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Discriminatory Acquittal

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DISCRIMINATORY ACQUITTAL

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ABSTRACT

This article is the first to analyze a pervasive and unexplored constitutional problem: the rights of crime victims against unconstitutional discrimination by juries. From the Emmett Till trial to that of Rodney King, there is a long history of juries acquitting white defendants charged with violence against black victims. Modern empirical evidence continues to show a devaluation of black victims; dramatic disparities exist in death sentence and rape conviction rates according to the race of the victim. Moreover, just as juries have permitted violence against those who allegedly violated the racial order, juries use acquittals to punish female victims of rape and domestic violence for failing to meet gender norms. Statistical studies show that the "appropriateness" of a female victim's behavior is one of the most accurate predictors of conviction for gender-based violence.

Discriminatory acquittals violate the Constitution. Jurors may not constitutionally discriminate against victims of crimes any more than they may discriminate against defendants. Jurors are bound by the Equal Protection Clause because their verdicts constitute state action, a point that has received surprisingly little scholarly analysis. Finally, defendants have no countervailing right to jury nullification based on race or gender discrimination against victims. The Sixth Amendment promises defendants an "impartial" jury, not a partial one.

Double jeopardy prohibits a direct remedy for the problem of discriminatory acquittal, and jury secrecy makes proof difficult. Yet recognizing the unconstitutionality of discriminatory acquittal would result in fundamental normative shifts. It would create a new constitutional language for prosecutors and judges to protect victims against jury discrimination within our existing criminal procedure. Most of all, the pervasiveness of discriminatory acquittals could no longer serve as a legitimating excuse for police and prosecutors to magnify the problem by conducting their own anticipatory underenforcement of the law.

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INTRODUCTION

In 1955, two white defendants faced judgment for the murder of Emmett Till, confident that a jury of *their* peers would never convict for the killing of a black teenager after he whistled at a white woman.[1] All-white Mississippi juries did not hold

[1] *See generally* M. SUSAN ORR-KLOPFER, THE EMMETT TILL BOOK (2005); M. SUSAN ORR-KLOPFER, WHERE REBELS ROOST: MISSISSIPPI CIVIL RIGHTS REVISITED (2d ed. 2005); THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE (CHRISTOPHER METRESS ed., 2002); MAMIE TILL-MOBLEY & CHRISTOPHER BENSON, THE DEATH OF INNOCENCE: THE STORY OF THE HATE CRIME THAT CHANGED AMERICA (2003); STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL (1988); THE UNTOLD STORY OF EMMETT LOUIS TILL (Velocity/Thinkfilm 2005).

men accountable for murders conducted to enforce the racial order, not even in the spotlight of national publicity and outrage, not even a year after *Brown v. Board of Education*.[2] As a segregationist later proclaimed to Attorney General Robert Kennedy, "'[y]ou cannot whip us' . . . 'as long as we have the right of a jury trial.'"[3]

The Emmett Till trial is one example in a long history of what I term "discriminatory acquittals," juries' acquittals of guilty defendants because of the race or gender of the victim.[4] For centuries, those who lynched black men, raped black women, or beat their wives could count on walking away because juries refused to convict for these crimes.[5] Modern statistics show continuing disparities in convictions and sentencing based upon the race of the victim.[6] In the prosecution of gender-based violence, juries put female victims on trial for their compliance with gender roles.[7] Studies show that one of the most accurate predictors of conviction in rape cases is whether the female victim behaved "appropriately."[8] Discriminatory acquittals constitute a massive and effectively ungoverned constitutional problem rarely mentioned by scholars and never addressed by courts.[9]

Emmett Till's mother tried to shame the criminal justice system into enforcing the right of her son to equal protection of the law. She held an open casket funeral in Chicago where thousands stood in line to view Emmett's mangled body.[10] She

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[2] 347 U.S. 483 (1954); *see also supra* note 1 (exploring other trials in the wake of the acquittal).

[3] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 66 (1997) (quoting telegram from Nhagwin M. Jackson, District Attorney, State of Mississippi, to Robert Kennedy, May 14, 1964).

[4] *See infra* Part I.

[5] *See infra* Part I.A.

[6] *See infra* Part I.B.

[7] *See infra* Part I.D.

[8] *See infra id.*

[9] *See* Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 428 (1988) (discussing the failure of jurors to imagine blacks as victims in the context of the Bernard Goetz acquittal and *McCleskey v. Kemp*); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1325 n.25 (1997) (stating that "there is no legal literature dealing with acquittals"); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716–17 (2006) (noting that underenforcement of the law, as a general problem, is rarely addressed by scholars). *See generally* Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988). Kennedy describes potential remedies for race-of-the-victim disparities in the application of the death penalty, considering, for example, eliminating the death penalty or removing juries' discretion in imposing it, but he does not address the specific rights of victims themselves. *See generally* Kennedy, *supra*. The Second Circuit mentioned the issue in dicta in *United States v. Thomas*, 116 F.3d 606, 608 (2d Cir. 1997) (considering "whether a juror's intent to convict or acquit regardless of the evidence constitutes a basis for the juror's removal during the course of deliberations under Rule 23(b)").

[10] *See* TILL-MOBLEY & BENSON, *supra* note 1, at 141.

allowed *Jet* magazine to run gruesome photographs that spawned national publicity about the impending trial.[11] More than seventy reporters traveled to Sumner, Mississippi to describe the segregated courtroom and the segregated jury, twelve white men in a county that was sixty-three percent black.[12] During closing arguments, the defense attorney instructed the jurors on their racial duty, telling them that "every last Anglo-Saxon one of you has the courage to free these men . . . ."[13] Despite substantial evidence of the defendants' guilt, the jury deliberated a mere sixty-seven minutes before acquitting.[14] Jurors told reporters that it would not have taken so long, but they took a "soda pop break" so as to "make it look better."[15] A few months after the acquittal, *Look* magazine paid the defendants for an interview in which they bragged with impunity about the murder.[16]

Despite clear evidence that the jury in the Till case freed his killers based upon discriminatory motives, Till's mother had no direct remedy for the injustice done to her son. Double jeopardy protected the killers from re-prosecution; it also protected them from an appeal of the acquittal based on defense counsel's outrageous closing arguments.[17] Till's mother could not sue the jury itself for its discrimination against her son because juries enjoy absolute immunity.[18] Moreover, she could not have questioned the jury about their discriminatory motive because of the principle of jury secrecy.[19]

Regardless of the availability of remedy, it is critical to acknowledge that the Till jury did not simply act unfairly. It violated the Constitution.[20] In our focus on the rights of defendants and the overenforcement of the law, we ignore the powerful damage caused by discriminatory underenforcement of the law. When juries sanction lynchings, hate crimes, rape and domestic violence—when juries tolerate violence within minority communities and against women—they restrict the freedoms of

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[11] *Id.* at 139.

[12] *See* WHITFIELD, *supra* note 1, at 33, 35.

[13] TILL-MOBLEY & BENSON, *supra* note 1, at 188.

[14] *Id.* at 189.

[15] *Id.*

[16] Rebecca Leung, *Justice, Delayed But Not Denied:* 60 Minutes *Confirms Two Are Focus of Emmett Till Murder Probe*, CBS NEWS, Oct. 21, 2004, http://www.cbsnews.com/stories/2004/10/21/60minutes/main650652.shtml. Two months later, one of the defendant's friends shot a black gas station attendant after an argument, and another all-white jury acquitted him as well. KENNEDY, *supra* note 3, at 62–63.

[17] U.S. CONST. amend. V; *see also* Benton v. Maryland, 395 U.S. 784, 794 (1969) (applying federal protection from double jeopardy to state courts as well).

[18] *See* Yaselli v. Goff, 12 F.2d 396, 403 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927) ("[A] petit juror is not liable for any statements made by him during the deliberations of the jury after it has retired to consider a verdict, and that his privilege in this respect is not limited to the words which are shown to be pertinent to the questions arising for decision.").

[19] *See infra* Part II.C.

[20] *See infra* Part III.

crime victims and the communities to which they belong. Discriminatory acquittals send a message that government will provide less protection from violence based on race or gender. This government complicity in private violence accomplishes more to enforce the racial and gender order than does direct government discrimination.

In Part I, I describe the continuing history of discriminatory acquittals and the ways in which juries have often refused to convict defendants for racially-motivated violence against minority victims, for sexual violence against black women, or for gender-based violence generally. While courts and scholars have grappled with jury discrimination against defendants, they have ignored the equally long history of jury discrimination against victims.[21] Discriminatory acquittal persists as a wholly unanswered constitutional problem. Empirical studies, including the Baldus study presented to the Supreme Court in *McCleskey v. Kemp*,[22] consistently show a lack of empathy for minority victims.[23] The likelihood that a jury will convict a defendant or impose the death penalty correlates to the race of the victim.[24] In rape and domestic violence cases, juries put female victims on trial for failing to meet their proper gender roles instead of focusing on the defendant's behavior.[25]

Because of the dearth of case law or scholarship on the legal status of jury discrimination against victims, in Part II, I begin by examining the constitutional prohibition on jury discrimination against defendants. Appeals of discriminatory convictions make clear that the Constitution forbids jury discrimination, but also that establishing such discrimination proves difficult.[26] In *McCleskey v. Kemp*, for example, the Supreme Court rejected efforts to prove jury discrimination through statistical evidence of racial disparities.[27] Instead, the Court turned to procedural protections to try to prevent discriminatory convictions, or at least to reduce them to a constitutionally acceptable level of risk.[28]

In Part III, I argue that discriminatory acquittals also violate the Constitution. A jury may not constitutionally acquit based on discrimination against the victims of the crime any more than that jury could constitutionally convict a defendant based

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[21] Randall Kennedy compellingly documented the history of the racially unequal enforcement of the law across the criminal justice system in *Race, Crime, and the Law*. KENNEDY, *supra* note 3, at 29–135. He has also repeatedly urged a reassessment of the "disparate impact" of law enforcement on minority communities to consider the public good of protecting minority communities from crime. *See generally* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994) [hereinafter Kennedy, *Comment*]; *see also* Kennedy, *supra* note 9.

[22] *See* 481 U.S. 279, 286 (1987).

[23] *See infra* Part I.B (discussing empirical studies).

[24] *See McCleskey*, 481 U.S. at 286–87.

[25] *See infra* Parts I.C and I.D.

[26] *See infra* Part II.B.

[27] *See McCleskey*, 481 U.S. at 293–97.

[28] *See id.* at 308–09 ("The question is at what point that risk [of jury discrimination] becomes constitutionally unacceptable." (internal quotations and citations omitted)).

on discrimination. It is one of the most basic tenets of equal protection law that state actors may not discriminate based upon race or gender, particularly within criminal trials.[29]

The application of equal protection doctrine to juries and victims raises several important new questions. First, are jurors state actors? When we draft private citizens for jury duty, are they then bound by the Constitution? This is a question that has received only rare and peripheral discussion in legal scholarship, but I argue that the answer is yes.[30] The state has delegated to jurors the ultimate state power, the power to set a man free or to send him to prison. This seemingly obvious point about the state action of juries has fallen in the gaps between constitutional law and criminal procedure scholarship. Much attention is paid to the capacity and bias of jurors and the correctness of their verdicts, but little to the direct constitutional governance of juries.

The second question is whether there is a constitutional difference between a discriminatory conviction and a discriminatory acquittal, and whether the defendant has a competing constitutional right to jury nullification that trumps the victim's equal protection rights.[31] The right to a jury trial stands as a bulwark against overreaching government prosecutions.[32] I argue that this principle allows juries to do justice in an individual case, but not to discriminate against the victim of a crime based on race or gender. A defendant's right to jury lenity cannot trump the Equal Protection Clause.

Finally, in Part IV, I argue that, whether or not a direct remedy exists, an acknowledgement of discriminatory acquittals would create important normative shifts. Currently, police and prosecutors frequently refuse to enforce the law in the types of cases in which juries devalue or discriminate against certain victims.[33] By anticipating discriminatory acquittals, the government magnifies their impact. If we understood, however, that verdicts are state action and that discriminatory acquittals violate the Constitution, juries could no longer serve as the excuse for discriminatory underenforcement of the law by police and prosecutors.

Ultimately, the problems of juries are the problems of society, prejudice, and inevitable human fallibility. The instrumental solution to these problems must rely on inexact procedural tinkering. I do not propose a fundamental reordering of our criminal justice system to address discriminatory acquittals, but I do propose that we strengthen the procedures already in place to minimize the risk of jury discrimination against defendants, and that we adapt those procedures to protect victims.[34] At

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[29] *See infra* Part III.B.

[30] *See infra* Part III.A.

[31] *See infra* Part III.D.

[32] *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[33] *See infra* Part IV.A.

[34] *See infra* Part IV.B (discussing the use of voir dire, peremptory challenges, and the ban on overt appeals to discrimination during trial).

a minimum, acknowledging discriminatory acquittals would give judges and prosecutors constitutional language to invoke the equal protection rights of victims. Currently there is no such concept, and the system relies instead on the tepid language of "public perceptions of fairness" or evidentiary notions of relevance. The Constitution requires that our criminal justice system work to prevent discriminatory acquittals just as it seeks to prevent discriminatory convictions.

I. THE PROBLEM OF DISCRIMINATORY ACQUITTAL

Discriminatory underenforcement of criminal law matters as much as overenforcement.[35] Whether caused by active complicity or lack of empathy, government underenforcement sends a message of the permissibility of race- and gender-motivated violence. Minorities and women learn that certain kinds of beatings or rapes will go unpunished. They learn which neighborhoods they are allowed to travel in and what behavior will be deemed having "asked for it" if they seek justice.[36] They learn that the rules of the race and gender code will be enforced through violence and that government will turn a blind eye.

In this section, I describe the role juries play as the final arbiters of the discriminatory underenforcement of the law. Underenforcement of the law involves a myriad of discretionary decisions by police, probation officers, prosecutors, and judges. Even if juries only rule on a small percentage of cases, however, perceptions about jury biases shape the decisions of law enforcement. If juries refuse to convict a police officer who assaults a black victim, or to convict a man who rapes an insufficiently demure woman, then prosecutors will not bother to bring those cases or will plea bargain them cheaply. Jury decisions form the relevant backdrop of the system and the excuse for other acts of underenforcement.

The empirical evidence discussed below establishes three forms of discriminatory acquittal by juries. First, usually in the context of race, some juries show outright approval of the defendant's violence, like the murder of civil rights leaders. There are fewer stark examples of these acquittals today and when they do happen, they often spawn great publicity and protest.[37] In the second form, usually in the context of

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[35] *See* Natapoff, *supra* note 9, at 1759–60, 1772 ("The failure to enforce exposes residents to crime and insecurity, while reinforcing the idea that they have been abandoned by the state.").

[36] *See id.* at 1722–27.

[37] *See, e.g.*, Robert D. McFadden, *The Diallo Verdict: The Reaction; Verdict Bares Sharp Feelings on Both Sides*, N.Y. TIMES, Feb. 26, 2000, at A1 (outlining racial divisions following acquittal of four police officers in the shooting death of an unarmed black man); Rocco Parascandola, *N.Y. Prepares for Verdict in 50-Shot Killings*, L.A. TIMES, Apr. 24, 2008, at A21 (showing New York City's preparation for uprising in anticipation of the acquittal of three police officers in the shooting of a black man); John Seewer, *Ohio Officer Acquitted of Killing Mom Holding Baby*, ASSOC. PRESS, Aug. 4, 2008, *available at* http://abcnews.com/

gender, juries show disapproval of the victim's violation of hierarchical codes of behavior. Just as juries once permitted the lynchings of black victims who violated the racial code, so today do juries put the victims of gender-based crimes on trial. Juries often refuse to punish the rapists of the wrong kind of women or the attackers of wives who displease their husbands. Finally, in the context of race, empirical evidence shows a general lack of empathy for black victims as such and an unwillingness to value their suffering in the same ways as white victims.[38]

A. Using Acquittals to Endorse Racial Violence After Slavery

Many of the conditions of slavery were reinstituted after Emancipation through what the historian Eric Foner describes as a "wave of counterrevolutionary terror": private violence conducted almost entirely without government interference.[39] Rioting whites committed pogroms on black communities, burning neighborhoods and killing 280 blacks in Colfax, Louisiana in 1872, 46 blacks in Memphis in 1866, and 34 in New Orleans in 1866.[40] More than 3000 individual lynchings singled out those who allegedly violated the racial code, looked like someone who did, or happened to be in the vicinity.[41] Randall Kennedy argues that racial underenforcement of the law

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US/comments?type=story&id=5513699 (referring to protests in wake of police officer's acquittal of misdemeanor charges of negligent homicide and negligent assault). Police brutality acquittals, however, arguably belong in the third category: a lack of empathy for black victims. Juries understandably give some deference to police claims of self-defense, but sometimes seem to credit those claims more with minority victims.

[38] *See infra* Part I.B.

[39] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 425 (3d ed. 2002) ("[T]he wave of counterrevolutionary terror that swept over large parts of the South between 1868 and 1871 lacks a counterpart either in the American experience or in that of the other Western Hemisphere societies that abolished slavery in the nineteenth century."). *See generally* ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (2d ed. 1995) (providing a history of post-slavery violence against blacks). During the slavery era, the law expressly punished crimes against white victims more harshly than against black victims. McCleskey v. Kemp, 481 U.S. 279, 329–30 (Brennan, J., dissenting).

The government sanction of private violence to enforce the racial order mirrored slavery itself. Slavery constituted a private ordering of power and violence condoned by the state through its "private law" of property and contract. Indeed, the Thirteenth Amendment banning slavery is almost the only provision of the Constitution that governs private conduct. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[40] FONER, *supra* note 39, at 261–63; KENNEDY, *supra* note 3, at 39, 50; NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 3–29, 75–76 (2006).

