

The Jena Six and the History of Racially Compromised Justice in Louisiana

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I. INTRODUCTION

On casual examination, it certainly appears that the young men known as the Jena Six were charged based on race.¹ Not only were white students who hung nooses from a tree on school grounds not charged with a crime, but they were also granted leniency in school discipline.² Meanwhile, the six African American defendants, accused of attacking a white student who was uninvolved in the noose incident, were charged with attempted murder.³

But proving racially selective prosecution in a specific case is extremely difficult.⁴ If a defendant is demonstrably innocent, then the case can be defended on that basis without resort to any claim of discrimination.⁵ If the defendant committed the charged acts (or it cannot be shown that she has not), then no matter how pervasive the bias in a particular institution or jurisdiction may be, the decision to prosecute may be justified on the facts.⁶ In this regard, the Jena Six is not a case in which anyone claims that the allegations were fabricated or that the alleged conduct was not criminal.⁷

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¹ Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dead Hand of History*, 44 HARV. C.R.–C.L. L. REV. 275, 275–83 (2009) (containing description of facts of the Jena Six case).

² *Id.*

³ *Id.*

⁴ See Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 266–67, 271–73 (2002).

⁵ From a defendant’s perspective it might well be preferable to be found not guilty of, for example, drug dealing, than to have the charges dismissed based on a defense that is consistent with guilt. In favor of a discriminatory prosecution claim is that proof of innocence may require a trial, while a discriminatory prosecution defense is generally raised before trial. See *United States v. Abboud*, 438 F.3d 554, 579–80 (6th Cir. 2006).

⁶ See, e.g., Reed Walters, Op-Ed., *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27. Mr. Walters, the La Salle Parish District Attorney, claimed that there was no crime with which the noose-hangers could be charged.

⁷ See *Jena Six and the Role of Federal Intervention in Hate Crimes and Race-Related Violence in Public Schools: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 5–6 (2007), available at http://votesmart.org/speech_detail.php?sc_id=324763 [hereinafter *H.*

Although the Jena Six were palpably overcharged—after the case became notorious, the prosecutor unilaterally dropped attempted murder charges in favor of battery—overcharging is considered a routine prosecutorial plea bargaining tactic regardless of racial considerations.⁸ Convincing proof of discrimination may require an admission of bias on the part of the decision-maker, which is difficult to come by, particularly if bias is at the subconscious level,⁹ or a painstaking comparison of the facts of the challenged case to those of all other relevant prosecutions.¹⁰ Even if there is highly selective prosecution, it will be extremely rare that only members of one race are ever charged with certain types of felonies.¹¹ It is nearly impossible in practice to prove discriminatory prosecution in court.

Of course, that something is almost never provable by legal standards does not imply that it never happens. It is possible to identify circumstances where selective prosecution is more likely to exist, and to examine patterns of governmental behavior and decision-making. When discrimination has happened in the past and has been rewarded, it is more likely to occur in the future.

This Article makes some observations about the history of government and law enforcement in Louisiana in an effort to suggest that the ingredients for racially selective prosecution might well exist in Louisiana. One may conclude that the modern State of Louisiana was founded on, and exists as a result of, a compromised criminal justice system that, with other laws, disadvantaged African Americans.¹² This corruption unquestionably existed at

Comm. Hearing: Jena Six and the Role of Federal Intervention] (statement of Donald Washington, U.S. Attorney). Washington said: “I agree that there’s a victim in this case who was brutally beaten, that the individuals who have been charged aren’t saints or martyrs. They’re young kids who were involved in conduct that needs to be addressed.” *Id.* See also *id.* (statement of Charles Ogletree, Professor, Harvard Law School) (“It seems to me—along with Richard Cohen, that battery seems to be the appropriate charge. These were dramatically overcharged against the Jena Six.”). That a crime occurred, of course, does not mean that some or all of the Jena Six could not have been mistakenly identified as participants.

⁸ See Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 286-88 (2006); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2517-19 (2004).

⁹ For a number of citations to work on implicit bias, see Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1102 nn.25-29 (2008).

¹⁰ Efforts to prove discrimination by a comparison to other prosecutions are almost never successful. *But see* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886); *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (suppressing evidence based on statistical demonstration of racial profiling in traffic stops).

¹¹ The courts seem to require prosecution of merely one race to prove discriminatory prosecution. *See* Ah Sin v. Wittman, 198 U.S. 500, 507 (1905) (rejecting claim as “a mere allegation that the ordinance attacked was enforced against the Chinese only”). The Jena Six were initially charged with attempted murder, Taslitz & Steiker, *supra* note 1 at 278, surely an allegation that is sometimes brought against white people in Louisiana.

¹² See discussion *infra* Parts II & III.

least until recent decades,¹³ and the attitudes behind that discrimination persist, to some extent, to this day.¹⁴

For decades after the Civil War, African Americans represented a majority of Louisiana's population,¹⁵ or close enough to it that the addition of only a handful of white votes would have been enough to take political control of the state.¹⁶ Accordingly, if laws like the Fourteenth or Fifteenth Amendment had been followed, or principles like majority rule honored, African Americans and their allies would have been politically dominant. They would have thus had control of the government of the state, the power to formulate all law, including the criminal and tax codes, and the power to appoint or elect police chiefs, judges, and others who carry out those laws. The price for obedience to the law for conservatives in Louisiana (unlike, for example, Texas or North Carolina where the proportion of African Americans was much lower¹⁷), was apparently permanent minority status. Accordingly, the conservative¹⁸ incentive for lawlessness was not mere racist ideology, whatever attraction that might have had in a former slave state, but also control of the government.

In addition, while conservatives did not covet the African American population as a group of new fellow-citizens, African Americans in Louisiana had been a major economic asset as slaves. They had the potential to be such an asset again, even after the Thirteenth Amendment. Clothed with technical citizenship and legal liberty, African Americans could, if uncontrolled, demand market wages, or at least migrate to states offering better opportunities, as millions of Europeans did when they came to America and as other Americans did when, for example, they moved west. Louisiana's justice system was the most important institution for ensuring that African Americans could not vote, sell their labor at market wages, or leave. The criminal justice system accomplished these ends through two mechanisms—

¹³ See discussion *infra* Part IV.

¹⁴ See discussion *infra* Part V.

¹⁵ See, e.g., *United States v. Louisiana*, 225 F. Supp. 353, 364-69 (E.D. La. 1963) (three-judge court) (documenting that voter registration in 1867 was 45,189 white and 84,527 African American, and that by 1888 it was 126,884 white and 127,923 African American), *aff'd*, 380 U.S. 145 (1965); CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT AND THE BETRAYAL OF RECONSTRUCTION* 38 (2008) (stating that after 1867, there was a "black-majority electorate in Louisiana").

¹⁶ Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 81 (2008). Although by 1890 the South was solidly Democratic, in the five presidential elections from 1884 to 1900, the Republican polled over 20%, and averaged over 25%. HISTORICAL STATISTICS OF THE UNITED STATES MILLENNIAL EDITION ONLINE, Popular votes cast for President, by state and political party: 1836-2000 Table Eb208-259, <http://hsus.cambridge.org/HSUSWeb/HSUSEntryServlet>.

¹⁷ Chin & Wagner, *supra* note 16, at 81.

¹⁸ I use the term "conservative" rather than Democrat because it is the self-description of this group and it is accurate over time, accounting, for example, for the Louisiana victories in the presidential election of the State's Rights Party in 1948 and Goldwater in 1964. "White" is also inaccurate, because many white Republicans, Populists, and even some Democrats were also negatively affected by disenfranchisement of African Americans.

facially neutral laws designed to disadvantage African Americans,¹⁹ and selective enforcement of those and other laws.²⁰

A post-*Brown* example, still on the books, illuminates the willingness and incentives on the part of some Louisianans to both structure and violate the law for political and financial profit. A 1960 Louisiana statute criminalizes “[f]alse statements concerning denial of constitutional rights.”²¹ It provides that no person shall make to the Federal Bureau of Investigation (“FBI”) or the U.S. Commission on Civil Rights “any false or fictitious or fraudulent statement . . . asserting or claiming that such person or persons, or any other person or persons have been or are about to be denied or deprived of any right, privilege or immunity granted or secured to them, or to any of them, by the United States Constitution and laws, or by the Louisiana Constitution and laws”²²

This statute nicely captures several notable aspects of Louisiana institutions. First, the statute is transparently aimed at African Americans and their allies. It criminalizes only false claims that Louisiana has *denied* civil rights; it would subject someone to potential liability if they testified that, for example, Louisiana in 1960 practiced segregation in schools or discriminated in voting. However, those who falsely claimed that civil rights were respected in Louisiana were guilty of no violation of the statute. Second, the clear implication is that the law would be applied to those who were innocent, as an effort at intimidation. Since formal state policy was to “maintain segregation of the races in all phases of our life,”²³ those who claimed that civil rights were denied in Louisiana were telling the truth. The real message was that those fought for their civil rights might find themselves facing criminal charges.

A third notable aspect of the statute is its origin. Louisiana enacted the law shortly after the U.S. Commission on Civil Rights scheduled a hearing in New Orleans to investigate the denial of voting rights.²⁴ State officials unsuccessfully attempted to enjoin the hearings in *Hannah v. Larche*.²⁵ Mainstream political Louisiana, on short notice, enacted a statute facilitating

¹⁹ See discussion *infra* Part III.B.

²⁰ See discussion *infra* Part IV.

²¹ LA. REV. STAT. ANN. § 14:126.2 (1960).

²² *Id.*

²³ Note, *Federal Enforcement of Negro Voting Rights*, 51 VA. L. REV. 1051, 1068 (1965) (quoting La. H. Con. Res. 27 (1954)) [hereinafter *Federal Enforcement*]. The packages of laws passed by the Louisiana legislature throughout 1960 to prevent integration of schools and other facilities and African American voter registration are conveniently reprinted in 5 RACE REL. L. REP. 857-86, 890-902, 1177-1235 (1960).

²⁴ FOSTER RHEA DULLES, THE CIVIL RIGHTS COMMISSION: 1957-1965, at 41 (1968) (“The Louisiana officials were completely uncooperative in the preliminary investigations, tried to force the Commission to reveal the names of Negro complainants, instituted a civil suit challenging the constitutionality of the Civil Rights Act itself, and finally appealed to a Federal District Court for a temporary order enjoining the Commission from holding the hearing.”).

²⁵ 363 U.S. 420 (1960), *rev’g* 177 F. Supp. 816 (W.D. La. 1959).

criminal suppression of those whose truthful statements challenged the status quo.²⁶

A fourth important aspect of the statute is the penalty: “not less than one year nor more than five years with or without hard labor”²⁷ and/or a fine.²⁸ The potential sentence of up to five years hard labor made it possible that African American deviance could actually yield a profit for the state. Rather than promoting equal justice under law, this statute, like many others, was a warning to African Americans that the price of asserting constitutional rights might well be forced labor. To the modern analyst, the statute is a reminder that for many decades, Louisiana’s criminal justice system was corrupted at the expense of African Americans, not just for ideological reasons, but also for monetary and political profit.

