WL-5VSF].

131. WILLIAM SHAKESPEARE, *MERCHANT OF VENICE*, Act 2, Scene 2 (1605).

132. WALDREP, *supra* note 2, at 12.

133. Kevin Crosby, *Women on the Jury*, *FIRST HUNDRED YEARS* (May 6, 2016) <https://first100years.org.uk/1481-2> [https://perma.cc/L24X-5JFU].

134. WILLIAM BLACKSTONE, *COMMENTARIES* 445.

135. *Id.* at 362. (Written in the text in Latin as “defectum sexus”). Writing in reply to Blackstone for the *Women Lawyers' Journal* in 1929, Burnita Shelton Matthews quipped “the defect lies in the masculine, not the feminine ranks.” Shelton Matthews, *supra* note 61, at 15.

1804.¹³⁶ Despite the woman's jury service generating "wide-spread attention," collaborative evidence is difficult to find.¹³⁷

The first well-documented incidence of a female juror was in the Wyoming territorial court of 1870.¹³⁸ The state has always been proud of its egalitarian attitudes on gender. Wyoming, in July 1889, was the first state where women were part of the constitutional convention.¹³⁹ To this day, its great seal bears a woman in the center, beneath a banner reading "Equal Rights"—a nod to Wyoming being the first state to grant equal civil and political rights to women.¹⁴⁰

In deciding whether women ought to be able to serve on juries, a judge in 1870 said women had long been "the victim of the vices, crimes and immoralities of man."¹⁴¹ The court found that the government had been indifferent to these wrongs, so women should be able to serve on juries to protect themselves.¹⁴² A female bailiff was also appointed for the grand jury around the same time.¹⁴³ As a consequence of the decision, virtually every jury that sat during the term included women.¹⁴⁴ Furthermore, Wyoming also had the first woman to serve as a justice of the peace—responsible for drawing grand juries and trial juries in 1871.¹⁴⁵

But, even when women were allowed on juries, there was not perfect equality. Back in Wyoming's early experiment with gender-inclusive juries, the state excluded "all nursing mothers, all pregnant women, all with sick or very young children demanding their care, all delicate, nervous or hysterical women, all of notoriously bad character, and all who would be exempt for the same

136. *The Pioneer Women*, ATLANTA CONST. (July 5, 1895), at 5, <https://www.newspapers.com/image/26839500>.

137. *Id.*

138. ABRAMSON, *supra* note 33, at 112.

139. *Success in Wyoming*, AKRON BEACON J. (May 24, 1892), at 4, <https://www.newspapers.com/image/228074595/>.

140. *Wyoming Great Seal*, EREFERENCE DESK, <http://www.ereferencedesk.com/resources/state-seal/wyoming.html> [<https://perma.cc/K47C-JFS9>] (last visited June 6, 2019).

141. WALDREP, *supra* note 2, at 4.

142. *Id.*

143. *The Woman Jurors*, LAWRENCE DAILY J. (Mar. 8, 1870), at 2, <https://www.newspapers.com/image/59538814>.

144. *The Women of Wyoming*, NASHVILLE UNION & AM. (Aug. 25, 1871), at 1 <https://www.newspapers.com/image/80927922>.

145. *Mrs. Esther Morris, J.P.*, ATCHISON DAILY PATRIOT (Feb. 9, 1871), at 3 <https://www.newspapers.com/image/80381494>.

reasons as men.”¹⁴⁶ One newspaper estimated that only 200 women in the territory were eligible.¹⁴⁷

Though small in quantity, these pioneering women were large in quality. According to the judge, the first women “acquitted themselves with such dignity, decorum, propriety of conduct, and intelligence as to win the admiration of every fair minded citizen of Wyoming. They were careful, painstaking, intelligent, and conscientious.”¹⁴⁸

In fact, the newly appointed women on the grand jury in Wyoming led a crusade against vice. Around the time women gained jury rights, the territory witnessed an increase in drinking rates, saloons, and slums.¹⁴⁹ Within two days of the grand jury meeting, dance-house keepers, gamblers, and prostitutes “fled out of the city in dismay, to escape the indictment of women grand juries!”¹⁵⁰ These new jurors “contributed to the speedy release of the territory from the regime of the pistol and bowie-knife.”¹⁵¹ When women started serving on grand juries “gamblers, law-breakers and demi-monde fled the town.”¹⁵² They were “persistent in enforcing the [saloon closure] law, and imposed fines and penalties without stint.”¹⁵³ Even as crime rose by more than 40 percent nationwide, it held steady or dropped in Wyoming.¹⁵⁴

Not everyone was pleased with the addition of women on juries. Families of the female jurors struggled without them. When six women jurors were locked-up overnight to deliberate in a murder case, the women’s husbands complained to the judges and “a half dozen children made the courtroom ring with their cries.”¹⁵⁵

146. *Woman Suffrage in Wyoming*, BURLINGTON FREE PRESS (Sept. 14, 1875), at 2, <https://www.newspapers.com/image/197228064>.

147. *Id.*

148. J.H. Howe, *Female Jurors*, ALBANY LEDGER (May 5, 1870), at 1, <https://www.newspapers.com/image/211081090>.

149. Cristina M. Rodriguez, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys’ Network in Nineteenth-Century America*, 108 YALE L.J. 1805, 1811 (1999).

150. Howe, *supra* note 149.

151. *Success in Wyoming*, AKRON BEACON J. (May 24, 1892), at 4, <https://www.newspapers.com/image/228074595>.

152. *Cause of Woman*, BUFFALO MORNING EXPRESS & ILLUSTRATED BUFFALO EXPRESS (Aug. 25, 1892), at 5, <https://www.newspapers.com/image/344152712>.

153. Rebecca Hein, “*Those Damn Women: Louise Graf and Women on Wyoming Juries*,” WYOHistory.org (Oct. 3, 2016), <https://www.wyohistory.org/encyclopedia/those-damn-women-louise-graf-and-women-wyoming-juries> [<https://perma.cc/9PB4-CPW8>].

154. *Cause of Woman*, *supra* note 153, at 5.

155. Untitled, TIMES-DEMOCRAT (July 28, 1871), at 4, <https://www.newspapers.com/image/226970391>.

Some husbands were so upset with having their wives serve on juries that they rallied against women's rights in general.¹⁵⁶

In contrast, others observed how women differed from men as jurors. For example, men who drew guns and shot each other to resolve heated arguments would be charged with murder if they killed the opposing party.¹⁵⁷ Male jurors would routinely acquit the survivor if he claimed self-defense. Female jurors, however, would convict unless they were convinced the dead man was truly the aggressor.¹⁵⁸ A later study in England found that conviction rates for sex offenses skyrocketed after juries included female and male jurors.¹⁵⁹

News of the first female jurors made headlines around the county. Ignorant, perhaps, of Rome and England, one paper claimed it was "the first panel of lady jurors in the world."¹⁶⁰ Commenting on one panel that was nearly entirely female, with a gender breakdown of eleven-to-one, one paper joked, "How will that one defenseless man get along with the eleven women?"¹⁶¹ The news became international, leading King Wilhelm of Prussia to send President Ulysses S. Grant a congratulatory telegram.¹⁶²

King Wilhelm, it turned out, acted hastily. The right to serve was taken away from women in Wyoming within two years, not to be reclaimed for decades.¹⁶³ But during the two-year period in Wyoming, women were more widely represented on juries than other government offices. Though one woman was elected justice of the peace, and another superintendent, that was the extent of their electoral success.¹⁶⁴ Not a single woman was elected or nom-

156. *How Woman's Rights Work!*, ATLANTA CONST. (Jan. 27, 1872), at 2, <https://www.newspapers.com/image/26773329>.

157. *The Woman Movement in Wyoming*, WATERLOO PRESS (June 13, 1872), at 1, <https://www.newspapers.com/image/36022356>.

158. Women were also reportedly more likely to begin their duties each morning with prayers. *New Testimony to the Good Effects of Woman Suffrage in Wyoming*, ST. LANDRY DEMOCRAT (Nov. 30, 1872), at 3, <https://www.newspapers.com/image/367173578>. See also Cause of Woman, *supra* note 153, at 5. One woman brought a newborn baby with her on the jury, promptly causing the losing party in the case to appeal the verdict on that account. Untitled, PITTSBURGH POST (Feb. 22, 1873), at 10, <https://www.newspapers.com/image/87639374>.

159. Jay Fitzgerald, *How the First Female Jurors Swayed Verdicts*, PBS (Apr. 18, 2016), <https://www.pbs.org/newshour/economy/how-the-first-female-jurors-swayed-verdicts> [perma.cc/6Q99-8ELL].

160. *The Woman Jurors*, *supra* note 144.

161. *Id.*

162. Alschuler & Deiss, *supra* note 10, at 898.

163. *Id.* at 898–99.

164. *Woman Suffrage in Wyoming*, *supra* note 147.

inated as a delegate, city councilor, representative, police judge, or any clerical office in those two years.¹⁶⁵

Following Wyoming, women in the Washington Territory were permitted to serve on juries starting in 1884.¹⁶⁶ This allowed women in Washington a unique opportunity to serve in government as paid positions for women in the state's early government were almost nonexistent.¹⁶⁷ Before long, lawyers started expressing a general preference for female jurors and found that no grand jury had ever done "prompter, cleaner, better work" than these mixed-gender ones.¹⁶⁸ The chief justice of the territorial court said he had not heard "a single adverse criticism or any word but praise" for the new jurors from any informed observer.¹⁶⁹

Uninformed observers were a different matter. The chief justice of the territory, speaking of female jurors, presaged "after her proper station is well won, some special form of evil may develop out of the fact that that she occupies it."¹⁷⁰ That soon came to pass. When some of the first women were empaneled on Washington juries, an effort was made to disqualify them because they were not citizens, or even persons, by the critics' estimations.¹⁷¹ And if things went wrong on a mixed-gender jury, the women could expect to, in the words of one woman juror, "shoulder all the blame and censure."¹⁷²

More broadly, as women became leaders in the Prohibition movement, organized vice moved to block them from gaining access to the ballot and jury box. "Pimps, gamblers, prostitutes, drunkards and drunkard-makers" arrayed themselves in opposition to female jurors.¹⁷³

Reactions of the female jurors to serving in court could be mixed. Some women "hear[d] things in Court that cause[d] them an agony of mortification," leading many women to ask to be

165. *Id.*

166. *Woman as Jurors*, RUTLAND DAILY HERALD (June 3, 1884), at 2, <https://www.newspapers.com/image/534068978>.

167. *Women in Early Seattle: Looking and Hoping for Justice*, CITY OF SEATTLE, <https://www.seattle.gov/cityarchives/exhibits-and-education/online-exhibits/women-in-city-government/women-in-early-seattle>. [<https://perma.cc/TQC6-N56C>] (last visited July 3, 2019).

168. *Woman as Jurors*, *supra* note 167.

169. *Id.*

170. *Id.*

171. Laura E. Hall, *From a Woman Juror*, KAN. PROHIBITIONIST (May 28, 1884), at 6, <https://www.newspapers.com/image/485141048>.

