Restoring Unanimity to the Alabama Death Penalty

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ABSTRACT

In Alabama, one of the jurisdictions most responsible for executions in the United States, the death penalty statute contains a very unusual provision: juries can sentence defendants to death even if they are not unanimous. This is a surprising fact to many people, including lawyers, who largely believe that the U.S. Supreme Court eliminated non-unanimous juries in 2020. That provision is enormously important to the capital punishment regime in Alabama, where 80% of people on death row were sentenced non-unanimously. The law's history, however, is poorly understood. This article lays out that history, showing it to be part of the state's reaction to increasing Black political participation in the 1960s and 1970s. It also examines the Alabama Supreme Court's interpretation of the state's constitutional jury trial right. Applying that standard to the history of both jury unanimity and jury sentencing in Alabama, this article contends that non-unanimous sentencing is unconstitutional under state law and argues that Alabama's longstanding and fierce commitment to protecting individual rights to freedom and life via jury unanimity must be recovered in its capital sentencing procedures.

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INTRODUCTION

In 1993, Christopher Barbour was convicted of the murder of Thelma Roberts in Montgomery, Alabama, and sentenced to death. Almost from the beginning of the case, there was reason to doubt his guilt. Barbour immediately recanted a confession he said he made after being beaten by Montgomery police, who were at that time under investigation by the FBI for abusing defendants to secure confessions.[1] An alleged accomplice was also convicted of the murder, but his story contradicted Barbour's.[2] Although Barbour was convicted, these doubts may have weighed on the jury, two of whose members voted not to execute him.[3] In almost any other state, those two votes would have saved Barbour from a capital sentence. Not so in Alabama, whose unusual[4] death penalty law allows non-unanimous juries to condemn defendants to death—while requiring convictions to be unanimous—as long as at least ten jurors agree on the sentence. In August of 2025, a federal district court judge in Alabama ordered that Barbour receive a new trial, after recently tested DNA evidence

1. Ivana Hrynkiw, *Judge Grants New Trial for Alabama Death Row Inmate Whose DNA Did Not Match,* AL.COM (Aug. 26, 2025), https://www.al.com/news/2025/08/judge-grants-new-trial-for-alabama-death-row-inmate-whose-dna-did-not-match.html.

2. Ivana Hrynkiw, *He's Been on Death Row for Decades. Alabama 'Downplays' DNA That Points to Someone Else, Judge Says,* AL.COM (Oct. 2, 2024), https://www.al.com/news/2024/10/hes-been-on-death-row-for-decades-alabama-downplays-dna-that-points-to-someone-else-judge-says.html.

3. *Id.*

4. Though a few other states had previously permitted it, Alabama was the only state that allowed the practice between 2016 and April of 2023. *The Death Penalty in 2023: Year End Report,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report (last visited June 27, 2024). The Supreme Court invalidated Florida's non-unanimous sentencing statute in 2016, but in 2023, Governor Ron DeSantis signed a bill allowing juries to impose death sentences by votes of 8 to 4. *Hurst v. Florida,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/hurst-v-florida (last visited June 27, 2024); *Florida's New Non-Unanimous Capital Sentencing Law Faces Retroactivity Challenge in State Supreme Court,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/news/floridas-new-non-unanimous-capital-sentencing-law-faces-retroactivity-challenge-in-state-supreme-court (last visited July 1, 2024).

implicated a different person in the crime for which he had spent decades on death row.[5]

It is almost redundant to say that non-unanimous jury decisions are more likely to result in death sentences in cases like Barbour's, convictions that are clouded by significant doubts about a defendant's guilt.[6] And they are enormously important in Alabama, where (as of 2025) 80% of people on death row were sentenced by non-unanimous juries.[7] This is an American problem as much as it is an Alabama problem, because Alabama accounts for a significant percentage of the American death penalty. Since 1976, Alabama has had the fifth highest rate of executions relative to its population.[8] In 2024, it executed the most people of any state and was one of only three states to impose new death sentences.[9] Non-unanimous sentencing has been one of the key tools through which it has maintained that preeminent position.

Non-unanimous sentencing has a convoluted history in Alabama. At the time the current death penalty statute was passed into law in 1981, Alabama judges were empowered to override the consequences that juries believed should be imposed on defendants found guilty. They could change life sentences to death and vice versa (although they almost always overrode in favor of death[10]). The jury was therefore not the decision-maker when it came to sentencing; instead, it was advising the judge. As the bill's author, then-Assistant Attorney General Ed Carnes,[11] noted in a memo to pro-death penalty senators during the fight over the law's passage, it was this system of override that (in his view) permitted non-unanimous "sentencing." The memo argued that those "advisory" decisions were not in fact sentences at all. They were, in Carnes' words, "merely a recommendation," and therefore not required to be unanimous. All that

5. Hrynkiw, *supra* note 1.

6. In many contexts, non-unanimous juries produce worse outcomes that are seen as less legitimate by participants and observers. *See* Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006); BRIAN H. BORNSTEIN & EDIE GREENE, THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM (2017).

7. *Alabama's Death Penalty,* EQUAL JUST. INITIATIVE, https://eji.org/issues/alabama-death-penalty/ (last visited July 1, 2024).

8. *State Execution Rates (through 2024),* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/state-execution-rates (last visited Sept. 30, 2025).

9. *The Death Penalty in 2024: Executions,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-2024/executions (last visited July 24, 2025).