Part II of this Article discusses the political situation at the close of the Civil War under African American majority rule. When African Americans could vote, they participated in government and adopted measures reasonably calculated to advance their interests and the interests of the poor.²⁹ Before the election of 1876, conservatives violently suppressed the African American vote, and attacked African American governments.³⁰ In the 1873 Colfax Massacre, a white mob, intent on taking over the government, killed a number of African American militiamen and local elected officials.³¹ Federal prosecutions following the massacre led to Supreme Court decisions suggesting that Congress had little authority to prevent this sort of violence.³²

Part III describes financial incentives shaping the criminal justice system following Reconstruction. Louisiana developed a system in which those convicted of state and local crimes could be forced to labor for the profit of the state and private employers.³³ Louisiana criminal laws were designed to compel all African Americans to accept employment on the terms offered, and, failing that, provided ample opportunity for selective application to penalize those who refused such terms.³⁴ Criminal laws were so broad and vague that almost anyone could violate them.³⁵ Under such laws, almost any disfavored group could readily be incarcerated for a statutory misdemeanor

²⁶ See LA. REV. STAT. ANN. § 14:59(6) (1960). The Louisiana Supreme Court held that this bill and others enacted at the same time were not intended to be applied discriminatorily. See *State v. Goldfinch*, 132 So. 2d 860, 863-64 & nn.2-3 (La. 1961), *rev'd*, 373 U.S. 267. The U.S. Supreme Court reversed, finding that the particular criminal mischief statute at issue had indeed been used to preserve segregation. *Lombard v. Louisiana*, 373 U.S. 267 (1963).

²⁷ LA. REV. STAT. ANN. § 14:126.2 (1960).

²⁸ *Id.*

²⁹ See *infra* notes 50-55 and accompanying text.

³⁰ See *infra* notes 72-80 and accompanying text.

³¹ See *infra* notes 63-71 and accompanying text.

³² See *infra* notes 72-80 and accompanying text.

³³ MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928*, at 19 (1996).

³⁴ See discussion *infra* Part III.B.

³⁵ See *infra* notes 119-121 and accompanying text.

or local violation. With no right to appointed counsel³⁶ or, in many cases, to appeal short sentences,³⁷ application of these laws was subject to little scrutiny.

Part IV describes some of the laws designed to prevent African Americans from gaining civil rights in the years following *Brown*. Structured to allow maximum discretion, they were designed to allow the State to avoid integrating schools, and to prevent African Americans from voting, in ways that would be practically invisible and thus difficult to challenge.³⁸

Part V examines some evidence of whether these conditions might continue to exist. While much has changed in the past 30 years, much has not. Since 1990, La Salle Parish, of which Jena is the seat, has offered greater support to racist politician David Duke than the rest of the state,³⁹ and lesser support to the occasional statewide African American candidate than the rest of the state. La Salle Parish also has directly benefitted from Louisiana's imprisonment rate, the highest in the nation, with a private prison in Jena and seven-figure annual payments to the Parish for housing prisoners committed to state custody.⁴⁰ While this evidence does not prove discrimination in particular cases, it does suggest that the system is inclined to bias, and thus that the Jena Six did not receive fair treatment at the hands of the criminal justice system.

II. LOUISIANA REVOLUTIONS

Conservatives in Louisiana after the Civil War faced a terrible problem: African Americans were a majority of the population. Accordingly, conservatives could not use the ordinary political process to pass laws subordinating African Americans. Instead, whether conservatives supported or feared majority rule in principle, they knew that it would work to their disadvantage if allowed to exist. They were compelled to choose between accepting majority rule and therefore possible permanent minority status or finding some way to evade the principles of American democracy, made positive law by the Fourteenth and Fifteenth Amendments to the Constitution.⁴¹

The aftermath of the Civil War and Reconstruction put African Americans in a dominant political position. Under the law of 1865, African Amer-

³⁶ See *infra* note 127 and accompanying text.

³⁷ See *infra* note 130 and accompanying text.

³⁸ See *infra* Part IV.

³⁹ See *infra* Part V.B.

⁴⁰ See *infra* Part V.C.

⁴¹ The African American population presented a potential political danger to other regions of the country. The three-fifths compromise of the original Constitution was eliminated by Section 2 of the Fourteenth Amendment, which counted the former slaves as full persons for purposes of apportioning Congress. Accordingly, if for some reason African Americans did not vote, the traditional disproportionate power of southern voters would be enhanced. Chin & Wagner, *supra* note 16, at 107-08.

icans could not vote, and the all-white electorate of Louisiana, like other former Confederate states, adopted “black codes” putting African Americans in largely the same position they enjoyed during slavery.⁴² However, these laws were unacceptable to Congress, in which delegations from the former Confederate states were not seated.⁴³ Congress passed the Civil Rights Act of 1866,⁴⁴ and proposed the Fourteenth Amendment in 1866⁴⁵ and the Fifteenth in 1869.⁴⁶ Congress also imposed military reconstruction on Louisiana and other former Confederate states, requiring them to ratify the Fourteenth Amendment and establish new constitutions offering universal manhood suffrage.⁴⁷ In 1867, Louisiana voters were registered under the protection of the U.S. Army.⁴⁸ The political combination of African Americans and like-minded whites had the most voters.⁴⁹

The policies enacted by majority governments, not surprisingly, reflected the policy preferences of the majority. Many race-based controversies not decided by the Supreme Court until the twentieth century had been resolved democratically by the people of Louisiana in the nineteenth century. The legislature passed a statute prohibiting segregation in streetcars and other common carriers.⁵⁰ The legislature “enacted Civil Rights laws, which were very full and stringent in their terms,”⁵¹ which were upheld by the Louisiana Supreme Court.⁵² Although the U.S. Supreme Court did not address the constitutionality of interracial marriage until 1967,⁵³ the Louisiana Supreme Court declared this form of discrimination unconstitutional in

⁴² George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1397 (2008). See generally THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* (1965).

⁴³ See Gabriel J. Chin, *The “Voting Rights Act of 1867”: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1581-82 (2004).

⁴⁴ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982 (2006)).

⁴⁵ Act of June 16, 1866, ch. 48, 14 Stat. 358 (proposing the Fourteenth Amendment to the United States Constitution).

⁴⁶ Act of Feb. 27, 1869, ch. 14, 15 Stat. 346 (proposing the Fifteenth Amendment to the United States Constitution).

⁴⁷ Chin, *supra* note 43, at 1590-91.

⁴⁸ See Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 270-71 (2004).

⁴⁹ See *supra* note 15.

⁵⁰ 1869 La. Acts No. 38 p. 37, *invalidated by* Hall v. DeCuir, 95 U.S. 485, 488 (1877) (reversing judgment of Louisiana Supreme Court by holding that the anti-segregation law “impose[s] a direct burden upon inter-state commerce” and thus “does encroach upon the exclusive power of Congress”). However, the statute remained on the books and was not repealed until the early twentieth century. FRANKLIN JOHNSON, *THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO* 34 (Greenwood Press 1979) (1919). For more information regarding the history of this statute, see *id.*

⁵¹ JOHNSON, *supra* note 50, at 29; see also, e.g., Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1374 (1996).

⁵² *Decuir v. Benson*, 27 La. Ann. 1, 6 (1875), *rev'd on other grounds sub nom.* Hall v. Decuir, 95 U.S. at 490-91.

⁵³ *Loving v. Virginia*, 388 U.S. 1 (1967).

1874.⁵⁴ The Louisiana Constitution prohibited school segregation.⁵⁵ None of this is to say that Louisiana was a paradise for African Americans, that laws on the books were always followed, or that the African American population enjoyed all of the potential rewards of its electoral strength—there is no evidence that any of those things were true.⁵⁶ But to the extent that African Americans were allowed to exercise their electoral majority, it was a substantial benefit to them, and they used it in the ways that those in the post-*Brown* era might assume they would, i.e., to enact policies in their interest.

Conservatives did not resign themselves to the new legal and political situation. Those who were made a political minority by the radical transformation of the electorate fought back. Throughout the South, they made “skillful use of electoral machinery and outright fraud to prevent the negro vote from being counted”; techniques included “theft of the ballot boxes, suppression of the ballot boxes, exchanging boxes, removal of the polls to unknown places, doctoring the returns, false certifications, repeating, excising names from the registry book, and illegal arrests before the day of the election.”⁵⁷ Another tactic used to regain control over the government was violence.⁵⁸ The Ku Klux Klan and similar groups attacked Republicans of both races.⁵⁹ “In parts of the South, blacks holding public office daily faced the threat of violence”⁶⁰; many were assaulted or murdered.⁶¹

Conservatives, unable to win fair electoral victories, ultimately carried out a coup d'état. During the so-called “New Orleans Massacre” of July 30, 1866, a group of white city police officers, mostly Confederate veterans, attacked a group of African American and white Republicans who were demonstrating in a suffrage parade led by African American U.S. Army vet-

⁵⁴ Hart v. Hoss, 26 La. Ann. 90, 94 (1874). The Louisiana prohibition on interracial marriage was statutorily reinstated by 1894. See State v. Treadaway, 52 So. 500, 502 (La. 1910) (referring to the miscegenation law, 1894 La. Acts 63).

⁵⁵ JOHNSON, *supra* note 50, at 32.

⁵⁶ See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 351-52 (1988) (noting that African Americans held office below the proportion of their population in the Reconstruction South).

⁵⁷ Albert Bushnell Hart, *The Realities of Negro Suffrage*, 2 PROC. AM. POL. SCI. ASS'N 149, 159 (1905); see also J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second* (detailing techniques, most from the 1870s, used to hamper African American voting), in MINORITY VOTE DILUTION 27, 31-36 (C. Davidson ed., 1989).

⁵⁸ FONER, *supra* note 56, at 436-40. For descriptions of this violence, see, for example, NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2006) (discussing Louisiana and Mississippi); GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION (1984).

⁵⁹ FONER, *supra* note 56, at 425; see also ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 419 (1971) (discussing role of violence in Democratic victories in Alabama, Georgia, and North Carolina in 1870 and noting that “[p]erhaps the Klan’s most important effect—politically and otherwise—was to weaken Negro and Republican morale” and that “[t]he fact that it could get by with anything drastically reduced their will and capacity to sustain themselves”).

⁶⁰ FONER, *supra* note 56, at 425-26.