172. *Id.*

173. *Woman in Public Affairs*, SALINA HERALD (Nov. 20, 1884), at 3, <https://www.newspapers.com/image/484209127>.

excused from service or else pay the fine for contempt of court.¹⁷⁴ In the following years, these sorts of incidents fed into the complaint that women lacked the constitution or intellect to be jurors.¹⁷⁵ Although, not all women felt this way. Laura E. Hall wrote an op-ed sharing her experience as one of the first female jurors in Washington. She said, “[W]e serve because we consider ourselves citizens . . . and believe we have the interest and well-being of the community at heart.” She noted how some women were unafraid to hold out all night on the force of their convictions, resulting in a hung jury.¹⁷⁶ Other women also announced their willingness to continue serving.¹⁷⁷ Clara Burwick Colby would later say “If women find unpleasant facts about jury serving they will alter them.”¹⁷⁸

It should not be surprising that women had their first opportunity to sit on juries out West. On the frontier, women’s equality was one part justice, one part necessity. In Wyoming, for instance, after Union Pacific crews had left the territory, only 9,000 people remained—most of them single men.¹⁷⁹ The top legislators in support of women’s rights not only saw women serving on juries as morally right but also as a means to generate good publicity for the fledgling territory and attract settlers.¹⁸⁰ Similarly, in the Washington Territory, during the 1860s, men outnumbered women nine-to-one—women’s equality led to more women arriving in the territory.

B. *Fighting for the Right to Serve on Juries*

Buoyed by territorial experiments with gender equality, successes cropped-up around the county. The Sheriff of McDowell County, North Carolina said that one of the jurors drawn for the spring term of 1880 was a woman.¹⁸¹ Pennsylvania summoned its first woman for jury duty in 1891.¹⁸² Chicago placed a woman in charge of selecting female jurors in 1893.¹⁸³ Rockford, Illinois had its

174. *Patchwork*, S.F. EXAMINER (May 11, 1884), at 2, <https://www.newspapers.com/image/457503344>.

175. Crosby, *supra* note 134.

176. Hall, *supra* note 172, at 6.

177. *Items from Woman’s Journal*, LINCOLN BEACON (July 30, 1885), at 5, <https://www.newspapers.com/image/476899721>.

178. Cause of Woman, *supra* note 153, at 5.

179. T.A. Larson, *Equality*, in WYO. BLUE BOOK, VOL. III, at vii, (Virginia Cole Trenholm ed., 1974).

180. *Id.*

181. *Woman Juror*, CHATHAM RECORD (Feb. 26, 1880), at 3, <https://www.newspapers.com/image/74251074>.

182. *Judge Ewing’s Error*, PITTSBURGH DISPATCH (Dec. 2, 1891), at 5, <https://www.newspapers.com/image/76229467>.

183. *Why the Women Fought*, BUFFALO WEEKLY EXPRESS (Aug. 17, 1893), at 2, <https://www.newspapers.com/image/494884282>. The state of Illinois did not

first female juror in 1894.¹⁸⁴ The first woman juror in Pottawatomie County, Kansas, seated in 1896, was “probably” the first female juror in Kansas according to an Atchison, Kansas newspaper.¹⁸⁵ Colorado also seated its first woman juror in 1896.¹⁸⁶ The State of Utah allowed women to serve in 1898.¹⁸⁷ Dr. Mary Walker — the first and only woman to win the Congressional Medal of Honor — spoke in 1893 in support of a bill that would have allowed married women to serve if their husbands were qualified.¹⁸⁸ By the 1890s, women were “engaged in an earnest movement to secure their rights to sit on juries.”¹⁸⁹

However, the courts were not terribly sympathetic to women’s rights. When Myra Bradwell applied for a law license in Illinois, her case made it to the U.S. Supreme Court in 1872. The Court dismissed her claim as so baseless that “elaborate argument in the present case [was] unnecessary[.]”¹⁹⁰ Concurring, Justice Bradley said “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”¹⁹¹

In contrast, a few years later in *Strauder v. West Virginia*, the U.S. Supreme Court held that jurors could not be excluded on the basis of race.¹⁹² But, even in this decision, the Justices did not question the fact that states could exclude people on the basis of sex, along with property, age, citizenship, or education,¹⁹³ and the Justices did not believe that the Fourteenth Amendment “was ever

pass a law allowing women to serve until 1939. Bob Hughes, *Equality on Trial: When Women Were Barred From Juries*, CHI. TRIBUNE (May 12, 1985), at H8.

184. *A Woman Juror*, WOMAN’S FRIEND (May 1, 1894), at 8, <https://www.newspapers.com/image/477547479>.

185. *A Woman Juror*, ATCHISON DAILY CHAMPION (Feb. 11, 1896), at 1, <https://www.newspapers.com/image/109167070>.

186. *A Woman Juror in Colorado*, CHARLOTTE OBSERVER (Apr. 22, 1896), at 1, <https://www.newspapers.com/image/73297006>.

187. Nancy S. Marder, *The Changing Composition of the American Jury*, 125TH ANNIVERSARY MATERIALS 66, 72 (2013); Katie Lange, *Meet Dr. Mary Walker: The Only Female Medal of Honor Recipient*, U.S. ARMY (Mar. 7, 2017), https://www.army.mil/article/183800/meet_dr_mary_walker_the_only_female_medal_of_honor_recipient [<https://perma.cc/HZF9-PUM9>].

188. *Id.*

189. “*Why Not Mixed Juries?*”, FAIRVIEW ENTER. (July 25, 1891), at 4, <https://www.newspapers.com/image/482869191>.

190. *Bradwell v. State*, 83 U.S. 130, 139 (1873).

191. *Id.* at 141.

192. *Strauder v. W. Va.*, 100 U.S. 303 (1880).

193. *Id.* at 310.

intended to prohibit this. Looking at its history, it is clear it had no such purpose.”¹⁹⁴

Further, in 1892, a Wyoming defendant argued that his conviction was invalid because the jury was exclusively male.¹⁹⁵ The state constitution at the time declared that “Both male and female citizens of this state shall equally enjoy all civil, political, and religious rights and privileges.”¹⁹⁶ The constitutional language describing juries and grand juries, however, spoke of “men,” not “persons.”¹⁹⁷ The Court held that the right to vote or hold office did not include the right to serve on juries,¹⁹⁸ and if women did have a right to serve, it would have to be asserted by a female juror, not a male defendant.¹⁹⁹

In addition to the courts, there were many other critics of women serving on juries. The *Boston Globe* ran a satirical piece mocking female jurors for deciding a case on the basis of how a party was dressed.²⁰⁰ Alfred Hitchcock released a silent film critiquing the female juror and questioning whether women were fit to rule on divorce court proceedings.²⁰¹ When Kentucky allowed female jurors to serve, a Mississippi paper speculated that women would decide the case based on the attractiveness of one of the parties.²⁰²

Beyond journalists, businesses opposed female jurors on the grounds that they lacked business acumen and, thus, would be less sympathetic to businesses’ claims.²⁰³ Male lawyers feared that women would be less susceptible to traditional jury persuasion techniques.²⁰⁴ Moreover, traditional women’s organizations were skeptical, as they thought jury service would pull women away from their work as homemakers.²⁰⁵ Indeed, when the sheriff summoned Louise Graf—an early female juror in Wyoming—for a court date

194. *Id.*

195. McKinney, *supra* note 82.

196. *Id.*

197. *Id.* at 294–95.

198. *Id.* at 295.

199. *Id.* at 296. *Cf.* *Marshall v. Donovan*, 73 Ky. 681, 695 (1874) (holding that a white man could not raise a claim of discrimination against Black people); *Commonwealth v. Wright*, 79 Ky. 22 (1880).

200. *In 1914*, *BOSTON GLOBE* (Mar. 25, 1894), at 30, <https://www.newspapers.com/image/430672871>.

201. Crosby, *supra* note 134.

202. *The Female Jury*, *DEMOCRATIC-HERALD* (Nov. 14, 1895), at 2, <https://www.newspapers.com/image/316119973>.

203. Cynthia Harrison, *H-NET REVS.*, 3 (Nov. 2013) (reviewing HOLLY J. McCAMMON, *THE U.S. WOMEN’S JURY MOVEMENTS AND STRATEGIC ADAPTATION: A MORE JUST VERDICT* (2012)).

204. *Id.*

205. *Id.*

on Monday, she tried to demur, pointing out that Monday was wash day.²⁰⁶ To many, a woman “in the court-room . . . is an eye-sore to nearly all mankind. She is believed to be out of her sphere.”²⁰⁷ Others maintained that “women are too sentimental and impressionable to be severely judicial.”²⁰⁸

Nevertheless, the movement to attain jury rights for women was inextricably tied to the movement for women’s suffrage. During the suffragette movement, opponents warned voting equality “MEANS WOMEN ON JURIES.”²⁰⁹ In fact, the Massachusetts Anti-Suffrage Committee claimed jury duty “for your wife or your daughter is almost unthinkable” given their delicate constitution.²¹⁰ The past subjugation of women was held against them, as some argued that lack of work experience among women meant they lacked the relevant experience to serve on juries.²¹¹

Yet, the passage of the Nineteenth Amendment harkened a new era for women’s rights. Because several states tied jury service to suffrage, women gained access to the jury box in those states.²¹² Following the passage of the Amendment, a good many other states passed laws allowing women to serve on juries.²¹³

But, for years after the ratification of the Nineteenth Amendment, arguments against female jurors persisted. State legislators in Illinois claimed that “The jury box is no place for a lady,” because of the sordid crime presented in courts, and that jury service was no more a privilege than “going to war is a privilege.”²¹⁴ Costs were another concern argued by opponents. Having female jurors would

206. Bill Barton, *Louise Graf, Jury Foreman and Green River Citizen*, Wyo. St. HIST. Soc’y. (Sept. 20, 2016), <https://www.wyohistory.org/oral-histories/louise-graf-jury-foreman-and-green-river-citizen> [<https://perma.cc/X8D9-M3LJ>].

207. *The Light and Life of a Home*, COURIER-J. (Mar. 5, 1887), at 5, <https://www.newspapers.com/image/32447184>.

208. “Why Not Mixed Juries?,” *supra* note 190, at 4.

209. *Learn About the History of the Jury System*, MASS.GOV, <https://www.mass.gov/info-details/learn-about-the-history-of-the-jury-system> [<https://perma.cc/ZE88-7XSD>] (accessed May 26, 2019).

210. *Id.*

211. Shamera Anwar, Patrick Bayer, & Randi Hjalmarsson, *A Jury of Her Peers: The Impact of the First Female Jurors on Criminal Convictions*, NAT’L BUR. ECON. RES. 8 (2016).

212. Shelton Matthews, *supra* note 61, at 16. Though the Nineteenth Amendment removed the legal disability against women voting, and, thus from serving on juries, states could use many schemes to keep Black people, including Black women, off of juries. *See infra*, Part III.