[41] *See* FONER, *supra* note 39, at 120; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889–1918

had greater historical consequences than racial overenforcement; it directly affected more people and was more difficult to address.[42] There were more lynchings during Reconstruction than state executions of black people.[43]

The criminal justice system condoned the practice of lynching through three levels of inaction and complicity—failure to arrest, to prosecute, and to convict. Police arrested few of the killers of thousands of black victims even as newspapers publicly celebrated the acknowledged perpetrators.[44] Prosecutors brought still fewer charges.[45]

Even had police and prosecutors had the desire and the courage to enforce the law, the jury stood as the final and absolute level of protection for private racial violence.[46]

(Negro Univ. Press 1969) (1919) [hereinafter NAACP THIRTY YEARS] (providing a collection of newspaper accounts); ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950, at 4 (1980). Methods of lynching included hanging, burning at the stake, shooting, and dismemberment. *See generally* NAACP THIRTY YEARS, *supra*. Lynchings were often public events, featuring family gatherings. *See, e.g.*, *id.* at 21, 24–25. Bodies were sometimes cut up into souvenirs for the crowd. *See, e.g.*, *id.* at 18, 24.

[42] KENNEDY, *supra* note 3, at 29; *see also* Kennedy, *Comment*, *supra* note 21, at 1267 n.55 ("'[T]he most extensive and frequent losses of liberty are not due either to court or executive, but to the failure of the force of the government to protect men from violence and mobs. The history of liberty could almost be written in terms of mobs that got away with it, and were never punished—from the Tory-hunters of 1778 to the Ku Klux Klan of 1927.'" (quoting LEON WHIPPLE, OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES 144 (1927))); Natapoff, *supra* note 9, at 1715–17; William J. Stuntz, *Accountable Policing* 3–4 (Harv. Pub. Law, Working Paper No. 130, 2006), *available at* http://ssrn.com/abstract=886170.

[43] *See* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 24 (2006).

[44] *See* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 39–42 (1996) (discussing state inaction over lynchings); Pokorak, *supra* note 43, at 24 (discussing a speech on the floor of the U.S. Congress in 1921 defending the reasons for lynching a black man).

[45] Predominantly black juries convicted lynchers in the Piedmont Counties during Reconstruction, but those trials only occurred after President Ulysses S. Grant sent troops to quell a "condition of lawlessness." FONER, *supra* note 39, at 457–58; *see also* LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872, at 1–2 (1996); Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872*, 33 EMORY L.J. 921, 925–28, 936–40 (1984). Congress repeatedly failed to pass anti-lynching legislation. *See* Brian DeBose, *Senate Regrets Lynching Inaction*, WASH. TIMES, June 12, 2005, at A02; *see also* Holden-Smith, *supra* note 44, at 42–59.

[46] In 1933, Professor James Chadbourn estimated that less than one percent of lynchings since 1900 resulted in a conviction. JAMES HARMON CHADBOURN, LYNCHING AND THE LAW 13 (photo. reprint 1970) (1933). Several of these rare convictions, based on federal prosecutions, were reversed by the Supreme Court on various grounds, including federalism and state action. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945) (reversed and remanded on error of trial judge with three Justices dissenting and arguing for reversal on federalism grounds); United States v. Cruikshank, 92 U.S. 542 (1875); *see also* KENNEDY, *supra* note 3, at 50–55.

In the mid-20th century, when international publicity about the murder of civil rights activists pressured prosecutors to bring the killers to trial, these trials routinely resulted in race-based jury nullifications like that in the Emmett Till case.[47] All-white juries failed to convict Byron de la Beckwith for the murder of NAACP official Medgar Evers,[48] acquitted most of the defendants accused of killing James Chaney, Andrew Goodman, and Michael Schwerner during the Freedom Summer of 1964,[49] and acquitted the killers of Viola Liuzzo, James Reeb, and Jonathan Daniels in the 1965 Selma, Alabama protests.[50] Discriminatory acquittal represented the final bulwark of segregation. Even more than the silent inaction of police and prosecutors, such jury verdicts made dramatic statements about the permissibility of racially motivated violence.[51]

B. Modern Racially Discriminatory Acquittals, a Racial Lack of Empathy

In recent decades, prosecutors have retried some of those murderers of civil rights leaders and juries have promptly convicted them,[52] but while the outright jury nullification in race-based crimes has diminished, it has not ended.[53] Archetypal cases continue to make clear that the problem remains.[54] For example, there was little public doubt that the predominantly white jury that acquitted the police officers charged with beating Rodney King did so in furtherance of their racial discrimination against King,

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[47] *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 61–67 (1994). *See generally* GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION (2006) (describing the role of the press in the civil rights struggle, including the Emmett Till trial).

[48] John Herbers, *Beckwith's 2d Trial Ends in Hung Jury*, N.Y. TIMES, Apr. 18, 1964, at 1.

[49] Although seven of the defendants were convicted, another eight were acquitted and charges against three others were dismissed. *Charges Dismissed in Rights Slayings*, N.Y. TIMES, Jan. 28, 1973, at 38; *see also* DOUG MCADAM, FREEDOM SUMMER (1988) (detailing the Freedom Summer campaign and its impact).

[50] *See* MARY STANTON, FROM SELMA TO SORROW: THE LIFE AND DEATH OF VIOLA LIUZZO 48, 127–28 (1998). Some of these murder victims were themselves white, but violated the racial code by working for the Civil Rights Movement.

[51] *See, e.g.*, *id.* at 127 ("[T]he democratic process was going 'down the drain of irrationality, bigotry, and improper law enforcement . . . now those who feel they have a license to kill, destroy and cripple have been issued that license.'" (quoting CHARLES W. EAGLES, OUTSIDE AGITATOR: JON DANIELS AND THE CIVIL RIGHTS MOVEMENT IN ALABAMA 245 (1993))).

[52] *See* Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1159–66 (2003).

[53] *See* JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIMES (2002) (describing the struggles of policing hate crimes).

[54] *See generally* Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) (describing the lynching of a Mobile man by the Klan in 1984 and the subsequent trials); Carter, *supra* note 9, at 420–21 (describing acquittal of Bernhard Goetz for the shooting of young black men on a subway, based on his unsupported claim of self-defense).

because a videotape of the beating provided such strong evidence of the defendants' guilt.[55] The perception of a discriminatory acquittal in that case,[56] and other police brutality acquittals involving minority victims, spawned riots in Miami in 1980,[57] Los Angeles in 1992,[58] and Cincinnati in 2001.[59]

The Rodney King jury did not crow about its acquittal in the way that the Emmett Till jury did.[60] Jurors today are less likely to perceive themselves as overtly and proudly racist against victims. Instead, social science shows that Americans tend to engage in a more subtle racial allegiance to their own race and discomfort with others.[61] This "racially selective empathy" remains a powerful influence in the under-enforcement of criminal law.[62]

Empirical evidence confirms that juries on average value white victims more than black victims, at least in the context of death penalty verdicts.[63] In *McCleskey v.*

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[55] *See* REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 3–17 (1991) (describing the Rodney King incident and the evidence of the defendants' guilt); Robert Reinhold, *Surprised, Police React Slowly as Violence Spreads*, N.Y. TIMES, May 1, 1992, at A1 (describing the resulting riot, one of the most violent episodes in U.S. history). Los Angeles Mayor Tom Bradley stated that he was "outraged" by the verdicts. Jane Fritsch, *Los Angeles Mayor Criticizes Chief for Slow Action on Riot*, N.Y. TIMES, May 4, 1992, at A1. President George H.W. Bush found it "hard to understand how the verdicts could possibly square with the video." Richard A. Serrano & Jim Newton, *3 King Case Defendants Notified of U.S. Inquiry*, L.A. TIMES, July 31, 1992, at A1.

[56] *See* Robin Toner, *U.S. Must Face Racial and Urban Problems, Many Say in Poll*, N.Y. TIMES, May 11, 1992, at A1.

[57] *3 Die in Miami Riot After Ex-Policemen's Acquittal*, L.A. TIMES, May 18, 1980, at A1.

[58] *See* Reinhold, *supra* note 55.

[59] *See* Howard Wilkinson, *Curfew Quiets City Streets: State of Emergency Begins*, CIN. ENQUIRER, Apr. 13, 2001, at 1A.

[60] Seth Mydans, *Storm of Anger Erupts—National Guard Called into City*, N.Y. TIMES, Apr. 30, 1992, at A1.

[61] *See* Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1017–25 (1988).

[62] KENNEDY, *supra* note 3, at 384–85 (coining the term "racially selective empathy" and discussing its role in the debate over the crack-powder distinction in drug laws).

[63] There are advantages and disadvantages to comparing the problem of discriminatory acquittals to death penalty sentencing verdicts. By design, death penalty decisions allow more discretion and therefore may heighten the level of discrimination. On the other hand, defendants facing the death penalty have already been convicted of a crime, so the jury's further decision to inflict or spare the death penalty constitutes a more precise measure of the jury's valuation of victims. Ultimately, it is very difficult to statistically isolate the various potential types of discrimination because so many overlap, but it seems clear that discriminatory sentencing disparities by juries based on the race of the victim exist. *See, e.g.*, Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAV. SCI. & L. 61, 63, 76–78 (1995) ("It is a commonplace in such research that race discrimination at one stage of the process may obscure the effects of race discrimination at another. For example, if prosecutors systematically decline to press capital charges in murder

Kemp, the defendant presented the Supreme Court with the most comprehensive study of jury discrimination ever conducted to date, known as the Baldus study.[64] It provided rigorous analysis of Georgia death sentences in the 1970s and showed a profound racial disparity in the imposition of the death penalty corresponding to the race of the victim, much more so than to the race of the defendant.[65] Juries were 4.3 times more likely to impose the death penalty for the killers of white victims than for the killers of black victims, even after excluding 39 nonracial variables such as the severity of the crime.[66] By comparison, the disparity of death penalty verdicts for black defendants versus other defendants was a multiple of 1.1.[67] The Baldus study mirrored and thus validated numerous previous studies.[68]

Studies of sentencing disparities continue to show jury discrimination against victims.[69] In 1990, the General Accounting Office conducted an exhaustive review

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cases involving black victims unless the nonracial features of the crime are particularly aggravated [as compared with the sorts of murder cases involving white victims in which prosecutors regularly press capital charges], the universe of cases presented for trial and sentencing is skewed from the start. Thus, juries which appear to be meting out death sentences at the same rate to killers of white victims and of black victims are actually electing death for killers of black victims only in cases characterized as a class by a higher level of aggravation than is present in the cases where juries elect death for killers of white victims.").

[64] *See* 481 U.S. 279, 286 (1987); *see also* Brief for Dr. Franklin M. Fisher et al. as Amici Curiae Supporting Petitioner at 3, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811) (describing the Georgia study conducted by Professor David Baldus and his colleagues as "among the best empirical studies on criminal sentencing ever conducted").

[65] *See* Brief Supporting Petitioner, *supra* note 64, at 2–3; *see also McCleskey*, 481 U.S. at 286–87.

[66] *McCleskey*, 481 U.S. at 287.

[67] *Id.*

[68] *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 266 (1990) ("[T]here is persuasive evidence that, in many jurisdictions, defendants who killed white victims receive more punitive treatment than those whose victims were black."). Baldus explained, "[t]o a surprising degree, the results of our study of Georgia's capital-sentencing system both before and after *Furman* parallel the findings reported for other jurisdictions." *Id.* at 265. Further, "this consistency in results, despite the weaknesses and limitations of virtually every study, tends to validate the findings of each." *Id.*

[69] *See, e.g.*, SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 109–110 (1989) ("[R]acial discrimination in the imposition of the death penalty under post-*Furman* statutes . . . based on the race of the victim . . . is a remarkably stable and consistent phenomenon. . . . Our conclusion rests on several different sets of data, from different states, analyzed in different forms; this provides 'convergent validation' of our hypothesis and makes it particularly unlikely that a fortuitous association or a peculiarity of the research design could have misled us."). Several studies have been documented which show the disproportionate sentencing of blacks as compared to whites in capital cases. *Id.* at 66, 68–69 (describing an Illinois study examining cases from 1976 to 1980); Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976–1991*, 20 AM. J. CRIM. JUST. 17, 23–30 (1995) (describing a Kentucky study examining

and statistical analysis of the various studies on racial disparities in the imposition of the death penalty, which confirmed statistically significant racial discrimination against victims.[70] In 1998, another study showed statistical or "practically significant" race-of-the-victim disparities in twenty-five states for some time period after the re-imposition of the death penalty in 1972.[71]

Because the Baldus study showed discrimination against victims more than defendants, McCleskey was forced to make the contorted argument that his death penalty verdict should be reversed because it was based in part on his choice of a white victim.[72] Justice Brennan acknowledged in dissent, however, that the real issue was the "devaluation of the lives of black persons."[73] Our criminal justice system treats the murder of black people as less deserving of punishment, and yet we fail to conduct any constitutional inquiry of the resulting equal protection violation.

Measuring the prevalence of discriminatory acquittal outside of the sentencing context is difficult, first because social scientists and legal scholars rarely study

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cases from 1976 to 1991); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1, 17–29 (1991) (describing a Florida study examining cases from 1976 to 1987); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 J. CRIM. JUST. 279, 281–83 (1987) (describing a Louisiana study examining cases from 1976 to 1982). *See generally* Sorensen & Wallace, *supra* note 63, at 61, 70–78 (describing a Missouri study examining cases from 1977 to 1991).

[70] *See* U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), *available at* http://archive.gao.gov/t2pbat11/140845.pdf; *see also* Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 353 (2000) (stating that "disparities were particularly evident in the conditions where the defendant/victim characteristics were cross-racial, resulting in a one-third higher percentage of death sentences for a Black defendant convicted of killing a White victim (54%) than for a White defendant who killed a Black victim (40%)").

[71] The states were: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Washington. David C. Baldus et. al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1742–45 (1998). No race-of-the-victim effects were found in Nevada; a practically significant reverse effect was found in Delaware; in the remaining states, no studies had been done or sample sizes were too small to support an estimate. *Id.*

[72] McCleskey argued that he suffered from discrimination against victims in addition to the direct discrimination against defendants also shown by the Baldus study, albeit at much lower rates. *McCleskey*, 481 U.S. at 286–87, 291.

[73] *Id.* at 336 (Brennan, J., dissenting); *see also* KENNEDY, *supra* note 3, at 29–75 (describing the long history of underenforcement of the law in black communities as a tool of racial oppression); Carter, *supra* note 9, at 444 ("When flexible juries use their discretion to impose the ultimate penalty, the lives of victims who happen to be black are simply worth less.").

acquittals, and second, because it is difficult to say for sure that an acquitted defendant was in fact guilty.[74] As discussed below, however, empirical evidence does show a marked disparity in rape convictions according to the race of the victim.

C. Condoning Sexual Violence Against Black Women

The most specific form of private violence used to enforce the oppression of African-American women was sexual violence.[75] Slave owners used rape both to terrorize slaves and to replenish slave populations with their own children.[76] While racist rhetoric ironically decried the creation of a "mongrel breed" because of the rape of white women by black men, the reality was that white men's rape of black women created a large percentage of biracial people.[77] Some state laws failed to

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[74] *See* Givelber, *supra* note 9, at 1325 & n.25. In fact, Givelber found that there was "no legal literature dealing with acquittals" partly because of the difficulty of proving actual guilt. *Id.* at 1325 n.25. *See also* Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1167 (2005) [hereinafter Givelber, *Lost Innocence*] ("Acquittals are the mystery disposition of the criminal justice system. We know very little about them.").

[75] Kimberlé Crenshaw has discussed the ways that antiracist descriptions of lynching and feminist descriptions of rape disregard the particular experience of black women, effectively compete with each other and thus lose power by their incompleteness. Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY, 402, 405 (Toni Morrison ed., 1992) ("Neither narrative tends to acknowledge the legitimacy of the other; the reality of rape tends to be disregarded within the lynching narrative; the impact of racism is frequently marginalized within rape narratives.").

[76] *See* MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY AND SOCIETY 73–74 (1983) ("Raping the Black woman was not unlike plowing up fertile ground; the realities of plantation labor descended into the beds of the slaves' quarters, where the violent ritual of rape paralleled the harsh political realities of slave agricultural production."). *But see* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 29–30 (1997) ("[Sexual violence's] intended long-term effect . . . was the maintenance of a submissive workforce. Whites' sexual exploitation of their slaves, therefore, should not be viewed simply as either a method of slave-breeding or the fulfillment of slaveholders' sexual urges.").

[77] GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920, at 68–69 (1996). The history of disparate acquittal rates by juries in rape cases is complicated by the use of rape in the racial *over-enforcement* of the law against minority men. Crenshaw, *supra* note 75, at 419. The lynching trope, the rape of white women by black men, had far more to do with white men's property interest in their women than it did with protecting women's liberties. *Id.* at 416. Some have also argued that the overenforcement of rape laws against black men accused of raping white women also made it less likely that black jurors would convict black men accused of raping *black* women, because it has created a cultural climate that denies all rape accusations against

recognize the rape of a slave woman, even by another slave, as a crime.[78] After slavery, the rape of black women by white men continued, with little hope of conviction by juries.[79]

Before 1977, while states could still execute defendants for rape, jury verdicts demonstrated an extraordinary rate of disparate sentencing according to the race of both the victim and the defendant.[80] A Florida study from 1940 to 1964 showed that only five percent of white male rapes of white women resulted in execution versus fifty-four percent of black male rapes of white women.[81] Not one of the eight white

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black men. *See, e.g.*, Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997, 999–1006 (1992) (describing the author's own reflexive racial allegiance to Mike Tyson rather than to his alleged victim). Clarence Thomas used the lynching trope to defend against accusations of sexual harassment, even though his alleged victim was also black. *See* Crenshaw, *supra* note 75, at 416.