⁶¹ *Id.* at 134.

erans, ultimately killing 38 people and wounding 184 more.⁶² In the Colfax Massacre of 1873, 140 conservative combatants overthrew an integrated Republican local government in Colfax, the seat of Grant Parish, which is just under thirty-six miles from Jena. Conservative forces killed approximately sixty to eighty African American men, while only three white men lost their lives in the fray.⁶³ State authorities obtained indictments, but their support for the indictments withered when the prosecutor was met at the courthouse by sixty to seventy armed critics.⁶⁴

Republican U.S. Attorney James Beckwith obtained a federal indictment from a largely African American grand jury.⁶⁵ “Beckwith was determined to seek capital punishment for the authors of the Colfax Massacre—and, in a state where black people had been routinely whipped and shot by whites for generations, with total impunity, that was unheard of.”⁶⁶ The conservatives had a macabre sense of humor. In February 1874, John McEnery, who would come close to taking the governorship in a military uprising later that year, appeared in Washington to deliver a petition for clemency for the Colfax defendants. Several of the supposed signatories were murdered African Americans.⁶⁷

When some of those involved were tried in federal court, “[t]he defense case was an exercise in mass perjury.”⁶⁸ At the first trial, the jury acquitted one defendant and did not reach a verdict as to the other eight defendants.⁶⁹ At the second trial, five defendants were acquitted, and three were convicted of civil rights violations.⁷⁰ “On July 25, 1874, whites gathered in Colfax for a big outdoor barbecue in honor of the former defendants.”⁷¹

But the convictions were in legal peril. The defendants challenged the authority of the United States to enact the civil rights laws under which they were convicted. In March 1876, in *United States v. Cruikshank*,⁷² an appeal by one of the Colfax defendants, and *United States v. Reese*,⁷³ an election law case from Kentucky, the Court held that Congress was powerless to prevent violence in state or local elections, and showed that it would construe broadly neither civil rights statutes nor indictments against those charged with violating them.⁷⁴ The decisions were widely publicized,⁷⁵ and

⁶² LANE, *supra* note 15, at 18.

⁶³ *Id.* at 265-66.

⁶⁴ *Id.* at 142.

⁶⁵ *Id.* at 111-12.

⁶⁶ *Id.* at 112.

⁶⁷ *Id.* at 157-58.

⁶⁸ *Id.* at 172.

⁶⁹ *Id.* at 186.

⁷⁰ *Id.* at 203.

⁷¹ *Id.* at 215.

⁷² 92 U.S. 542 (1876).

⁷³ 92 U.S. 214 (1876).

⁷⁴ See generally ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK (2001).

“almost immediately [a]ffected the course of political events”⁷⁶ by making clear that federal law would not stand in the way of political terror.⁷⁷ Conservatives regained control of Louisiana not by prevailing at the ballot box, but by force of arms.⁷⁸ “The Colfax Massacre was a pivotal moment in this tragic saga.”⁷⁹ If the laws had been upheld, “[g]reater numbers of Southern blacks and white republicans might have felt safe voting in 1876. Rutherford B. Hayes might have won clearer victories in states such as Louisiana and South Carolina, and possibly others. There might not have been an election deadlock, or a Compromise of 1877.”⁸⁰

In 1898, disenfranchisement of African Americans in Louisiana was regularized with a new constitution.⁸¹ According to the president of the convention, the purpose of the revised constitution was to “let the white man vote, and . . . stop the negro from voting.”⁸² The constitution imposed a series of facially neutral measures designed to disenfranchise African Americans⁸³ (and included a grandfather clause allowing whites who did not satisfy the provisions to remain electors nevertheless⁸⁴). Louisiana’s white primary provided a second line of defense, excluding African American registrants from “the only election that had any significance in the Louisiana electoral process,” the Democratic primary.⁸⁵

The Supreme Court made its determination that segregation was consistent with the Fourteenth Amendment with full knowledge that segregation was possible only because democracy had been eliminated in Louisiana. In

⁷⁵ *Id.* at 108.

⁷⁶ JOHN R. HOWARD, *THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN* 111 (1999).

⁷⁷ FONER, *supra* note 56, at 569. Foner explains: “[T]he defeat of the 1875 Force bill, the Supreme Court’s *Cruikshank* decision, and the President’s refusal to send troops to Mississippi—had thoroughly demoralized many Southern Republicans. Feeling themselves ‘abandoned . . . to the tender mercies of the Ku Klux Klan,’ some abandoned the 1876 campaign.” *Id.* (citation omitted) (omission in original).

⁷⁸ *Id.* at 550-52 (describing political violence in Louisiana elections).

⁷⁹ LANE, *supra* note 15, at 251.

⁸⁰ *Id.*; see also FONER, *supra* note 56, at 582 (suggesting that “the abandonment of Reconstruction was as much a cause of the crisis of 1876-77 as a consequence, for had Republicans still been willing to intervene in defense of black rights, Tilden would never have come close to carrying the entire South”).

⁸¹ Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 HARV. L. REV. 279, 279 (1899) (arguing that motivation for revision was that “[f]raud upon the negroes naturally led to fraud upon members of any opposing faction, even if nominally of the same party”); J.L. Warren Woodville, *Suffrage Limitation in Louisiana*, 21 POL. SCI. Q. 177, 177 (1906) (“When in 1898 . . . a Convention was called to frame a new constitution for the state of Louisiana, it was clearly understood by everyone that the main object of the gathering was the elimination of the negro from Louisiana politics.”).

⁸² Eaton, *supra* note 81, at 292.

⁸³ *Id.* at 286-87; Woodville, *supra* note 81, at 180-81.

⁸⁴ *Trudeau v. Barnes*, 1 F. Supp. 453, 455 (E.D. La. 1932) (recognizing unconstitutionality of 1898 grandfather clause), *aff’d*, 65 F.2d 563 (5th Cir. 1933).

⁸⁵ *United States v. Louisiana*, 225 F. Supp. 353, 377 (E.D. La. 1963) (three-judge court), *aff’d*, 380 U.S. 145 (1965); cf. *Marrero v. Middleton*, 59 So. 863, 865 (La. 1912) (holding voter’s “registration as a white Democrat will not prevent a candidate in a primary election from contesting the validity of the vote of a colored person”).

Plessy v. Ferguson the Court upheld legally mandated racial segregation on Louisiana streetcars.⁸⁶ In arguing that the protections of the Fourteenth Amendment had a broad reach, Plessy's brief reminded the Court of the demographic realities of the Southern political situation: "Suppose the colored people . . . secure control of certain states as they ultimately will, for ten cannot always chase a thousand no matter how white the ten or how black the thousand may be, [discriminatory laws] would leave the personal rights of a white minority wholly at the mercy of a colored majority . . ." ⁸⁷ The Court rejected the claim that "the enforced separation of the two races stamps the colored race with a badge of inferiority."⁸⁸ The Court implicitly acknowledged the magnitude of the African American population:

The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position.⁸⁹

The Court knew that African Americans had once controlled the legislature, knew from its decision in *Hall v. DeCuir*⁹⁰ that the majority voted to prohibit segregation while in control, and knew not only from general knowledge but also from *United States v. Cruikshank*⁹¹ and other cases like *Reese*⁹² that violence had removed African Americans from power and left them disenfranchised.

All in all, it is fair to say that the modern government of Louisiana traces back to a revolution in the 1870s that was based on selective enforcement of the law to the disadvantage of African Americans. Criminal and electoral laws were essentially suspended for purposes of the minority disenfranchising African Americans and their allies. The cooperation of the existing or incoming law enforcement system was necessary to bring about this result. It would be police, judges, governors, and militia who enforced the

⁸⁶ 163 U.S. 537 (1896).

⁸⁷ Brief of Plaintiff in Error at 20, *Plessy v. Ferguson*, 163 U.S. 537 (1893) (No. 95-210) (arguing that given the cases suggesting that the Fourteenth Amendment imposed few limits on state authority, "it is little wonder that the white people of the south declare themselves ready to resist even to the death; the domination of a colored majority in any state").

⁸⁸ *Plessy*, 163 U.S. at 551.

⁸⁹ *Id.* Justice Harlan's dissent pointedly ignored this issue. He first referred to legislative supremacy in a way that seems out of place in an opinion arguing that an enactment is unconstitutional: "There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature." *Id.* at 558 (Harlan, J., dissenting). He then acknowledged that "[t]he white race deems itself to be the dominant race . . . in prestige, in achievements, in education, in wealth, and in power . . . [and] it will continue to be for all time . . ." *Id.* at 559. Finally, he stated that "[s]ixty millions of whites are in no danger from the presence here of eight millions of blacks," putting African Americans in the minority. *Id.* at 560.

⁹⁰ 95 U.S. 485, 488 (1878); see also *supra* note 50 and accompanying text.

⁹¹ 92 U.S. 542 (1876); see also *supra* text accompanying note 72.

⁹² 92 U.S. 214 (1876); see also *supra* text accompanying note 73.

law. Certainly, aspiring officeholders who committed assaults, perjury, or election offenses to gain office would be tolerant of like conduct by themselves or their allies. Cases like *Cruikshank* and *Plessy* gave at least tacit approval to the idea that, for the special purpose of eliminating African Americans from political participation, these measures were tolerable.

III. PROFITS FROM THE CRIMINAL JUSTICE SYSTEM

After Reconstruction, the criminal justice systems of the former Confederate states were structured to impose a form of involuntary servitude as a replacement for slavery. As historian William Cohen explained, “this system comprised a variety of state laws aimed at making it possible for both individuals and local governments to acquire and hold black labor virtually at will.”⁹³ As Douglas A. Blackmon put it,

[b]y 1900, the South’s judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans. . . . Sentences were handed down by provincial judges, local mayors, and justices of the peace—often men in the employ of the white business owners who relied on the forced labor produced by the judgments. Dockets and trial records were inconsistently maintained. Attorneys were rarely involved on the side of blacks. Revenues from the neo-slavery poured the equivalent of tens of millions of dollars into the treasuries of Alabama, Mississippi, Louisiana, Georgia, Florida, Texas, North Carolina, and South Carolina.⁹⁴

This system prevailed in Louisiana. Historian Mark Carleton notes that because most convicts “(as slaves) had become experts . . . sending many of them back to the fields seemed the natural (and most profitable) policy to pursue.”⁹⁵ This section outlines some of the legal means used to achieve involuntary servitude in Louisiana, and the financial benefits that flowed from them.

A. *Convict Leasing and Prison Plantations*

According to the Louisiana Supreme Court in 1922, “penal servitude” was “customary” in that state.⁹⁶ Servitude was not merely a preferred technique of correcting offenders, but also a way to make money: “Louisiana

⁹³ William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 31 (1976).

⁹⁴ DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 7-8 (2008).

⁹⁵ MARK T. CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* 7 (1971).

