Fighting Jim Crow, Chapter 517

Author : Gabriel "Jack" Chin

Date : December 13, 2018

Thomas Ward Frampton, *The Jim Crow Jury*, 71 **Vand. L. Rev.** 1593 (2018), available at SSRN.

This article challenges the practice of non-unanimous criminal jury verdicts in Louisiana. In a certain sense, the article was irrelevant, moot, by the time it saw print. This is not because, say, it was about an election that was already over, or made an argument that the courts had definitively rejected. Instead, the claim in this paper was so factually, legally and historically compelling that even in draft form it spurred concrete action; thanks in part to this paper, the policy it analyzed was both declared unconstitutional by a court, and repealed by the voters.

The article carefully recounts the history of the substantial elimination of African Americans from juries in Louisiana after Reconstruction. African Americans were, of course, a major part of the population of most of the former Confederate states, and amounted to a majority in Louisiana, Mississippi, and South Carolina. As Frederick Douglass wrote, “the liberties of the American people” depended on “the Jury-box” as well as “the Ballot-box,” if allowed to serve on juries, there was the danger that African American defendants would get a fair hearing, and that Whites (and White officials) accused of crimes against African Americans could be convicted. These were risks that White supremacists could not accept.

The Louisiana Constitutional Convention of 1898 was part of what the Supreme Court described in *Hunter v. Underwood* as “a movement that swept the post-Reconstruction South to disenfranchise blacks.” As the president of the convention explained, the aim was “to protect the purity of the ballot box, and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.” The constitution that resulted also eliminated jury trials for misdemeanors, provided for a jury of five for low-level felonies, and a jury of 12 for serious felonies, only 9 of whom would be required to agree in order to render a verdict. Were non-unanimous juries part of the movement to eliminate African American political power, or a coincidental good-government reform or experiment? The article notes that the records of the convention revealed no explicit racial motivation for this change. But the tale was told by other sources, such as newspaper reports supporting non-unanimous juries as a way of ensuring convictions of African Americans charged with crimes, and thereby avoiding the necessity for lynching.

If there is little question that Louisiana’s 1898 convention was intended to undermine African American rights, there is also no doubt that the provisions it put in place continue to have that effect. The article analyzed a dataset compiled by journalists, and concluded that “black jurors are dramatically more likely than white voters to cast ‘empty votes’ (i.e., dissenting votes that are overridden by supermajority verdicts). Black defendants are also more likely than white defendants to be convicted by non-unanimous verdicts.” The dataset also shows that African Americans are disproportionately eliminated from juries through prosecutorial preemptory challenges. As a result, in Louisiana African Americans can often be convicted, and Whites acquitted, without regard to minority views.

Well, they could; anyway, split juries are no more. In *State of Louisiana v. Maxie*, an individual had been convicted by a non-unanimous vote after the panel’s sole Black juror held out for acquittal. Maxie’s enterprising lawyer had heard about Professor Frampton’s paper, and filed a motion challenging the conviction. Based on Professor Frampton’s work, in October, 2018, a court declared non-unanimous juries to be unconstitutional, because they had the purpose and effect of discriminating against African Americans.

Meanwhile, this fall the Louisiana voters had before them a proposal to eliminate non-unanimous juries. Many media outlets quoted Professor Frampton and his work in support of the idea that non-unanimous juries were a vestige of Jim

Crow that had to go. On November 6, 2018, voters approved the change by an almost 2 to 1 margin. Now, Oregon and the U.S. military court-martial system stand alone in allowing criminal conviction by non-unanimous juries.

Cite as: Gabriel "Jack" Chin, *Fighting Jim Crow, Chapter 517*, JOTWELL (December 13, 2018) (reviewing Thomas Ward Frampton, *The Jim Crow Jury*, 71 **Vand. L. Rev.** 1593 (2018), available at SSRN), https://crim.jotwell.com/fighting-jim-crow-chapter-517/.