[78] KENNEDY, *supra* note 3, at 34–35; *see also* Stephen v. State, 11 Ga. 225, 242 (Ga. 1852) ("The Penal Code was not intended to apply to slaves or free persons of color, in any of its enactments, unless they are expressly mentioned."); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 33 (1974) ("Rape meant, by definition, rape of white women, for no such crime as rape of a black woman existed at law.").

[79] Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 276 n.101 (2003) ("There is no record of white men having been lynched for the rape of a black woman, although by all accounts attacks on black women by white men were not uncommon. It may be that the prevalence of these attacks formed part of the basis of white southerners' obsession with black men raping white women. Nor were black men lynched for raping black women. Prosecutions and convictions for the rape of black women by men of any race were extremely rare during the first half of the twentieth century. The rape of black women continues to be prosecuted less frequently and punished less severely than that of white women.").

[80] Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 132 (1973) (finding that black defendants whose victims were white were sentenced to death eighteen times more frequently than any other racial combination). Rape executions constituted 11.1% of all executions from 1930 to 1950. Frank E. Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 10 (1952). This potential for racial discrimination in the imposition of the death penalty, particularly for rape cases, helped to support the Supreme Court's limitation of the death penalty in *Furman v. Georgia*, 408 U.S. 238, 249–51 (1972) (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring).

[81] *See* Wolfgang & Riedel, *supra* note 80, at 125 (citing FLORIDA CIVIL LIBERTIES UNION, RAPE: SELECTIVE ELECTROCUTION BASED ON RACE (1964)). In *Coker v. Georgia*, 433 U.S. 584 (1977), the Supreme Court banned the use of the death penalty in rape cases without overt mention of these racial disparities, but they may well have helped motivate the Court's decision. KENNEDY, *supra* note 3, at 323–25; Barbara Holden-Smith, *Inherently Unequal Justice: Interracial Rape and the Death Penalty*, 86 J. CRIM. L. & CRIMINOLOGY 1571, 1572 (1996) (reviewing ERIC W. RISE, THE MARTINSVILLE SEVEN, RACE, RAPE, AND CAPITAL PUNISHMENT (1995)); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 27–28 (2002).

men accused of raping a black woman received the death penalty.[82] Modern statistics also show a marked disparity in conviction rates according to the race of the rape victim.[83] Psychological studies of mock jurors confirm a bias against minority victims in rape cases, particularly in interracial rapes.[84]

D. Using Acquittals in Rape and Domestic Violence Cases to Enforce the Gender Power Structure

Jury discrimination against women as such differs from discrimination based on race. Jurors do not express a systematic undervaluing of women as victims of all violent crimes, and indeed, may well judge some violent crimes committed against women more harshly in the name of protecting women. We are willing to see women in the role of victims in a way that we do not recognize black people as victims.[85] Certain categories of violence, however, serve to enforce the gender order. Male violence (particularly sexual violence) against wives, girlfriends, or acquaintances enforces gender hierarchy and is routinely condoned by police, prosecutors, and juries.[86]

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[82] Wolfgang & Riedel, *supra* note 80, at 125 (citing FLORIDA CIVIL LIBERTIES UNION, RAPE: SELECTIVE ELECTROCUTION BASED ON RACE (1964)).

[83] *See* GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 219–20 (1989); *see also* Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"*, 48 SOC. PROBS. 206, 210 (2001) (correlating race matters to prosecution rates); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 110–16, 121–22 (1983).

[84] *See generally* Hubert S. Feild, *Rape Trials and Jurors' Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 LAW & HUM. BEHAV. 261 (1979); Robert W. Hymes et al., *Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions*, 133 J. SOC. PSYCHOL. 627 (1993) (studying white mock jurors in cases of consent ambiguity in rape cases, finding that both females and males were more likely to convict when the defendant-victim combination was interracial; there was no significant difference when the defendant-victim combination was white-black or black-white).

[85] *See generally* Carter, *supra* note 9 (discussing the difficulty of perceiving blacks as the victims of violent crimes in comparison to willingness to see whites as the "victims" of affirmative action); Serena Mayeri, Note, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045 (2001) (discussing benefits and pitfalls of comparisons of racial and gender oppression). The differential in rape conviction rates shows the way that black women benefit less from the perception of white women as victims.

[86] Mayeri, *supra* note 85, at 1081–83 (describing the ways in which proponents of the Violence Against Women Act's civil rights remedies made comparisons between racially motivated crimes and the underenforcement of gender-based violence); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1199–1200 (2001). Violence against women is not typically accompanied by the same outright expressions of gender hatred as racially-motivated crime. Birgit Schmidt am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1,

Like racial violence, gender-based violence serves an important role in enforcing the power structure. As Randall Kennedy noted, "[w]hat rape is to women, lynchings were to blacks: a constant threat shaping daily decisions from choice of demeanor to choice in clothing."[87] The purposes and effects of gender-based violence are clear in countries around the world, where rape and domestic violence (or honor killings and dowry murders) restrict women's personal freedom and limit their political and economic power.[88]

Historically, the common law made explicit the connection between violence and the legal prerogatives of men. Blackstone minimized the crime of murdering one's wife, but declared a wife's murder of a husband akin to treason.[89] The "rule of thumb," enforced by American courts into the nineteenth century, allowed a husband the right of chastisement of his wife so long as he beat her with a switch no wider than his thumb.[90] Raping one's wife was not outlawed in all states until very recently.[91] In the later nineteenth century, the law eased its enforcement of men's right to chastisement, but accomplished the same goal through underenforcement of the law and complicity in private violence.[92] Courts relegated women brutalized by their husbands to the private sphere of the family, stripped, as a practical matter, of any protections of the criminal justice system.[93]

Government sanction of gender-based violence through the underenforcement of the law continues. According to a 1993 U.S. Senate Committee report, "[s]tudy after study has concluded that crimes disproportionately affecting women are often

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14–17 (1995). *See generally* David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163 (1993).

[87] KENNEDY, *supra* note 3, at 46. And, of course, the sexual violence perpetrated against the female half of the black population involved an inextricable mix of race and gender discrimination.

[88] Volpp, *supra* note 86, at 1186–90 (arguing that we acknowledge the use of private violence to subordinate women in other countries, but see it as merely aberrant in our own).

[89] ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 113–14 (2000).

[90] Bradley v. State, 1 Miss. (1 Walker) 156, 157 (1824). In one historic exception, the Puritans enacted the first laws anywhere in the world against wife-beating and child abuse from 1640 to 1680. ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 4 (1987).

[91] *See* Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Influence: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1497 (2003). Moreover, as of 2003, only twenty-four states and the District of Columbia had abolished the marital rape exemption within tort law, and the other twenty-six states retained some form of marital immunity. *Id.* at 1468–70.

[92] Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47–51 (1992).

[93] PLECK, *supra* note 90, at 3–9.

treated less seriously than comparable crimes affecting men."[94] Domestic violence and rape remain the most under-reported violent crimes because of shoddy treatment of victims by the criminal justice system as well as the public shaming attached to women who report these crimes.[95] When women do report violence or rape by a partner, police are famously reluctant to act.[96] Prosecutors further underenforce the law by undercharging or dropping the cases altogether.[97] All of these decisions are made, moreover, in the shadow of discriminatory acquittals.[98] Studies show that police and prosecutors frequently discourage or plead down charges because of concern about juror willingness to convict for gender-based violence.[99] Discriminatory acquittals thus generally form the excuse for discriminatory underenforcement.

Despite the frequency of domestic violence (which comprises around twenty percent of all non-fatal violent crimes against females age twelve or older),[100] few such

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[94] S. REP. NO. 103-138, at 49 (1993). The Violence Against Women Act created a civil rights remedy (later struck down as beyond Congress's Commerce Clause authorization) because "victims of gender-motivated violence have a right to equal protection of the laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violent crimes." S. REP. NO. 102-197, at 28 (1991).

[95] Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1161 (1986) (noting that violent, stranger rape is frequently reported, while non-violent, non-stranger rape is often not reported, even when the victim considers rape to have occurred). The Department of Justice reports that only thirty-six percent of completed rapes, thirty-four percent of attempted rapes, and twenty-six percent of sexual assaults are reported to police. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992–2000, at 2 tbl.3 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf; *see also* Zanita E. Fenton, *Silence Compounded—The Conjunction of Race and Gender Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 271, 279 (2003) ("[S]cholars generally acknowledge that domestic violence offenses are greatly under-reported . . . ."); Thekla Hansen-Young, *Considering the Constitutionality of a Confrontation Clause Exception for Domestic Violence Victims*, 14 BUFF. WOMEN'S L.J. 81, 88 (2005) (discussing one study which found that only 6.7% of spousal assaults were reported).

[96] Zorza, *supra* note 92, at 47–48. Some police departments even had policies in place to downplay domestic violence disputes. *Id.* (reporting on municipal procedures in Oakland and Detroit).

[97] Spohn et al., *supra* note 83, at 209–10.

[98] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004).

[99] *See* SUSAN ESTRICH, REAL RAPE 29 (1987) (noting problems for prosecutors in distinguishing between "jump-from-the-bushes stranger rapes and the simple cases of unarmed rape by friends, neighbors, and acquaintances"); *see also* Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 213–14 (1991) (noting that prosecutors worry about jury results, and specify typical bases for case rejection).

[100] CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993–2001 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf.

cases go to jury trials charged as felonies.[101] In those rare trials, the most effective defense against domestic violence charges centers on the imposition of gender roles—challenging the victim as a consenting masochist or as a nag deserving of discipline.[102] Indeed, as women gained more liberties during the twentieth century, juries actually became less likely to convict in domestic violence cases.[103] Juries seemed to worry less about men's violence than about blaming female victims who did not exercise their supposed new autonomy in order to leave their abusive husbands.[104]

The law of rape actively encourages a jury to put the victim, rather than the defendant, on trial by focusing on her lack of consent and on whether she adequately resisted, rather than on the defendant's intent to rape.[105] Juries show bias for the defendants in rape trials when there are suggestions of "contributory behavior" by the victims.[106] A rape trial frequently devolves into whether the victim properly met her gender role, whether she was sufficiently innocent and virginal, whether she showed a willingness to fight to the death rather than lose her virtue, and whether she assumed

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[101] *See* Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 307 (1993); Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859 & n.30 (1996). In New Orleans in 2007, for example, approximately ninety percent of domestic violence arrests were booked as municipal misdemeanors. Of those that were sent to state court, seventy-four percent were dropped immediately by the district attorney's office. E-mail from Nathaniel Weaver, Domestic Violence Program Coordinator, City of New Orleans, to Tania Tetlow, Associate Professor and Director, Tulane Law School Domestic Violence Clinic (Mar. 4, 2008, 15:56 EST) (on file with author).

[102] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2133–34 & n.60 (1996). As an Assistant U.S. Attorney prosecuting a rare federal domestic violence-related case, I had to object to the relevance of defense counsel questions focusing on whether the defendant paid for the car of his victim and whether she was dating someone new, seemingly irrelevant to the issue of whether he broke down her door and used it to beat her over the head.

[103] *Id.* at 2170.

[104] LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880–1960, at 282–83 (1988). There is no meaningful way to compare conviction rates for gender-based violence because such crimes by definition disproportionately affect women. Perhaps the only useful comparison is to compare the murder sentencing rates for men convicted of killing their wives to women convicted of killing their husbands. Women who kill their husbands (many of whom alleged self-defense) tend to receive much harsher sentences than men who kill their wives—an average of 15 years for women versus 2–6 years for men. MICHIGAN AMERICAN CIVIL LIBERTIES UNION, CLEMENCY FOR BATTERED WOMEN IN MICHIGAN: A MANUAL FOR ATTORNEYS, LAW STUDENTS AND SOCIAL WORKERS (1998), at ch. 1, http://www.sado.org/clemency.htm.

[105] *See* ESTRICH, *supra* note 99, at 18–20.

[106] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 249–51 (1966). This study remains the most extensive study of acquittals. *See* Givelber, *Lost Innocence*, *supra* note 74, at 1167.

the risk by being alone with a man.[107] Studies of prosecutors show that the factors they deem most important to successful convictions by juries focus almost entirely on the victim: a stranger relationship between perpetrator and victim, a lack of any voluntary interaction between perpetrator and victim before the rape, a high degree of force, a high degree of resistance, and corroboration.[108]

When jurors acquit a defendant because they believe that the female victim failed to meet the strictures of her gender role, they use acquittal to enforce the rules of discrimination. Just as the Emmett Till jury made clear that black teenagers should not whistle at white women by acquitting Till's murderers,[109] juries use acquittals to enforce the rules by which women are to behave. The frequency of these discriminatory acquittals is measured by a unique attempt at a legislative fix. Rape shield statutes became necessary precisely because defense lawyers were effectively attacking female victims for their sexual history—sending a clear message to women that only the virtuous and conformist will be protected by juries against sexual violence.[110]

E. The Impact of Discriminatory Acquittals

The general failure to protect certain groups from crime devalues those groups and restricts their freedom. Law enforcement is a public resource, capable of being inequitably distributed.[111] The striking refusal to enforce rape, sexual assault, and domestic violence laws has a demonstrated impact on women's ability to participate in the market, to move freely, and to live.[112] An estimated one in six women will be

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[107] ESTRICH, *supra* note 99, at 18–19.

[108] Givelber, *Lost Innocence*, *supra* note 74, at 1171–74, 1179.

[109] *See supra* notes 1–2 and accompanying text.

[110] *See, e.g.*, FED. R. EVID. 412 advisory committee's note (describing legislative history of the federal rape shield statute and congressional intent to prevent "inquisitions into the victim's morality" and "sexual stereotyping"). Many studies illustrate that rape shield statutes and statutory rape reforms have not significantly changed the results in rape prosecutions of civil tort claims. *See* CASSIA SPOHN & JULIA HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 77–104 (1992) (finding no identifiable change in sexual assault reports, indictments, or convictions after the statutory reform); Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 573 (1993) ("[S]tatutory rape law reform has not had a very substantial effect on either victim behavior or actual practices in the criminal justice system."); *see also* Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 469–471 (2005).

[111] *See* Natapoff, *supra* note 9, at 1725.

[112] G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 134 (2000) ("I live in a world where to be female is to be a target of hatred, of physical violence, and of torture."). Congress, in passing the civil rights remedy of the Violence Against Women Act of 1994, cited statistics related to the impact of domestic violence on commerce. *See* United States v. Morrison, 529 U.S. 598, 631–35 (2000) (Souter, J., dissenting).

raped in their lives,[113] and one in four women will be raped and/or physically assaulted by a husband or boyfriend.[114]

Likewise, the disparate failure to enforce the law within minority communities leaves citizens prisoners within their homes, fearing violent crime that would never be tolerated in other neighborhoods. Until ten years ago, the rate of violent crime generally against black victims was significantly higher,[115] and the rape rate of African-American women was higher than that of white women.[116] Discriminatory acquittal condones certain types of private violence and thus makes it more likely to occur.

Permitted private violence more effectively enforces the racial and gender order than does overt government action. Lynchings and the assassinations of civil rights workers protected the rules of segregation more than did government arrests. Rape and domestic violence constantly remind women of their vulnerability to male power, keeping them from having illusions about their rights to participate in the market place or within family structures on an equal basis. Women understand that they are likely to be raped, or beaten by a partner, and that the perpetrator will almost certainly walk away free.

Discriminatory acquittal is but a subset of the greater problem of discriminatory underenforcement of the law, but it is an overlooked root of the problem. Discriminatory acquittal makes arrest and prosecution pointless and thus less likely. Jury discrimination serves as the main reason, and sometimes the excuse, for an entire system of discriminatory underenforcement. Yet, there is no constitutional language to condemn discriminatory acquittals as denying women and minorities equal protection of the law.

II. DISCRIMINATORY CONVICTIONS

I begin with an overview of the ways courts have grappled with jury discrimination against *defendants* rather than victims because a few appellate courts have addressed

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[113] *See* PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii (2006), http://www.ncjrs.gov/pdffiles1/nij/210346.pdf.

[114] PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE iii (2000), http://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

[115] The Bureau of Justice Statistics reported findings from the National Crime Victimization Survey (NCVS) from 1993 through 1998. CALLIE RENNISON, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION AND RACE, 1993–1998 (2001), http://www.ojp.usdoj.gov/bjs/pub/pdf/vvr98.pdf. "[F]rom 1993 to 1997, black persons were victimized at rates significantly greater than those of whites. By 1998 black and white persons were victimized overall at similar rates." *Id.* at 1. In 1993, 53.5 whites per "1,000 persons age 12 or older" were victims of crimes of violence while 69.3 blacks per "1,000 persons age 12 or older" were violent crime victims. *Id.* at 11. In 1994, whites had a rate of 52.8 per 1000 and blacks a rate of 64.8 per 1000. *Id.* By 1998, 38.1 per 1000 whites were victimized while 42.8 per 1000 blacks were victimized. *Id.*; *see also* Kennedy, *Comment*, *supra* note 21, at 1255–57 (relating race to crime statistics).