⁹⁶ *State v. McGuire*, 94 So. 896, 897 (La. 1922).

officials always knew convicts were a valuable commodity.⁹⁷ But the U.S. Supreme Court has held that due process is violated if judicial or quasi-judicial decision-makers have a financial incentive to charge or convict because of the risk that innocent defendants will be convicted.⁹⁸ In Louisiana, there was strong temptation to imprison defendants for profit, independent of culpability. Until 1901, the entire convict population of Louisiana was wholesaled to a single lessee, who used them in a variety of labor projects.⁹⁹

The profit motive led to a number of unfortunate consequences. First, “[t]he introduction of the convict lease system into the prisons of the South, thereby enabling the convicts to become a source of revenue, caused each state to have a financial interest in increasing the number of convicts.”¹⁰⁰ Given that prisoners were profitable, “[t]here was no check available, as in the North, where cells rapidly became crowded and compelled the construction of costly Bastiles [sic] if convictions were too frequent.”¹⁰¹ The ability to give custody of state prisoners to the state or to house them at the parish level ensured that demand for prisoners would exist statewide, regardless of local conditions. If there were few profitable local uses for prisoner labor, “the judges usually handed the great majority over to the state; but when a sheriff was building roads or leasing men to advantage, the courts usually kept the able-bodied at home and sent only the aged and infirm to state prison.”¹⁰² Even some public officials recognized the economic incentive to increase the number of prisoners regardless of, say, crime control considerations. As a state Board of Control was phased out in favor of giving complete authority over convicts to the leaseholder, the Board asked the legislature to inquire “why so many are sent to this institution for the term of three and four and six months, upon the most trivial charges? Does there not lurk beneath, the low, mean motive of depriving them of their right of citizenship?”¹⁰³

In addition, the profit motive ensured that the treatment of the prisoners would be brutal. The convict lease may have been worse than slavery, because “the penal lease camps lacked the saving grace of paternalism so characteristic of the old plantation slavery, and, at the same time, horror and brutality were unchecked by any concern for private property interests in the Negro.”¹⁰⁴ An 1883 study showed “that while only four prisons north of the

⁹⁷ MANCINI, *supra* note 33, at 145.

⁹⁸ *Ward v. Village of Monroe*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 532-33 (1927).

⁹⁹ Blake McKelvey, *Penal Slavery and Southern Reconstruction*, 20 J. NEGRO HIST. 153, 157-58 (1935); CARLETON, *supra* note 95, at 7 (noting that “[f]rom 1844 to 1901, almost without interruption, Louisiana leased her convicts to a number of private operators”).

¹⁰⁰ Monroe N. Work, *Negro Criminality in the South*, 49 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 77 (1913).

¹⁰¹ McKelvey, *supra* note 99, at 176.

¹⁰² *Id.* at 177.

¹⁰³ MANCINI, *supra* note 33, at 146.

¹⁰⁴ McKelvey, *supra* note 101, at 171.

Ohio had a mortality of 25 in 1,000 [prisoners annually], . . . Louisiana exceeded one in ten."¹⁰⁵

The Louisiana lease proved problematic in that the prisoners were awarded based on patronage, and there was little incentive for the leaseholder to pay the rent; the State would have no place to put the men if they were sent back.¹⁰⁶ In 1901, Louisiana abolished the lease, and replaced it with a state agricultural plantation, Angola, now known as the Louisiana State Penitentiary.¹⁰⁷ The prisoners continued to work in a variety of venues on and off the grounds, including performing levee work for private firms and farming for the state.¹⁰⁸ Parolees were effectively leased out at least until 1944.¹⁰⁹ Carleton quotes the Louisiana director of institutions, who, in 1946, described the Louisiana prison system as "one of the largest businesses in Louisiana."¹¹⁰

B. *Criminal Breach of Contract and Vagrancy*

In the twentieth century, sending large numbers of workers to a distant prison for minor offenses would have disrupted the local labor supply. Accordingly, a system of locally compelled labor for minor offenses paralleled the state prison systems of the South. Until around 1970, the laws of Louisiana offered African Americans a simple choice: work on whatever terms are offered, or be arrested and forced to work for free. Historian Matthew Mancini explains that this phenomenon occurred across the South,

not only by the machinery of criminal justice but also through corrupt networks of sheriffs and labor agents. The criminal justice apparatus was systematically geared for the collection of labor. . . . [E]nforcement even of ostensibly neutral statutes worked to incarcerate blacks . . . far out of proportion to their numbers. . . . Southern states rewrote the criminal law and created such "Negro crimes" as incitement to insurrection and criminal trespass.¹¹¹

Laws concerning vagrancy, disorder, contracts for work, chattel, mortgages, and crop liens combined so as to punish African Americans unfairly and keep them entrenched in a rigged labor system.¹¹² Informal procedure facili-

¹⁰⁵ *Id.* at 174.

¹⁰⁶ For more information about how the private leaseholders profited enormously from convict leasing, see Matthew J. Mancini, *Race, Economics and the Abandonment of Convict Leasing*, 63 J. NEGRO HIST. 339 (1978).

¹⁰⁷ MANCINI, *supra* note 33, at 150-51.

¹⁰⁸ Blake McKelvey, *A Half Century of Southern Penal Exploitation*, 13 SOC. FORCES 112, 115-16 (1934).

¹⁰⁹ James E. Crown, *Peonage of Paroled Convicts Meets Louisiana Curb*, N.Y. TIMES, Dec. 24, 1944, at 52 (noting that "[t]he state is now engaged in busily investigating each case where prisoners have been assigned to work for favored employers").

¹¹⁰ CARLETON, *supra* note 95, at 139.

¹¹¹ MANCINI, *supra* note 33, at 41.

¹¹² *Id.*

tated the laws. According to one historian, defendants would “confess judgment,” admitting responsibility without a trial. The justice of the peace would impose a fine, typically paid by a surety, who was then entitled to custody of the defendant until the fine was paid off through work, either for the surety or for some other employer.¹¹³

Louisiana laws facilitated compulsory labor. An 1892 statute provided that “whoever violates a contract of labor, upon . . . which money or goods have been advanced, shall be punished by a fine . . . of not less than \$10 or over \$200, or, in default of payment, 90 days or less imprisonment”¹¹⁴ unless the defendant had tendered back the value of the advance. The statute put muscle behind sharecropping contracts, under which a small farmer would receive advances on crops subject to settlement at the end of the year.¹¹⁵

A sharecropper wanting to move faced a no-win situation. He could comply with the contract and remain notwithstanding his desire to move, essentially being forced to work, or he could breach his contract, and, if caught, be arrested, and through fines and incarceration be forced to perform the work anyway. “Those jailed . . . were then vulnerable to the operations of the criminal-surety system, which gave the offender an ‘opportunity’ to sign a voluntary labor contract with his former employer or some other white who agreed to post bond.”¹¹⁶ If he insisted on his right to a trial, things could get worse: “Convict labor laws began where the surety system ended, and those who had no surety often wound up on chain gangs.”¹¹⁷

Louisiana authorized parish-level leasing for those convicted of all crimes. A 1902 statute provided that those sentenced to imprisonment in the parish jail “may, at the discretion of the court, be set to work on the roads, levees, or other public works of the parish, or may be hired out or leased for work in the parish, during the term for which he may be sentenced to imprisonment.”¹¹⁸

A sharecropper lucky enough to come out ahead at the end of the season or a young person not yet caught up in the system might decline to sign a labor contract. However, the law anticipated that loophole. Louisiana va-

¹¹³ BLACKMON, *supra* note 94, at 67 (“The defendants would typically ‘confess judgment.’ . . . The local judge then accepted payment . . . from the white surety, rather than render a verdict on the alleged crime. In return, the African American farmer would sign a contract to work . . . for the white landlord for however long it took to pay back the amount of the bond.”).

¹¹⁴ *State v. Murray*, 40 So. 930, 931 (La. 1906).

¹¹⁵ *See Wideman v. Selph*, 30 S.E.2d 797, 797-98 (Ga. Ct. App. 1944) (setting out sharecrop contract).

¹¹⁶ Cohen, *supra* note 93, at 34. For more background on the criminal surety system, see *United States v. Reynolds*, 235 U.S. 133, 145-55 (1914) (invalidating the criminal surety system).

¹¹⁷ Cohen, *supra* note 93, at 34.

¹¹⁸ *State v. Cunningham*, 58 So. 558, 561 (La. 1912) (describing 1906 La. Acts 61); *see also State v. Patterson*, 47 So. 511 (La. 1908) (rejecting habeas corpus petition without prejudice because defendant had not yet exhausted all his appeals where defendant argued that the parish violated the 1902 statute because convicts were contracted out to work under inhumane conditions).

grancy laws, which criminalized a wide range of behavior, provided African Americans in such situations with extra incentive to sign a labor contract. Under the laws, “able bodied persons without lawful means of support who do not seek employment and take employment when it is available to them” were guilty of vagrancy.¹¹⁹ The beauty of these provisions is that they required little to no perjury to prove a violation; an African American worker traveling north or to another farm was actually guilty of vagrancy if he or she refused a job offer without having another in hand.¹²⁰ Even if a defendant’s behavior was not criminal under one vagrancy law, there were many vagrancy laws to choose from; the Louisiana Supreme Court noted that “[w]e have state vagrancy laws, city vagrancy ordinances, and police jury vagrancy ordinances,”¹²¹ so in any given spot in Louisiana there were as many as three applicable statutes and three legislative bodies able to refine their provisions. The Louisiana Supreme Court regularly upheld the constitutionality of vagrancy laws.¹²²

While northern employers were sometimes interested in African American labor, albeit often for menial positions, the southern worker could not seek help from the market. Early on, the Supreme Court upheld state restrictions on labor agents, who recruited workers for employers in other states.¹²³ Louisiana enacted a similar law that the *Chicago Defender* claimed made plantation laborers “serfs” by prohibiting entering the property of another for the purpose of “moving of any laborer or tenant without the consent of the owner or proprietor.”¹²⁴ The Louisiana Supreme Court upheld a conviction under this statute of a truck driver who moved a tenant farmer and his possessions from a Louisiana plantation to another one in Arkansas, without permission of the Louisiana plantation owner.¹²⁵ There was a famous “Great Migration” of African Americans out of the South, but that, it turns out, was at the sufferance of the criminal justice system; migration was typically allowed “at times and places where labor was superabundant.”¹²⁶

A critical feature of vagrancy laws and other “minor” offenses was their low visibility in the criminal justice system. A defendant might want to assert as a defense that a person is not guilty of vagrancy if a particular job offer was declined because the terms were unreasonable, or that the labor

¹¹⁹ LA. REV. STAT. ANN. § 14:107(5). Another section criminalized being “found in or near any structure, movable, vessel, or private grounds, without being able to account for . . . lawful presence.” LA. REV. STAT. ANN. § 14:107(8).

¹²⁰ See *State v. Wilkins*, 193 So. 2d 275, 275 (La. 1966) (upholding nine month sentence for violating this statute).

¹²¹ *City of Shreveport v. Scott*, 175 So. 622, 623 (La. 1937).

¹²² *City of New Orleans v. Postek*, 158 So. 553 (La. 1934); *State v. Westmoreland*, 63 So. 502 (La. 1913).

¹²³ *Williams v. Fears*, 179 U.S. 270 (1900). See generally Davison M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541, 1544-45 (2002).

¹²⁴ *Peonage Bill Hits Workers in Louisiana: Plantation Laborers Are Made Serfs*, CHI. DEFENDER, Aug. 21, 1926, at 1 (citations omitted).

¹²⁵ *State v. Hunter*, 114 So. 76 (La. 1927).