213. Gretchen Ritter, *Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment*, 20 L. & HIST. REV. 479, 503 (2002).

214. Hughes, *supra* note 184.

mean a need to hire extra bailiffs and construct separate quarters for them to keep them apart from men.²¹⁵

C. *Subtle Exclusions to Keep Women off Juries*

By the late 1960s, every state permitted women to serve on juries,²¹⁶ but, even then, barriers remained. After women were allowed on juries, many courts adopted “blue-ribbon” juries or “key-man” systems that were based on the idea that certain groups were better suited to deal out justice than others. These jurors were believed to have extra-ordinary intelligence and experience.²¹⁷ Decades after the system’s heyday, a federal district court stated, and the U.S. Supreme Court agreed, that the “key-man” system highly subjective,²¹⁸ and the Massachusetts Supreme Judicial Court admitted that the “key man” jury “contains the possibility of abuse.”²¹⁹

Yet, abuse was more than a possibility; it was a reality. These supposedly merit-based juries were manned, seldom womanned,²²⁰ by those with “high business standing and broad educational experience and, therefore [consisted of] those with a greater than average income.”²²¹ The task of finding these prime-cut jurors was left to community leaders, who would compile a list of people they thought had good intelligence and character,²²² or would simply draw names out of a phonebook.²²³ Predictably, this led to homogeneous jurors—consisting of similar religious beliefs, similar politics, and similar social circles—with Black and female jurors largely excluded.²²⁴ Although these juries were more likely to convict criminal defendants,²²⁵ except men who killed their wives for adultery,²²⁶ and less likely to find for personal injury victims, this was attributed to their “superior mental equipment” and the fact that ordinary

215. *Id.*

216. Harrison, *supra* note 204.

217. Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 57 (1990); Jordan, *supra* note 47, at 6.

218. *Castaneda v. Partida*, 430 U.S. 482, 491 (1977).

219. *Commonwealth v. Bastarache*, 414 N.E.2d 984, 995 (1980).

220. Ellen Goodman, *Today's Juror Must Carry the Baggage of Evolving Values*, CHI. TRIBUNE (Mar. 21, 1994), at L13.

221. Note, *The “Blue-Ribbon” Jury*, 60 HARV. L. REV. 613, 613 n.2 (1947).

222. Jordan, *supra* note 47, at 14.

223. Goodman, *supra* note 221, at 27.

224. Jordan, *supra* note 47, at 13 n.38, 14; JONAKAIT, *supra* note 7, at 121.

225. One study, with an admittedly small sample size, estimated that regular juries convicted 57 percent of the time, and special juries convicted 79 percent of the time. Moore, *supra* note 117, at 566–67.

226. Goodman, *supra* note 221, at 27.

juries were doing “poor work” of reaching the correct result.²²⁷ If anything, higher conviction rates were a feature, not a bug. “Intelligent” jurymen were supposed to be “the first line of defense against crime” according to one of the key-man system’s boosters.²²⁸

The U.S. Supreme Court took a challenge to the key-man system in 1947. A year earlier, it had forbidden the “purposeful and systematic exclusion of women” from juries.²²⁹ But, in *Fay v. New York*, the Court showed it was happy to allow the near-systematic exclusion of women. Under the New York system of 1947, the 1,800,000 people of New York County were whittled down to 60,000 eligible jurors.²³⁰ Of that figure, only 11 percent were women.²³¹ Confronted with this data, the Court said: “It is almost frivolous to assert that there is a bias against [women’s] inclusion on juries.”²³² The fact that the system indisputably lowered the number of women who served did not matter because women were not categorically barred.²³³ As late as 1967, nearly two-thirds of federal courts were still using key-man systems.²³⁴ Congress abolished this system in the federal courts in 1968 with the Jury Selection and Service Act.²³⁵

If not locked out of the jury room by biased selection, women could be kept off in subtler ways. States granted numerous exemptions to women. Wyoming allowed women to be excused from jury service when “household duties or family obligations require her absence.”²³⁶ New York and Washington automatically exempted women, unless they affirmatively took steps to serve.²³⁷ Others required women to go down to the courthouse to register as jurors, or granted the judge discretion to excuse women if he thought the subject of the trial might be embarrassing to her.²³⁸ In the 1970s, five states allowed women to be excused based purely upon their

227. Note, *The “Blue-Ribbon” Jury*, *supra* note 222 at 613 n.4, 614.

228. Richard C. Backer, *In Defense of the “Blue Ribbon” Jury*, 35 IOWA L. REV. 409, 409 (1950).

229. *Ballard v. United States*, 329 U.S. 187, 193 (1946).

230. *Fay*, *supra* note 105, at 266.

231. *Id.* at 266 n.4.

232. *Id.*

233. *Id.* at 277–78.

234. ABRAMSON, *supra* note 33, at 99.

235. *Id.* at 99–100.

236. Ch. 61, § 2, 1949 Wyo. Sess. Laws 105, 106 (codified at WYO. COMP. STAT. § 12–104 (1945, 1957 Supp.))

237. Joanna L. Grossman, *Women’s Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1129 (1994); WASH. REV. CODE § 2.36.060 (1961).

238. Harrison, *supra* note 204, at 6.

gender.²³⁹ Missouri still provides an exemption, even if it might not be enforceable.²⁴⁰

These laws may look to be favorable to women since they allowed them to get out of inconvenient jury duty, but looks can be deceiving. By making it easy to be exempted from jury duty, these laws all but guaranteed fewer women would serve. Under Missouri's exemption-on-demand system, fewer than 15 percent of jurors were women.²⁴¹ Under Louisiana's system, which required women to proactively volunteer, women could make up as little as 10 percent of jury pools.²⁴²

In 1961, the U.S. Supreme Court heard the case of *Hoyt v. Florida*.²⁴³ State law in Florida permitted women to serve on juries but required women to affirmatively register to do so, resulting in a piddling number of women who actually ended-up serving.²⁴⁴ Much like in *Fay*, the Court chalked this up to "circumstances or chance" and held that this did not invalidate the statute.²⁴⁵ The fact that only 220 women were on the jury roll, out of 46,000 registered female voters, was irrelevant.²⁴⁶ It was not until 1975 that the Court finally said that defendants were entitled to a jury drawn from a fair cross-section of the community, including women.²⁴⁷ Nevertheless, the courts would not prohibit lawyers from peremptorily removing women from the jury until 1994.²⁴⁸

D. *Women's Representation on Juries*

Rocky though the road might have been, women have had more success with juries than other offices of government. Although women gained the right to vote in many states before they attained the right to serve on juries, women actually served on juries before they served in any elected government office.²⁴⁹ The first female mayor, statewide executive, national convention delegate, and

239. *Duren v. Missouri*, 439 U.S. 357, 359 (1979).

240. Mo. Const. art. I, § 22(b).

241. *Duren*, *supra* note 240, at 357.

242. *Taylor v. Louisiana*, 419 U.S. 522, 524 (1975).

243. *Hoyt v. Florida*, 368 U.S. 57, 58 (1961).

244. *Id.*

245. *Id.* at 65.

246. *Id.* at 64.

247. *Taylor*, *supra* note 243, at 523.

248. J.E.B., *supra* note 39.

249. The first woman to hold *elected* office in the United States was Lydia Sayer Hasbrouck, who was elected to the Middletown, New York, Board of Education in 1880. Judith C. Reveal, *Hasbrouck, Lydia Sayer (1827–1910)*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/women/encyclopedias-almanacs-transcripts-and-maps/hasbrouck-lydia-sayer-1827-1910> [<https://perma.cc/D8FY-M3BD>] (last accessed Mar. 28, 2021).

federal and state legislators were not elected until several years after women began serving on juries.²⁵⁰

Women also dominated juries with far greater regularity than other government institutions, though there is some dispute about when the *first* all-female jury was held. According to *The Atlantic*, it was in 1911 in Los Angeles.²⁵¹ Yet, newspapers from 1910 claim there was an all-female jury in Spokane, Washington in July 1910²⁵² and another in Olympia, Washington in December 1910.²⁵³ In any event, the first all-female jury happened at the front-end of the twentieth century. Today, high and petty cases alike routinely feature all-female juries.²⁵⁴ Journalists consider this occurrence novel enough to mention it or put it in a headline, but it has been happening for more than a century—before women had the right to vote.

This sets juries apart from other institutions of government. Among the 50 states, only one state legislature is majority women; instead, the average is 29 percent.²⁵⁵ Further, only 36 percent of *candidates* for state supreme courts are women.²⁵⁶

Even at the local level, which presumably would be easier for women to break into, the track record pales in comparison to juries. A search of a newspaper database containing hundreds of millions of pages of text between 1700 and 2019 reveals 2,578 results for “all female jury,” clustered between 1950 and today; 11,418 results for “all woman jury,” clustered between 1920 and 1990; and 1,785 results for “all women jury,” clustered between 1910 and 1990.²⁵⁷

250. CTR. FOR AMER. WOMEN & POL., <https://cawp.rutgers.edu/facts/milestones-for-women> [<https://perma.cc/52JV-DVX2>] (accessed Mar. 28, 2021).

251. Jennie Rothenberg Gritz, *What America Looked Like: First All-Female Jury, 1911*, ATLANTIC (Nov. 29, 2011), <https://www.theatlantic.com/national/archive/2011/11/what-america-looked-like-first-all-female-jury-1911/249196> [<https://perma.cc/KSU3-XX6V>].

252. *All-Woman Jury Renders Verdict*, ARGUS-LEADER (July 11, 1910) at 2, <https://www.newspapers.com/image/229671103>.

253. *All-Woman Jury Sits in Olympia, Washington*, GADSDEN DAILY TIMES-NEWS (Dec. 14, 1910), at 1, <https://www.newspapers.com/image/321918955>.

254. E.g. Cory Shaffer, *Jury Deliberates Fate of Mother, Girlfriend in Death of Ta'Naejah McCloud After Closing Arguments Turn Contentious*, CLEVELAND.COM (June 8, 2018), https://www.cleveland.com/metro/index.ssf/2018/06/jury_deliberates_fate_of_mothe_1.html [<https://perma.cc/9QCK-DBK4>]; Julia Marsh, *Woman Who Claims 'OrgyMan' Stalked Her Gets All-Female Jury*, N.Y. POST (July 17, 2017), <https://nypost.com/2017/07/17/woman-who-claims-orgy-man-stalked-her-gets-all-female-jury> [<https://perma.cc/JVB7-M9VC>].

255. *Women in State Legislatures for 2019*, *supra* note 52.

256. Laila Robbins, *State Supreme Courts Are Overwhelmingly White and Male*, BRENNAN CTR. (Nov. 2, 2018), <https://www.brennancenter.org/blog/state-supreme-courts-are-overwhelmingly-white-and-male> [<https://perma.cc/S8GS-NXVR>].

257. Search Results, NEWSPAPERS.COM, <https://www.newspapers.com>

Not every result represents a unique example of an all-woman jury. But the fact that 15,000 articles register strongly suggests that all-female juries were not all that rare during the twentieth century.

Compare those numbers to city councils. A search of the same database and time range reveals 155 results for “all female city council,” clustered between 1988 and 2008; 304 results for “all woman city council,” clustered between 1925 and 2001; 159 results for “all women city council,” clustered between 1974 and 1994. Changing the search terms only adds a negligible number of additional articles, and adding a hyphen does not alter results.²⁵⁸ Comparing the two, there were about 15,000 articles for all-female juries and about 600 articles for women-only local governments.

Additionally, to demonstrate the rarity of all-female city councils, the *Los Angeles Times* reported that when Pacifica, California elected an all-female city council in 1992, it was the first time it had ever happened in California, and the first time it happened anywhere in more than a century.²⁵⁹

Hence, these early examples of women on juries may well have been the first instances in American history that women were able to use government office to force a policy outcome. Typically, a single juror is enough to force a result in favor of a defendant, or at least short-circuit a trial. This means that these pioneering women had real power over the machinery of government.