[116] Recent Department of Justice statistics indicate that these disparities have dissipated to statistical insignificance. RENNISON, *supra* note 115, at 1.

the issue in this context.[117] The decisions governing what I will term "discriminatory convictions" provide a framework with which to structure a constitutional analysis of discriminatory acquittal. These cases make clear that jury discrimination against defendants is unconstitutional, but also that it is almost impossible to prove.[118]

Consideration of discriminatory convictions establishes three things that are important to a consideration of discriminatory acquittals. First, juror discrimination against defendants is clearly unconstitutional: the Constitution requires an "impartial jury" regulated by the Equal Protection Clause.[119] Second, although statistical evidence proves the existence of jury discrimination, it is very difficult to prove in individual cases. Even if you could require jurors to testify about their racial motives, which jury secrecy prevents, verdicts are rendered by multiple individuals with a complex mix of conscious and subconscious motives. Third, the Supreme Court relies primarily on procedural regulation of jury selection in an attempt to minimize the risk of jury discrimination; it is these kind of procedures that I argue in Part IV should be made available to protect against discriminatory acquittal.

A. Jury Discrimination Is Unconstitutional

In the handful of appellate opinions addressing alleged jury discrimination, the procedural posture typically involves the following: a post-conviction report by a juror alleging that other jurors used racial slurs, a refusal by the trial judge to hold an evidentiary hearing, and a resulting appeal.[120] Defendants ask appellate courts to reverse and remand for an inquiry into the jury's deliberations, sometimes long after the actual verdict.[121] Courts have reversed convictions, or remanded for evidentiary hearings on the issue of jury discrimination, based on three separate but sufficient constitutional

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[117] *See infra* note 120.

[118] I also begin my analysis by focusing on race because I find no cases addressing specific allegations of jury discrimination against female defendants as such.

[119] U.S. CONST. amend. XIV, § 1.

[120] *See, e.g.*, Marshall v. State, 854 So. 2d 1235 (Fla. 2003) (jurors allegedly told racial jokes about the defendant and voted against the death penalty because they wanted him to go back to prison and kill more black inmates); State v. Santiago, 715 A.2d 1, 15 (Conn. 1998) (one juror alleged that another juror had repeatedly called the defendant a "spic"). In *United States v. Heller*, 785 F.2d 1524, 1525–26 (11th Cir. 1986), the Eleventh Circuit reversed a conviction based on admissions by some of the jurors that they used religious epithets against a Jewish defendant. Presumably when trial judges hold such evidentiary hearings, or even reverse based on the results, the government rarely appeals, and I find no such opinions.

[121] *See, e.g.*, *Marshall*, 854 So. 2d at 1242 (granting post-conviction relief, requiring an evidentiary hearing into jury misconduct fourteen years later); *Santiago*, 715 A.2d 1 (reversing and remanding for evidentiary hearing); State v. Brown, 668 A.2d 1288 (Conn. 1995) (reversing and remanding for evidentiary hearing into allegations jury overheard racial slurs made by government officials). *But see* Spencer v. State, 398 S.E.2d 179 (Ga. 1990) (affirming conviction despite a juror's affidavit alleging that she overheard two other jurors using racial comments about the defendant, and the trial judge's refusal to hold an evidentiary hearing).

principles: the Equal Protection Clause,[122] the Sixth Amendment right to an impartial jury,[123] and the due process rights to a fair trial.[124] These opinions tend to conflate the Sixth Amendment right to an impartial jury with the equal protection doctrine that racial discrimination is the worst form of impartiality. The Eleventh Circuit summed up the blending of these doctrines: "The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require."[125] Similarly, other courts have invoked procedural due process as a way of essentially summarizing and incorporating the other rights at issue–the right to an impartial jury and equal protection rights against discrimination.[126] Unsurprisingly, I find no court that argues that a jury could constitutionally convict a defendant based upon his race.

B. Difficulties of Proof

There is substantial historical and empirical evidence that discriminatory convictions exist, yet opinions considering the issue are rare, and reversals even more so.[127] Direct evidence of discrimination by a particular jury, as opposed to statistical evidence of discrimination by juries generally, is difficult to uncover because the law protects the secrecy of jury deliberations. Further, courts have difficulty defining the requisite level of discriminatory motive, much less grappling with unstated or subconscious discrimination. Few modern juries will collectively brag about their overt and conscious racism in the way the Emmett Till jury did.

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[122] *See, e.g.*, *Marshall*, 854 So. 2d at 1241 (relying on Powell v. Allstate Ins. Co., 652 So. 2d 354 (Fla. 1995) and explicitly discussing equal protection jurisprudence).

[123] *See, e.g.*, *Brown*, 668 A.2d 1288. The Eleventh Circuit has also applied Sixth Amendment analysis to religious discrimination. *See Heller*, 785 F.2d at 1525–26 (reversing a conviction because, among other reasons, jurors reportedly used religious epithets against a Jewish defendant).

[124] *See, e.g.*, Tavares v. Holbrook, 779 F.2d 1 (1st Cir. 1985) (applying due process to a claim that a juror used a racial term during deliberations). Sometimes, jurors report racial discrimination *during* jury deliberation, although government cross-appeals of these decisions are rare. *See* United States v. McClinton, 135 F.3d 1178, 1188 (7th Cir. 1998), *cert. denied*, 534 U.S. 920 (2001) (noting approvingly the removal of a juror based upon her racial comments, citing defendant's due process rights, and affirming trial court's decision not to find a mistrial).

[125] *Heller*, 785 F.2d at 1527 (addressing both racial and religious prejudice).

[126] *See, e.g.*, *Tavares*, 779 F.2d at 2 (in addressing a claim that a juror used a racial slur during deliberations, the court invoked *Irvin v. Dowd*, 366 U.S. 717 (1961), for the proposition that the Fourteenth Amendment guarantees a fair trial by impartial jurors as a minimal standard of due process).

[127] KENNEDY, *supra* note 3, at 76–135 (discussing the history and current evidence of rampant discriminatory convictions); *id.* at 277–82 (discussing the paucity of reported decisions addressing discriminatory convictions).

In contrast to other governmental decision-making, juries work in absolute secrecy, deliberating in private and without transcription.[128] As the Supreme Court noted in *McCleskey v. Kemp*, this makes it almost impossible to prove a jury's alleged discriminatory motive.[129] Federal Rule of Evidence 606(b) prohibits jurors from testifying about jury deliberations, with the exception of questioning jurors about an "extraneous influence."[130]

Defendants have argued that racial prejudice falls within Rule 606(b)'s exception for "extraneous influences" and have asked to question jurors about potential discrimination.[131] The Supreme Court has yet to rule on the issue, but generally defines "extraneous influence" quite strictly. In *Tanner v. United States*, for example, the Court famously held that a juror's intoxication during trial did not constitute an "extraneous influence."[132]

Alcohol would seem to be far more extraneous than a juror's racist ideology. Despite Rule 606(b), however, when a juror has actually reported alleged jury discrimination, several state appellate court decisions have reversed a trial judge's refusal to hold an evidentiary hearing.[133] Those courts did not so much define prejudice as an outside influence, but trumped the rule of jury secrecy to protect the constitutional

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[128] *See generally* Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771 (2005) (arguing for an amendment of jury secrecy rules in capital cases to prevent against prejudicial and erroneous decision-making). Jury secrecy has been justified on several policy grounds: (1) preserving the finality of verdicts from speculation about jury deliberations; (2) deference for the jury's role as fact-finder, a role that would be challenged if judges could simply substitute their own judgments; (3) avoiding the harassment of jurors after a verdict; (4) fostering free and open deliberations by jurors without concern for future embarrassment; and (5) preserving public confidence in the jury (by hiding the quality of deliberations from the public). *Id.* at Part IV.B.

[129] 481 U.S. 279, 308–09 (1987) (quoting Turner v. Murray, 476 U.S. 28, 36 n.8 (1986)).

[130] *See* FED. R. EVID. 606(b) ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.").

[131] *See, e.g.*, Wright v. United States, 559 F. Supp. 1139 (E.D.N.Y. 1983).

[132] 483 U.S. 107, 125 (1987).

[133] *See Wright*, 559 F. Supp. at 1151 ("Despite the broad language of Rule 606(b), courts faced with the difficult issue of whether to consider evidence that a criminal defendant was prejudiced by racial bias in the jury room have hesitated to apply the rule dogmatically." (citing Tobias v. Smith, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979); Smith v. Brewer, 444 F. Supp. 482, 489 (S.D. Iowa 1978))).

interests of a convicted defendant in the interest of the "plainest principles of justice."[134] The Florida Supreme Court, for example, requires investigation of any allegations of overtly racist jury deliberations.[135] The court draws a bright line rule requiring investigation into "overt acts" of racist jury comments, but not into unspoken racial bias.[136]

In the Florida case of *Marshall v. State*, a juror reported racial slurs against both the black defendant and the murder victim.[137] Some jurors, she alleged, voted against the death penalty for a prison murder because they wanted to send Marshall back to prison to "kill more black inmates."[138] The Supreme Court of Florida granted post-conviction relief and ordered an evidentiary hearing fourteen years after Marshall's original trial.[139] Despite the strong interest in finality of judgments, in protecting the privacy and integrity of jury deliberations, in preventing juror harassment, and in "'maintaining public confidence in the jury system,'" the court found that racial bias is among the "most serious" possible allegations of juror misconduct and must be investigated.[140]

Even if a defendant could question jurors about discrimination, however, courts would still stumble over the question of defining unconstitutionally racist motive. Does racism need to be the sole motive for the verdict? Does racism need to be conscious and spoken?[141] Does one racist juror undermine the entire verdict? Two? All twelve?[142] The U.S. Supreme Court has never defined the level of discrimination that

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[134] As the Supreme Court noted in *McDonald v. Pless*, "there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" 238 U.S. 264, 268–69 (1915) (internal citations omitted). In *Wright v. United States*, the district court explained, "[c]ertainly, if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the sixth amendment's guarantee to a fair trial and an impartial jury." 559 F. Supp. at 1151 (citing Tobias v. Smith, 468 F. Supp. at 1290; Smith v. Brewer, 444 F. Supp. at 490).

[135] *See* Marshall v. State, 854 So. 2d 1235, 1240 (Fla. 2003).

[136] *See id.*

[137] *Id.* at 1239.

[138] *Id.*

[139] *Id.* at 1244.

[140] *Id.* at 1243–44 (internal citations omitted).

[141] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, *in* A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW: A MULTIRACIAL APPROACH 127–130 (Timothy Davis et al. eds., 2001); Johnson, *supra* note 61, at 1017–21; Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141 (2007); *see also* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 45 (2006) ("Courts are hostile to disparate impact law for precisely the same reason that they hesitate to read disparate treatment doctrine as embracing implicit bias—because actions taken without a conscious intent to discriminate do not fit the paradigm of a fault-based understanding of 'discrimination.'"); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1230 (1999) (concluding that "nothing more should be done within the existing legal framework to address unconscious disparate treatment" because it is not possible to detect unconscious bias).

[142] *See* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?:*

would render a verdict unconstitutional.[143] In fact, even within the broader equal protection doctrine, the Supreme Court varies widely in defining the permissible degree of race consciousness in governmental decision-making.[144]

In most of the cases cited above, appellate courts merely remanded for an evidentiary hearing and thus did not define the requisite level of racism, but two cases provide extremes of the possible requisite levels of proof. The Eleventh Circuit simply reversed the conviction of a Jewish defendant based, in part, on reports that several of the jurors used religious slurs.[145] The court found that such bias within the jury violated due process.[146] In stark contrast, the Georgia Supreme Court affirmed the denial of a habeas corpus in *Spencer v. State*, despite a juror's affidavit claiming to have overheard jurors using racial epithets about the defendant.[147] The court reasoned that, even assuming the truth of the allegations, "it shows only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die."[148] Defining the requisite level of bias to allow an appellate court to reverse a conviction remains difficult, particularly in the context of secret group decision-making made by a body whose decisions are accorded great deference by our criminal justice system.

C. Using Statistics to Prove the Likelihood of Jury Discrimination

A defendant suspicious of jury discrimination thus has to hope that racist jurors articulated those ideas out loud during the trial and that another juror will bravely decide to report the comments. Because defendants face such insurmountable difficulties

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Discrimination in Multi-Actor Employment Decision Making, 61 LA. L. REV. 495, 538 (2001).

[143] *See* McCleskey v. Kemp, 481 U.S. 279 (1987). *McCleskey* assumes that proof of discriminatory motive by the defendant's jury would render a verdict unconstitutional, but does not describe the requisite level of discrimination. *See id.*

[144] At the greatest extreme, the Court in the *Batson v. Kentucky* line of cases seemed to prohibit any degree of race consciousness in exercising a peremptory challenge during jury selection. *See* Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 101–02 (1996). In the legislative redistricting line of cases, the Court took a middle ground and forbade race consciousness that provides the "predominant reason" for legislative redistricting. *See* Miller v. Johnson, 515 U.S. 900, 928 (1995). The Court created the lowest standard of all in the context of racial profiling, allowing race to be considered as a factor to establish "reasonable and articulable suspicion" for stopping a suspect, so long as race is not the sole reason for the stop. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563–64 & n.16 (1976).

[145] *See* United States v. Heller, 785 F.2d 1524, 1525–26 (11th Cir. 1986) (reversing a conviction because, among other reasons, jurors reportedly used religious epithets against a Jewish defendant during deliberations).

[146] *See id.* at 1529.

[147] 398 S.E.2d 179, 184 (Ga. 1990) (holding that allegations of racial prejudice do not supersede Rule 606(b)'s prohibition on inquiring into jury deliberations).

[148] *Id.* at 185.

of proof, defense lawyers instead have turned to statistical studies of collective jury verdicts to show the ubiquity of jury discrimination. For example, defendants challenged the death penalty as inherently racist in its application by showing a strong correlation between race and sentencing.[149]

In 1987, the defendant in *McCleskey v. Kemp* presented the Supreme Court with the Baldus study, the most elaborate and statistically accurate study conducted to that point.[150] As described above in Part I, the Baldus study showed a disparity in the application of the death penalty according to the race of the defendant, but also a much larger disparity in the application of the death penalty according to the race of the victim.[151] In a 5-4 decision, the Court held that statistical evidence that juries collectively *tend* to discriminate would not prove that McCleskey's jury *did* discriminate.[152] The Court acknowledged that the rules of jury secrecy would make this proof almost impossible; nevertheless, McCleskey could not substitute statistical likelihood for direct evidence in his case.[153]

The Court rejected the contention that the death penalty must be abandoned because it is sometimes discriminatorily applied, in part because such logic could undermine the entire criminal justice system.[154] If race infects convictions or other sentences, how could the Court strike down the entire jury system as a remedy?[155] Instead, the Court described an acceptable level of risk.[156] "There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. . . . The question 'is at what point that risk becomes constitutionally unacceptable.'"[157] The Court raised the pragmatic fact that the motives of jurors are generally unknowable and treated it as constitutional principle, holding that the risk of discrimination can exist at a constitutionally acceptable level.[158] The Supreme Court essentially admitted that it lacked the ability to root out racial discrimination from the jury system.[159]

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[149] Brief for Petitioner at 56, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444).

[150] *See* 481 U.S. 279, 286–87 (1987).

[151] *Id.* at 286. The Supreme Court considered McCleskey's claim without expressing any concern about a defendant complaining of discrimination against victims. Carter, *supra* note 9, at 440–41, 443–44; Kennedy, *supra* note 9, at 1389.

[152] *See McCleskey*, 481 U.S. at 313–14.

[153] *See id.* at 312; *see also* Kennedy, *supra* note 9, at 1419–21 (criticizing the Court's failure of judicial imagination and leadership in *McCleskey*).

[154] *See* Carter, *supra* note 9, at 446 ("No wonder nine Justices tiptoed around the matter: Sometimes the exposure of the pervasiveness of racialism, and of the racist policy it entails, can cost too much.").

[155] *See McCleskey*, 481 U.S. at 314–15. The Court also expressed concern that such rights could even apply to gender. *Id.* at 316–17. The dissent dismissed these slippery slope arguments as "a fear of too much justice." *Id.* at 339 (Brennan, J., dissenting).

[156] *See id.* at 308–09.

[157] *Id.* (quoting Turner v. Murray, 476 U.S. 28, 36 n.8 (1986)).

[158] *See id.* at 313.

[159] *See* Johnson, *supra* note 61, at 1017–21.

D. Procedures to Diminish the Risk of Jury Discrimination Against Defendants

Because of the seeming unfeasibility of direct remedies, the *McCleskey* Court turned to preventative measures. The Court argued that procedural protections would have to suffice to prevent jury discrimination.[160] The Court specifically invoked several recently announced procedural protections applying equal protection to the selection of juries, including *Batson v. Kentucky*, decided the year before.[161]

When the *McCleskey* Court pointed to prophylactic procedural remedies to the problem of racist juries, it followed a time-honored tradition. For much of the twentieth century, the Supreme Court reviewed appeals of convictions based upon flagrant racial injustice but rarely acknowledged the underlying problem of racial discrimination by juries.[162] Instead, the Court crafted a myriad of constitutional criminal procedure protections to try to solve the problem instrumentally.[163] It regulated the rules of the game rather than the fairness of its outcome.

These procedural solutions, governing everything from involuntary confessions to the right to adequate counsel, attempted to even the odds for minority defendants. Mere procedure, however, could not overcome the determination of a racist jury. The Supreme Court twice reversed the infamous rape convictions of the innocent Scottsboro boys in the 1930s, for example, first for inadequate counsel,[164] then for

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[160] *McCleskey*, 481 U.S. at 309; *see also* Holland v. Illinois, 493 U.S. 474, 511–12 n.8 (1990) (Stevens, J., dissenting) ("[*McCleskey*] held that the jury system and the fair-cross-section principle were designed to eliminate any discrimination in the imposition of sentence based on the race of *the victim*.").