10. EQUAL JUST. INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 4 (2011), https://eji.org/reports/judge-override/.

11. In addition to being the statute's author, Carnes was the head of the capital division of the Attorney General's office, an expert in state and federal death penalty law. One of his harshest critics, Stephen Bright of the Southern Center for Human Rights, explained that, "He has devoted most of his career to a very narrow subspecialty, appellate and postconviction capital litigation." *Statement Regarding the Nomination of Ed Carnes to the United States Court of Appeals for the Eleventh Circuit*, at 3 (1992). Carnes went on to serve on and then lead the United States Court of Appeals for the Eleventh Circuit.

Alabama law mandated, Carnes wrote, was that "the jury must unanimously agree on those matters about which the jury makes the actual, binding determination."[12]

But the legal landscape has changed since Carnes wrote his memo. Alabama juries have been making the "actual, binding determination" in capital sentencing since 2017, when the state legislature eliminated judicial override.[13] The effect of that decision was to turn what had been the jury's "mere recommendations" (as Carnes characterized it) about sentences into precisely the kind of "binding determination" the memo said required unanimous agreement.[14] According to Ed Carnes' views at the time the death penalty law he wrote was enacted, the sentencing provision of Alabama's capital punishment statute has been illegal for at least the past eight years.

Through examining the history of Alabama's death penalty statute and the state's constitutional jurisprudence on jury unanimity, this article concludes that Carnes was correct in 1981: binding, non-unanimous jury decisions have always been unconstitutional in Alabama. Part I explains why jury non-unanimity is such a comparatively recent innovation in Alabama, decades after its incorporation into the law of other states like Louisiana and Oregon. In those states, legislators explicitly stated that they intended for non-unanimity to disenfranchise Black jurors. Alabama, by contrast, was more effective at excluding African Americans from jury service altogether for most of the twentieth century, and thus had no need for such a law. It was not until federal law paved the way for significant increases in Black political participation in the 1970s that key actors in the state's political power structure began to push for non-unanimous sentencing.

In most contexts, the Alabama Supreme Court has understood the right to a unanimous jury to be guaranteed by the short but forceful Article I, Section 11

12. Charles Graddick, *Reasons Why the Proposed Amendment to Section 8(f) of House Bill 297 Should Be Defeated*, 6 (Mar. 18, 1981) (SG18581, Folder 20 ("Capital Punishment"; Folder #1 of 2), Alabama Department of Archives and History). Although the memo purported to be by Attorney General Charles Graddick, Carnes (who often wrote and circulated memos under the Attorney General's name) was almost certainly its author. He wrote all four drafts of the bill and was the unquestioned subject-matter expert in the Attorney General's office. It was his explanation of the non-unanimity provision, not Graddick's, that the bill's senate sponsor sought to support his efforts to pass it. Mike Sherman, *Amendment Stalls Death Bill*, ANNISTON STAR, Mar. 18, 1981, at 7. The Attorney General's office submitted the memo almost immediately after Carnes was denied permission to testify. Roger Neil, *Senate Moves to Stop Death Bill Filibuster*, DOTHAN EAGLE, Mar. 20, 1981, at 1.

13. Aaryn Urell, *AL Abolished Judge Override, But Still Seeks to Execute People Who Received Life Verdicts* EQUAL JUST. INITIATIVE (Nov. 4, 2022), https://eji.org/news/alabama-abolished-judge-override-but-still-seeks-to-execute-people-who-received-life-verdicts/.

14. Although the statute itself still contains the word "recommend," the shift has been reflected in the instructions read to capital juries. ALA. CODE § 13A-5-46(f); *Alabama Judicial System*, https://judicial.alabama.gov/library/juryinstructions, "Penalty Phase Capital 18+, effective after passage of Act No. 2017-131," https://judicial.alabama.gov/docs/library/docs/Penalty_Phase_Capital_18Plus.pdf (last visited November 22, 2025).

of the state's 1901 constitution. That section reads simply: "That the right to trial by jury shall remain inviolate."[15] As Part II shows, however, the Court has struggled mightily with how to interpret Section 11. In its efforts to resolve the related question of whether defendants are constitutionally entitled to have punishments determined by juries rather than judges, the Court has repeatedly articulated competing historical standards for understanding Section 11. In civil cases, the Court has held that the Section 11 jury trial right should be understood according to the state of the law at the time Alabama's last Constitution was ratified in 1901. In criminal cases, however, the Court has held the provision's meaning must be drawn from the time of Alabama's *first* Constitution of 1819. This article argues that these incompatible standards derived not primarily from jurisprudential disputes but rather from the Court's involvement in hot-button political fights of the 1990s. Once the politics were no longer at issue, the Court articulated an interpretive approach to Section 11 that has been understood (somewhat inaccurately) as requiring evidence of pre-1819 law. Because Alabama courts have long held (also inaccurately) that pre-1819 juries had no role in sentencing, they have also held that unanimity is not a constitutional requirement in jury sentencing today.