IV. RACE

The first Black jurors served in the middle of the 19th century and continued throughout Reconstruction. During this time, many racist attacks were lobbed at Black jurors: calling them stupid or lazy. Once Reconstruction ended, juries became all-white throughout the South. But, there were a few exceptions and, in general, courts were more receptive to civil rights cases involving

(searches for “all female city council,” “all-female city council,” “all woman city council,” “all-woman city council,” “all women city council,” and “all women city council” conducted June 8, 2019).

258. For example, using different terms for “all woman town hall” (with variations) adds about two dozen articles, “all woman local government” adds about ten articles, and “all woman county commission” adds about twenty. *Id.*

259. Richard C. Paddock, *All-Female City Council to Take Office in Pacifica*, L.A. TIMES (June 11, 1992) at A1. This does not appear to be accurate, since articles from the twentieth-century report that all-female city councils were elected in 1919 and 1921. *E.g. Untitled*, DAILY GAZETTE (Mar. 17, 1919), at 2, <https://www.newspapers.com/image/198991619/>; *All-Woman City Council*, DAVIE REC. (May 4, 1921), at 6, <https://www.newspapers.com/image/62374745/>. But the fact that one of the largest newspapers in the county reported the fact as true suggests their researchers had a hard time finding evidence to the contrary.

discrimination in jury selection than any other right. Hispanic and Asian jurors followed a similar progression; enduring bigotry and using the courts to gradually secure their right to serve. Consequently, today juries compare favorably to other government institutions, in terms of racial diversity.

A. *Antebellum through Reconstruction*

In 1838, Lord Brougham in England bemoaned the fact that “the whole apparatus of justice, both administrative and executive, [was] exclusively in the hands of one race.”²⁶⁰ Indeed, in South Carolina, for example, courts were strictly ornamental for Black citizens; Black citizens could not sue, enforce a contract through the court, or serve as jurors or witnesses.²⁶¹ Similarly, in California, no “Black or Mulatto person, or Indian” could testify against a white party by statute, and courts, as practice, similarly excluded Chinese witnesses.²⁶² Though bias would never be eradicated completely, Black people eventually had more success integrating the jury box than they did with other institutions of government.

According to Albert W. Alschuler and Andrew G. Deiss, the first Black juror was seated in Worcester, Massachusetts in 1860, causing astonishment across the country.²⁶³ William Lloyd Garrison wrote this was “an encouraging sign of the times.”²⁶⁴ But, yet again, the title of “first” is contested. An 1844 newspaper from Buffalo, New York claimed “Erie County—Here is the honor of having furnished to the country the first colored juror.”²⁶⁵

Even if 1860 was not the year of the first Black juror, the 1860s was the first decade that had Black jurors in many jurisdictions. In Rhode Island and New York, Black jurors were seated in 1865 where, in the past, it had been customary to pass over Black jurors when their names showed up on the lists.²⁶⁶ By 1866, four Black jurors were present in Boston.²⁶⁷ One was even selected as foreman

260. *Lord Brougham's Splendid Speech on Slavery*, PRESTON CHRON. & LANCASHIRE ADVERT. (Mar. 3, 1838), at 4, <https://www.newspapers.com/image/392774082>.

261. *Black Jurors in the South*, MECKLENBURG TIMES (July 5, 1889), at 2, <https://www.newspapers.com/image/64588771>.

262. *People v. Hall*, 4 Cal. 399, 399, 404 (1854).

263. Alschuler & Deiss, *supra* note 10, at 884–85.

264. MASS.GOV, *supra* note 210.

265. *Liberty Party Celebration—East Aurora*, BUFFALO DAILY GAZETTE (July 10, 1844), at 2, <https://www.newspapers.com/image/254929675>.

266. *A Black Juror*, SUMMIT CTY. BEACON (Mar. 30, 1865), at 1, <https://www.newspapers.com/image/228732683>.

267. *Negro Jurors*, DEMOCRATIC ADVOCATE (Nov. 15, 1866), at 2, <https://www.newspapers.com/image/348153232>.

that year—possibly the first Black foreman in the country.²⁶⁸ He was said to have “acquitted himself very creditably.”²⁶⁹

Moreover, in the lead-up to the Civil War, Black jurors were held up as boogeymen right alongside Black voters or integrated schools.²⁷⁰ Papers would ask candidates where they stood on the idea of Black jury rights—and made it plain how they felt about the matter.²⁷¹ Or, if a candidate had already expressed their support, papers would attack them for it.²⁷²

After the Civil War, Congress prohibited states from excluding jurors based on race, and for a time during Reconstruction, Black people served on juries.²⁷³ In addition to the law, General Sheridan issued an order rejiggering jury lists throughout Louisiana. By his order, the name of every legal voter was to be put in a box to ensure that newly registered Black people would be included.²⁷⁴ In some areas, Black registration shot up to triple that of whites.²⁷⁵

From Alabama to North Carolina to the District of Columbia, freed Black people served on juries.²⁷⁶ Between 1872 and 1878 in New Orleans, one-third of all citizens summoned for jury duty were Black, matching their overall share of the city’s population.²⁷⁷ In Washington County, Texas, and Warren County, Mississippi, roughly a third of jurors were Black and, while this was still under-representative of the population, it was significant progress.²⁷⁸ Freed Black people were serving on juries at a time when it was still unacceptable for them to be marrying whites.²⁷⁹

268. *Untitled*, EVENING STAR (Nov. 13, 1866), at 2, <https://www.newspapers.com/image/168207275>.

269. *Political*, at 2, BUFFALO COM. (Nov. 14, 1866), at 2, <https://www.newspapers.com/image/264443665>.

270. *Republican Voter, a Word in Your Ear!*, DEL. GAZETTE (Oct. 5, 1860), at 2, <https://www.newspapers.com/image/329792035>; *Work!*, DAILY EMPIRE (Oct. 12, 1863), at 2, <https://www.newspapers.com/image/215054102>.

271. *E.g.*, *Let Mr. Chase Answer the Following Queries?*, CADIZ SENTINEL (Aug. 8, 1855), at 2, <https://www.newspapers.com/image/339519007>.

272. *E.g.*, *Keep it Before the People*, JACKSON STANDARD (Sept. 13, 1855), at 3, <https://www.newspapers.com/image/349472126>; *The Republican Idea of Socia [sic] Equality—Hon. S.G. Haven, &c*, BUFFALO COURIER (Nov. 1, 1860), at 2, <https://www.newspapers.com/image/312997683>.

273. King, *supra* note 67, at 54.

274. “Amalgamation” Jury, *supra* note 15.

275. *Id.*

276. *Untitled*, PUBLIC LEDGER (Aug. 21, 1867), at 2, <https://www.newspapers.com/image/215152142>; *Untitled*, INTELLIGENCER (July 17, 1867), at 2, <https://www.newspapers.com/image/76766175>; *Decision as to Negro Jurors*, DAILY OHIO STATESMAN (Aug. 31, 1867), at 3, <https://www.newspapers.com/image/186747547>.

277. Marder, *supra* note 188, at 68.

278. *Id.*

279. *Untitled*, BROOKLYN DAILY EAGLE (Sept. 22, 1865), at 2, <https://www>.

Not only did Black citizens serve, but they were also able to permeate. In Navasota, Texas, an all-black jury—heralded as the “first ever recorded”—was empaneled in 1867.²⁸⁰ An all-black jury cleared a Black defendant in Oskaloosa, Iowa in 1872.²⁸¹ A Tennessee newspaper referenced an all-black jury in 1880.²⁸² In another case, an attorney who was a former slaveholder had to try to persuade a jury full of Black men.²⁸³ A search of one newspaper database turns up about 4,000 articles with variations of the search term “all Black jury” over the nation’s history.²⁸⁴

Even so, resistance to Black jurors never died. In Nevada in 1867, a Black juror was summoned but an attorney objected, claiming that the state constitution forbade Black jurors.²⁸⁵ The opposing counsel countered that federal law invalidated the state constitutional provision.²⁸⁶ A judge ruled that federal law did not preempt the state constitution and struck the juror, to a smattering of applause from spectators.²⁸⁷ Further, in Colorado, the legislature attempted to pass a law excluding colored jurors.²⁸⁸

Others were harshly critical of an integrated justice system. A Raleigh, North Carolina paper said that no disability should be visited upon the Black man, but asked “is it essential to this protection, that white and Black jurors should fill our jury boxes . . . We think not.”²⁸⁹ Nearby in Tarboro, North Carolina, a judge adjourned court

newspapers.com/image/50254836 (“Shall we have Black jurors . . . and deny to dusky maidens the opportunity of getting a husband when they can among the white folks?”).

280. *Negro Jurors*, LOUISVILLE DAILY COURIER (June 18, 1867), at 4, <https://www.newspapers.com/image/119279631>.

281. *Kansas*, WKLY. COMMONWEALTH (Apr. 3, 1872), at 3, <https://www.newspapers.com/image/366828899>.

282. Untitled, MEMPHIS DAILY APPEAL (May 26, 1880), at 4, <https://www.newspapers.com/image/167992114>.

283. *The South*, N.Y. DAILY HERALD (June 12, 1867), at 8, <https://www.newspapers.com/image/329591370>.

284. Search of Newspapers.com with a year range of 1700 to 2019 for the terms “all Black jury,” (2,138 results), “all negro jury,” (1,538 results) and “all colored jury” (143 results). All searches conducted on April 6, 2021. Note that 4,000 results does not mean 4,000 unique instances of an all-black jury, but it gives a sense of the magnitude.

285. *Colorado*, BUFFALO MORNING EXPRESS & ILLUSTRATED BUFFALO EXPRESS (Jan. 28, 1867), at 1, <https://www.newspapers.com/image/343752817>.

286. *Id.*

287. *State Constitutions vs. Civil Rights Bill*, RICHMOND DISPATCH (July 16, 1866), at 2, <https://www.newspapers.com/image/349578092>.

288. *Colorado*, BUFFALO MORNING EXPRESS & ILLUSTRATED BUFFALO EXPRESS (Jan. 28, 1867), at 1, <https://www.newspapers.com/image/343752817>.

289. *The Prejudice of Color*, WKLY. SENTINEL (Aug. 6, 1867), at 1 <https://www.newspapers.com/image/58183938>.

when Black people were summoned as jurors.²⁹⁰ He claimed that state laws did not recognize Black jurors and he would not either.²⁹¹ A Texas paper bemoaned that as to “negro jurors, we believe they will either be very severe or very lenient—a medium course being contrary, if not to their nature, at least to their present state of enlightenment.”²⁹² For this reason, it would be better to “leave the active duties of the government, political and judicial, in the hands of the white race.”²⁹³

Senator Charles Sumner proposed that in Southern states, where people of color made up one-sixth of the population, one-half of each jury should consist of men of color.²⁹⁴ This proposal was ridiculed even in the North, with the *Ottawa Free Trader* jesting that the proposal should further read “in places where two-sixth of the population are Black, all jurors shall be colored, and where one-sixth of the people are mulattoes one-half of the jurors shall be colored women.”²⁹⁵ By the paper’s reckoning, a Black woman on a jury was even wilder than a Black man.²⁹⁶ The *Chicago Tribune* also criticized the proposal, albeit in more measured terms. It said that mandating color quotas for juries would be “not only unwise, politically, but would be subversive of the jury system itself.”²⁹⁷ It also stated that the law would effectively declare that different races would never be able to agree in cases with parties of other races.²⁹⁸

Often, attacks on Black jurors throughout the country were couched in terms of “intelligence.” The *South-Western* of Shreveport, Louisiana did not restrain itself. Out of almost 3,000 Black jurors in one county, it joked, “but seven can write their names, and not one of them can string a half dozen words together correctly.”²⁹⁹ Most of these Black jurors “at the time of registration improvised a surname for the occasion, and in all probability have forgotten them by this time” the paper claimed.³⁰⁰ Over in Bossier Parish,

290. *Miscellaneous Items*, MORNING OREGONIAN (Aug. 7, 1867), at 4, <https://www.newspapers.com/image/9638120>.