[161] *McCleskey*, 481 U.S. at 309 (citing Batson v. Kentucky, 476 U.S. 79, 85 (1986) (banning the racial use of peremptory challenges)).

[162] *See generally* Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359 (2001); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000). For examples of the Court's superficial treatment of the racial issues at stake, see the following: *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (referring to the defendants as an "indigent Mexican defendant" and an "indigent Los Angeles Negro"); *Brown v. Mississippi*, 297 U.S. 278, 281 (1936) (noting the trial court's description of the defendants as "all ignorant negroes" (quoting Brown v. State, 161 So. 465, 470 (1935) (Griffith, J., dissenting))); *Powell v. Alabama*, 287 U.S. 45, 49 (1932) ("The petitioners . . . are negroes charged with the crime of rape . . . of two white girls.").

[163] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 14–15 (1968) (referencing risk of racial profiling in establishing standard of "reasonable" and "articulable" suspicion for a stop and frisk); *Miranda*, 384 U.S. at 444 (requiring police to warn arrested defendant of the right to remain silent and the right to counsel); *Brown*, 297 U.S. at 286 (holding that obtaining evidence through coercion and brutality violates due process); *Powell*, 287 U.S. at 58 (expanding right to counsel).

[164] *Powell*, 287 U.S. at 58 (finding that defendants received inadequate counsel when every lawyer in the county was jointly appointed to represent them).

the exclusion of blacks from the juries.[165] After each reversal on procedural grounds, Alabama juries simply convicted them again.[166]

Courts may have no choice about relying on procedure and prevention rather than regulating the results and the accuracy of jury deliberations. Jury discrimination is both difficult to prove and to measure. More to the point, judges cannot simply substitute their own judgments for the decisions of juries without violating our constitutional guarantee of jury trials.[167]

Yet *McCleskey* represented an all too rare moment of acknowledgement of the fallibility of preventative procedures. Generally, the Supreme Court mandates a state of denial about the black box of jury deliberations and the possibility of discriminatory convictions. Established doctrine presumes that jurors follow instructions and that jurors are colorblind.[168] The Court adamantly insists on the myth of juror objectivity despite all of the empirical evidence to the contrary.[169] The *McCleskey* opinion was not unusual in relying on prophylactic procedural remedies in deference to juries, but it did represent a rare acknowledgement by the Court that procedures may not suffice.

III. DISCRIMINATORY ACQUITTALS VIOLATE THE CONSTITUTION

Having described the rather hopeless state of the law governing discriminatory convictions, I now argue for acknowledgement of a new area of constitutional violation without a clear remedy. Yet recognition of the problem of discriminatory acquittal is an important step with immediate impact. It shatters certain illusions about the fallibility of our criminal justice system and about the ways in which we thoroughly exclude consideration of victims' rights from the process.

Discriminatory acquittals have gone unnoticed and unremedied in our constitutional jurisprudence for several reasons having nothing to do with their constitutionality. Victims lack standing within the criminal justice system to complain directly

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[165] Norris v. Alabama, 294 U.S. 587, 596 (1935) (reversing defendant's conviction because blacks were excluded from the jury).

[166] *See generally* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 2007) (recounting the cases of nine African-Americans falsely accused of raping two Caucasian women on a train, eight of whom were sentenced to death).

[167] *See* U.S. CONST. amend. VI.

[168] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) ("Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice."); Rodriguez v. Colorado, 498 U.S. 1055, 1058 (1991) (Marshall, J., dissenting) ("As a matter of convention, we presume that jurors follow jury instructions." (citing McKoy v. North Carolina, 494 U.S. 433, 454 (1990) (Kennedy, J., concurring))).

[169] *See* Ristaino v. Ross, 424 U.S. 589, 596 n.8 (1976) ("In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.").

of discrimination.[170] Even if victims had a procedural opportunity to challenge discriminatory acquittals, double jeopardy prevents re-prosecution or the appeal of an acquittal.[171] While the existence of discriminatory acquittals can be shown in the abstract by statistical analyses of jury verdicts collectively, principles of jury secrecy make it difficult to root out particular discriminatory acquittals.[172] The days of juries bragging about their racism to the media, as Emmett Till's jury did, have passed.

Yet, as I argue below in Part IV, it remains important to acknowledge the unconstitutionality of discriminatory acquittal. In part, this represents a merely normative shift, but an important one. Discriminatory acquittals constitute a pervasive constitutional problem. They legitimatize the use of private violence to enforce discrimination and signal that government resources do not apply to protect all of our citizens. Recognizing the problem of discriminatory acquittals, and recognizing the problem as one of constitutional import, would change the norms by which we understand criminal procedure.

Further, engaging in the analysis necessary to prove the unconstitutionality of discriminatory acquittals also produces some surprising constitutional insights. Put aside for a moment all objections about standing and remedy and consider the core questions: Are jurors bound by the Equal Protection Clause? Are they even state actors? There are important normative implications to these issues.

I begin by discussing why jury verdicts constitute state action, an important point rarely discussed by courts or scholars. I then argue that discriminatory acquittals violate the Equal Protection Clause. Even if victims have no procedural or substantive due process rights to a fair verdict, they retain a right against verdicts motivated by discrimination. Finally, I argue that defendants possess no countervailing right to jury nullification based upon discriminatory acquittal.

I will not belabor standing issues essentially made moot by the legal and pragmatic difficulties with creating a remedy for victims of discriminatory acquittal. I will briefly note, however, that despite the difficulties victims have had in obtaining standing to challenge government underenforcement of the law generally,[173] in the

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[170] To have standing, a plaintiff must show that the challenged conduct caused the plaintiff actual injury. BLACK'S LAW DICTIONARY 1442 (8th ed. 2004).

[171] Several scholars argue convincingly that double jeopardy does not, and should not, ban the reversal of an acquittal obtained through fundamental defects in the judicial process, whether through witness tampering or misconduct by defense counsel. *See, e.g.*, Thomas M. DiBiagio, *Judicial Equity: An Argument for Post-Acquittal Retrial When the Judicial Process Is Fundamentally Defective*, 46 CATH. U. L. REV. 77, 77–79 (1996). The Supreme Court did not hold that prosecutive appeal violated double jeopardy until 1896, and then reversed positions on the subject until finally banning prosecutive appeals and retrials in a closely-divided opinion. United States v. Ball, 163 U.S. 662 (1896); *see* DiBiagio, *supra*, at 83–84. I do not grapple here with the possibility of reversing course again and allowing prosecutive appeals, though I believe it is worth considering for the reasons discussed in these articles.

[172] *See* FED. R. EVID. 606(b).

[173] *See, e.g.*, Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973) (holding that a citizen lacked standing to contest policies of prosecutors if he is neither subject to prosecution nor

jury selection context, the Supreme Court has proved willing to stretch standing far more broadly, recognizing the attenuated interests of potential jurors as well as the interests of the entire community in the public perception of justice.[174] In those cases, the Court brushed away standing concerns with broad declarations about the important issues at stake: "Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."[175] Thus, if a constitutional remedy for discriminatory acquittal were available, the precedent exists to recognize third parties' direct interest in a race-neutral criminal justice process.[176]

A. Jury Verdicts Constitute State Action

A constitutional analysis of discriminatory acquittal first requires a determination of whether jury verdicts constitute state action governed by the Constitution, a question that has been the subject of surprisingly little discussion.[177] On one hand, jurors act with the authority of government, are paid by the government, and enjoy absolute immunity for their verdicts.[178] Yet, we also characterize jurors as citizens bringing their independent judgment to a particular case and as private actors subjecting government prosecution to the will of the public.[179] We think of jurors as beyond government control.

The Supreme Court has never decided whether jury verdicts constitute state action, but it has repeatedly made this point in dicta in the *Batson v. Kentucky* line of cases.[180] The Court held that the very process of choosing a jury is state action,

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threatened with prosecution); Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 347 (urging a broader definition of standing for victims, particularly those protecting their equal protection rights, but noting the "cynical conclusion" that "the only collective interest cognizable is the government's own definition of its own interests, which it buttresses when necessary by claiming to represent victims or society as a whole").

[174] *See* Georgia v. McCollum, 505 U.S. 42, 48–49 (1992).

[175] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991).

[176] Others have discussed the odd standing issues for a criminal defendant making race-of-the-victim disparity claims. *See generally* Carter, *supra* note 9; Kennedy, *supra* note 9. I seek a more direct remedy for victims, not a method for defendants to challenge their convictions or sentences.

[177] A few scholars discussing the application of the First Amendment religion clauses to jury deliberations have briefly theorized that jury deliberations must constitute state action. *See, e.g.*, *Capital Sentencing—Juror Prejudice—Colorado Supreme Court Holds Presence of Bible in Jury Room Prejudicial*, 119 HARV. L. REV. 646, 651 (2005); Terrence T. Egland, *Prejudiced by the Presence of God: Keeping Religious Material Out of Death Penalty Deliberations*, 16 CAP. DEF. J. 337, 356 (2004); Gary J. Simson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1121 (2001).

[178] Egland, *supra* note 177, at 359 (citing *Edmonson*, 500 U.S. at 626).

[179] Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 324 (1996).

[180] *See* Georgia v. McCollum, 505 U.S. 42, 59 (1992) (applying *Batson* to criminal defense attorneys); *Edmonson*, 500 U.S. at 631 (applying *Batson* to civil attorneys).

even when done by private lawyers, because juries are "a quintessential governmental body—indeed, the institution of government on which our judicial system depends."[181] The jury system "performs the critical governmental functions of guarding the rights of litigants and 'ensur[ing] continued acceptance of the laws by all of the people.'"[182] Deciding whether a criminal defendant goes to prison or walks free is the ultimate government function.[183]

Rather than characterizing jurors as private citizens acting in governance over the state, the Court has made clear that jurors derive their power from the state: "The jury exercises the power of the court and of the government that confers the court's jurisdiction."[184] The fact that government delegates power to otherwise private citizens does not alter the state action of the work that jurors do. Government "cannot avoid its constitutional responsibilities by delegating a public function to private parties."[185] Accordingly, the Court reasoned in dicta, jurors are governed by the Constitution.[186]

Government can be held responsible for the voting of private citizens on juries in the same way that a law created by direct popular referendum is subject to the Constitution.[187] Jurors exercise enormous power, regardless of whether it is temporary. Once citizens were sworn in to serve on the Emmett Till jury, they took on the full force of government authority: the state-granted power to send Till's killers home or to the electric chair.[188] In a bench trial, there would be no doubt that the judge constitutes a state actor bound by the Equal Protection Clause, not just because the judge receives a government salary, but because the judge performs a government function.[189] Jurors are no different.

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[181] *McCollum*, 505 U.S. at 54.

[182] *Edmonson*, 500 U.S. at 624 (quoting Powers v. Ohio, 499 U.S. 400, 407 (1991)).

[183] *See id.*

[184] *Id.*

[185] *McCollum*, 505 U.S. at 53.

[186] *Edmonson*, 500 U.S. at 625 (explaining that juries are not "a select, private group beyond the reach of the Constitution").

[187] My state action argument raises the question of whether an individual voting in a government election conducts state action, a point raised to me by Laurence Tribe. I agree with him that voting is state action governed by the Constitution, even if there is no practical ability to regulate voter motive. It might make a slight impact on voter behavior, moreover, if voters thought of themselves as bound by the constitutional guarantee of nondiscrimination. We might ask them to swear an oath to that effect before they voted.

[188] *See supra* note 1.

[189] *See, e.g.*, United States v. Brown, 539 F.2d 467, 468–70 (5th Cir. 1976) (vacating a conviction due to the judge's racial bias after it was revealed that before trial, the judge had told an attorney "that he was going to get that nigger"). One could make an argument that jurors are merely fact-finders and thus different from a judge in a bench trial. Jurors do not simply make findings of fact, however; they also apply the law to facts. Wainwright v. Witt, 469 U.S. 412, 423 (1985) ("[T]he quest is for jurors who will conscientiously apply the law *and* find the facts." (emphasis added)). Further, jury fact-finding is still an important governmental

B. Discriminatory Acquittals Violate the Equal Protection Clause

When a jury acquits a defendant based on race or gender discrimination against a victim, the jury violates the constitutional guarantee of equal protection of the law. Equal protection doctrine subjects most race-based government decision-making to strict scrutiny.[190] The discriminatory enforcement of seemingly neutral statutes also violates the Constitution.[191] Legislatures cannot pass facially neutral laws for the purpose of imposing a "disparate impact" on minorities.[192] Government actors may not hire or fire employees based on race or gender, even for purposes of affirmative action, without meeting strict scrutiny.[193]

The Supreme Court has been particularly adamant that race discrimination has no place in criminal trials: "Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."[194] Even decision-making within the criminal justice system that is highly discretionary and which receives great deference may not be based upon race. Discrimination may not influence the decision to prosecute a case,[195] nor may attorneys choosing a jury consider the race or gender of a potential juror.[196] While the Court has been far more sanguine about allowing the police to use race when deciding whom to stop and frisk on the street,[197] the Court has closely guarded against the use of race by prosecutors and within the courthouse, declaring the Court's own arena to be particularly sacrosanct:[198] "[T]he injury caused by the discrimination is made more severe because the government permits it to occur

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function. Jury verdicts constitute enforceable government action, not simply a non-binding recommendation to a judge who ultimately makes the decision.

[190] Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." (internal citations omitted)); Korematsu v. United States, 323 U.S. 214, 216 (1944) (finding that racial classifications are subject to strict scrutiny).

[191] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

[192] Washington v. Davis, 426 U.S. 229, 246 (1976) (requiring proof of both disparate impact and discriminatory purpose before subjecting a facially neutral statute to strict scrutiny).

[193] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to a government affirmative action program which selected contractors).

[194] Rose v. Mitchell, 443 U.S. 545, 555 (1979).

[195] Wayte v. United States, 470 U.S. 598, 608 (1985).

[196] Batson v. Kentucky, 476 U.S. 79, 88 (1986).

[197] The Court has punted at least in part on the subject of discriminatory overenforcement of the law, holding only that race may not serve as the sole reason for a *Terry* stop and frisk. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563 n.16 (1976). Scholars have roundly criticized the Court for failing to consider how extraordinarily discordant this footnote is with the rest of equal protection law. *See, e.g.*, Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 976–78 (1999).

[198] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991). The delegation of state power means that a private body "will be bound by the constitutional mandate of race neutrality." *Id.* at 625.

within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds . . . [and where] juries render verdicts . . . ."[199] Thus, the Supreme Court has declared criminal trials to be particularly subject to equal protection regulation.

McCleskey v. Kemp itself arguably stands for the proposition that the Equal Protection Clause directly governs jury deliberations and discrimination based on the race of victims.[200] Although the Court did not engage in overt discussion of the application of equal protection to juries, it seemed to presume that a defendant who could show actual discrimination by his jury based on the race of the victim would be entitled to redress. As Justice Brennan made more clear in his dissent, for a jury to punish the murder of a black victim less severely "reflects a devaluation of the lives of black persons."[201]

While the Court analyzes gender under a reduced level of equal protection scrutiny,[202] the Court consistently strikes down gender classifications based upon "archaic and overbroad" generalizations about gender,[203] much less those based upon invidious discrimination.[204] The Court has proved just as willing to ban gender discrimination in jury selection as it has with race.[205] In *J.E.B. v. Alabama*, the Court expanded the *Batson* rule to prohibit gender-based peremptory challenges.[206] While recognizing certain differences between race and gender, the Court expressly rejected Alabama's contention that "gender discrimination, unlike racial discrimination, is tolerable in the courtroom,"[207] holding instead that such stereotypes would cause a loss of confidence in the fairness of our judicial system.[208] The Court reasoned that "with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans."[209] While the Court makes only loose

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[199] *Id.* at 628.

[200] 481 U.S. 279 (1987).

[201] *Id.* at 336 (Brennan, J., dissenting).

[202] *E.g.*, Reed v. Reed, 404 U.S. 71 (1971) (applying an intermediate level of scrutiny to gender classifications).

[203] Craig v. Boren, 429 U.S. 190, 198–99 (1976) (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

[204] *See* United States v. Virginia, 518 U.S. 515, 534 (1996) (stating that gender classifications may not be used to perpetuate the subordination of women).

[205] *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975) (striking down an automatic exemption of women from jury service); Ballard v. United States, 329 U.S. 187 (1946) (holding that women may not be excluded from federal venires where women were eligible for jury service under local law).

[206] 511 U.S. 127, 128–29 (1994). Before *J.E.B.*, however, the majority opinion in *McCleskey* used the possibility that jury discrimination rulings might someday apply to gender as a slippery slope argument. *McCleskey*, 481 U.S. at 281.

[207] *J.E.B.*, 511 U.S. at 135.

[208] *Id.* at 140.

[209] *Id.* at 136.

connections between the rights of citizens to participate on juries and the rights of the parties to litigation to be free from discrimination,[210] it is hard to imagine the Court permitting a jury either to convict a defendant based on her gender, or to acquit a defendant based on the gender of the victim.