Parts III and IV explore the history of jury unanimity and jury sentencing in Alabama that the state's courts have largely overlooked. Part III demonstrates that centuries of Alabama law reflect an unusually strong commitment to jury unanimity in general. From its first constitution in 1819, Alabama has insisted on that unanimity. It did so against both the countervailing trends of most other states and vigorous campaigns to loosen the requirement during its own subsequent constitutional conventions. Part IV argues that jury sentencing in particular has a lengthy history and was always required to be unanimous. Contrary to the Alabama courts' view, common law juries *were* involved in sentencing. That involvement was occasionally explicit in England, and it exploded in the early American context to which the Alabama Court routinely looks for guidance. It was even a feature of the statutory law that governed Alabama before the passage of its first constitution in 1819. For the last twenty years, the Court has held that Section 11 of the 1901 Constitution protects legally sanctioned jury practices in place before the 1819 Constitution. Because the historical evidence shows that juries *were* sentencing pre-1819, jury sentencing is also protected by Section 11's guarantee of unanimity.

I. THE ORIGINS OF ALABAMA'S DEATH PENALTY

Non-unanimous capital sentencing was part of an establishment backlash to large-scale racial and political changes in Alabama from the 1960s to the 1980s. Until the late twentieth century, Alabama relied on a system of county commissioners to select pools of potential jury members. Those commissioners

15. ALA. CONST. art. I, § 11.

were extremely effective at excluding African American citizens from jury service. Federal civil rights legislation and Black activism in the 1960s led to large increases in Black political participation, including jury service. The point of non-unanimous capital sentencing was likely to nullify the votes of these newly empowered jurors.

A. Early Exclusion of Black Jurors

Non-unanimous sentencing emerged far later in Alabama than in other states with similar histories of Black political disenfranchisement. In the late nineteenth century, many states of the former Confederacy rewrote their constitutions in the wake of Reconstruction's failure. These so-called "Redeemer Constitutions" were explicitly aimed at suppressing the Black political participation that had briefly flourished under Reconstruction.[16] One tool of that suppression was jury non-unanimity. In the constitution nearby Louisiana ratified in 1898, in a convention explicitly dedicated to the upholding of white supremacy in the state, juries were allowed to convict defendants non-unanimously to make sure that minority jurors could not impede white majorities from persecuting non-whites.[17] Alabama's 1901 convention was just as openly aimed at ensuring white political dominance, but it explicitly preserved jury unanimity, even though a vocal minority were forcefully advocating its removal.[18] Why did the Alabama conventioneers think that non-unanimity was less crucial to their own efforts to preserve what they explicitly hailed as white supremacy?

One reason is that the racial composition of juries looked very different in the two states. An impressively thorough early 1900s study, which surveyed hundreds of court clerks in Southern counties with significant Black populations,[19] found that, even after the 1898 Constitution, African Americans

16. JILL LEPORE, WE THE PEOPLE: A HISTORY OF THE U.S. CONSTITUTION 277 (2025). Though Alabama's Redeemer Constitution was ratified in 1875, supporters of white supremacy (who initially feared federal pushback) did not mount a full-on effort to disenfranchise the state's Black citizens until the Constitution of 1901. WILLIAM H. STEWART, THE ALABAMA STATE CONSTITUTION 4 (2016).

17. Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1597 (2018). *See also Ramos v. Louisiana*, 590 U.S. 83, 87–88 (2020).

18. "[I]f we would have white supremacy," the convention's president declared, "we must establish it by law—not by force or fraud." WAYNE FLYNT, ALABAMA IN THE TWENTIETH CENTURY 7 (2004). In that respect, the 1901 document was quite successful, building on previous Alabama constitutions to establish "an elaborate panoply of measures to make sure that governing Alabama would be the business of white men only, especially white men from the southern areas of the state where human slavery had been most prominent before the Civil War." STEWART, *supra* note 16 at 4. These included a ban on state sanction of interracial marriages and racially integrated public schools. GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 80, 170 (1910). In striking down certain provisions of the Alabama constitution, the U.S. Supreme Court has identified the 1901 convention as "part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

19. STEPHENSON, *supra* note 18, at 253.

still sometimes served on Louisiana juries.[20] Not so in Alabama. Of the three counties surveyed, none reported a single instance of Black jury service. In one, where Black citizens outnumbered whites four to one, a clerk who had lived there for sixty-six years could not recall a single instance of Black jury service. "[N]or do I ever expect to see one in the jury-box in this county,"[21] he predicted. In another county, where the ratio of Blacks to whites was more than five to one, a clerk wrote that, "Negroes do not serve on juries in our courts. Such a state of affairs would be considered by the people of this county as farcical."[22] If a Black person *were* ever called to jury service, even by accident, the consequences could be severe, as a third county clerk explained:

> Negroes are not allowed to sit upon juries in this county. It sometimes happens that names of Negroes are placed in our jury-box by mistake on the part of the jury commissioners, and are regularly drawn to serve as jurors; this, however, is a very rare occurrence. Once in the past four years, a Negro was drawn as a grand juror (by mistake) who appeared and insisted upon the court's impaneling him with other jurors, which was done in accordance with law, the court having no legal right to discharge or excuse him. My recollection is he served two days, when he was taken out at night and severely beaten, and was then discharged on his own petition by the court. This will convey to your mind that Negro jurors are not very wholesomely regarded and tolerated in this county.[23]

"The fact is," the clerk stressed, "Negroes have never been or never will be allowed to sit on juries in this county."[24] "[E]xcept for the brief period of Reconstruction, Alabama's voters looked like Alabama's jury pools: all-white."[25] It is hardly surprising, then, that the 1901 conventioneers felt no pressure to alter the constitution to keep Black people off juries.