291. *Id.*

292. *Negro Jurors*, GALVESTON DAILY NEWS (May 3, 1867), at 2, <https://www.newspapers.com/image/23964761>.

293. *Id.*

294. Untitled, OTTAWA FREE TRADER (Dec. 30, 1865), at 2, <https://www.newspapers.com/image/186565523>.

295. *Id.*

296. *Id.*

297. *The Tone of Congress*, CHI. TRIB. (Dec. 7, 1865), at 2 <https://www.newspapers.com/image/349751081>.

298. *Id.*

299. “Amalgamation” Jury, *supra* note 15.

300. *Id.*

with about 2,000 registered Black people, “not one of the newly enfranchised can sign his name,”³⁰¹ and in DeSoto Parish, “she has three learned darkies out of 1,683.”³⁰²

Further, it was so plainly known that no Black person had ever served on a jury in Delaware that the Supreme Court felt compelled to take judicial notice of the fact.³⁰³ And this was in a state where the Black population consisted of 26,000 out of 150,000 people total.³⁰⁴ According to the state, the lack of Black jurors was because they were disqualified by reason of “intelligence, experience, or moral integrity.”³⁰⁵ Over in Tennessee, the *Nashville Union & American* raged “Think of the amazing stupidity which sacrifices the highest interest of thirty five million whites to try the experiment of making a race of Black judges, jurors, governors and legislators over a people three thousand years in advance of them in civilization and moral development!”³⁰⁶

If newspapers and critics were not baselessly calling Black jurors too stupid, they were calling them too lazy or ill-behaved. The *Times-Picayune* ran a story of Black jurors dozing off multiple times in a single trial.³⁰⁷ It sarcastically remarked that it was “very pleasant to think that great questions of life, liberty, property and public rights, are to be decided by Black men so capable, intelligent and attentive” as these.³⁰⁸ In Berkeley, the court claimed the Black jurors have behaved so badly “that the public solicitor in despair has continued all the remaining cases to the next term.”³⁰⁹ In another case, a judge dismissed a mixed-race jury because he did not believe white jurors should have to suffer the indignity of serving alongside Black jurors.³¹⁰ This is despite the fact that Black citizens had been

301. *Id.*

302. *Id.* at 2. See also *Negro Jurors*, PERRY COUNTY DEMOCRAT (Aug. 29, 1867), at 2, <https://www.newspapers.com/image/362441682> (contrasting obsequious Black jurors were contrasted with “white intelligent men”); Untitled, LAFAYETTE ADVERTISER (June 14, 1879), at 2, <https://www.newspapers.com/image/33821784> (“The great majority of colored men are totally unfit for jurors . . . Ignorant jurors bring the jury system into contempt and lessen the respect for courts of justice”).

303. *Neal v. Delaware*, 103 U.S. 370, 397 (1880).

304. *Id.*

305. *Id.*

306. *Races in the South*, NASHVILLE UNION & AM. (Mar. 14, 1875), at 3, <https://www.newspapers.com/image/80774422>.

307. *The Reformed Jury Trial*, TIMES-PICAYUNE (June 2, 1870), at 1, <https://www.newspapers.com/image/26768361>.

308. *Id.*

309. *Current Comment*, HARTFORD COURANT (Feb. 19, 1883), at 2, <https://www.newspapers.com/image/369475023>.

310. *Black Jurors Not Allowed to Serve with White Men*, PHILA. INQUIRER

serving on juries in the county for a while without issue.³¹¹ But, this judge said the mere fact that the law authorized Black people to sit in judgment of white men was “humiliating enough” and the fact that Black jurors were *actually* serving was “a menace.”³¹²

Worst of all, Black jurors were accused of ignoring their work to focus on self-interested political goals. In 1867, a federal grand jury in Richmond, Virginia included five Black jurors.³¹³ This was said to be the first integrated grand jury in the county.³¹⁴ Given its historical significance, the grand jury became a lightning rod. Assassination threats were made against grand jurors.³¹⁵ The grand jury met for four hours each day, it was said by one paper, but no work was accomplished because “the negro members occupy all the time in making speeches upon the duty of Government to confiscate the lands of the South.”³¹⁶

Despite these baseless descriptions and accusations, once in a while, southerners voiced confidence in Black jurors. Writing on that same Richmond grand jury, a Democratic paper said “we call with especial confidence on the ‘colored’ jurors to vindicate the public morals and rebuke corruption in high office . . . Let the Black jurors set the example of integrity and devotion to justice, that shall shame their pale face colleagues, if they shrink from their duty.”³¹⁷ The white members of the grand jury pushed back against the maligning of their Black colleagues, writing “the conduct of the colored grand jurors has been throughout their session uninterruptedly exemplary and praiseworthy; they have not only been unassuming, but courteous and respectful to all.”³¹⁸ Sometimes, though, the praise was a great deal more patronizing. Black

(Feb. 16, 1910), at 1, <https://www.newspapers.com/image/167224394>.

311. *Id.*

312. *Black Jurors Summoned to Try White Men for Cursing Members of Their Race*, WKLY. CHIEFTAIN (Sept. 12, 1901), at 2, <https://www.newspapers.com/image/50258475>.

313. *Black Jurors*, AEGIS & INTELLIGENCER (May 10, 1867), at 2, <https://www.newspapers.com/image/466179372>.

314. *United States District Court of Richmond*, PITTSBURGH DAILY COMMERCIAL (May 25, 1867), at 1, <https://www.newspapers.com/image/85263733>.

315. *United States District Court—Colored Jurors—Charge of Judge Underwood—Chief Justice Chase Expected to Preside at the Trial of Jeff. Davis*, WHEELING DAILY INTELLIGENCER (May 8, 1867), at 2, <https://www.newspapers.com/image/171168010>.

316. *Sambo in his New Biz*, DAILY EMPIRE (May 23, 1867), at 2, <https://www.newspapers.com/image/194781086>.

317. *Underwood Liable to Indictment*, Nashville Union and American (May 12, 1867), at 1, <http://www.newspapers.com/image/64242210>.

318. Untitled, COURIER-J. (May 29, 1867), at 1, <https://www.newspapers.com/image/118784728>.

jurors in Charleston were said to have borne themselves “fairly as a citizen and a juror” thanks to their “natural imitateness and the good example set him by his white (democratic) neighbor.”³¹⁹

Unsurprisingly, all of these knocks against Black jurors would be repeated against other Black officeholders later. D.W. Griffith's 1915 film *Birth of a Nation* portrayed Black legislators during Reconstruction as uncouth drunkards.³²⁰ Claude Bowers' *The Tragic Era*, a bestselling book from the 1920s, offered the same picture of ineptitude of Black legislators.³²¹ These works were simply repeating attack lines that had been rehearsed against Black jurors for years.

B. *Post-Reconstruction*

Reconstruction ended after incoming Republican President Rutherford B. Hayes struck a deal to remove federal troops from the South in exchange for southern support for the presidency after a contested election.³²² The last federal troops left the South in April 1877.³²³ Fifty years after the fact, a letter to the editor of the *Montgomery Advertiser* ruminated about Reconstruction and its aftermath. The “conditions during those years were almost unbearable. We had negro legislators, negro jurors, negro justices of the peace, a negro tax assessor and a negro for county treasurer.”³²⁴ A Democratic speaker told a crowd that during Reconstruction, “a negro wench whipped her white mistress, and told of how negro jurors held the life, liberty and property of the white man in their hands.”³²⁵ This state of affairs continued until “the white people . . . rose in their might and established white rule.”³²⁶ And rule they *did*. Newly empowered southern whites lost no time in restoring the racial hierarchy from before the war. Southern legislatures

319. *Current Comment*, *supra* note 310.

320. Eric Foner, *Rooted in Reconstruction: The First Wave of Black Congressmen*, NATION (Oct. 15, 2008), <https://www.thenation.com/article/rooted-reconstruction-first-wave-black-congressmen> [<https://perma.cc/L8KS-TJQD>].

321. *Id.*

322. *Compromise of 1877*, HISTORY.COM (Aug. 21, 2018), <https://www.history.com/topics/us-presidents/compromise-of-1877> [<https://perma.cc/U2P8-3MJW>].

323. *End of Reconstruction*, U.S. HIST., <https://www.u-s-history.com/pages/h421.html> [<https://perma.cc/47T6-N4CD>] (last visited May 26, 2019).

324. *Old Lowndes County Citizen Surprised*, MONTGOMERY ADVERTISER, (Aug. 31, 1928), at 4, <https://www.newspapers.com/image/413696703>.

325. *Crowd Swarms to hear Espy, Steagall Speak*, DOTHAN EAGLE (Oct. 1, 1928), at 1, <https://www.newspapers.com/image/538716193>.

326. *Old Lowndes County Citizen Surprised*, *supra* note 325.

passed laws segregating public transportation, schools, parks, restaurants, and theaters, among other policies.³²⁷

Yet, Black jurors clung on for a brief time after the end of Reconstruction. A jury of six white and six Black people were still seated in Ellenton, South Carolina in June 1877.³²⁸ A jury with four Black people was empaneled in Virginia in 1884.³²⁹ A mixed-race jury occurred that same year in South Carolina.³³⁰ When the lawyer could not bring the Black jurors to his position in South Carolina, a mistrial resulted.³³¹ Though a new trial could be held, perhaps without Black jurors, this still shows that Black jurors had the power to disagree with their white colleagues and have their opinion honored. In fact, in a Black enclave in North Carolina “negro jurors were drawn by the Republican sheriffs as regularly as whites.”³³²

Further, in South Carolina, a mixed-race jury presided over the “most noteworthy criminal trial . . . since the war.”³³³ The *Mecklenburg Times* reflected on how improbable it was that a mixed-race jury—majority Black, in fact—could be sitting in judgment of one of the most prominent white citizens of the city.³³⁴ In fact, that majority Black jury went on to acquit the prominent white citizen, to the consternation of those who thought him plainly guilty.³³⁵ Engaging in well-practiced cognitive dissonance, southern papers excoriated the Black jurors for their supposedly misguided acquittal but were silent on the white jurors who voted the same way.³³⁶ With Black juries seemingly here to stay, a paper predicted that “a white man

327. *Compromise of 1877*, *supra* note 323.

328. *The Ellenton Conspiracy Trial*, RUTLAND DAILY GLOBE (June 5, 1877), at 2, <https://www.newspapers.com/image/443177062>.