C. Equal Protection Analysis Does Not Require Fundamental Rights

The analogy between the unconstitutionality of discriminatory conviction and discriminatory acquittal is not complete: there are important distinctions between the rights of victims and defendants within a criminal trial. Courts that have held discriminatory convictions to be unconstitutional have mentioned the Equal Protection Clause but have relied more heavily on the defendant's due process rights and Sixth Amendment right to an impartial jury.[211] Victims, however, do not have any claim based on those procedural rights.[212] Nor do victims have any substantive right to conviction of guilty defendants. On the contrary, our system requires acquittal of guilty defendants for all sorts of instrumental reasons, including the exclusionary rule or the failure of the government to prove its case to the highest standards of proof.[213]

Equal protection law, however, does not require the enforcement of a procedural or substantive right. Government may refuse to perform its duties for a variety of discretionary and arbitrary reasons, with the express exception of race and gender discrimination.[214] In *DeShaney v. Winnebago County Department of Social Services*, for example, the Supreme Court rejected a claim that substantive due process should require government to protect children from violence, but made clear that the "State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."[215] For the same reasons, while the

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[210] *See* Muller, *supra* note 144, at 101–02 (arguing that the Supreme Court pretends that the racial and gender composition of juries has no effect on jury verdicts, and that to assume otherwise would violate the Constitution). *See generally* Tania Tetlow, *How* Batson *Spawned* Shaw, 49 LOY. L. REV. 133 (2003) (same).

[211] *See supra* notes 121–23. *McCleskey* also considered the defendant's Eighth Amendment right against cruel and unusual punishment, as well as the Equal Protection Clause. 481 U.S. at 297–99.

[212] I argue below in Part III.D that the Sixth Amendment should provide some base-level protection for the public generally, including victims. The Sixth Amendment right to an "impartial jury" belongs by its text to the defendant, however, and it would prove difficult for a particular victim to invoke directly. Yet, it does provide a basic procedural rubric designed to protect fundamental justice for everyone in the courtroom.

[213] *See* Givelber, *Lost Innocence*, *supra* note 74, at 1188–98 (discussing reasons for acquittals).

[214] *See* Natapoff, *supra* note 9, at 1748–49; *see also* Romer v. Evans, 517 U.S. 620, 631 (1996); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 n.3 (1989); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 571 (1991).

[215] 489 U.S. at 197 n.3 (1989); *see also Romer*, 517 U.S. at 631 (declaring a heightened constitutional review triggered by either the burdening of a fundamental right *or* the targeting

Court gives wide berth to the inherently discretionary decisions made by actors within the criminal justice system, those actors may not base their decisions on purposeful discrimination.[216] Indeed, there are originalist arguments for the principle that the Equal Protection Clause was intended to "protect" from the discriminatory underenforcement of the law. The specter of lynchings and rampant violence against freed slaves motivated the ratifiers of the Fourteenth Amendment.[217]

The Supreme Court's recent decision in *Town of Castle Rock v. Gonzales* presents an example of the difference between a due process and an equal protection claim.[218] *Castle Rock* demonstrated the terrible consequences that sometimes result from police underenforcement of domestic violence law, yet the Supreme Court held that even a mandatory arrest statute[219] did not create an entitlement to enforcement of a domestic violence protective order because, in part, of the enormous importance of police discretion.[220] *Castle Rock* all but foreclosed procedural due process rights of crime victims for police protection, just as *DeShaney* foreclosed substantive due process rights.[221]

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of a suspect class); Heyman, *supra* note 214, at 571 ("[T]he Framers understood protection to include not only the right to a civil remedy and to protection under the criminal law, but also the state's responsibility to prevent violence."); Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 223–30 (1999) (arguing that the Equal Protection Clause forbids discriminatory underenforcement of the law).

[216] *McCleskey*, 481 U.S. at 364 (Blackmun, J., dissenting) (stating that courts must guard against discretionary authority within the criminal justice system becoming discriminatory authority).

[217] *Id.* at 346–47 (Blackmun, J., dissenting) (explaining that the ratifiers of the Fourteenth Amendment acted out of concern for the equal protection of freed slaves from private violence); ROBERT KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876 (1985); Pokorak, *supra* note 43, at 20–22 (collecting a legislative history); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 129–37 (1991) (making textual and historical arguments that equal protection means guarantee of protection by criminal law against private violence).

[218] 545 U.S. 748 (2005). Although there are differences between discriminatory underenforcement by police and discriminatory acquittal, I argue in Part I that law enforcement's failures are often motivated by an eye towards what can result in convictions.

[219] Like many states, Colorado passed a "mandatory arrest" statute to overcome the famous reluctance of the police to act against gender-based violence. *Id.* at 780 (Stevens, J., dissenting). These statutes became a national trend in the 1990s. *See id.* (citing Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1662–63).

[220] *Id.* at 760.

[221] *Id.* at 753–54. Jessica Gonzales brought a procedural due process claim alleging the underenforcement of domestic violence law by the Castle Rock, Colorado police department. Despite a statute requiring enforcement of domestic violence protective orders, the police refused her repeated requests to enforce such an order after the kidnapping of her three children

Nevertheless, as *DeShaney* established, victims retain a right against underenforcement of the law motivated by race or gender discrimination.[222] If Jessica Gonzales could have proved that the Castle Rock Police Department refused to enforce protective orders because of gender discrimination, she could have brought an equal protection claim not foreclosed by the Supreme Court's due process rulings.[223] Several federal appellate courts have upheld the legal viability of equal protection claims for underenforcement of domestic violence laws as gender discrimination.[224] As a practical matter, proving discrimination is much more difficult than proving incompetence, but it remains a viable constitutional option.

Clearly, discriminatory acquittals would not create either substantive or procedural due process claims for victims. Victims have neither a property interest in avoiding wrongful acquittal nor an entitlement to a conviction. But while the Constitution does not require government to perform well, it does require the government not to discriminate. The constitutional claim that discriminatory acquittals violate the Equal Protection Clause is a very different argument than claiming that victims have a right to conviction of the guilty. Victims may lack the same rights as defendants to an impartial jury or to an accurate verdict, but they retain a right against discrimination.

D. Jury Nullification Cannot Be Based on Unconstitutional Discrimination

The most powerful potential objection to the unconstitutionality of discriminatory acquittal would posit that defendants have a countervailing constitutional right to an acquittal for any reason, no matter how silly or illegitimate. As one scholar declared,

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by her ex-husband. Later that night, Mr. Gonzales drove the dead bodies of the three girls to the police station. *Id.* at 754.

[222] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 n.3 (1989).

[223] *See generally* Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* DeShaney v. Winnebago County Department of Social Services, 75 CORNELL L. REV. 1393 (1990) (analyzing the equal protection and due process claims of battered women under § 1983 after the Supreme Court held that there was no general constitutional right to police protection in *DeShaney*).

[224] *See, e.g.*, Estate of Macias v. Ihde, 219 F.3d 1018, 1028–29 (9th Cir. 2000) (remanding a domestic violence case to consider equal protection claim); Watson v. City of Kansas City, 857 F.2d 690, 694 (10th Cir. 1988); Hynson v. City of Chester, 864 F.2d 1026, 1027 (3d Cir. 1987). In the 1970s, domestic violence victims brought lawsuits against the police departments of New York and Oakland, alleging that explicit police policies refusing to enforce domestic violence laws were motivated by gender discrimination. The police departments settled the cases. *See, e.g.*, Bruno v. Codd, 396 N.Y.S.2d 974 (N.Y. Sup. Ct. 1977); CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN & THE LAW 594 (2001). In *Thurman v. City of Torrington*, a federal court jury awarded $2.3 million for the discriminatory underenforcement of domestic violence laws in Torrington, Connecticut. 595 F. Supp. 1521 (D. Conn. 1984); Albert R. Roberts & Karel Kurst-Swanger, *Police Responses to Battered Women: Past, Present, and Future*, *in* HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES: POLICIES, PROGRAMS AND LEGAL REMEDIES 110–11 (Albert R. Roberts ed., 2002).

"the criminal jury's power to acquit is sacrosanct and cannot be disturbed."[225] Arguably, the Sixth Amendment right to a jury trial implies a right to jury nullification, to an acquittal based on the jury's refusal to follow the law. I argue, however, that any potential right of jury nullification cannot include a right for a jury to discriminate against victims based on race or gender. The Sixth Amendment guarantees an "impartial" jury, not a partial one.[226]

The Supreme Court gives wide berth to the discretion of all of the government actors within the criminal justice system,[227] and juries have a particular constitutional basis for their independence. The Supreme Court describes "jury lenity" as part "of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch."[228] The defendant's right to a jury trial serves to "prevent oppression by the [g]overnment" and to protect against the "overzealous prosecutor and against the compliant, biased, or eccentric judge."[229] Jury lenity thus implies the right to disobey the law in the interest of mercy and a broader sense of justice.[230]

Most courts refuse to define jury lenity so broadly as to include outright jury nullification, the refusal of a jury to enforce the law.[231] The D.C. Circuit has argued that such verdicts are a "lawless" abuse of power and even unconstitutional, "a denial of due process."[232] The fact that a jury can nullify with impunity because of double

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[225] Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 MICH. J.L. REFORM 93, 116 (2006).

[226] *See* U.S. CONST. amend. VI.

[227] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (referencing deference that is given in accordance with prosecutorial discretion).

[228] United States v. Powell, 469 U.S. 57, 65 (1984).

[229] Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968).

[230] Kemmitt, *supra* note 225, at 117.

[231] The Supreme Court's decision in *Sparf v. United States*, 156 U.S. 51 (1895), is often cited as rejecting jury nullification, but it held only that it was not reversible error to refuse to offer a jury instruction informing the jury of a right or power to nullify. In *United States v. Polizzi*, 549 F. Supp. 2d 308, 405–46, 450–54 (E.D.N.Y. 2008), Judge Weinstein authored an extraordinarily thorough description of the controversy over jury nullification, complete with a four page appendix of citations, tracing its history from colonial times to the current Supreme Court case law overturning mandatory sentencing. *See also* B. Michael Dann, *"Must Find the Defendant Guilty" Jury Instructions Violate the Sixth Amendment*, 91 JUDICATURE 12 (2007) ("[A] survey of the states' and federal circuits' corresponding jury instruction language reveals that 24, or almost 40 percent, of state courts and federal circuits use the command 'must' or its equivalent ('shall' or 'duty') to direct juries to verdicts of guilty when all of the elements of the alleged crime have been proven. Another 7, or 13 percent, use the milder admonition 'should' to steer the jury's decision to guilt."). Some judges have gone as far as to tell jurors they have a legal obligation to apply the law, that they could face sanctions upon nullification, and that they had a duty to notify the court if any juror expressed intent to disregard the law. *Id.* at 13.

[232] United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983).

jeopardy "does not create a right out of the power to misapply the law."[233] Other circuits also have held that defendants have no right to a jury instruction on the power to nullify a verdict.[234] Scholars urging a right to jury nullification usually contend that it constitutes a moral, rather than a constitutional, prerogative.[235]

Regardless of the controversy over jury nullification generally,[236] no court or scholar argues that juries should have the power to decide based upon discrimination against the victims of crimes. The closest such argument occurred in dicta in *McCleskey v. Kemp*, when the Court referred to the ability of juries to acquit for any number of illegitimate reasons without appellate review: "Of course, 'the power to be lenient [also] is the power to discriminate.'"[237] The Court treated this as a potential bonus, the dangling carrot that jury discretion offers to defendants. The Court's cynical statement of fact about the "power" to discriminate, however, did not serve as a normative statement of a defendant's right to the possibility of discriminatory acquittal. Instead, the statement seems indicative of the odd procedural posture of the case. McCleskey complained that his jury sentenced him to death because he killed a white victim instead of a black one.[238] The Court's statement implied that McCleskey should be careful what he asked for; the correct remedy would be stronger sentences for the killers of black victims rather than leniency for the killers of white victims.

In contrast, the Second Circuit has condemned the practice of jury nullification precisely because it risks discrimination against victims.[239] In *United States v.*

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[233] *Id.*

[234] United States v. Edwards, 101 F.3d 17, 19–20 (2d Cir. 1996) (holding that defendant had no right to his proposed jury nullification charge); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) (holding that a judge may "block defense attorneys' attempts to serenade a jury with the siren song of nullification"); United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (finding no error in trial judge's negative response to jury question on nullification).

[235] *E.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 61 (1994) ("[F]or anyone who takes seriously the jury as a bridge between community values and the law, jury nullification is a strong plank. In essence, nullification empowers jurors to appeal to fundamental principles of justice over and above the written law."); Robert P. Lawry, *The Moral Obligation of the Juror to the Law*, 112 PENN ST. L. REV. 137, 158–59 (2007).

[236] *See generally* David Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of its Nullification Right*, 33 AM. CRIM. L. REV. 89, 105 (1995) (urging the Supreme Court to reconsider *Sparf*). *But see* Pamela Baschab, *Jury Nullification: the Anti-Atticus*, 65 ALA. LAW. 110, 114 (2004) ("Jury nullification, no matter how you slice it, is at bottom a desecration of the basic premise that we are all equal under the law."); Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563 (1997) (criticizing legislative proposals to authorize jury nullification).

[237] 481 U.S. 279, 312 (quoting KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 170 (1973)).

[238] *Id.* at 291–92.

[239] *See* United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997).

Thomas, a seminal case on jury deliberations, the court distinguished between jury nullification used to protest government authority, such as the historic refusal to enforce the Fugitive Slave Act, and jury nullification used for the purpose of discrimination, citing the acquittals of the killers of Medgar Evers and Emmett Till as "shameful examples of how nullification has been used to sanction murder and lynching."[240]

Any alleged right to jury lenity cannot extend so far that it invades the province of delineated constitutional guarantees; it cannot trump the Equal Protection Clause. While the right to a jury trial might imply a certain amount of personalized justice and mercy for the killers of Emmett Till, it did not guarantee them the possibility of a jury nullification based on racism against Till. The jury's discriminatory acquittal violated Till's Equal Protection Clause rights, and it also violated the Supreme Court's oft-expressed commitment to remove racial discrimination of any kind from criminal trials.[241]

Further, the Constitution speaks directly to the issue of whether defendants have a right to a discriminatory jury nullification when it guarantees defendants only a right to an "impartial jury," not to a partial one.[242] Impartiality represents a fixed point, bending neither towards the defendant nor away from him.

Textually, the Sixth Amendment right applies only to the defendant, and, it could be argued, does not guarantee impartiality for the victim. Yet, the Supreme Court has described the right more broadly as protecting the public as a whole: "Although the constitutional guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored."[243] The Sixth Amendment guarantees not only impartiality

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[240] *Id.* at 616 ("Moreover, although the early history of our country includes the occasional *Zenger* trial or acquittals in fugitive slave cases, more recent history presents numerous and notorious examples of jurors nullifying—cases that reveal the destructive potential of a practice Professor Randall Kennedy of the Harvard Law School has rightly termed a 'sabotage of justice.'" (quoting Randall Kennedy, *The Angry Juror*, WALL ST. J., Sept. 30, 1994, at A12)). A California state court has cited *Thomas* with approval for this point. People v. Williams, 25 Cal. 4th 441, 459 (Cal. 2001) ("[I]t is important not to encourage or glorify the jury's power to disregard the law. While that power has, on some occasions, achieved just results, it also has led to verdicts based upon bigotry and racism. A jury that disregards the law and, instead, reaches a verdict based upon the personal views and beliefs of the jurors violates one of our nation's most basic precepts: that we are 'a government of laws and not men.'" (internal citations omitted)). Ultimately, however, the court in *Thomas* despaired of a trial judge's pragmatic ability to prove the difference between a juror who refuses to deliberate for legitimate versus illegitimate reasons. *Thomas*, 116 F.3d at 616. *But see* United States v. Polizzi, 549 F. Supp. 2d 308, 433–36 (E.D.N.Y. 2008) (criticizing *Thomas* as unduly restricting Sixth Amendment rights to jury lenity).

[241] *See* Georgia v. McCollum, 505 U.S. 42, 56 (1992) (applying the Equal Protection Clause to the exercise of peremptory challenges by defense lawyers because it threatens the public's perception of the validity and neutrality of the criminal justice system).

[242] *See* U.S. CONST. amend. VI.

[243] Holland v. Illinois, 493 U.S. 474, 483 (1990).

for the defendant, "but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."[244] The Sixth Amendment does not simply protect the rights of the accused, it strives for accuracy of verdicts.[245]

No scholars supportive of the right of jury nullification have defended discriminatory acquittal,[246] but at least one has argued for the permissibility of jury nullification based on racial solidarity with the defendant. Paul Butler argues that juries have a right to use nullification to correct the racial overenforcement of the law.[247] As a prosecutor in Washington, D.C., he watched majority-minority juries acquit black defendants in order to prevent "send[ing] yet another black man to jail," and he argues that those juries acted within their moral, if not legal, authority.[248]

Butler does not attempt to invoke a constitutional right to jury nullification in his analysis. More to the point, he also carefully excludes trials of crimes with victims, recognizing that crime victims have countervailing rights and interests.[249] There is a difference between racial or gender solidarity with the defendant and discriminatory acquittals.

For example, when representing O.J. Simpson, Johnny Cochran arguably appealed for jury nullification based on racial solidarity and outrage at the racism of the Los Angeles Police Department.[250] It would have been different had Cochran appealed to jurors to disregard the murder of Nicole Simpson because she was friendly with another man and thus deserved her fate. The first example arguably falls within the traditional definition of jury lenity as a bulwark against overweening government authority and thus falls within the existing controversy over the permissibility of

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[244] Swain v. Alabama, 380 U.S. 202, 220 (1965) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

[245] For example, in *Ballew v. Georgia*, 435 U.S. 223 (1978), when deciding the constitutionally required size of a jury, the Court cited the Sixth Amendment as balancing the odds against a jury's conviction of the innocent versus the risk that a jury would acquit the guilty. Thus "an optimal jury size can be selected as a function of the interaction between the two risks." *Id.* at 234.

[246] One scholar lists the possibility of discrimination against victims by race as a "potential harm" of jury nullification. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 935 (1999) (describing the difficulties of distinguishing between legitimate acquittal and nullification).