This state of affairs apparently persisted long after the constitutional convention. Although there is little data on the historical racial composition of Alabama juries, subsequent U.S. Supreme Court cases strongly suggest that Black jury participation barely increased between the turn of the twentieth century and the 1970s.[26] For most of the twentieth century, these cases indicate, in large parts of Alabama, almost no Black citizens were being called to serve

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20. *Id.* at 258–259. As Frampton points out, "In Louisiana… black jury participation remained relatively robust into the late nineteenth century." Frampton, *supra* note 17, at 1598.

21. He did claim that, "Our adjoining counties have all had them," but the study contained no direct testimony to that effect and even those instances of supposed service dated to "a number of years ago." STEPHENSON, *supra* note 18 at 254.

22. *Id.*

23. *Id.* at 253–254.

24. *Id.* at 254.

25. Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present Symposium - We the Jury: Conversations on the American Jury's Past, Present, and Future*, 81 LA. L. REV. 55, 63 (2020).

26. *Norris v. Alabama*, 294 U.S. 587, 591 (1935); *Swain v. Alabama*, 380 U.S. 202, 205 (1965); *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 327 (1969).

on juries, and many of those who *were* called were eliminated via peremptory strikes. A 2011 lawsuit brought by the Equal Justice Initiative demonstrates that this exclusion has continued in recent years in at least some parts of the state, finding that no jury in Houston County had more than one Black juror from 2006 to 2010, despite the county's population being a quarter African American.[27]

B. 1970s Alabama Law and Politics

This situation began to change radically in the 1960s, when a combination of federal civil rights legislation and Black activism started to transform Black political life in Alabama.[28] For example, as one doctoral dissertation from the mid-1970s found, voter registration of age-eligible African Americans increased from 19 percent to 52 percent between 1965 and 1967.[29] The impact on jury service was particularly striking. Alabama's jury commission system meant that circuit court clerks in the state's counties were responsible for making up the rolls of eligible jurors. For years, these positions had been filled exclusively by white people who made sure that Black citizens were largely left off the lists. A lawsuit against one Alabama county revealed that, between 1961 and 1963, African Americans made up 75 percent of the local population but just 7 percent of the jury lists.[30] Just a few years later, in 1970, the first Black person to ever hold the office took over as jury commissioner in the same county. The consequences were enormous: by 1976, jury lists were 70 to 75 percent Black.[31] Black people began to fill circuit court clerk positions around the state.[32] This was perhaps part of the reason that a 1982 study found that Black citizens in Alabama were considerably more likely to serve on juries than Black citizens in other Southern states.[33]

The state's white power structure reacted to these enormous advances in different, often surprising ways. Some, like Governor George Wallace—of "segregation forever" fame—adapted relatively quickly to the new political realities, courting newly empowered Black voters.[34] Others, like Alabama Attorney General Charles Graddick (who vigorously championed the non-unanimity provision) and his deputy Ed Carnes (who wrote it), took a different tack. In his gubernatorial campaign in 1986, Graddick cultivated an image built

27. *Hall v. Valeska,* EQUAL JUST. INITIATIVE, https://eji.org/cases/hall-v-valeska/ (last visited Jan. 30, 2025).

28. ALLEN TULLOS, ALABAMA GETAWAY: THE POLITICAL IMAGINARY AND THE HEART OF DIXIE 186 (2011).

29. James David Campbell, Electoral Participation and the Quest for Equality: Black Politics in Alabama since the Voting Rights Act of 1965, 28–31 (1976) (Ph.D. dissertation, University of Texas at Austin) (ProQuest).

30. *Carter*, 396 U.S. at 327.

31. Campbell, *supra* note 29 at 351.

32. *Id.* at 370.

33. Nijole Benokraitis & Joyce A. Griffin-Keene, *Prejudice and Jury Selection*, 12 J. BLACK STUDIES 427, 436 (1982).

34. TULLOS, *supra* note 28 at 121.

on a mix of death penalty and racial politics.[35] Though Graddick generally avoided the explicitly racist language of his predecessors, many understood him as a "white-hope, tough-guy."[36] For many Alabamians, he was—as a longtime journalist, editor, and Southern Poverty Law Center staff member[37] put it at the time—"the New version of the Old Wallace… a demagogue for the Eighties, a subtle master of euphemisms and code phrases that communicate racial meaning without the blatantly nasty words of the previous generation."[38] Though Graddick rejected the KKK's endorsement, he was praised by the Grand Wizard for being the only candidate for governor to not court Black voters.[39]

During Graddick's tenure as Attorney General, no person in his office was more influential in securing the passage of the death penalty law than Assistant Attorney General Ed Carnes. Carnes became a specialist in death penalty jurisprudence through defending the state's capital appellate cases, training prosecutors throughout the state in death penalty litigation, and rewriting Alabama's capital punishment laws throughout the 1970s and 80s. "As the *New York Times* wrote upon his nomination to be a judge, 'Death penalty law in Alabama bears the imprint of Mr. Carnes more than that of anyone else.'"[40] He was also deeply involved in maintaining Alabama's historical exclusion of Black citizens from jury service through methods like peremptory strikes. He defended many cases from all over the state of prosecutors (many of whom he had trained) using those strikes to severely curtail Black jury participation, a practice that often resulted in all- or nearly all-white juries.[41] Carnes was thus perfectly placed

35. *Id.* at 121–122.

36. *Id.* at 122.

37. *Randall Williams – My Blog*, https://foranewsouth.com/randall-williams/ (last visited Oct. 31, 2025).