329. Untitled, SHENANDOAH HERALD (Feb. 20, 1884), at 2, <https://www.newspapers.com/image/164489174>.

330. *Court of General Sessions*, ABBEVILLE PRESS & BANNER (Oct. 29, 1884), at 3, <https://www.newspapers.com/image/171984114>.

331. *Id.*

332. *The Negro Exodus*, GASTONIA GAZETTE (Apr. 18, 1916), at 2, <https://www.newspapers.com/image/73934393>.

333. *Black Jurors in the South*, *supra* note 262.

334. *Id.*

335. Untitled, FORT SCOTT WKLY. MONITOR (July 11, 1889), at 4, <https://www.newspapers.com/image/67647745>.

336. Untitled, BUFFALO EVENING NEWS (July 9, 1889), at 2, <https://www.newspapers.com/image/326796494> (“The negro has been fully tested as a voter and has been proved an inglorious failure. As a juror he has been partially tested, and with equally unsatisfactory results.”); *Incapable as Juror or Voter*, FORT WORTH GAZETTE (July 11, 1889), at 1, <https://www.newspapers.com/image/68087532>.

will be unable to obtain justice in the courts and quick reprisals will be made on the negro race as a consequence."³³⁷

Because Black jury rights outlasted other civil rights, it led to some absurd juxtapositions. In Augusta, Georgia, a Black man was on a jury in 1902.³³⁸ When it was time for lunch, the jury was unable to dine at any restaurant for lunch because one of their number was Black.³³⁹ Though the law had vested this Black man with the power to deal out justice to his neighbors, it did not allow him to enjoy a meal in public.³⁴⁰ Food had to be ordered and eaten in the jury room.³⁴¹ Nevertheless, four of the white jurors went hungry rather than have it be said they had taken a meal with a Black person.³⁴² This was despite the fact that the Black juror tried to accommodate them by eating his meal in the corner alone.³⁴³

Black jurors were also denied meals in the North. In Harrisburg, Pennsylvania, businessman James Russ denied Black jurors a seat at his hotel's table.³⁴⁴ The next time he went to have his hotel's business license renewed, the judge upbraided him, saying "If colored men are good enough to sit in court with the Judges and other court officials, they are certainly good enough to eat in any hotel in this city."³⁴⁵ Russ was told if this happened again, his license would be revoked.³⁴⁶

Elsewhere, Black jurors were making new strides. It was claimed that Utah had its first Black juror in 1900, though there is one lawyer stating the first one sat in 1898.³⁴⁷ Further, in 1900, the first Black juror served in Monmouth County, New Jersey,³⁴⁸ and in Washington County, Pennsylvania.³⁴⁹ In 1922, it was reported that Hamilton, Ohio convened the first-ever all-black jury.³⁵⁰

337. *Black Jurors*, *supra* note 313.

338. *Wouldn't Eat With the Black Juror*, HARTFORD COURANT (May 13, 1902), at 10, <https://www.newspapers.com/image/369250566>.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Got License and Warning*, TIMES (Feb. 20, 1900), at 4, <https://www.newspapers.com/image/52570727>.

345. *Id.*

346. *Id.*

347. *Other Colored Jurors*, SALT LAKE HERALD (Mar. 1, 1900), at 3, <https://www.newspapers.com/image/80790656>.

348. *Colored Juror Serves*, FREEHOLD TRANSCRIPT & MONMOUTH INQUIRER (Mar. 9, 1900), at 6, <https://www.newspapers.com/image/358809488>.

349. *First Colored Petit Juror*, DAILY REPUBLICAN (Mar. 22, 1900), at 4, <https://www.newspapers.com/image/53145831>.

350. *All Colored Jurors*, PRESS-FORUM WKLY. (June 24, 1922), at 1, <https://www.newspapers.com/image/53145831>.

Despite the best efforts of Black jurors, they fell by the way-side by the early 20th century, at least in the South. By 1901, Black jury rights had “been practically forgotten” around Virginia, but it was once “a very general thing to see negroes on Virginia juries.”³⁵¹ Booker T. Washington would write “in the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts.”³⁵² Around the same time, Congress entered a thirty-year period, between 1901 and 1929, in which there were zero Black members.³⁵³ In fact, post-Reconstruction, no Black person represented a southern state in Congress until 1972.³⁵⁴ “The negro is not only out of Congress,” wrote the Washington Post in 1887, “he is practically out of politics.”³⁵⁵

Pushed-out from politics, Black public officials would be driven from the bureaucracy as well. In the 1910s, President Woodrow Wilson instigated a wholesale purge of Black workers from the federal government.³⁵⁶ By 1913, Wilson’s Collector of Internal Revenue for Georgia could declare “There are no Government positions for Negroes in the South. A Negroes place is in the cornfield.”³⁵⁷

Not quite. Though rare, during the early 20th century Black citizens continued to serve on juries through the South. They may well have been the *only Black* people exercising governmental authority in their communities. In Wilmington, Delaware mixed juries were used for cases involving Black defendants.³⁵⁸ Further,

www.newspapers.com/image/322821775.

351. *Black Jurors Still*, FREE LANCE (July 20, 1901), at 2, <https://www.newspapers.com/image/83338219>.

352. THE BOOKER T. WASHINGTON PAPERS, VOLUME 3: 1889–95, at 29 (Louis R. Harlan ed., 1974).

353. *Black-American Representatives and Senators by Congress, 1870–Present*, U.S. HOUSE, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress> [<https://perma.cc/RV3Z-K5CM>] (last visited June 2, 2019).

354. Foner, *supra* note 321.

355. *The Negroes’ Temporary Farewell: Jim Crow and the Exclusion of African Americans from Congress, 1887–1929*, U.S. HOUSE, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Introduction> [<https://perma.cc/J47C-HTSH>] (last visited June 2, 2019).

356. Gordon J. Davis, *What Woodrow Wilson Cost My Grandfather*, N.Y. TIMES (Nov. 24, 2015), <https://www.nytimes.com/2015/11/24/opinion/what-woodrow-wilson-cost-my-grandfather.html> [<https://perma.cc/H7LW-NEKY>].

357. THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 279 (1997).

358. *Coroner Says He Has Summoned Colored Jurors*, EVENING J. (Sept. 11, 1914), at 7, <https://www.newspapers.com/image/159964537>. For another example of Black people serving on juries in the South, see *Colored Man to Be Juror*, EVENING J. (Dec. 14, 1915), at 1, <https://www.newspapers.com/image/161101321>.

Black jurors served in the District of Columbia,³⁵⁹ Florida,³⁶⁰ Missouri,³⁶¹ West Virginia,³⁶² Texas,³⁶³ North Carolina,³⁶⁴ Kentucky,³⁶⁵ and Tennessee.³⁶⁶ It was “a hard row, indeed, the colored juror has to hoe,” but they kept at it.³⁶⁷ At a time when most citizens of Austin, Texas were unwilling to serve on juries, the “colored juror rarely asks to be excused from jury service.”³⁶⁸ In Kentucky, there were even some Black women summoned in 1925,³⁶⁹ and, that same year, Spencer County, Indiana had its first-ever Black juror.³⁷⁰

C. *Black Jury Discrimination Cases*

Around the time Reconstruction was sounding its death rattle, Courts started becoming involved in racial jury rights. These early cases could not be called resounding successes, but they still represented the first meaningful foray by the Court in the criminal

359. *Juror Loses His Job Just Because He Talked*, WASH. TIMES (Oct. 28, 1914), at 9, <https://www.newspapers.com/image/79966350>; *Jail for Gun Carriers*, WASH. POST (Aug. 2, 1919), at 2, <https://www.newspapers.com/image/28952606>.

360. Untitled, TAMPA TIMES (Mar. 9, 1915), at 4, <https://www.newspapers.com/image/325612769>; *Minstrel Box Replaces Jury Box for Court Men*, PALM BEACH POST (May 28, 1925), at 1, <https://www.newspapers.com/image/133377813>.

361. *Select 12 Negro Men for St. Louis Jury*, DAL. EXPRESS (June 12, 1920), at 1, <https://www.newspapers.com/image/85291062>.

362. *County Court Ends Busy May Session*, RALEIGH REG. (May 19, 1921), at 18, <https://www.newspapers.com/image/47822265>.

363. *What Would Old Klan Say?*, AUSTIN AM.-STATESMAN (Oct. 3, 1921), at 8, <https://www.newspapers.com/image/358054707>; *Negro Object to Being Tried by Negro Jurors*, AUSTIN AM.-STATESMAN (June 27, 1922), at 10, <https://www.newspapers.com/image/359062956>; *Negro Juror Is Chosen in Trial of Austin Man*, AMARILLO DAILY NEWS (Oct. 26, 1922), at 2, <https://www.newspapers.com/image/171786332>.

364. *Clear Criminal Docket in Federal Court*, DAILY ADVANCE (Oct. 16, 1919), at 1, <https://www.newspapers.com/image/75629840>; *Negro is Condemned to Death by Negro Jurors*, SALISBURY EVENING POST (Dec. 2, 1921), at 1, <https://www.newspapers.com/image/80519868>; *Moody Would Excuse Travis Negro Jurors*, AUSTIN AM. (Nov. 14, 1923), at 1, <https://www.newspapers.com/image/384417722>.

365. *Negro Juror Votes Life Term for Black Slayer*, COURIER-J. (Feb. 3, 1921), at 7, <https://www.newspapers.com/image/119243296>; *Negro Be Tried by Negro Jury*, MESSENGER-INQUIRER (Jan. 14, 1926), at 3, <https://www.newspapers.com/image/375891828>.

366. *Negro Juror is Qualified as First in South*, TALLAHASSEE DEMOCRAT (Feb. 2, 1928), at 2, <https://www.newspapers.com/image/244285162>.

367. Untitled, TAMPA TIMES (Mar. 9, 1915), at 4, <https://www.newspapers.com/image/325612769>.

368. *What Would Old Klan Say?*, *supra* note 364, at 8.

369. *Negro Jurors, Men and Women Are Summoned*, MESSENGER-INQUIRER (Aug. 5, 1925), at 3, <https://www.newspapers.com/image/375663186>.

370. *Child Injured at Tell City Game*, OWENSBORO MESSENGER (Sept. 1, 1925), at 2, <https://www.newspapers.com/image/376081756>.

due process system. For many decades, criminal procedure has eaten up a larger and larger share of the Supreme Court's docket,³⁷¹ and this trend was inaugurated by cases involving racial jury discrimination. In the words of Michael Klarman, before 1920, "the Supreme Court had upset the results of the state criminal justice system in just a handful of cases, all involving race discrimination in jury selection."³⁷²

The earliest case was in 1879, *Strauder v. West Virginia*, 1879, which involved a Black man convicted of murder by a jury that was statutorily limited to white men.³⁷³ Though *Strauder* demeaned Black people as "abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence," the Court did at least hold the statute violated the Fourteenth Amendment and struck down the law.³⁷⁴ This was significant as it was the first time the Court interpreted the Fourteenth Amendment to enforce civil rights.³⁷⁵

Over the next eight decades, the Court would take up the question of racial exclusion from juries time and time again. In fact, at least thirty jury discrimination cases were decided between 1880 and 1964.³⁷⁶

In *Bush v. Kentucky*, 1880, the Court invalidated a state law that excluded all non-white citizens from jury service.³⁷⁷ That same year, the Court also overturned a conviction in Delaware because not one of the 26,000 Black people living in the county had ever been summoned for jury duty.³⁷⁸ Both of these cases were relatively easy decisions because the discrimination was so stark, but the Court would let states get away with biased procedures if they could be even a little more subtle about excluding jurors of color.