[247] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705–06 (1995). Butler explicitly excludes violent crimes with victims from his analysis, recognizing that acquitting such defendants would create too great a cost. *See id.* at 719–20. *But cf.* Long X. Do, *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 UCLA L. REV. 1843 (2000) (reviewing criticism of Butler for undermining race-free justice).

[248] Butler, *supra* note 247, at 679.

[249] *Id.* at 719.

[250] Walter L. Hixson, *Black and White: The O.J. Simpson Case*, *in* RACE ON TRIAL: LAW AND JUSTICE IN AMERICAN HISTORY 228–29 (Annette Gordon-Reed ed., 2002).

outright nullification. The second example would describe discriminatory acquittal, the unconstitutional discrimination against the victim because of her failure to meet gender roles. A jury has no more right to acquit O.J. Simpson in order to permit gender-based violence than it would have a right to convict him because of his race.

The constitutional right of jury lenity is rooted in an expanded definition of justice, the recognition that justice in the particular case may require mercy.[251] Any arguable right to jury nullification, therefore, does not include a right to discriminatory acquittal. The Constitution defines race and gender discrimination as manifestly unjust, and requires an "impartial jury." Discriminatory acquittals effect, rather than check, government oppression.

E. Impossibility of Direct Remedy

I do not propose the type of fundamental reordering of our system necessary to provide a direct remedy for discriminatory acquittal, in large part because such remedies accomplish so little to remedy discriminatory convictions. Despite the empirical evidence that discriminatory acquittal is a serious systemic problem, it would seem an impossible task for a judge to find evidence of jury discrimination in an individual case, for all of the reasons the Supreme Court named in *McCleskey*.[252] Judges would have to sift out acquittals based upon discrimination from acquittals based on a host of legitimate grounds, and would have far less room for error. The Second Circuit in *United States v. Thomas* despaired of the ability to tell the difference and still protect the defendant's rights to a legitimate acquittal, particularly because the evidence relevant to such hard distinctions lies hidden beneath the veil of jury secrecy.[253] While there are legitimate arguments for creating an exception to double

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[251] *E.g.*, THE FEDERALIST NO. 74 (Alexander Hamilton) ("The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."); *see also* Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1360 (2008) ("Both nullification and clemency allow individualization, which becomes increasingly important as judges lose authority to tailor sentences."); George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 FED. SENT'G REP. 212, 212 (noting, with respect to presidential grants, "the importance of having a safety valve in any system of mandatory punishments").

[252] 481 U.S. 279, 314–19 (1987).

[253] 116 F.3d 606, 616 (1997). *Thomas* addressed the rare situation in which potential discrimination becomes known during jury deliberations, before an acquittal protected by double jeopardy. The Second Circuit discussed the inherent difficulties of intervening during jury deliberations and distinguishing between a juror who wants to acquit the defendant for legitimate reasons versus illegitimate. Because a defendant deserves every benefit of the doubt, the Second Circuit in *Thomas* created a "beyond a reasonable doubt" standard before removing a juror for nondeliberation. *See also* Marder, *supra* note 246, at 885–87 (describing the difficulties of distinguishing between legitimate acquittal and nullification).

jeopardy for discriminatory acquittals,[254] for now, the pragmatic difficulties with such a remedy make the instrumental approaches suggested below more important.

IV. THE IMPORTANCE OF RECOGNIZING DISCRIMINATORY ACQUITTAL AND INSTRUMENTAL APPROACHES

Constitutional violations frequently lack viable direct remedies, yet we acknowledge them for other reasons. Understanding the ways our government falls short of constitutional guarantees informs our legal norms.[255] It alters the way we perceive the limits of our system, and it creates an impetus to seek other methods to avoid the problem at issue. Acknowledging the problem of discriminatory convictions, for example, has not magically created direct solutions to the problem of jury discrimination against defendants, but it has created an awareness of the issue that underlies other reforms: a new hesitation about the viability of the death penalty in the face of jury discrimination[256] and an understanding that criminal procedure must do what it can to guard against jury discrimination.[257]

Similarly, acknowledging discriminatory acquittals would result in some important paradigm shifts. First, it would prevent us from using juries as excuses for

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[254] There is an exception to double jeopardy after the bribery of a jury which could arguably be extended to discriminatory acquittals. If a defendant was never really in jeopardy because he bribed the jury, he has forfeited his rights against double jeopardy. *See* People v. Aleman, 667 N.E.2d 615 (1996); *cf.* David S. Rudstein, *Double Jeopardy and the Fraudulently-Obtained Acquittal*, 60 MO. L. REV. 607 (1995) (arguing that double jeopardy should forbid retrials even for acquittals obtained through fraud). One might argue that the killers of Emmett Till were never really in jeopardy from a racist jury determined to acquit, and that an exception to the double jeopardy protection should apply. Unlike bribery, however, the defendant does not necessarily induce a jury to discriminate against the victim. A defendant cannot forfeit his double jeopardy rights unless he causes the error. *See, e.g.*, *id.* at 641. After the Rodney King acquittal, Akhil Amar made the analogy to bribery and proposed such an exception. Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995). Amar recognized the forfeiture issue and would limit a due process exception to trials in which the defendant commits *Batson* error in choosing a jury. Amar did not ground this proposal in any notion of victim's equal protection rights, however, but rather in the potential juror's rights and in general Sixth Amendment interests in an impartial jury. Further, this argument would be difficult to make because *Batson* itself did not presume that the makeup of the jury necessarily led to jury discrimination. In fact the *Batson* line of cases declared such assumptions to be unconstitutional. Muller, *supra* note 144, at 101.

[255] *See generally* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing the interplay between law and legal norms).

[256] *See* TRISHA KENDALL, EQUAL JUSTICE USA/QUIXOTE CENTER, LEGISLATION PROGRESS (BY STATE) (2000), http://www.ejusa.org/archives/updates/legis2000.html (providing a summary of death penalty activity in each state at that time, including moratoria established by several governors).

[257] *See McCleskey*, 481 U.S. at 309.

otherwise unconstitutional behavior. No longer could police and prosecutors point to the likelihood of a discriminatory acquittal as a legitimizing scapegoat for the refusal to protect a disfavored victim. Second, it would make available a new constitutional vocabulary for judges and prosecutors to protect the rights of victims against jury discrimination. The procedural rights we grant defendants to try to prevent discriminatory convictions should also apply to protect victims.

A. Using Discriminatory Acquittal as an Excuse for Discriminatory Underenforcement

Discriminatory acquittals are but a subset of the greater problem of discriminatory underenforcement of the law, but they are at its core; they are its excuse. As described in Part I, police and prosecutorial decisions are made with an eye towards anticipated jury bias.[258] While law enforcement sometimes engages in its own unconstitutional bias against certain victims,[259] such bias is at least recognized as impermissible.[260] What is treated as legitimate, however, is the use of probable discrimination of juries as an excuse. Police and prosecutors are unlikely to tell a rape victim that they themselves do not care about gender-based violence. What they would, and do, say is that the jury is unlikely to convict the rapist because the victim did something that violated acceptable gender norms.[261] Empirical studies make clear that arrest and prosecutive decisions are justified by the likelihood of discriminatory acquittal.[262] It makes sense

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[258] *See supra* text accompanying notes 77–78.

[259] *See* Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 446 (1979) (describing study showing prosecutive bias based on race of the victim). *See generally* LAFREE, *supra* note 83.

[260] *See generally* Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371 (2000) (describing constitutional ban on exercising prosecutorial discretion based on the race of the victim).

[261] *See* Estrich, *supra* note 95, at 1087–89 (describing the experience of being a "good" rape victim because she did not know her attacker and because he carried a weapon). I recently experienced this while assisting a student seeking prosecution of her rapist. The police detective informed me that the student's delay in reporting the rape, despite her reasonable explanation for the delay, made the case unwinnable, so the detective refused to seek an arrest warrant. The detective complained to me generally about date rape victims and how angry she got at them for not reacting with sufficiently immediate signs of fear and rage, thus making it too difficult to get a conviction from a jury. She found their cases "annoying." Once the detective was finally convinced, the prosecutor refused the case for the same reasons. Neither seemed to doubt that the student was raped, but both seemed quite angry that she behaved in a way inconsistent with what juries expect of female rape victims. They were unwilling to try to reeducate a jury. The fact that a jury would blame or disbelieve the rape victim (in ways described above in Part I as gendered) was treated as an entirely sufficient explanation for their refusals to arrest and prosecute.

[262] *See* Pokorak, *supra* note 43, at 39–40 (discussing prosecutorial race-of-victim charging disparities in rape cases in anticipation of jury discrimination).

that law enforcement would hesitate to invest resources and reputation in cases in which juries are unlikely to convict.[263]

Yet in cases in which the government refuses to enforce the law because of the possibility of jury discrimination, government anticipates, and thus magnifies, a constitutional violation. Recognizing discriminatory acquittal as unconstitutional would remove jury discrimination as a legitimizing basis for anticipatory discrimination against certain crime victims. Police and prosecutors would receive the message that the Constitution requires them to enforce the law despite the possibility of jury discrimination against victims. As an example of this paradigm shift, during the mid-twentieth century, the possibility of jury discrimination stopped serving as an excuse for refusing to arrest or prosecute the killers of civil rights leaders. Instead, law enforcement understood that it had an obligation to work harder for convictions, not to anticipate the discrimination and drop the case.[264] Acknowledging the modern version of discriminatory acquittal should create a similar paradigm shift. Police and prosecutors should understand that they may not refuse to charge a crime because of anticipated jury discrimination, any more than they could refuse to bring charges because of their own discrimination against the victim.

Moreover, prosecutors should have an affirmative obligation to work harder to counter jury discrimination during trials.[265] In order to counter a racial lack of empathy, prosecutors should spend more effort and resources convincing juries of the value and humanity of minority victims. Prosecutors who shy away from prosecuting complicated gender-based violence cases should try to reeducate juries with expert witness testimony on "normal" behavior by rape or domestic violence victims.[266]

Regardless of whether these techniques succeed, at a minimum, bringing cases to trial reveals the true extent of discriminatory acquittal instead of anticipating and

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[263] *See* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 543–44 (1996); Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289–92 (2001).

[264] *See* KENNEDY, *supra* note 3, at 65–68 (describing efforts, particularly by the Justice Department, to prosecute racial violence not charged by local officials); *supra* text accompanying notes 32–39.

[265] By this I do not mean an enforceable obligation mandating skillful trial techniques, but rather an ethical obligation informed by constitutional norms. *See* Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 52 (1998) (describing police and prosecutors' ethical and constitutional obligations to guard against discrimination against victims in their arrest and charging decisions).

[266] *See generally* Bonnie J. Buchele & James P. Buchele, *Legal and Psychological Issues in the Use of Expert Testimony on Rape Trauma Syndrome*, 25 WASHBURN L.J. 26 (1985); Patricia Frazier & Eugene Borgida, *Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court*, 12 LAW & HUM. BEHAV. 101 (1988). I do not pretend that such steps are obvious and easy, or that they will necessarily work. But the decision not even to attempt to undo the potential discrimination of a jury transforms the possibility of unequal protection of the law into an absolute certainty.

thus masking it.[267] It was not until law enforcement finally began arresting and prosecuting lynchers and the killers of civil rights leaders with any frequency that the extent of discrimination against minority victims became clear to the public.[268] Even though such prosecutions usually resulted in predictable acquittals, they were a necessary step towards justice. They publicly revealed the fact that African-Americans still did not share in equal protection of criminal laws, and the verdicts served as an oft-cited part of the roiling national debate on race.[269]

Acknowledging discriminatory acquittal, and removing it as an excuse for discriminatory underenforcement of the law, should bring new attention to the unequal protection of the law. In our constitutional and policy conversations about civil rights and equality, we focus on the residual effects of segregation, overt governmental discrimination, and the injustice of discriminatory convictions, but we miss the enormous and ongoing problem of discriminatory underenforcement of criminal laws.[270] We usually fail to connect the failure to convict those who rape women, who beat their wives, or who do violence to black victims with the disproportionate rates of violence against those groups.[271] We fail to acknowledge the ways that victims lose freedom not just because of overt government discrimination, but because they know that crimes against them are far less likely to be punished.

International law offers a concrete example of the paradigm shift created by acknowledging discriminatory underenforcement. In contrast to American constitutional law, international human rights law explicitly decrees that the discriminatory underenforcement of the law is an impermissible abuse of government power.[272] It makes clear that governments may not permit the murder, rape, or torture of distinct

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[267] Others have urged this kind of disclosure as to prosecutors and police. *See, e.g.*, Davis, *supra* note 265, at 54–56 (urging the keeping of statistics to reveal racial bias in prosecutive decisions).

[268] *See* CHADBOURN, *supra* note 46 (discussing failure to arrest, prosecute, and then convict lynchers); *supra* text accompanying notes 32–39.

[269] *See generally* ROBERTS & KLIBANOFF, *supra* note 47.

[270] *See* Kennedy, *Comment*, *supra* note 21, at 1256 (discussing public failure to acknowledge the costs of unequal protection of the law); Natapoff, *supra* note 9, at 1716–17 (2006) (noting that underenforcement of the law, as a general problem, is rarely addressed by scholars).

[271] There is far more recognition of this issue in the context of gender than of race. The congressional and scholarly debate over the Violence Against Women Act, for example, and the conception of gender-based violence as a civil right helped to raise the profile of underenforcement of the law as to gender crimes. Scholars certainly focus on the underenforcement of gender-based violence generally. *See* Estrich, *supra* note 95, at 1161. There is some public discussion of unequal protection of the law in the increasingly rare circumstance of the acquittal of an alleged hate crime or racially motivated killing. *See, e.g.*, Carter, *supra* note 9, at 420–29 (analyzing the acquittal of Bernard Goetz for the subway shooting of young black men, purportedly in self-defense). Yet, underenforcement of the law remains a rare topic of discussion.

[272] International Covenant on Economic, Social and Cultural Rights art. 5, Dec. 16, 1966, 3 U.N.T.S. 993, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

minorities or women either to punish them or because of a lack of concern for them.[273] A series of Conventions and U.N. Declarations provide examples from all over the world of discriminatory government complicity in "private" violence against particular groups: hate crimes, the private violence underlying apartheid, segregation, dowry murders, and honor killings.[274] In the context of gender, the U.N. has declared lax enforcement of domestic violence laws to be a violation of international human rights because such underenforcement has the cause and effect of subjugating women.[275] In the context of race, the Convention on the Elimination of All Forms of Racial Discrimination guarantees "the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution."[276] Government complicity in private violence violates human rights.

International law thus fleshes out the stated principle of American constitutional law that equality rights prohibit the selective enforcement of criminal law. It establishes

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[273] *Id.*; International Convention on the Elimination of All Forms of Discrimination Against Women art. 2(e), Sept. 3, 1981, 34 U.N.T.S. 193, *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm [hereinafter Convention on Elimination of Discrimination]; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(b), Jan. 4, 1969, 660 U.N.T.S. 195, *available at* http://www1.umn.edu/humanrts/instree/d1cerd.htm [hereinafter Convention on Racial Discrimination]; United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation 19, Violence Against Women, U.N. Doc. A/47/38 (11th Session, 1992), *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm [hereinafter General Recommendation on Discrimination Against Women]. Arguably, government acquiescence in violence against women also violates international customary law against torture. *See* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 295 (1994).

[274] *See* Convention on Racial Discrimination, *supra* note 273; Convention on Elimination of Discrimination, *supra* note 273; Radhika Coomaraswamy, *Combating Domestic Violence: Obligations of the State*, 6 INNOCENTI DIG. 10, 10 (2000).

[275] The Committee on the Elimination of Discrimination Against Women (CEDAW) not only requires states to refrain from committing violations themselves, but also makes them responsible for otherwise "private" acts if they fail to fulfill their duty to prevent and punish such acts. *See* General Recommendation on Discrimination Against Women, *supra* note 273. (The United States stands almost alone in not ratifying CEDAW.) The Declaration on the Elimination of Violence Against Women decries the "long-standing failure to protect and promote [women's] rights and freedoms in the case of violence against women," and makes clear that "violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms." United Nations Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993), *available at* http://www.un.org/documents/ga/res/48/a48r104.htm; Coomaraswamy, *supra* note 274, at 10. Domestic violence also falls within prohibitions on torture. *See* Michele E. Beasley & Dorothy Q. Thomas, *Domestic Violence as a Human Rights Issue*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 323 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

[276] Convention on Racial Discrimination, *supra* note 273, at art. 5(b).

discriminatory underenforcement as violating basic human rights. It acknowledges that minorities and women all over the world often suffer more at the hands of legitimized private violence than from direct government abuse. In the United States, we lack such language because of our own constitutional focus on state action rather than purposeful omission and because our criminal justice system excludes victims in its bilateral balancing between the defendant and the state.[277]

B. Remembering the Victim in Equal Protection Regulation of Criminal Trials

Acknowledging discriminatory acquittals would also change the norms of criminal procedure. In our current adversarial, bilateral understanding of criminal justice, we focus entirely on the state and the defendant. We ignore victims almost entirely and treat juries as unknowable black boxes, seemingly beyond the authority of the Constitution. A doctrine of discriminatory acquittal situates the rights and obligations of these invisible others. It requires acknowledgment of the state action of juries and of the equal protection rights of victims.[278]

Currently, victims possess only limited statutory, and in some states constitutional, procedural rights to participate in the outer edges of the criminal process.[279] Victims may quietly observe criminal trials, but they generally have rights to speak only in bond hearings or sentencing.[280] While the more inquisitorial criminal justice systems in civil law countries often allow victims direct participation in criminal trials (from

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[277] I argue that jury verdicts, whether convictions or acquittals, constitute state action rather than omission, and regardless, are governed by the Equal Protection Clause. *See supra* Parts III.B and III.C.