38. TULLOS, *supra* note 28 at 122. He "dangled race in front of rural and suburban whites in television ads complaining that 'black politicians' had too much influence on" his gubernatorial opponent. *Id*. "In the old days, they used to cry 'nigger, nigger,'" said another of his detractors. "Now they just say 'black politician,' but everyone knows that's a code word that means the same thing." *Id*.

39. *Id.*

40. Steven T. Marshall & Andrew L. Brasher, *Assistant Attorney General Ed Carnes from 1980 to 1985*, 69 ALA. L. REV. 651, 660 (2018). "[I]t was Carnes who did the vast majority of the leg work and research. It was Carnes who fought the state's case for capital punishment before the U.S. Supreme Court. It was Carnes who faced the grim details of death penalty issues on a daily basis" while he was writing the death penalty bill in 1980-81. *Profile: State's Chief Death Advocate*, SELMA TIMES-J., Mar. 30, 1981, at 5.

41. *Statement regarding the nomination of Ed Carnes to the United States Court of Appeals for the Eleventh Circuit, supra* note 11, at 21. Speaking to the Senate in 1992, Stephen Bright made clear that he was describing Carnes' recent practices, not ancient history. "Even after the Batson case was decided by the Supreme Court [in 1986], Mr. Carnes engaged in no effort to put an end to the pervasive practice by Alabama prosecutors of eliminating black citizens from jury service. Instead, he and his unit of the Alabama Attorney General's office have tried to persuade courts to limit the applicability of the Batson decision as much as possible, while continuing to defend racial discrimination by prosecutors." *Id.* at 25.

to understand how powerful jury non-unanimity could be in limiting the new influence of Black voices in the administration of justice.[42]

C. The 1981 Death Penalty Statute

Although Graddick and Carnes were careful to explain the non-unanimity provision as race-neutral,[43] Alabama's Black legislators clearly understood its racial motivation. The bill passed the House almost entirely along racial lines.[44] It was then briefly held up by the state's three Black senators,[45] who filibustered the bill. They focused almost all their energies on attacking the non-unanimity provision, which they characterized as an obvious attempt to suppress the power of Black jurors.[46] One Black senator, J. Richmond Pearson, made clear that his

42. Another factor contributed to the law's reformulation: Carnes was writing what became the 1981 death penalty statute at a time when capital punishment law was changing quickly and dramatically. After the U.S. Supreme Court found in 1972 that the death penalty produced intolerably racially biased results, dozens of states began rewriting their laws. Carnes was paying very close attention to how the Supreme Court responded. Ted Bryant, *Legislative Lines Drawn Over Death Penalty*, BIRMINGHAM POST-HERALD, Dec. 29, 1980, at 4. One of the things he noticed was that the Court upheld (in *Proffitt v. Florida* in 1976) Florida's rule that a simple majority of jurors could impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242 (1976). This was where Carnes got the idea for what became today's non-unanimity provision of Alabama's statute. Lou Elliot, *Graddick Wants Death Row Inmates Retried*, ALABAMA JOURNAL, Jul. 1, 1980, at 1. *Death Penalty Law Drafted*, ALABAMA JOURNAL, Dec. 18, 1980, at A11. Reasoning that the Court would be even happier with requiring a 10-2 vote, he included a section in his draft bill that allowed one or two jurors to dissent without preventing the jury from imposing a capital sentence. Cynthia Smith, *Senate debates death penalty, takes no vote*, MONTGOMERY ADVERTISER, Mar. 18, 1981, at 7.

There was a profound irony to this borrowing. In the early 1970s, both Florida's governor and its Attorney General were far more ambivalent about the death penalty than Alabama's leading politicians. *Execution Delay Sought*, FORT LAUDERDALE NEWS, Feb. 1, 1972, at A12; *Askew Execution Order Attacked*, ORLANDO EVENING STAR, Feb. 24, 1972, at A10. Previously, Florida law had held that defendants convicted of capital crimes would be automatically sentenced to death unless a majority of the jury voted to impose a life sentence. Martin Dyckman, *Legislature OKs Death Penalty Bill; Trial Judges Given Final Decision (Continued)*, MIAMI HERALD, Dec. 2, 1972, at 11. GORDON E. HARVEY, THE POLITICS OF TRUST: REUBIN ASKEW AND FLORIDA IN THE 1970S 68 (Glenn Feldman & Kari Frederickson eds. 2015). The governor thought this default of death was too harsh and that it discriminated against marginalized people. *Askew Rejects Alternative Plans for Death Penalty (Continued)*, TAMPA BAY TIMES, Nov. 23, 1972, at 23; *Askew To Ask Legislature To Revive Death Penalty*, TAMPA BAY TIMES, Nov. 21, 1972, at 21. He and the Attorney General therefore wanted to force juries to actively opt for capital sentences, in the hopes of reducing the imposition of such sentences. Bill Purvis, *Askew Seeks More Power For Governor*, TAMPA TRIB., Feb. 2, 1972, at 1; *Shevin Still Undecided On Candidate To Back*, ORLANDO SENTINEL, Feb. 4, 1972, at 27. The Alabamians' hope was just the opposite. As the following section shows, Carnes, Graddick, and Alabama Governor Fob James wanted to make it *easier*, not harder, to secure death sentences by diluting the power of minority votes, completely inverting the original purpose of Florida's less-than-unanimous provision.