For instance, New York imposed a slate of restrictions on jury service that, while not explicitly race-based, were vague enough they could easily be used by election officials to exclude the

371. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1233 (2012).

372. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 (2000).

373. *Strauder v. W.V.*, 100 U.S. 303, 304 (1880).

374. *Id.* at 306, 310.

375. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1872) were the first to address the Fourteenth Amendment, but they tightly circumscribed the reach of the Amendment.

376. Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 530 (1994).

377. *Bush v. Kentucky*, 107 U.S. 110, 122 (1883).

378. Neal, *supra* note 304, at 394, 397.

marginalized.³⁷⁹ Further, Mississippi had a county that went many years without a single Black grand juror due to purposeful exclusion by court officials when summoning jurors.³⁸⁰ When both procedures were contested, the Supreme Court rejected both appeals, stating the defendants should take seek relief in state courts instead.³⁸¹

Relief would be in short supply in state courts, however. Multiple cases allowed local officials to discriminate in the practice of jury selection so long as they did not openly proclaim what they were doing.³⁸² Even though cases from Utah and Alabama courts all issued opinions in favor of Black litigants on the basis of jury discrimination, they declined to articulate any sort of broad rights that future litigants could utilize.³⁸³ Relatedly, California courts interpreted the Fourteenth Amendment to permit segregated schools, so it hardly appeared they would rely on that Amendment to vindicate jury rights.³⁸⁴

Nevertheless, challenges to unrepresentative juries reached a frenetic pace by the mid-20th century, usually with good results. In the Scottsboro Boys case—involving a number of Black youths accused of raping two white women—it was found that no Black juror had served on jury in the county for many years and evidence strongly suggested black residents were not even on the jury rolls.³⁸⁵ On this basis, the Court ruled in favor of the defendants.³⁸⁶ The decision did not end jury discrimination, but it did prompt several southern states to start empaneling black jurors for the first time in decades.³⁸⁷ Moreover, famed civil rights lawyer Charles Hamilton Houston won his first Supreme Court victory for the NAACP in 1935 by appealing a criminal conviction from a segregated, unequal jury.³⁸⁸ He was not alone. Between 1935 and 1975, the Supreme

379. In re Wood, *supra* note 104, at 283.

380. Gibson v. Mississippi, 162 U.S. 565, 584 (1896).

381. In re Wood, *supra* note 104, at 288; Gibson, *supra* note 381.

382. See, e.g., Martin v. Texas, 200 U.S. 316, 321 (1906); Thomas v. Texas 212 U.S. 278, 281 (1909); *Plea in Berry Case Is Not a New One*, MONTGOMERY ADVERTISER (Aug. 6, 1920), at 9, <https://www.newspapers.com/image/412887277>.

383. McPherson v. McCarrick, 61 P. 1004, 1005 (Utah 1900); Rogers v. Alabama, 192 U.S. 226, 231 (1904).

384. Ward v. Flood, 48 Cal. 36, 56 (1874).

385. Norris v. State of Alabama 294 U.S. 587, 592–93 (1935).

386. *Id.* at 599.

387. Jari Honora, *First Negro Juror – Dominick St. Thomas (1901–1961)*, CREOLEGEN (May 18, 2015), <http://www.creolegen.org/2015/05/18/first-negro-juror-dominick-st-thomas-1901-1961> [<https://perma.cc/VY5S-8FZC>].

388. Charles J. Ogletree Jr., *Forward* to ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION xi, xv (2013). The case was Hollins v. Oklahoma, 295 U.S. 394 (1935).

Court heard about one jury discrimination case per year, usually ruling in favor of the challenger.³⁸⁹

Around that time, the Court became interested in various other criminal due process issues. These included banning mob trials,³⁹⁰ requiring counsel in capital cases,³⁹¹ and stopping forced confessions.³⁹² On forced confessions, for instance, the Court also struggled with enforcing its holdings, found itself taking numerous cases after states ignored rulings, and kept trying to push the envelope.³⁹³

All of these early criminal due process cases share some similar features. They were not cases of “marginal unfairness” but rather “flagrant injustices” masquerading as criminal trials.³⁹⁴ Constitutional violations were obvious. In all but one of the jury discrimination cases before 1942, the offending state did not bother to contest the evidence of discrimination.³⁹⁵ In *Brown v. Mississippi*—which banned involuntary confessions—the Court said it “would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners.”³⁹⁶ In fact, the prosecution in the case admitted to much of the torture inflicted on Black defendants.³⁹⁷

Such cases demonstrate that the evidence of injustice needed to be rock solid before the Court could find the courage to tackle state criminal due process issues. It says something profound about jury rights that they were the first topic that so offended the Court it felt spurred to act—particularly with such a wide menu of criminal justice abuses to choose from.

D. *Other Race-Based Jury Discrimination Cases*

Though the vast majority of case law and analysis is devoted to Black litigants, other racial groups also had to struggle to get into the courtroom. In one case, the California Supreme Court justified excluding Chinese people from serving as witnesses, because allowing them in the front door would mean “we might soon see them

389. ABRAMSON, *supra* note 33, at 109.

390. *Moore v. Dempsey*, 261 U.S. 86 (1923).

391. *Powell v. Alabama*, 287 U.S. 45 (1932).

392. *Brown v. Mississippi*, 297 U.S. 278 (1936).

393. *See, e.g.*, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Watts v. Indiana*, 338 U.S. 49 (1949); *Cicenia v. Lagay*, 357 U.S. 504 (1958); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Spano v. New York*, 360 U.S. 315 (1959).

394. Klarman, *supra* note 373, at 48–49.

395. Surell Brady, *A Failure of Judicial Review of Racial Discrimination Claims in Criminal Cases*, 52 SYRACUSE L. REV. 735, 763 (2002).

396. *Brown*, *supra* note 393, at 286.

397. *Id.* at 284–85.

at the polls, in the jury box, upon the bench, and in our legislative halls."³⁹⁸ That case was one of many doubting the veracity of Asian litigants.³⁹⁹

Even when Asian-American jurors had been allowed to serve, they faced discrimination. A judge had to be removed from a case because he was asking an Asian juror about the price of "fish heads and rice" in 1983.⁴⁰⁰ Court officials were also hesitant to select Asian-Americans to serve on grand juries. In Orange County, California, judges could nominate people, for grand jury service, out of only a pool of over 150 potential jurors each year.⁴⁰¹ In a ten-year period, between 1980–1990, in Orange County, California, only a single Asian-American was nominated by a judge to be a grand juror.⁴⁰² In fact, Asian-Americans were severely underrepresented on grand juries: they were 11.7 percent of the population and only 1.3 percent of the grand jury pool.⁴⁰³ Nevertheless, the California Supreme Court said there was no "systematic exclusion" because the court clerk had made "exhaustive efforts" to "invite" Asian-Americans to apply for grand jury service.⁴⁰⁴

Further, between 1960 and 1996, San Francisco did not select a single Hispanic, Chinese, or Filipino grand jury foreman, despite the groups comprising nearly a quarter of the population.⁴⁰⁵ According to one statistician, there is only a 0.0003 percent chance this anomaly could be explained by happenstance instead of discrimination.⁴⁰⁶ In 1992, the court made policy changes that successfully increased the number of Black and female grand jury forepersons, but these successes did not extend to other marginalized groups.⁴⁰⁷ A probable explanation was that the court officials who were selecting grand jury forepersons were looking for candidates with good "leadership" or "people skills" — traits that they stereotypically did

398. Hall, *supra* note 263 at 404.

399. *People v. Foo*, 44 P. 453, 455–56 (Cal. 1896) (finding no error when a prosecutor told a jury they must disregard a statement by a Chinese witness unless it was corroborated by a white witness); *State v. Mah*, 10 P. 306, 306–07 (Or. 1886) (noting that Chinese witnesses were "very unreliable" and "they are apt to be actuated by motives that are not honest."); *In re Shong Toon*, 21 F. 386, 392 (D. Cal. 1884) (noting the judge was "[p]rofoundly impressed . . . with the unreliability of Chinese testimony in general").

400. *Court Ousts Judge*, *TIMES* (Shreveport) (Feb. 8, 1983), at 3, <https://www.newspapers.com/image/219696813>.

401. *People v. Burney*, 212 P.3d 639, 660 (Cal. 2009).

402. *Id.*

403. *Id.*

404. *Id.* at 662–63.

405. *Chin v. Runnels*, 343 F. Supp. 2d 891, 895 (N.D. Cal. 2004).

406. *Id.*

407. *Id.* at 895–96.

not believe Asian-American jurors possessed.⁴⁰⁸ But, even after recognizing the problem and diagnosing the cause, the court said it was powerless to rectify the situation due to the “narrow standard” of habeas review.⁴⁰⁹

In addition, Hispanic jurors also face underrepresentation. The courts in Yoho County, California used an admittedly non-random process to applications for grand jury service, including “attempting” to be inclusive to all racial groups.⁴¹⁰ However, data shows these “attempts” left much to be desired. Over a 20-year period, ending in 2004, Hispanics made up a considerably smaller slice of the jury pool than their representation in the state’s population would suggest.⁴¹¹ In fact, there was only a one-in-five-million chance that this disparity could be attributed to chance.⁴¹²

Despite this evidence regarding Asian-American and Hispanic jurors, the court still found no evidence of systematic exclusion.⁴¹³ Instead, exclusions were explained away as being the fault of the population, rather than the system. One speaker said Asian-American jurors could not grasp the finer points of law due to their shaky grasp of English and called for the end of the jury system.⁴¹⁴ One judge declared that underrepresentation of Puerto Ricans was because they “do not read, write, speak and understand English; because [they are] a highly mobile population; and . . . they tend to register to vote in smaller percentages.”⁴¹⁵ Neither of these actors questioned whether the jury system could be changed to accommodate these groups. Nevertheless, around the same time, the National Committee for Hispanic Civil Rights was calling for more translators at trial to enable greater participation by Hispanics on juries.⁴¹⁶ Collectively, these court decisions elevated process over outcome: even if juries are woefully unrepresentative, it does not matter so long as court officials can articulate some plan by which to recruit people of color.

408. *Id.* at 905–06.

409. *Id.* at 905.

410. *People v. Romero*, 139 Cal. Rptr. 3d 167, 179 (2012).

411. *Id.* at 175–76. Asian jurors were also underrepresented. *Id.* at 177.

412. *Id.* at 176.

413. *Id.* at 179.

414. *Many Asian Jurors Can't Grasp Points*, TIMES COLONIST (Victoria, British Columbia) (Jan. 16, 1970), at 5, <https://www.newspapers.com/image/507171001>.

415. *Court Rules Against Hispanic Jury Quotas*, PHILA. DAILY NEWS (Feb. 22, 1978), at 8, <https://www.newspapers.com/image/185837653>.

416. *Group to Campaign for Hispanic Rights*, ARIZ. DAILY STAR (June 27, 1979), at E8, <https://www.newspapers.com/image/170632484>.