[278] *See supra* Parts III.A and III.B.

[279] *See* 18 U.S.C. § 3771(a)(2)–(8) (guaranteeing victims rights to notice and presence at all proceedings, to be heard at sentencing, to confer with the prosecutor, to restitution as provided for in law, rights against unreasonable delay, and "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy"). Thirty-three states now have victims' rights amendments, and every state and the federal government have victims' rights statutes with varying provisions. *See* Hon. Jon Kyl et. al., *On the Wings of Their Angels*, 9 LEWIS & CLARK L. REV. 581, 588 n.30 (2005) (listing state victims' rights amendments and statutes). Congress has even considered a victims' rights amendment to the Constitution similar to the federal statute. The Victims' Bill of Rights Constitutional Amendment was originally introduced as S.J. Res. 52 and H.J. Res. 174 on April 22, 1996 by Senators Jon Kyl (R-AZ) and Dianne Feinstein (D-CA). *See* Chief Justice Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 5 n.11 (1997). After the amendment failed in the 104th Congress, it was reintroduced in the 105th as S.J. 6, but failed again. *See* Victoria Schwartz, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525, 528–29 (2005). None of these, however, offer victims direct procedural participation in criminal trials or substantive constitutional rights to equal protection.

[280] *See* Kyl, *supra* note 279, 581–91 (describing limits of victim's rights protections).

questioning witnesses to making closing arguments),[281] such direct victim participation would not easily fit within our adversarial criminal justice system.[282]

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[281] Civilian systems often allow victims and their attorneys to stand beside prosecutors and defense lawyers, to question witnesses and to give closing arguments. *See* Christine Van Den Wyngaert, *Belgium*, *in* CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 17–18 (Christine Van Den Wyngaert ed., 1993); R.L. Jones, *Victims of Crime in France*, 158 JUST. PEACE & LOC. GOV'T L., 795, 795–96 (1994); Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French* Cour d'Assises, 2001 U. ILL. L. REV. 791, 819–22; William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 54–55 (1996) (explaining that Germany allows victim participation in cases very personal to victims or their families); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 14 (1992) (stating that in Italy, injured persons are entitled to participate as parties to criminal case from pretrial to appeal). Interestingly, a few American states still allow victims to retain counsel to represent their interests alongside the public prosecutor for minor crimes. *See* Cronan *ex rel.* State v. Cronan, 774 A.2d 866 (R.I. 2001) (upholding assault victim's right to initiate a private complaint and prosecute defendant for misdemeanor assault); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 529 (1994).

[282] We might consider allowing victims to participate directly in criminal trials, not just on the periphery, in order to prevent discriminatory acquittals. Victims and their counsel might prove more effective at directly rebutting the discrimination that leads to jury nullification. The direct presence of victims in the proceedings could give voice to the voiceless, and remind juries to contemplate the rights of victims to equal protection of the law. *See* William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System"*, 1999 UTAH L. REV. 349, 355 (arguing that victims of gender-based violence might be more effective at directly rebutting sex discrimination). In our adversarial notion of criminal justice, however, it is very difficult for us to imagine expanding victims' rights beyond the usual unenforced, tepid statutory requirements of notice and allocution. In contrast, civil systems are inquisitorial, more focused on seeking out the truth than on balancing adversarial rights to participate in the system. Pizzi & Marafioti, *supra* note 281, at 7. Including victims directly in our own process would require fundamental transformation of our adversarial criminal justice system, a system embedded in our Constitution and constitutional jurisprudence. We would have difficulty situating a third party in the delicate balance between government and criminal defendant. *See* Rachel King, *Why a Victims' Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 370–98 (2000) (describing practical and ethical difficulties of incorporating direct victim participation into our adversarial system); Walker A. Matthews, III, Note, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998) (same). We exclude individual victims from the process in part to prevent a notion of retribution by any particular victim. *See* Jones v. Richards, 776 F.2d 1244, 1247 (4th Cir. 1985) ("[T]he use of private prosecutors who are also representing plaintiffs in civil actions against the criminal defendant should be discouraged."); Woods v. Linahan, 648 F.2d 973, 977 (5th Cir. 1981) ("[W]e note our concern about the practice of using a private attorney . . . ."); New Jersey v. Imperiale, 773 F. Supp. 747 (D.N.J. 1991) (finding a conflict of interest for private citizen pursuant to state rule to initiate and prosecute assault charges).

It is not necessary to include victims directly in criminal trials, however, in order to include their interests within criminal procedure. We should vest responsibility for the protection of the equal protection rights of victims with the government, to define a prosecutor's ethical role to do justice broadly enough to encompass the equal protection rights of victims against discriminatory acquittal.[283] Prosecutors do not "represent" individual victims as if they were clients; nor should they.[284] Yet the protection of basic tenets of justice should require prosecutors to guard against jury discrimination against minorities and women, and to represent the equal protection rights of victims far more collectively.

This would create a fundamental norm change in current criminal procedure. At the moment, neither the prosecutor nor the judge has any available constitutional language to describe or protect the equal protection rights of victims. Instead, prosecutors invoke, and judges can enforce, a general sense of fairness, the rules of relevance, and the reputation of the criminal justice system.[285] These doctrines are highly discretionary and lack the constitutional and persuasive impetus of an overt attempt to provide equal protection rights to victims.

As an example of the difference, in *Georgia v. McCollum*, the Court missed a perfect opportunity to extend the equal protection rights of victims to race-neutral justice.[286] *McCollum* involved the prosecution of an alleged hate crime by white

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[283] *See* Davis, *supra* note 265, at 50–53 (arguing that prosecutors have an ethical obligation to provide equal protection of the law to victims by correcting the discrimination of the police and by refraining from discriminating themselves).

[284] *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7–13 (2004) (Prosecutors must "seek justice."); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2007) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.2 cmt. at 53 (1993) ("[T]he prosecutor's client is not the victim but the people who live in the prosecutor's jurisdiction."); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) ("[A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."); State *ex rel.* Romley v. Superior Court, 891 P.2d 246, 250 (Ariz. Ct. App. 1995) ("[A] prosecutor does not 'represent' the victim in a criminal trial; therefore, the victim is not a 'client' of the prosecutor."); Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537 (1986) ("The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole.").

[285] *See* Georgia v. McCollum, 505 U.S. 42, 56 (1992) (holding that a state has a right to protect "the fairness and integrity of its own judicial process").

[286] *See id.*

defendants against black victims.[287] During jury selection, McCollum's lawyer argued that he had an absolute right to use peremptory challenges to strike every black person off of the jury, because the constitutional prohibition announced in *Batson v. Kentucky* applied only to the state.[288] The Supreme Court disagreed, applying *Batson* for the first time to the defense. Instead of addressing the rights of the African-American victims of the hate crime, however, the Court rested on far more attenuated interests. The Court found potential injury to jurors who were stereotyped, and injury to the reputation for fairness in the process.[289]

The Court did not acknowledge the rights of the African-American victims to a fair trial. Ironically, however, it did express concern about the possibility of riots after an acquittal by an all-white jury.[290] The Court cited such riots in Miami and opined that public confidence in race-neutral trials is "essential for preserving community peace in trials involving race-related crimes."[291] Thus the Court worried more about public outcry than about the rights of victims to race-neutral justice, and more about the perception of justice than its substance.

At least in *McCollum*, the Supreme Court provided equal protection enforcement rights to prosecutors, albeit for the wrong reasons.[292] For the most part, however, the procedural protections that we offer defendants to protect against discriminatory convictions simply do not apply to prosecutors.[293] As a practical matter, trial judges sometimes voluntarily apply the defendant's constitutional procedural protections to the government as well in the interest of general fairness, but they are not required to do so.[294] Until we acknowledge the issue of discriminatory acquittal, we lack any constitutional language to give impetus to such protections.

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[287] *Id.* at 44.

[288] *Id.* at 44–45.

[289] *Id.* at 55–56. Neither side made this argument to the Court. The Court defined the injury to jurors narrowly, as injury stemming from the act of being stereotyped, not because of a more collective right of racial minorities to representative justice in the criminal justice system.

[290] *Id.* at 49.

[291] *Id.*

[292] Why does it matter that the Court reached the right result in that case for the wrong reasons? Because the *McCollum* Court weakened its ruling by ignoring the most important interests at stake, those of victims. The dissenters lambasted the majority for trumping the rights of criminal defendants with the seemingly less important rights of the public to confidence in the criminal justice system and of jurors against unstated race consciousness. *Id.* at 68–69 (O'Connor, J., dissenting). Accordingly, a trial judge enforcing the highly subjective *Batson* inquiry against a defense lawyer would lack a description of the constitutional urgency of such protections.

[293] Appellate courts lack the opportunity to announce such procedural protections because of the double jeopardy ban on prosecutive appeals. Interlocutory appeals like *McCollum* remain rare.

[294] There are times when a defense lawyer would have no interest in invoking such rights and would strenuously object to their application to protect the government, as in *McCollum*.

So, for example, the district attorneys prosecuting the Los Angeles police officers charged with beating Rodney King could not have cited the racial justice implications of the trial for Rodney King.[295] Instead, they could only assert general notions of fairness and the reputation of the criminal justice system. And, to use the Court's reasoning in *McCollum*, they could have correctly predicted riots in Los Angeles by those protesting the lack of equal protection for African-Americans by the criminal justice system.

The most important of the procedural protections against jury discrimination should be expanded to prevent discriminatory acquittals. First, prosecutors should share with defendants the right to voir dire potential jurors about their prejudices, to root out potential bias before a jury is selected. In *Ristaino v. Ross*, the Supreme Court allowed defendants to ask potential jurors about their prejudices during voir dire.[296] While the Court unduly limited that right to cases in which there exists a substantial likelihood that race will be injected into the trial,[297] it remains an important procedural protection against jury discrimination.[298] When racism will obviously be an issue, defendants have a constitutional right to attempt to identify prejudice before selecting a jury.

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[295] *See, e.g.*, Amar & Marcus, *supra* note 254, at 3 (proposing an exception to double jeopardy for an acquittal occurring after defense counsel racially skewed the jury, but without reference to the victim's rights).

[296] 424 U.S. 589, 596 (1976). The Court also held in an earlier case that "essential demands of fairness" may require a judge to ask jurors whether they entertain any racial prejudice. Aldridge v. United States, 283 U.S. 308, 310 (1931). Before a jury is selected, the trial judge conducts voir dire, questioning potential jurors about their qualifications and backgrounds. Many judges question jurors themselves, though frequently they allow prosecutors and defense lawyers to do so directly.

[297] *Ristaino*, 424 U.S. at 596. Defendants enjoy this right only in trials in which the Court deems that race will clearly be an issue, ignoring empirical evidence that race may more often than not be an issue. In *Turner v. Murray*, 476 U.S. 28 (1986), the Court reversed a death penalty sentence for failure to permit voir dire on racial prejudices simply because the defendant and victim were different races. Yet the Court refused to reverse the murder conviction itself, reasoning that the possibility of racist discretion was greater in the sentencing context than in conviction. *Id.* at 37–38. Justice Brennan, in dissent, decried the injustice of finding that a particular jury was good enough to convict for murder but not good enough to sentence to death. "King Solomon did not, in fact, split the baby in two, and had he done so, I suspect that he would be remembered less for his wisdom than for his hardheartedness." *Id.* at 44 (Brennan, J., dissenting).

[298] *See generally* Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545 (1975) (describing the importance of voir dire in rooting out potential discrimination); Richard J. Crawford & Daniel W. Patterson, *Exploring and Expanding Voir Dire Boundaries: A Note to Judges and Trial Lawyers*, 20 AM. J. TRIAL ADVOC. 645, 662 (1997) ("Opening up the questioning process is likely to enhance the quality of juror screening without doing violence to the fair trial ideal.").

Yet, courts have never recognized an equivalent right for prosecutors to voir dire about potential jury discrimination.[299] Indeed, as the *McCollum* opinion demonstrated, until we acknowledge the problem of discriminatory acquittal, courts will have no constitutional language to describe the problem of juror prejudice against victims. While judges may permit prosecutors to conduct such voir dire as a matter of discretion,[300] courts frequently avoid allowing counsel to introduce the subject of racial prejudice for fear of invoking it, as if requiring counsel to ignore the elephant in the room will make it disappear.[301]

When the risk of discriminatory acquittal is high, judges should be required to allow the government to protect the equal protection rights of victims through voir dire. Prosecutors should be permitted to question potential jurors in the trials of gender-based violence about their attitudes towards women and the permissibility of rape or domestic violence.[302] Prosecutors should be permitted to ask jurors in the trial of a hate crime questions designed to reveal their racial prejudices.[303] Such questioning helps to implement the Sixth Amendment promise of an "impartial jury" by protecting against unconstitutional discrimination generally.[304]

The second important procedural protection at issue is the prohibition on overt appeals to jury discrimination. The Equal Protection Clause forbids prosecutors

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[299] Because double jeopardy prohibits prosecutive appeals, see *supra* Part III.E, there exists very little case law articulating any of the rights and interests of the government within our adversarial system.

[300] Judges vary widely by jurisdiction and discretion in the leeway they give attorneys in voir dire. *Ristaino*, 424 U.S. at 594 ("Voir dire 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.'" (quoting Connors v. United States, 158 U.S. 408, 413 (1895))).

[301] A notion I find as logical as the theory that an absence of sex education will discourage sex. Indeed, the Supreme Court itself requires this reticence. "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Ristaino*, 424 U.S. at 596, n.8. Courts may be particularly hesitant to allow the prosecutor to conduct such voir dire when the defendant objects to it. One can imagine such a situation during McCollum's trial on hate crime charges, for example. As argued in Part III.D, however, defendants have no right to racial jury nullification.

[302] *See* Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 45 (2005) (discussing use of voir dire to eliminate jurors with gender prejudices); *see also* Mark Soler, *"A Woman's Place . . . ": Combating Sex-Based Prejudices in Jury Trials Through Voir Dire*, 15 SANTA CLARA L. REV. 535, 538–39 (1975).

[303] *See* Barat S. McClain, Note, Turner *'s Acceptance of Limited Voir Dire Renders* Batson *'s Equal Protection a Hollow Promise*, 65 CHI.-KENT L. REV. 273, 306 (1989) (discussing the importance of voir dire to eliminating jury discrimination without violating *Batson*'s prohibition on presuming such prejudice according to race).

[304] *See supra* Part III.D (explaining that the Sixth Amendment permits bias neither for nor against the defendant).

from invoking jury discrimination against defendants during trial.[305] Acknowledging discriminatory acquittal should extend that prohibition to defense counsels' appeals to discriminate against victims. Inviting the jury to discriminate against either the defendant or the victim because of race or gender violates the Equal Protection Clause.[306]

While judges routinely attempt to rein in such appeals from defense counsel in the interests of evidentiary relevance, generic fairness, or the reputation of the criminal justice system, they are not currently required to police the equal protection rights of victims. When the lawyers representing Emmett Till's killers called the jurors "custodians of American civilization," required to do their "Anglo-Saxon" duty and to release his clients, they violated more than the decorum of the Court or the rules of relevancy.[307] Overt appeals to racial and gender discrimination violate the Equal Protection Clause just as much from a defense lawyer as from a prosecutor. Appealing to juror prejudice has no place in a system of justice.

As described above in Part II, the difficulty of remedying jury discrimination requires us to rely on criminal procedures designed to prevent jury discrimination before it occurs.[308] The continuing occurrence of discriminatory convictions shows that such procedures do not always work, but they remain our best effort to preserve the hope of equal justice. Prosecutors should have the same rights as defense counsel to try to prevent unconstitutional jury discrimination. Acknowledging discriminatory acquittal will create constitutional language to do so.

CONCLUSION

In his dissent to *McCleskey*, Justice Brennan imagined a poignant conversation between McCleskey and his lawyer about the chances that the jury would sentence him to death. "A candid reply to this question would have been disturbing" because of the enormous impact of race on the chances that McCleskey would receive the death penalty.[309] Throughout our history, equally candid conversations with minority and female crime victims have explained the reverse lesson, that certain kinds of crimes will go unpunished. African-American parents have taught their children that there may be no consequences for hate crimes, and that juries simply do not care as much about violence within black communities. Mothers of all races have taught their

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[305] *See generally* Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212 (1992) (discussing prohibition on prosecutorial appeal to racism against defendant, the lack of cases addressing gender discrimination, and proposing a stronger prohibition on both).

[306] *See supra* Part III.D (arguing that defendants have no right to a discriminatory jury nullification).

[307] *See* TILL-MOBLEY & BENSON, *supra* note 1; ROBERTS & KLIBANOFF, *supra* note 47, at 100.

[308] *See* McCleskey v. Kemp, 481 U.S. 279, 309 (1987).

[309] *Id.* at 321 (Brennan, J., dissenting).

daughters that rapes and domestic violence happen with impunity, particularly if their daughters step outside of the bounds of acceptable female behavior. The criminal justice system does not provide equal protection of the law. Private violence against women and minorities succeeds in limiting the freedom of these groups far more than direct government discrimination ever could. Discriminatory acquittals are at the root of this problem.

Acknowledging discriminatory acquittal raises this issue as a problem of constitutional import for the first time. It recognizes that jury verdicts are state action governed by the Equal Protection Clause. It makes clear that the defendant's right to jury lenity does not include a right to discriminate against victims. It situates the rights of victims within the criminal justice system, and gives judges and prosecutors constitutional language to protect them from jury discrimination.