43. Michael Nutt, *Court: Death Penalty Law Usable*, ALABAMA JOURNAL, Dec. 19, 1980, at 1.

44. All thirteen Black members and a single white colleague voted against it. Ralph Holmes, *House Passes Death Penalty Bill*, BIRMINGHAM NEWS, Feb. 25, 1981, at 23.

45. State Senators J. Richmond Pearson, Michael Figures, and Earl Hilliard.

46. Roger Neil, *Senate Approves Death Bill; James's Signature Expected*, DOTHAN EAGLE, Mar. 27, 1981, at 1. As the three senators who disapproved of the bill explained, "there are usually only one or two blacks selected for a jury," so "the 10-member punishment provision is simply a move to

objection to the bill was entirely about non-unanimity, given how popular he knew the death penalty was in Alabama. "If you take out that one provision you won't hear from me anymore," he said. "I know the people want a death-penalty law."[47]

But the bill's supporters clung fiercely to that one provision. Graddick called it "tremendously important."[48] Alabama Governor Fob James repeatedly stressed how critical it was, arguing that removing non-unanimous sentencing would make the death penalty bill "totally useless."[49] The bill's senate sponsor, Finis St. John, said that removing it would make the law "inoperable."[50] These men were so committed to the provision that they were willing to violate longstanding senate norms to force the passage of the version of the death penalty bill that included it. Over the objections of some senators who emphasized the filibuster's historical importance in Alabama,[51] the House passed a resolution to allow the Senate to meet on back-to-back days, making it much more onerous for small numbers of legislators to maintain the physical demands of a filibuster.[52] Pearson, explaining his decision to drop the filibuster, said that the Senate was "changing the rules to get what they wanted. There's no need for us to play if they're going to change the rules." For Pearson and his colleagues, it was "obvious to us we were dealing with people who had no respect for the rules and no respect for us."[53]

As the Black senators and numerous journalists pointed out at the time, this urgency made little sense. Alabama had a perfectly functional death penalty law, despite the requirement of jury unanimity (which, as commentators emphasized, was a fundamental principle of English, American, and Alabama law).[54] As one editorialist wrote, "Alabama's current death penalty law, passed in 1975, requires a unanimous decision to send someone to the electric chair, and juries have elected to do that 52 times."[55] The one white senator who opposed non-unanimous sentencing (Larry Keener) pointed out that "[d]eath rows

exclude blacks from having any say in recommending the sentence." Roger Neil, *Senate Adjourns with Death Bill Awaiting Action*, BIRMINGHAM POST-HERALD, Mar. 18, 1981, at 34.

47. Frank Bruer, *Senate Adjourns with Death Bill Awaiting Action,* BIRMINGHAM POST-HERALD, Mar. 18, 1981, at 34. Neil, *supra* note 46.

48. Cynthia Smith, *Three Filibuster Death Penalty Bill in Senate*, MONTGOMERY ADVERTISER, Mar. 20, 1981, at 1. Throughout this process, Graddick continued to stalk the halls, frequently appearing in the doorway to the senate chamber, and was there when the bill passed. Frank Bruer, *New Death Penalty Law Set Back after Black Filibuster Broken*, BIRMINGHAM POST-HERALD, Mar. 27, 1981, at 2.

49. Phillip Rawls, *James Warns of Filibuster Danger*, DAILY SENTINEL, Mar. 26, 1981, at 1.

50. Roger Neil, *Death Penalty Bill: Graddick Asked For Explanation*, DOTHAN EAGLE, Mar. 18, 1981, at 12.

51. Cynthia Smith, *Senate Passes Death Penalty Bill, 31-3*, MONTGOMERY ADVERTISER, Mar. 27, 1981, at 2. Lou Elliot, *Senate's 12:15 A.M. Session Aimed At Ending Death Penalty Filibuster*, ALA. J., Mar. 23, 1981, at 1.

52. Smith*, supra* note 51, at 1.

53. *Id.*

54. Sherman, *supra* note 12, at 7.

55. Rawls, *supra* note 49.

'overflowing' with condemned prisoners, most of whom were sentenced by unanimous votes of juries, are evidence that requiring a unanimous verdict does not stop imposition of capital punishment."[56] The provision's supporters were largely incapable of answering these challenges persuasively. In an emblematic interchange, when the bill's senate sponsor—Finis St. John, who had claimed that getting rid of it would "make the bill inoperable"—was asked about it, he had literally nothing to say.[57]

One of the reasons the non-unanimity provision was so difficult to explain was that it was completely at odds with the massive overhaul of Alabama criminal law that had just been completed. A group of lawyers, judges, lawmakers, and academics (largely working under the auspices of the Alabama Law Institute) codified the state's preexisting mass of caselaw and statutes into a criminal code in the mid-1970s, with an effective date of January 1, 1980. This revision intersected with a national movement to reduce or eliminate the role of the jury in sentencing.[58] One of the new Alabama code's principal aims was to shift the responsibility for sentencing from jury to judge.[59] The code's commentary quoted approvingly and at length from the American Bar Association's firm stance against jury sentencing.[60] In all but capital cases, as the commentary pointed out, the new criminal code completely removed the jury's longstanding and robust ability to determine a defendant's sentence.[61] St. John and the bill's other chief supporters, many of whom had been involved with the criminal codification,[62] knew this very well.

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56. Sherman*, supra* note 12, at 7.