¹²⁶ Cohen, *supra* note 93, at 59.

contract statute is not violated if the tenant left because the landlord failed to comply with the bargain. But there were no jury trials for misdemeanors in Louisiana until *Duncan v. Louisiana*,¹²⁷ a case involving charges which appeared to have been brought in retaliation against an African American defendant who was attending a desegregated school.¹²⁸ There was no right to appointed counsel for misdemeanors.¹²⁹ Even for those able to hire counsel, judicial review was restricted; Louisiana law provided no right to appeal unless the fine exceeded \$300 or the incarceration exceeded six months.¹³⁰ Accordingly, the implications of *Bailey v. Alabama*,¹³¹ a 1911 case invalidating a breach of contract statute like the one upheld by the Louisiana Supreme Court in 1906, were not confronted by the Louisiana Supreme Court until 1918, when the law was invalidated.¹³² Even on the counterfactual assumption that the laws were applied fairly, it was difficult to test their legitimate scope.

While the contract labor law was officially void by the end of World War I, the courts did not begin to invalidate Louisiana's vagrancy statutes until 1970. Since then, courts have struck down most provisions of the Louisiana statute,¹³³ although those decisions have not inspired the Louisiana legislature to amend the provision—the unconstitutional portions remain on the books. At least until 1940, and perhaps since, “[w]hether enforced or not, these laws served as a threat to those who might hesitate to enter into labor contracts, and this was their central purpose.”¹³⁴

Historians of the period invariably describe the system as a whole as involving corruption of law enforcement. According to Professor Pete Daniel, “[a] victim of lawlessness usually turns to the nearest law-enforcement officer, but peonage victims found this avenue blocked. County sheriffs, constables, justices of the peace, and sometimes federal officials aided in preserving the nightmare world of peonage.”¹³⁵ Similarly, Professor Co-

¹²⁷ 391 U.S. 145 (1968).

¹²⁸ Nancy J. King, *Duncan v. Louisiana: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, in *CRIMINAL PROCEDURE STORIES* 261 (Carol Steiker ed., 2006).

¹²⁹ See, e.g., *State v. Brown*, 201 So. 2d 277, 280 n.3 (La. 1967) (upholding nine month sentence for vagrancy), *overruled by* *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding right to counsel exists where possibility of incarceration).

¹³⁰ *State v. Breaux*, 79 So. 209, 209 (La. 1917); *State v. Hunter*, 38 So. 686, 686 (La. 1905).

¹³¹ 219 U.S. 219 (1911).

¹³² *State v. Olivia*, 80 So. 195 (La. 1918).

¹³³ See *Scott v. District Attorney, Jefferson Parish, Louisiana*, 309 F. Supp. 833, 836 (E.D. La. 1970) (invalidating sections on loitering and failure to give an account of one's lawful presence), *aff'd per curiam*, 437 F.2d 500 (5th Cir. 1971); *State v. Pugh*, 369 So. 2d 1308, 1309 (La. 1979) (invalidating “habitual drunkard” section); see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (invalidating similar Florida law); *Gordon v. Schiro*, 310 F. Supp. 884, 891 (E.D. La. 1970) (invalidating portions of New Orleans vagrancy ordinance).

¹³⁴ Cohen, *supra* note 93, at 49.

¹³⁵ PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969*, at 30-31 (1972).

hen explains that the power of these statutes was in their selective enforcement:

These statutes need not have created the system of involuntary servitude. . . . What gave life to the system was the intent of the men who wrote its laws and the spirit in which these measures were enforced. . . . [S]outherners knew that they were intended to maintain white control of the labor system, and local enforcement authorities implemented them with this in mind.¹³⁶

Douglas Blackmon's recent book concludes that those cast into slavery were guilty of no crime, or were only guilty of crimes created to imprison African Americans.

Instead of evidence showing black crime waves, the original records of county jails indicated thousands of arrests for inconsequential charges or for violations of laws specifically written to intimidate blacks—changing employers without permission, vagrancy, riding freight cars without a ticket, engaging in sexual activity—or loud talk—with white women. Repeatedly, the timing and scale of surges in arrests appeared . . . attuned to rises and dips in the need for cheap labor¹³⁷

Other scholars agree that the volume of criminal charges and imprisonment seems to have been associated with economic needs rather than the behavior of those charged with crime: “At harvest time cotton farmers experienced an acute need for a large work force, and it was precisely at such times that the police became most active in discovering vagrants.”¹³⁸

A notable piece of evidence about the social status of forced labor comes from its participants and defenders. In 1904, a U.S. District Judge in Georgia upheld an indictment for peonage. He offered sarcastic thanks to the powerful political leaders who showed up in court to support the defendants. The court noted the “voluntary aid afforded by statesmen” urging dismissal of the peonage charges, including briefs and argument by “a chairman of a penitentiary committee of the Georgia Senate . . . a member of the House judiciary committee in Congress . . . [and] a solicitor general of the state court in their state judicial district, charged with the prosecution of such offenses under the state law”¹³⁹ From the defense of the practices complained of by eminent Georgians, the judge drew a conclusion contrary

¹³⁶ Cohen, *supra* note 93, at 34.

¹³⁷ BLACKMON, *supra* note 94, at 7.

¹³⁸ Cohen, *supra* note 93, at 50.

¹³⁹ *United States v. McClellan*, 127 F. 971, 972-73 (S.D. Ga. 1904). The court's real attitude is reflected in its later description of the practices these leading citizens supported: “Is it not involuntary servitude to seize by force, to hurry the victim from wife and children, to incarcerate him in a stockade, and work him in range of the deadly muzzle of the shot-gun, or under the terror of the lash, and continue this servitude as long as resentment may prompt, or greed demand?” *Id.* at 976.

to the one the defendants sought: “if there is no system of peonage de jure, to which the statute applies, there is yet a de facto system of some equivalent sort, which has evoked the liveliest apprehensions of those who participate in its operation and emoluments, and of others whose sentiments toward it are not wholly antipathetic.”¹⁴⁰

Newspaper accounts of Louisiana peonage cases are consistent with the idea that peonage was accepted and practiced by the best people. In 1903, 221 people including “several leading planters of North Louisiana” were indicted;¹⁴¹ the *Chicago Tribune* asserted that the “enslavement of blacks will cease entirely if state or local authorities will cooperate heartily with the federal authorities, but in only a few instances have there been signs of a willingness to cooperate.”¹⁴² In 1904, the case investigator, Deputy U.S. Marshal J. E. Pope, was murdered in Trenton, Louisiana.¹⁴³ In 1906, “one of the wealthiest planters of North Louisiana” was federally indicted for peonage;¹⁴⁴ in 1908, the scion of the family that made Tabasco, U.S. Civil Service Commissioner James McIlhenny, was accused of forced labor on Avery Island.¹⁴⁵ A 1930 report in the *Chicago Defender* describes the guilty plea and eighteen-month federal prison sentence of a “wealthy white . . . planter” who

admitted that he had chained one of his tenants to a tree as an example, but protested that the methods he used in retaining help were common practices in his section. He insisted at first that his methods were legal and that he advanced food to his tenants, and that when they ran away he had warrants sworn out [sic] their arrest and that when officers returned the escaped men he simply held them to work out the money he had advanced.¹⁴⁶

In 1931, the American Federation of Labor accused construction companies working on the levees of brutality towards their workers.¹⁴⁷ There were also persistent complaints about lumber companies.¹⁴⁸ Notably, these prosecutions seem largely federal, and those accused typically substantial citizens.

¹⁴⁰ *Id.* at 973.

¹⁴¹ *Peonage in Louisiana*, N.Y. TIMES, Nov. 23, 1903, at 2.

¹⁴² *The War on Peonage*, CHI. DAILY TRIB., Nov. 27, 1903, at 6.

¹⁴³ *Deputy Marshal Murdered*, N.Y. TIMES, Dec. 3, 1904, at 1.

¹⁴⁴ *Peonage in Louisiana*, *supra* note 141, at 1.

¹⁴⁵ *Laborers Complain of J.A. M'Ilhenny*, N.Y. TIMES, Feb. 3, 1908, at 4.

¹⁴⁶ *Louisiana Planter Convicted of Peonage*, CHI. DEFENDER, Apr. 5, 1930, at 1.

¹⁴⁷ *Levee Contractors Accused of Brutality*, HARTFORD COURANT, Dec. 1, 1931, at 2.

¹⁴⁸ *See, e.g., Peonage Witness Tells of Manhunt*, N.Y. TIMES, Feb. 26, 1949, at 3; *Tell of More Peons: Lumber Workers of Louisiana Ask Wilson to Investigate*, WASH. POST, May 30, 1913, at 4 (reporting a union's claims that “thousands of workers are being held in a state of peonage by lumber companies throughout the South” and that “the governor and all the authorities of Louisiana have ignored and treated with contempt our every demand for redress”).

IV. SCHOOL SEGREGATION AND VOTING IN THE SECOND RECONSTRUCTION

After *Brown v. Board of Education*,¹⁴⁹ Louisiana faced litigation and political pressure¹⁵⁰ to end school segregation and to allow African Americans to vote. In each case, the legislature responded with facially neutral laws designed to allow for selective application against African Americans, thereby maintaining a segregated system.¹⁵¹

In 1954, State Senator William M. Rainach became the first chair of the Joint Legislative Committee¹⁵² that became known as the "Segregation Committee."¹⁵³ William M. Shaw was the committee's counsel.¹⁵⁴ Rainach and Shaw were also the founders of the Associated Citizens Councils of Louisiana.¹⁵⁵ The Committee and the Councils¹⁵⁶ had similar purposes; the Committee's goal was:

'to provide ways and means whereby our existing social order shall be preserved and our institutions and ways of life . . . maintained.' This was to be accomplished by a program 'to maintain segregation of the races in all phases of our life in accordance with the customs, traditions and laws of our State.'¹⁵⁷

The Citizens' Councils intended to "protect and preserve by all legal means, our historical Southern Social Institutions in all of their aspects."¹⁵⁸ This public-private partnership enacted into law and implemented several statutory regimes that were susceptible to selective enforcement, and therefore effectively prevented African Americans from enjoying their constitutional rights.

In the school integration context, one example of a law designed to maintain segregation is the Louisiana legislature's adoption of a so-called pupil placement law, which remains on the books today.¹⁵⁹ Under this statute, children attending public school could be evaluated and assigned to the

¹⁴⁹ 347 U.S. 483 (1954).

¹⁵⁰ See, e.g., Alan Wieder, *The New Orleans School Crisis of 1960: Causes and Consequences*, 48 *PHYLON* 122, 122 (1987).

¹⁵¹ *United States v. Louisiana*, 225 F. Supp. 353, 378 (E.D. La. 1963) (three-judge court), *aff'd*, 380 U.S. 145 (1965).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See generally NEIL McMILLEN, *THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION 1954-64* (1994) (describing the Citizens' Councils).

¹⁵⁷ *United States v. Louisiana*, 225 F. Supp. at 378 (citation omitted) (omission in original).

¹⁵⁸ *Id.* (quoting Art. II of the Association of Citizens' Councils of Louisiana's Act of Incorporation).