However, even if courts succeed in getting these jurors into the jury pools, prosecutions may still have free reign to strike them. Some have argued that the *Batson* rule—preventing racially-motivated peremptory strikes—does not apply to Asian-American jurors. The State of Arizona argued in 1992 that an Asian-American juror did not fall into a “cognizable” group that was protected by *Batson*.⁴¹⁷ In 2003 in New York, after a prosecutor peremptorily excluded an Asian-American juror and tried to explain himself, the trial judge interrupted to say: “There is no law that says you have to give the reason on jurors of that ethnic background, and peremptory challenges are allowed.”⁴¹⁸ Going further, the Third Circuit held that if a prosecutor struck an Asian-Indian juror because of uncertainty about what religion such a person would practice, that did not violate equal protection.⁴¹⁹

Real as these problems are, it is still worth reflecting on the fact that juries do fairly well in terms of giving a voice to a diverse group of citizens. For instance, Hispanic jurors were slightly overrepresented, relative to their share of the population in the Southern District of California.⁴²⁰ In Michigan, in 2007, the percentage of Hispanic jurors roughly mirrored their share of the eligible jury population.⁴²¹ Further, Asian jurors virtually matched their share of the population in Hamilton County, Tennessee.⁴²² There are counterexamples, of course, but it is extremely rare for courts or legislatures to be able to say they mirror the populations they serve. When assessing the legislatures, whites are overrepresented in all but two state legislatures, meaning that people of color are underrepresented in all but two.⁴²³ Compared to this stark underrepresentation in government, juries are leaps and bounds ahead in giving diverse citizens an opportunity to participate in governance.

417. *State v. Jordan*, 828 P.2d 786, 789 (Ariz. Ct. App. 1992).

418. *McRae v. New York*, 271 F. Supp. 2d 402, 407 (E.D.N.Y. 2003).

419. *United States v. Clemmons*, 892 F.2d 1153, 1157 (3d Cir. 1989).

420. *United States v. Hernandez-Estrada*, 704 F.3d 1015, 1021 (9th Cir. 2012).

421. *United States v. Booker*, 367 F. App'x 571, 574 (6th Cir. 2007).

422. Hemmer, *supra* note 18, at 22.

423. Compare the data in NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATORS' RACE AND ETHNICITY 2015 (2016), http://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Raceethnicity_Rev2.pdf [<https://perma.cc/6S2F-4YZ7>] with *State Population By Race, Ethnicity Data*, GOVERNING <https://www.governing.com/gov-data/census/state-minority-population-data-estimates.html> [<https://perma.cc/H572-EWX7>] (last visited April 3, 2021).

CONCLUSION

Through centuries of struggle, juries have drawn near to the representative asymptote. Yet, at the same time that the definition of “juror” has broadened, the number of cases going to jurors has narrowed. Between 1691 and 1776, 26 percent of cases in New York City were resolved by trial, but not all of them were jury trials.⁴²⁴ In 1962, about 5.5 percent of federal cases were resolved by juries.⁴²⁵ That number fell to 4.3 percent in 1970, 2.5 percent in 1980, and 2 percent in 1991.⁴²⁶ Since 2005, that statistic has further fallen to fewer than 1 percent.⁴²⁷ These trends are not unique to the Empire State.

Scholars have posited that criticism of the jury has grown *as a result* of the diversification of the jury.⁴²⁸ Assessing the criticism levied at Black and female jurors in newspapers across America, it is not hard to see why. A century or two ago, papers mocked the intelligence and ill-temper of Black jurors and the emotional fragility and shallowness of female jurors. Now, explicit attacks based on race or gender are rare, but attacks on jurors’ intelligence, temperance, emotionality, and shallowness remain common.

Papers still question the intelligence of juries, highlight cases of gross injustice, spread tales of drunk or corrupt jurors, and opine that jury power is out of control.⁴²⁹ The *New York Herald* criticized the perceived sympathy by weak-minded juries for criminal defendants.⁴³⁰ Others started proposing reforms to make juries less democratic. The *Democratic Review* argued that jurors should be made up entirely of lawyers.⁴³¹ The *New York Times* called for a majority vote of juries, rather than unanimous verdicts.⁴³² These stories prompted calls for juries to be reined in or eliminated altogether.⁴³³

Furthermore, academia has long shared this mistrust of juries. In 1880, the chief editor of the *American Law Review* said juries

424. DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 40 (2016).

425. *Senator Sheldon Whitehouse Champions the Civil Jury Trial*, NYU LAW (Sept. 16, 2015), <http://www.law.nyu.edu/news/senator-sheldon-whitehouse-civil-jury-project-inaugural-conference> [<https://perma.cc/YXK2-WNT8>].

426. Marc Galanter, *The Regulatory Function of the Civil Jury*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 61, 63 (Robert E. Litan, ed., 1993).

427. *Senator Sheldon Whitehouse Champions the Civil Jury Trial*, *supra* note 426.

428. Marder, *supra* note 188, at 67; Jordan, *supra* note 47, at 4.

429. McDERMOTT, *supra* note 5, at 15.

430. WALDREP, *supra* note 2, at 28.

431. McDERMOTT, *supra* note 5, at 16.

432. *Id.* at 17.

433. *Id.* at 15.

were like an untrained crew sailing a ship.⁴³⁴ Another commentator likened them to a pathogen on the courts, calling the jury an “artificial feature” and a “foreign body in the system.”⁴³⁵ The former Dean of Harvard Law School sniffed: “The jury trial at best is the apotheosis of the amateur. Why should anyone think that twelve persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?”⁴³⁶

These views have been reinforced by popular culture. A review of depictions of the jury by leading figures in literature “reveals a consistently negative, disparaging picture” where jurors “represent the collective prejudices and ignorance of the community” and are described as “ill-willed, malevolent types who seek revenge and retribution even at the cost of justice.”⁴³⁷

Although juries have many detractors, they have many friends as well. Polls of the public routinely find juries to be overwhelmingly popular, both in the abstract⁴³⁸ and in comparison to bench trials.⁴³⁹ A poll of the International Academy of Trial Lawyers found unanimous support for the jury system.⁴⁴⁰ Judges who work with juries on a daily basis, overall, express high confidence in them.⁴⁴¹ And of the men and women who serve, surveys repeatedly find near-universal satisfaction with the experience.⁴⁴²

A recent survey found that solid majorities of just about every racial, educational, and age group thought that jury service was part of being a good citizen.⁴⁴³ There was only one group that did not:

434. *The Changing Role of the Jury in the Nineteenth Century*, 74 *YALE L.J.* 170, 191 (1964).

435. *Id.* at 190–91.

436. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 *VA. L. REV.* 1055, 1068 (1964).

437. SIMON, *supra* note 7, at 11.

438. NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* 8 (1995); John T. Curtin, *A System that Works*, in *THE LITIGATION MANUAL: JURY TRIALS* 1, 3 (Weyman I. Lundquist & Alyson Pytte eds., 2008).

439. CHARLES W. JOINER, *CIVIL JUSTICE AND THE JURY* 65 (1962).

440. *Id.* at 92.

441. *See* VIDMAR, *supra* note 439, at 8.

442. John Guinther, *The Jury in America*, in *ASS'N OF TRIAL LAWYERS OF AM., THE AMERICAN CIVIL JURY: THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY* 45, 53 (1987).

443. John Gramlich, *Jury Duty Is Rare, but Most Americans See It as Part of Good Citizenship*, PEW RESEARCH CENTER (Aug. 24, 2017), <http://www.pew-research.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship> [<https://perma.cc/BX44-UAKH>].

young people.⁴⁴⁴ They were evenly divided, with only 50 percent seeing value in juries.⁴⁴⁵

Nevertheless, many have seen the diversity of the jury as a shortcoming. Modern commentators have criticized juries for lacking the pedigree of their colonial counterparts, and stated that the exclusion of women and the poor “probably helped to ensure that the members of the jury would be among the most educated members of society.”⁴⁴⁶ Now that, in large measure, jury rights have been secured, the fight will be to convince the next generation that juries are still valuable.

Mistrust of juries is troubling for many reasons. As mentioned above, there is vast empirical evidence showing that juries are excellent adjudicators, and common stereotypes of juror incompetence do not hold up under the microscope. To make matters worse, declines in jury trials mean that the most diverse governmental institution is being underutilized. If not juries, who decides?

Will it be judges? A 2009 study found that no state had more than one-third female judges and, in some states, fewer than one-in-ten judges were women.⁴⁴⁷ Most states had between 10 and 15 percent minority representation among their judges; in some states, that representation was zero percent.⁴⁴⁸ In addition to these shortcomings in diversity, it is common for judges to have homogeneous life experiences.⁴⁴⁹

Will it be prosecutors? With the rise of plea bargaining, prosecutors have enormous influence over the outcome of criminal trials.⁴⁵⁰ Ninety-five percent of elected prosecutors are white, and 83 percent are men.⁴⁵¹ Only 1 percent are women of color.⁴⁵² In fact, most states have zero Black elected prosecutors and one-quarter of states have no elected prosecutors of color.⁴⁵³

444. *Id.*

445. *Id.*

446. Smith, *supra* note 34, at 458–60.

447. Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Racial and Gender Diversity on State Courts*, AM. BAR ASS'N 3 (2009), http://www.judicialselection.us/uploads/documents/Racial_and_Gender_Diversity_on_Stat_8F60B84D96CC2.pdf [<https://perma.cc/6LHZ-RX6W>].

448. *Id.*

449. Jordan, *supra* note 47, at 53.

450. Alschuler & Deiss, *supra* note 10, at 924.

451. Amita Kelly, *Does It Matter That 95 Percent of Elected Prosecutors Are White?*, NPR (July 8, 2015, 4:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white> [<https://perma.cc/LT4C-KNR4>].

452. *Id.*

453. David A. Graham, *Most States Elect No Black Prosecutors*, ATLANTIC (July 7, 2015), <https://www.theatlantic.com/politics/archive/2015/07/>

Will it be arbitrators? Binding arbitration agreements force workers and consumers out of the courtroom altogether. Arbitration organizations are not public, unlike courts, so there is a lack of robust data. The only arbitration service to publish its data states that its arbitrators are three-quarters male and almost nine-tenths white.⁴⁵⁴ Based on such sporadic data from other arbitration services, they appear even less diverse.⁴⁵⁵ Further, the American Bar Association passed a resolution that “urges” arbitration groups to diversify their rosters.⁴⁵⁶ But, a non-binding resolution from a trade group is a poor substitute for a century-and-a-half of binding Supreme Court case law barring jury discrimination in courtrooms.

In the end, juries are our most representative decision-makers. People do not need to be wealthy, well-credentialed, or well-connected to serve on them. People who have no interest in or knack for seeking public office may participate. For a day, a week, or longer, juries can invest laypeople with the power to alter a life. In so doing, we entrust governmental power with groups who might otherwise be excluded. Yet, their future in America is unclear.

One thing is clear though: if juries are supplanted, their replacements will not look like America

american-prosecutors-are-incredible-whitedoes-it-matter/397847 [https://perma.cc/ME9Q-B683].

454. Benjamin G. Davis, *Resolution 105*, 2018 A.B.A. SEC. DISP. RESOL. REP. 4.

455. *Id.*

456. *Id.* at 1.