57. *Id.* It was in response to St. John's plea for help that Carnes wrote the memo discussed in the Introduction, arguing that non-unanimous sentences were legal because they were "merely a recommendation." Graddick, *supra* note 12, at 6.

58. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 966 n.55 (2002). This movement was particularly powerfully embodied in the Model Penal Code, which had a significant influence on the new Alabama code's sections on criminal culpability. MARKUS D. DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 9–10 (2d ed. 2015); M. Clinton McGee, *Towards a New Criminal Code for Alabama*, 35 ALA. LAW. 19, 34 (1974).

59. "It will be noted," the code's commentary pointed out, "that convicted defendants 'shall be sentenced by the court.' There is no provision for determination of the sentence by the jury." ALA. CODE § 13A-5-1 (1975).

60. "Recent opinion has been nearly unanimous that jury sentencing in noncapital cases is an anachronism and that it should be abolished." *Id*. It went further still, paraphrasing a number of reasons given by the ABA "for the opposition to determination of punishment by the jury," including the fact that different juries decide sentences very differently, on the basis of much less information than judges have. They also worried over juries making inappropriate decisions about conviction or sentence depending on their moral reactions to the crime.

61. One of the code's authors told me that the drafters "left capital punishment for later attention," in part because of the U.S. Supreme Court's rapidly evolving jurisprudence and in part because the Attorney General's office was particularly interested in passing a new death penalty law. Joseph Colquitt, *Capital Punishment Musings* (June 26, 2024). Joseph Colquitt, *Personal Interview* (2024).

62. St. John served as president of the Alabama Law Institute from 1978 to 1984, during both that group's promotion of the new code and the legislative fight over the death penalty bill. Robert L. McCurley, *Legislative Wrap-Up*, 53 THE ALABAMA LAWYER: OFFICIAL ORGAN STATE BAR OF

In fact, by championing the capital punishment law so vociferously, the Attorney General's office was directly and explicitly challenging this aspect of the criminal codification.[63] As Carnes made clear in his memo: "What [the death penalty bill] does [is] to mitigate that standard practice in criminal cases by providing for jury input into the sentencing decision in a capital case."[64] "That standard practice" which Carnes and Graddick were critiquing—the Alabama code's rejection of jury sentencing—reflected the considered judgement of the state's leading legal experts, drawn from the work of prominent professional organizations like the American Law Institute and the ABA. Non-unanimous sentencing was precisely the kind of jury input the state criminal codification hoped to eliminate, fearing it would encourage inconsistent decisions based on incomplete information. Of course the non-unanimity provision was hard for Finis St. John to explain: it directly contradicted his own work on the code that supposedly established the general principles governing Alabama criminal law.

Racial disenfranchisement and electoral politics, according to contemporaneous observers, were the real reasons Graddick, Carnes, and James fought so hard for an apparently unnecessary provision directly at odds with the state's own legal tradition and just-completed codification. One Alabama reporter, who noted that "it's unusual for the Legislature to be working on a new law while the old one is in good standing," argued that perhaps "some people were kicking off 1982 statewide campaigns with the death penalty bill," pointing to Graddick.[65] The reporter characterized the bill's passage as an exercise in cynicism, with legislators hoping to calm their constituents' fears over crime rates before an impending election. A prominent civil rights attorney agreed, writing, "Charlie Graddick… obviously hopes to place himself in the governor's chair by first placing some blacks and a few poor whites in the electric chair. No influential white ever made it to Alabama's death row and Charlie understands that well."[66] He echoed the Black senators' view that racial exclusion was the bill's true purpose.[67]

ALABAMA, Sept. 1992. He worked on the criminal codification. *Id.* The bill's House sponsor, Richard Manley, was another Law Institute Member. *1992-93 Committees and Task Forces*, 53 THE ALABAMA LAWYER: OFFICIAL ORGAN STATE BAR OF ALABAMA, Sept. 1992.

63. "Since the adoption of the New Criminal Code," the memo read, "the 'traditional notion' or accepted notion has been that the jury has absolutely no input on the question of punishment in a criminal case." Graddick, *supra* note 12, at 7–8.

64. *Id.*

65. Ted Bryant, *Politics Is Main Factor in Death Penalty Vote*, BIRMINGHAM POST-HERALD, Feb. 26, 1981, at 4.

66. J.L. Chestnut Jr., *Two Wait as Debate Sends up "Pure Political Smoke,"* SELMA TIMES-J., Mar. 22, 1981, at 5.

67. The attorney, J.L. Chestnut, Jr., wrote that, "The situation becomes more suspect when one realizes that predominantly white juries are as common as predominantly black juries are rare in certain kinds of cases. This peculiar principle holds true even in those counties with a black majority population." *Id.*

II. THE DOCTRINAL FOUNDATIONS OF NON-UNANIMOUS SENTENCING

Despite this unsavory history, non-unanimous sentencing has so far proved resilient against numerous legal challenges. Many of those challenges have been brought under federal death penalty precedents, which the Alabama Supreme Court and Court of Criminal Appeals have largely viewed as inapplicable to this particular feature of the state's capital regime. In the last two decades, few cases have relied significantly on state law. This is perhaps in part because (as Sections B and C explain below) the Alabama Supreme Court's interpretation of the state constitutional jury trial right has had its own complex and contradictory history, a history which produced a somewhat puzzling standard. This Part of the article is largely dedicated to laying out that history and that standard which has been misunderstood as requiring that any historical evidence relevant to the meaning of the constitutional jury trial right date to before the ratification of the state's first constitution in 1819.