¹⁵⁹ LA. REV. STAT. ANN. § 17:101 (added by Acts 1958, No. 259, § 1), *invalidated by Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491 (5th Cir. 1962).

school appropriate for him or her.¹⁶⁰ Unobjectionable on its face, the real purpose was to create a regime of unlimited discretion so that African American students could be assigned to African American schools regardless of conditions.¹⁶¹ As the Fifth Circuit explained when invalidating the law in 1962, using the laws, “the Orleans Parish School Board maintained virtually complete segregation in fact.”¹⁶² The court ordered the school board to transfer students “under a good faith, non-discriminatory application of the Pupil Placement Act to such transfers.”¹⁶³

Louisiana also relied upon a facially neutral statute that could be discriminatorily applied to maintain a white electorate. Under the “new approach,” required after the Supreme Court invalidated grandfather clauses and white primaries, “unclear or vague state voting provisions were combined with discriminatory exercise of wide discretion . . . to check the advance of Negro voting.”¹⁶⁴ La Salle Parish (of which Jena is the seat) was a defendant in *United States v. Louisiana*,¹⁶⁵ a landmark case that preceded and helped bring about¹⁶⁶ the Voting Rights Act.¹⁶⁷ The case was a federal challenge to the “understanding” clause of Louisiana’s constitution, which required a candidate for voter registration to interpret a provision of the Louisiana or United States constitution chosen by the registrar to that registrar’s satisfaction. In a decision affirmed by the Supreme Court,¹⁶⁸ a three-judge U.S. District Court found that “considering this law in its historical setting and considering too the actual operation and inescapable effect of the law, it is evident that the test is a sophisticated scheme to disfranchise Negroes.”¹⁶⁹

¹⁶⁰ LA. REV. STAT. ANN. § 17:101.

¹⁶¹ See, e.g., Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448, 1452 (1962) (“The particular genius of the assignment statutes derives from the provisions designed to individualize consideration of requests for transfers.”).

¹⁶² *Bush*, 308 F.2d at 498; see also *East Baton Rouge Parish Sch. Bd. v. Davis*, 287 F.2d 380, 381 (5th Cir. 1961).

¹⁶³ *Bush*, 308 F.2d at 500.

¹⁶⁴ Note, *supra* note 23, at 1068. For overviews of the period, see John H. Fenton, *The Negro Voter in Louisiana*, 26 J. NEGRO EDUC. 319, 320 (1957) and *Federal Enforcement*, *supra* note 23, at 1068-72. Extensive factual material about disenfranchisement in Louisiana is available from the reports of the U.S. Commission on Civil Rights. See HEARINGS BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS: HEARINGS HELD IN NEW ORLEANS, LOUISIANA 107, 114-17 (1961), reprinted in 2 GABRIEL J. CHIN & LORI WAGNER, U.S. COMMISSION ON CIVIL RIGHTS: REPORTS ON VOTING (2005); 1 1961 REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS: VOTING 39-72 (1961) (discussing findings of investigation in Louisiana), reprinted in CHIN & WAGNER, *supra*.

¹⁶⁵ *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963) (three-judge court), *aff’d*, 380 U.S. 145 (1965).

¹⁶⁶ See, e.g., Philip Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276, 278-82 (1985).

¹⁶⁷ 42 U.S.C. §§ 1973(a)-(b) (1965).

¹⁶⁸ *United States v. Louisiana*, 380 U.S. 145 (1965).

¹⁶⁹ *United States v. Louisiana*, 225 F. Supp. 353, 356 (E.D. La. 1963) (three-judge court), *aff’d*, 380 U.S. 145 (1965).

The court determined that “the test is unconstitutional as written and as administered.”¹⁷⁰

The lawsuit was the result of a two-step process. In 1956, in La Salle and several other parishes, over 50% of black registered voters were removed from the lists based on “challenges” by white voters organized by the Citizens’ Councils.¹⁷¹ The Segregation Committee and Citizens’ Councils had, through a series of meetings across the state, instructed registrars to enforce rigorously against African Americans¹⁷² the understanding clause that had been on the books since 1921, but not implemented.¹⁷³ Using the understanding test, white registration increased, and African American registration decreased.¹⁷⁴

The key was discriminatory application of the test. Said the court:

many white applicants were shown cards with sample answers on them. . . . Similarly, . . . the registrars often told white applicants the currently acceptable answers. . . .

Registrars were easily satisfied with answers from white voters. In one instance ‘FRDUM FOOF SPETGH’ was an acceptable response to the request to interpret Article 1, § 3 of the Louisiana Constitution.

On the other hand, . . . Negroes whose application forms and answers indicate that they are highly qualified . . . have been turned down although they had given a reasonable interpretation of fairly technical clauses of the constitution.¹⁷⁵

The court stated that “[w]hen neither the Constitution nor the statutes prescribe any standards for the administration of the test, the net result is full latitude for calculated, purposeful discrimination and even for unthinking, purposeless discrimination.”¹⁷⁶ A unanimous Supreme Court affirmed an injunction against La Salle and the other parishes using the interpretation test or one designed to replace it.¹⁷⁷ The Court agreed that a forceful decree was necessary to address “discriminatory practices shown to be so deeply engrained in the laws, policies, and traditions of the State of Louisiana.”¹⁷⁸

Discretionary laws permitting denial of civil rights could be supplemented with broad and vague criminal laws used on other occasions to compel labor or other compliance with social custom. According to Douglas Blackmon, speaking of the South as a whole, “[t]he laws passed to intimi-

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 379.

¹⁷² *Id.* at 377-81.

¹⁷³ *Id.* at 377. Before the mid-1940s, the white primary made use of the understanding test unnecessary. *Id.*

¹⁷⁴ *Id.* at 385.

¹⁷⁵ *Id.* at 383-84.

¹⁷⁶ *Id.* at 387.

¹⁷⁷ *United States v. Louisiana*, 380 U.S. 145, 156 (1965).

¹⁷⁸ *Id.*

date black men away from political participation were enforced by sending dissidents into slave mines or forced labor camps.”¹⁷⁹ There is evidence that Louisiana statutes were used for that purpose. For example, Zelma Wyche, later to become police chief, town marshal, and mayor of Tallulah,¹⁸⁰ an African American majority town, twice was forced to appeal to federal courts to protect him from prosecution on trumped up criminal charges,¹⁸¹ just as he had to go to federal court to deal with last-minute changes to electoral procedures designed to deny him office.¹⁸² Federal courts enjoined or permitted removal of many state prosecutions in Louisiana because they were designed to interfere with civil rights.¹⁸³

V. CONTEMPORARY LOUISIANA, LA SALLE PARISH, AND JENA

In what remains one of the most revealing opinions ever written on the question of race, in 1964 the Alabama Supreme Court unanimously upheld the conviction and imprisonment of a Freedom Rider attempting to integrate an illegally segregated interstate bus terminal.¹⁸⁴

Certain sections of the country . . . because of physical traits and differences between the white and colored races and other disparities real to them although perhaps imaginary to others, observed

¹⁷⁹ BLACKMON, *supra* note 94, at 6.

¹⁸⁰ ADAM FAIRCLOUGH, *RACE AND DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972*, at 395-98 (1995).

¹⁸¹ *Wyche v. Hester*, 431 F.2d 791 (5th Cir. 1970) (remanding for hearing on habeas corpus petition); *Wyche v. Louisiana*, 394 F.2d 927 (5th Cir. 1967) (holding removal improperly denied and remanding for hearing on question of whether defendant was engaged in federally protected activity). The facts are described in FAIRCLOUGH, *supra* note 180, at 398.

¹⁸² *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969) (invalidating election under Voting Rights Act where voting machines had party levers, but only Wyche's name had been disconnected). See generally Comment, *Voting Rights: A Case Study of Madison Parish, Louisiana*, 38 U. CHI. L. REV. 726 (1971).

¹⁸³ See, e.g., *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968) (enjoining prosecution of persons protesting segregated school in Port Allen, Louisiana); *Bush v. Orleans Parish Sch. Bd.*, 308 F.2d 491 (5th Cir. 1961) (enjoining enforcement of new criminal laws designed to frustrate integration); *Duncan v. Perez*, 321 F. Supp. 181 (E.D. La. 1970) (enjoining prosecution of successful litigant in *Duncan v. Louisiana* on spurious battery charges), *aff'd*, 445 F.2d 557 (5th Cir. 1971); *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968) (three-judge court) (per curiam) (enjoining prosecution of civil rights lawyer in Plaquemines Parish); see also *City of Baton Rouge v. Douglas*, 446 F.2d 874 (5th Cir. 1971) (per curiam) (remanding for hearing on removal petition of disorderly conduct prosecution of person trying to integrate restaurant); *Mahaney v. Louisiana*, 427 F.2d 850 (5th Cir. 1970) (per curiam) (remanding for hearing on removal); *Whatley v. City of Vidalia*, 399 F.2d 521, 521 (5th Cir. 1968) (allowing removal of a “state prosecution of Negro citizens allegedly engaged in a federally granted and protected right of encouraging others to register and vote”); *Robertson v. Johnson*, 376 F.2d 43 (5th Cir. 1967) (seeking to enjoin New Orleans vagrancy prosecution against white woman in company of African Americans sufficiently pleaded to proceed).

¹⁸⁴ *Knight v. State*, 161 So. 2d 521 (Miss. 1964). Defendant Pauline Knight Ofofu was expelled from college at the time, but in 2008 her alma mater Tennessee State University awarded her an honorary doctorate. See *Honorary Degrees for Freedom Riders, and More*, THE WEEK, Oct. 3, 2008, http://www.theweek.com/article/index/89174/3/Honorary_degrees_for_Freedom_Riders_and_more.

and practiced segregation of the races. . . . Within a decade novel constructions have nullified settled constitutional questions. . . . Large numbers of people, in this broad land, are steeped in their customs, practices, mores, and traditions. In many instances, their beliefs go as deep or deeper than religion itself. If, in the lapse of time, these principles, sacred to them, shall be disproved, then it may be accepted that truth will prevail. But, until those principles have been tested in the crucible of time, no abject surrender should be expected, much less demanded.¹⁸⁵

If justices of a state supreme court have good insight into the legal customs of their region, the starting point is that some conservative Southerners found the “sacred” commitment to segregation to be “as deep or deeper than religion itself.” There is a plausible argument that “discriminatory intent does tend to persist through time” unless something acts to change it, so courts may be justified “to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent.”¹⁸⁶ To what extent have Louisiana in general or La Salle Parish in particular reexamined their “customs, practices, mores, and traditions”? Have they engaged in “abject surrender”?

A. Segregation

Certain traditional measures of racial progress reflect stability in Louisiana. With regard to school segregation, in 2003, Louisiana had the nation’s fourth lowest percentage of white students in the school attended by the average black student.¹⁸⁷ In 1970, the average black student attended a school with 31% white population; by 2003, that number had fallen to 27%.¹⁸⁸ In 2003-04, Louisiana was the nation’s eighth most segregated school system, with 77% of African Americans in majority minority schools.¹⁸⁹

Louisiana also appears to have fairly stable residential segregation. A study of census data showed that of 291 Metropolitan Statistical Areas examined nationally, only nineteen showed increases in residential segregation between 1990 and 2000; of those nineteen, three had annexed neighboring areas which could have affected the result without reflecting a residential

¹⁸⁵ *Knight*, 161 So. 2d at 523.

¹⁸⁶ *United States v. Fordice*, 505 U.S. 717, 746-47 (1992) (Thomas, J., concurring).

¹⁸⁷ GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 18 (2006), available at http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf (reporting that California, Mississippi, and Texas had lower percentages, though only states with 5% or more African American population were listed).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 26.

shift.¹⁹⁰ Of six Louisiana MSAs studied, four reflected “hypersegregation,”¹⁹¹ meaning that at least 60% of African Americans would have to move to achieve a random pattern of residence.¹⁹² Two of the MSAs where segregation increased, without accompanying neighborhood annexation, were the North Louisiana MSA’s of Baton Rouge and Alexandria, the latter of which adjoins but does not include La Salle Parish.¹⁹³ The other four Louisiana MSAs studied were in the “small decrease” category.¹⁹⁴ None of the six Louisiana MSAs reflected a decrease in residential segregation of more than 5%,¹⁹⁵ although almost half of all MSAs in the entire study did.¹⁹⁶

B. Politics

Another piece of evidence of stability in Louisiana is the continuing appeal of racist politics. David Duke is one of America’s best known racists.¹⁹⁷ Author of *Jewish Supremacism: My Awakening to the Jewish Question*,¹⁹⁸ he has publicly worn the Nazi swastika¹⁹⁹ and started influential branches of both the Ku Klux Klan²⁰⁰ and the National Association for the Advancement of White People.²⁰¹ Duke held political office in Louisiana and came close to winning statewide office. La Salle Parish is David Duke country; he polled much more strongly there than in the state as a whole. In the October 6, 1990 open U.S. Senate primary, Bennett Johnson won Louisiana with 53% of the vote; David Duke got 43%.²⁰² However, in La Salle, David Duke had almost a two-to-one advantage, winning 3749 votes compared to Johnson’s 1980.²⁰³ J. Reed Walters, the La Salle Parish District Attorney and prosecutor of the Jena Six, was first elected in this same elec-

¹⁹⁰ EDWARD L. GLAESER & JACOB L. VIGDOR, RACIAL SEGREGATION IN THE 2000 CENSUS: PROMISING NEWS 9 (2001), available at <http://www.brookings.edu/es/urban/census/glaeser.pdf>.

¹⁹¹ *Id.* at 3.

¹⁹² *Id.* at 9-11.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 10-11 (listing Monroe, New Orleans, Houma, and Lake Charles).

¹⁹⁵ *Id.* at 9-14.

¹⁹⁶ *Id.*

¹⁹⁷ See The Anti-Defamation League, Extremism in America: David Duke, http://www.adl.org/Learn/Ext_US/duke.asp (last visited Mar. 5, 2009) [hereinafter Extremism in America: David Duke]; see generally DAVID DUKE AND THE POLITICS OF RACE IN THE SOUTH (John C. Kuzenski, Charles S. Bullock III & Ronald Keith Gaddie eds., 1995).

¹⁹⁸ DAVID DUKE, JEWISH SUPREMACISM: MY AWAKENING TO THE JEWISH QUESTION (2003); see also DAVID DUKE, MY AWAKENING: A PATH TO RACIAL UNDERSTANDING (1998).

¹⁹⁹ See Extremism in America: David Duke, *supra* note 198.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Louisiana Secretary of State, Official Election Results, Results for Election Date: 10/06/90, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcms2&rqsdta=100690> (last visited Mar. 31, 2009).

²⁰³ Louisiana Secretary of State, Election Results by Parish-Official, Results for Election Date: 10/06/90, U. S. Senator, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=10069014012601> (last visited Mar. 31, 2009).

tion.²⁰⁴ In the October 19, 1991 gubernatorial primary, Duke won less than a third of the statewide total,²⁰⁵ but more than two thirds in La Salle Parish with 3959 votes.²⁰⁶ Statewide winner Edwin Edwards was a distant second with 1433.²⁰⁷ In the November 16, 1991 statewide runoff between Edwards and Duke, Edwards won over 60%,²⁰⁸ but less than a third in La Salle, where Duke tallied 4910 votes to Governor Edwards's 2432.²⁰⁹

In 1995, the race issue was again injected into a statewide election when U.S. Representative Cleo Fields, an African American, became the first serious African American candidate for governor since Reconstruction.²¹⁰ On October 21, 1995, Fields won 19% of the vote statewide to force a runoff against Mike Foster;²¹¹ in La Salle Parish, Fields polled at less than 4%.²¹² In the November 18, 1995 runoff, statewide, Fields won 36% of the vote;²¹³ in La Salle Parish, less than half that.²¹⁴ Although, as one U.S. District Judge explained in 1996, "racial bloc voting is a fact in contemporary Louisiana politics,"²¹⁵ it is seemingly more prevalent in La Salle Parish.

A potentially contrary piece of evidence is that the State of Louisiana and La Salle Parish elected Republican Bobby Jindal, a dark-skinned Louisianan of Asian Indian descent, as governor in 2007.²¹⁶ The parish voted for

²⁰⁴ Louisiana Secretary of State, Official Parish Election Results, Results for Election Date: 10/06/90, Parish of LaSalle, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcpr&rqsdta=10069030> (last visited Mar. 31, 2009).

²⁰⁵ Louisiana Secretary of State, Official Election Results, Results for Election Date: 10/19/91, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcms2&rqsdta=101991> (last visited Mar. 31, 2009).

²⁰⁶ Louisiana Secretary of State, Election Results by Parish-Official, Results for Election Date: 10/19/91, Governor, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=10199110012919> (last visited Mar. 31, 2009).

²⁰⁷ *Id.*

²⁰⁸ Louisiana Secretary of State, Official Election Results, Results for Election Date: 11/16/91, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcms2&rqsdta=111691> (last visited Mar. 31, 2009).

²⁰⁹ Louisiana Secretary of State, Election Results by Parish-Official, Results for Election Date: 11/16/91, Governor, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=11169110012919> (last visited Mar. 31, 2009).

²¹⁰ See Jonathan Knuckey & Byron D'Andrea Orey, *Symbolic Racism in the 1995 Louisiana Gubernatorial Election*, 81 Soc. Sci. Q. 1027, 1028 (2000), available at <http://digitalcommons.unl.edu/poliscifacpub/6> (last visited Mar. 31, 2009).

²¹¹ Louisiana Secretary of State, Official Election Results, Results for Election Date: 10/21/95, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcms2&rqsdta=102195> (last visited Mar. 31, 2009).

²¹² Louisiana Secretary of State, Election Results by Parish, Official Results for Election Date: 10/21/95, Governor, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=10219510012919> (last visited Mar. 31, 2009).

²¹³ Louisiana Secretary of State, Official Election Results, Results for Election Date: 11/18/95, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcms2&rqsdta=111895> (last visited Mar. 31, 2009).

²¹⁴ Louisiana Secretary of State, Election Results by Parish, Official Results for Election Date: 11/18/95, Governor, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=11189510012919> (last visited Mar. 31, 2009).

²¹⁵ *Hays v. Louisiana*, 936 F. Supp. 360, 364 n.17 (W.D. La. 1996).

²¹⁶ Associated Press, *Son of Indian Immigrants Is New Louisiana Governor*, Oct. 21, 2007, MSNBC.com, <http://www.msnbc.msn.com/id/21397966>.

him at close to the same rate as Louisiana as a whole.²¹⁷ But it is important to note that Asian Americans are not African American. Though Asians and Asian Americans have a history in the South of being used by landowners as labor competition,²¹⁸ given the size of the Asian American population there was never a chance that Asian Americans would become politically dominant.²¹⁹ Moreover, for many people, Asians, including South Asians,²²⁰ trigger a different set of cultural associations than African Americans, captured in the phrase “model minority.”²²¹

In any event, if Governor Jindal’s election marked a new openness to candidates of color in Louisiana and La Salle, it was short-lived. In the 2008 presidential election, while nationally whites voted more Democratic than they had in 2004,²²² white support for the Democratic ticket dropped in three states: Mississippi,²²³ Alabama,²²⁴ and Louisiana.²²⁵ According to exit poll data, white support in “Louisiana went from 24% to 14%, the largest point drop of all.”²²⁶ Senator John McCain carried Louisiana by about three to two, but in La Salle he defeated Barack Obama by 5602 votes to 860, or over six to one.²²⁷

Legal action disadvantaging African American voters is a regular occurrence in Louisiana. A 2006 report from the NAACP Legal Defense and Education Fund states the U.S. Department of Justice blocked ninety-six changes to voting procedures in Louisiana since 1982 under the Voting Rights Act.²²⁸ The report asserts that these changes would have “affected nearly every aspect of voting, including redistricting, polling place relocations, changes in voting and voter registration procedures, annexations and other alterations of elected bodies, and even the attempted suspension of a

²¹⁷ Louisiana Secretary of State, Election Results by Parish, Official Results for Election Date: 10/20/07, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=10200710012919> (last visited Mar. 31, 2009).

²¹⁸ JAMES W. LOEWEN, *THE MISSISSIPPI CHINESE: BETWEEN BLACK AND WHITE* (2d ed. 1988).

²¹⁹ Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application Of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 *ASIAN L.J.* 1, 36-40, app. A, app. B (2002) (tracking Asian population in the United States over time).

²²⁰ See Tayyab Mahmud, *Genealogy of a State Engineered “Model Minority”*: “Not Quite/Not White” *South Asian Americans*, 78 *DENV. U. L. REV.* 657 (2001).

²²¹ See, e.g., Chris K. Iijima, *Political Accommodation and the Ideology of the “Model Minority”*: *Building a Bridge to White Minority Rule in the 21st Century*, 7 *S. CAL. INTERDISC. L.J.* 1 (1998); Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth”*, 100 *Nw. U. L. REV.* 331 (2006).

²²² Charles Franklin, *White Vote for Obama in the States, Part 2*, *POLLSTER.COM*, NOV. 15, 2008, http://www.pollster.com/blogs/white_vote_for_obama_in_the_st_1.php.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Louisiana Secretary of State, Election Results by Parish, Official Results for Election Date: 11/04/08, Presidential Electors, <http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=11040801017141> (last visited Mar. 31, 2009).

²²⁸ DEBO P. ADEGBILE, *VOTING RIGHTS IN LOUISIANA: 1982-2006* (2006), *reprinted in* 17 *S. CAL. REV. L. & SOC. J.* 413, 433 (2008).

presidential primary election. Discriminatory changes were proposed at every level of government.”²²⁹

C. *The Correctional System*

In 1971, a historian of the Louisiana prison system wrote that “the survival of agricultural operations with the penal system into the 1960s suggests that the terms ‘convict,’ ‘slave,’ ‘Negro,’ and ‘farm work’ have remained unconsciously interchangeable in the mind of institutional Louisiana.”²³⁰ If racial polarization in politics and voting continued even after the changes of the 1960s and 1970s, it seems conceivable that it could have in the criminal justice system as well.

There is little question that the harshly punitive attitudes of past decades continue to exist. Louisiana has the nation’s highest imprisonment rate (865 per 100,000),²³¹ and the fifth highest percentage of its population on parole (after the District of Columbia, Arkansas, Oregon, and Pennsylvania),²³² though it is below the national average rate of probation.²³³ Some of its laws are distinctively harsh, such as the capital punishment provided for child rapists, which was adopted in 1995 and invalidated in *Kennedy v. Louisiana*,²³⁴ and its chemical castration policy, approved in 2008.²³⁵ Louisiana’s high rates of imprisonment for both African Americans and whites mean that its level of racial disproportionality is slightly below the national average,²³⁶ but African Americans are 4.7 times more likely to wind up in prison in Louisiana than are whites.²³⁷

Louisiana also retains the profit motive in its correctional system. By a wide margin, Louisiana has the nation’s highest percentage of inmates in local facilities—45.5%.²³⁸ The local authorities are reimbursed by the state for housing prisoners.²³⁹ Accordingly, many stakeholders are making money

²²⁹ *Id.*

²³⁰ CARLETON, *supra* note 95, at 7.

²³¹ Heather C. West & William J. Sabol, *Prisoners in 2007*, BUREAU OF JUST. STATISTICS BULL., at 19 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>. This statistic refers to sentences over one year.

²³² Lauren E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United States, 2006*, BUREAU OF JUST. STATISTICS BULL., at 5 (2007), available at <http://www.ojp.usdoj.gov/bjs/abstract/ppus06.htm>. This implies that the high imprisonment rate is not explained, for example, by shorter sentences leading to quicker parole.

²³³ *Id.* at 3 (citing 1186 per 100,000, whereas the national average is 1868 per 100,000).

²³⁴ 128 S. Ct. 2641 (2008).

²³⁵ Michelle Millhollon, *Jindal Signs Chemical Castration Bill*, THE ADVOCATE, June 26, 2008, at 6A.

²³⁶ MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 11 (2007), available at <http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Crdstateratesofinbyraceandethnicity.pdf>.

²³⁷ *Id.*

²³⁸ West & Sabol, *supra* note 231, at 24.

²³⁹ 12 LA. REV. STAT. ANN. § 15:824 (2005).

from a high imprisonment rate. In addition, Louisiana law still allows the working of inmates by the state and by the parishes,²⁴⁰ albeit only, the law says, voluntarily.²⁴¹ It also provides for work release to private employers, with earnings, in principle, going first to the state to pay for the cost of incarceration.²⁴² Inmates convicted of state crimes and housed in parish facilities are subject to local work release.²⁴³

Local housing of state prisoners means that local prosecutions will yield local revenues. Clearly, there are opportunities for local employers to benefit;²⁴⁴ for example, an Attorney General opinion concluded that State Representative Dale Smith of Jena was eligible to have an inmate assigned to his office.²⁴⁵ In 2006, *The New York Times* reported that in one Louisiana parish, “[a]t barbecues, ballgames and funerals, cotton gins, service stations, the First Baptist Church, the pepper-sauce factory and the local private school — the men in orange are everywhere.”²⁴⁶ Only Louisiana allows citizens to use inmate labor so extensively.²⁴⁷ “The rules are loose and give the sheriffs broad discretion. . . . There is little in the state rules to limit the potential for a sheriff to use his inmate flock to curry favor or to reap personal benefit.”²⁴⁸

In Louisiana, sheriffs receive no appropriation for salaries or other costs;²⁴⁹ their offices are funded through fees for service, such as, for example, 15% of certain fees and taxes collected.²⁵⁰ Accordingly, the La Salle Sheriff, like others, must obtain grants or perform services to obtain funds to pay for all the necessities of running the agency. One of the largest sources of funds is reimbursement for housing state prisoners; it represented \$1.5 out of \$3.9 million in income in 2005,²⁵¹ and \$1.6 of \$4 million in income in 2006.²⁵² Again according to *The New York Times*, local housing is “a policy that saves the state from building new prisons and is lucrative for sheriffs, handsomely compensated for the privilege.”²⁵³

²⁴⁰ 12 LA. REV. STAT. ANN. § 15:708 (2005); 12 LA. REV. STAT. ANN. § 15:855 (2005).

²⁴¹ 11 LA. REV. STAT. ANN. § 15:571.3 (2005) (providing for sentence credit for voluntary work).

²⁴² 12 LA. REV. STAT. ANN. § 15:711 (2005) (parish work release); 12 LA. REV. STAT. ANN. § 15:1111 (state prison).

²⁴³ La. Att’y Gen. Op. No. 89-166 (1989).

²⁴⁴ For an example of an abuse of the work-release program by providing inexpensive labor to favored employers, see *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990).

²⁴⁵ La. Att’y Gen. Op. No. 88-489 (1988).

²⁴⁶ Adam Nossiter, *With Jobs to Do, Louisiana Parish Turns to Inmates*, N.Y. TIMES, July 5, 2006, at A1.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at A13.

²⁴⁹ 19 LA. REV. STAT. ANN. § 33:1423 (2009).

²⁵⁰ *Id.*

²⁵¹ La Salle Parish Sheriff, *Annual Financial Statements for the Year Ended June 30, 2005*, 11 (on file with author).

²⁵² La Salle Parish Sheriff, *Annual Financial Statements for the Year Ended June 30, 2006*, 11 (on file with author).

²⁵³ Nossiter, *supra* note 246, at A13.

There is a private prison in Jena, formerly owned by Wackenhut Corrections Corporation, which was renamed GEO Group.²⁵⁴ The prison was built after a Texas company paid then-Governor Edwin Edwards a bribe of \$845,000,²⁵⁵ an act for which several people were, ironically, themselves imprisoned.²⁵⁶ Designed to house juveniles,²⁵⁷ it was closed following a series of additional scandals²⁵⁸ and a lawsuit by the Civil Rights Division of the Justice Department.²⁵⁹ DOJ consultants issued a report describing violence against inmates by guards, and inadequate food, clothing, education, medical treatment, and training for guards.²⁶⁰ “[G]uards, most of whom were white, often used racial epithets when talking to the inmates, who were predominantly black.”²⁶¹

In July, 2007, the GEO Group announced that it had contracted with the Immigration and Customs Enforcement and the La Salle Economic Development District to use the La Salle Detention Facility to house up to 1160 immigration detainees.²⁶² The La Salle Economic Development District will receive a payment of \$60,000 per year, more than doubling its cash revenues,²⁶³ but the real effect will be the jobs and other expenditures; the expansion of the prison involved a \$30 million capital outlay.²⁶⁴ Although no citizens of Louisiana are likely to wind up in the prison under its current configuration,²⁶⁵ the jobs and other income injected into the economy of La Salle Parish can only make them sympathetic to the rewards of incarcerating large numbers of people.

That Louisiana as a whole and La Salle Parish in particular have an unfortunate history of racism is not, in itself, dispositive of the legitimacy of any particular decision. But the structures of government in Louisiana suggest that the system is likely to produce racist outcomes. In a parish with local financial incentives for incarceration, a punitive criminal justice system

²⁵⁴ The GEO Group, Inc., Corporate Milestones, <http://www.thegeogroupinc.com/milestones.asp> (last visited Mar. 5, 2009).

²⁵⁵ Fox Butterfield, *Privately Run Juvenile Prison in Louisiana Is Attacked for Abuse of Six Inmates*, N.Y. TIMES, Mar. 16, 2000, at A14.

²⁵⁶ *Id.*; *United States v. Brown*, 298 F.3d 392, 394 (5th Cir. 2002) (affirming conviction of Edwards’s associate).

²⁵⁷ Butterfield, *supra* note 255, at A14.

²⁵⁸ *Id.*; Julia Dahl, *Private Prison Co. Again Accused of Human Rights Abuses, Report: Immigrants in US Facility Held in “Atmosphere of Intimidation,”* ABCNEWS.COM, Aug. 5, 2008, <http://abcnews.go.com/Blotter/Story?id=5466166>.

²⁵⁹ *United States v. Louisiana*, Civ. No. 98-947-B-1 (M.D. La., filed Nov. 5, 1998).

²⁶⁰ Butterfield, *supra* note 255, at A14.

²⁶¹ *Id.*

²⁶² News Release, The GEO Group, The GEO Group Announces Agreement for the Housing of Immigration Detainees at the LaSalle Detention Facility in Jena, Louisiana (July 25, 2007), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-newsArticle&ID=1031073> [hereinafter GEO Group News Release].

²⁶³ La Salle Economic Development District, *Financial Statements and Independent Auditors Report for the Year Ended December 31, 2007* (on file with author).

²⁶⁴ See GEO Group News Release, *supra* note 262.

²⁶⁵ Of course, only non-citizens are housed in immigration facilities.

statewide, and racial polarization, it would be surprising if African Americans disproportionately represented in the criminal justice system were treated fairly.

VI. CONCLUSION

Reverend Brian Moran, President of the Jena chapter of the NAACP, testified before the House Judiciary Committee in 2007 that “[t]hroughout Jena’s history, there have always been two systems of justice, one for blacks and one for whites.”²⁶⁶ Little in Louisiana’s past or present contradicts him. During slavery, the law made no pretense that its goal was anything but the use of African Americans for profit. After slavery ended, the criminal justice system could not formally admit that its goal was to control African Americans, but it operated that way.

Throughout the decades, a core characteristic of Louisiana law has remained consistent: regimes of broad discretion, deployable for financial or other benefits, operated to disadvantage African Americans. In the Jim Crow era, criminal laws could be used against almost any agricultural worker, but were disproportionately used against African Americans. In the desegregation era, voting and school laws were changed or interpreted so that education and suffrage turned on the arbitrary discretion of administrators, to maintain segregation and conservative political dominance.

No one now defends slavery or segregation, and decision-makers, including prosecutors, vigorously deny that their actions are based on race. But the system continues to give prosecutors virtually unreviewable discretion to bring charges.²⁶⁷ As Professor Ogletree suggested, there is no legal basis for challenge if the prosecuting authority “considers something a prank or a practical joke and, in another context, . . . it’s considered a felony or attempted murder.”²⁶⁸ Louisiana also continues to associate immediate financial benefits with incarceration. Given the continuing enthusiasm for prison, and the continuing de facto segregation in Louisiana schools, housing, and the ballot box, disproportionate prosecution of African Americans seems no more likely to generate backlash among white voters now than it did in the past. The prosecution of the Jena Six appears to be unfair in a way identical to the way Louisiana law has been unfair to African Americans for nearly a century and a half.

²⁶⁶ See *H. Comm. Hearing: Jena Six and the Role of Federal Intervention*, *supra* note 7.

²⁶⁷ See, e.g., *State v. Mamon*, 743 So. 2d 766, 769 (La. App. 1999) (citing *State ex rel. Guste v. K-Mart Corp.*, 462 So. 2d 616, 620 (La. 1985)).

²⁶⁸ See *H. Comm. Hearing: Jena Six and the Role of Federal Intervention*, *supra* note 7.