A. Federal Law

The story of the Alabama Supreme Court's response to federal law claims against non-unanimity is not a complicated one, despite the fact that most challenges to the non-unanimity provision in the last few decades have been brought pursuant to U.S. Supreme Court cases. Most such suits were brought under *Ring v. Arizona*, holding that juries are required to unanimously find the aggravating factors of a capital crime that make a defendant eligible for the imposition of the death penalty. The state Court of Criminal Appeals and Supreme Court have been dismissing these cases for twenty years by holding that sentencing is outside *Ring*'s purview.[68] In the last few years, more challenges have been brought under *Ramos v. Louisiana*, the U.S. Supreme Court case striking down non-unanimous jury convictions as the vestige of racial disenfranchisement. This approach has been equally unsuccessful. The Alabama Court of Criminal Appeals has repeatedly held that *Ramos* speaks only to convictions, not to sentences, and therefore has no bearing on Alabama's system of unanimous convictions and non-unanimous sentences.[69]

68. *See* Duke v. State, 889 So. 2d 1, 43 n.4 (Ala. Crim. App. 2002), *cert. granted*, *judgment vacated*, 544 U.S. 901 (2005); Ziegler v. State, 886 So. 2d 127, 151–52 (Ala. Crim. App. 2003); Moody v. State, 888 So. 2d 532, 602 n.57 (Ala. Crim. App. 2003); Lewis v. State, 889 So. 2d 623, 705–06 (Ala. Crim. App. 2003); Miller v. State, 913 So. 2d 1148, 1169 n.4 (Ala. Crim. App. 2004); Flowers v. State, 922 So. 2d 938, 960 (Ala. Crim. App. 2005); Irvin v. State, 940 So. 2d 331, 366 (Ala. Crim. App. 2005); Brownfield v. State, 44 So. 3d 1, 38–39 (Ala. Crim. App. 2007), *aff'd sub nom*. Ex parte Brownfield, 44 So. 3d 43 (Ala. 2009); Gobble v. State, 104 So. 3d 920, 976–77 (Ala. Crim. App. 2010); Ex parte State, 223 So. 3d 954, 968 n.14 (Ala. Crim. App. 2016); Kirksey v. State, 243 So. 3d 849, 852–53 (Ala. Crim. App. 2016) (citing Bohannon v. State, 222 So. 3d 457). The ACCA has frequently relied on Bohannon for the proposition that, as the Court put it in 2018, "a jury is permitted to recommend a death sentence based on a nonunanimous verdict." Creque v. State, 272 So. 3d 659, 730 (Ala. Crim. App. 2018).

69. *See, e.g.*, Newton v. State, No. CR-2023-0953, 2024 WL 4312583, at *28 (Ala. Crim. App. Sept. 27, 2024).

B. The Road to the State Constitutional Standard

The story of how the Alabama Supreme Court has come to understand the state constitutional jury right and its relationship to non-unanimous sentencing is far more tortuous. The Court's present-day interpretation of the jury trial right guaranteed by Section 11 of the 1901 Constitution emerged from the collision of two conflicting political imperatives in the 1980s and 1990s. During that period, the Court repeatedly upheld big damage awards against large corporations and struck down the "tort reform" laws that sought to limit them. These rulings, the Court held, were based on the principle that Section 11 gave civil plaintiffs the right to have juries determine punishments. At the same time, however, the Court was announcing the exact opposite principle in criminal cases, as it dismissed numerous challenges claiming that judicial override deprived capital defendants of the right to have a jury decide their sentences. The Court held that, its opinions regarding *civil* juries notwithstanding, Section 11 gave *criminal* defendants no such right. In the mid-1990s, the Court sometimes announced these directly contradictory holdings in the same term.

Both sets of rulings took the view that Alabama's use of jury sentencing began in the mid-nineteenth century. Where they disagreed was over the question of at what point in history judicial and legislative practices should be considered incorporated into the Section 11 constitutional right. The rulings upholding civil damages held that Section 11 included such practices up to the ratification of the state's last constitution in 1901; the rulings dismissing criminal appeals held that Section 11 included only the laws in place before the ratification of the state's *first* constitution in 1819. It was only after aggressive political campaigning by tort reform advocates had ensured the dominance of pro-business Republicans on the state Supreme Court that the Court could attempt to resolve these incompatible approaches, which it did in 2001.

1. Origins

The initial contradiction in the Alabama Supreme Court's Section 11 jurisprudence arose between a 1974 state Supreme Court opinion and an Alabama Court of Criminal Appeals ruling ten years later. In 1974, the Supreme Court decided *Gilbreath v. Wallace*, holding that a law allowing for six-member juries in disputes over wills was unconstitutional under Section 11.[70] Relying on a series of precedents going back to the mid-nineteenth century, the Court held that "Alabama's Constitution effected a 'freezing' of the right to jury trial as of 1901."[71] More concretely, the opinion explained that any jury trial right existing either at common law when the first constitution was adopted in 1819 or in

70. The Court had to decide whether the right to a jury trial in "will contest" cases came from the legislature—which would therefore be able to reduce the number of jurors required—or from the constitution, in which case the legislature "may not abridge or limit the [s]ubstance of that right." Gilbreath v. Wallace, 292 So. 2d 652, 653 (Ala. 1974).

71. *Id.*

statutory law when the last constitution was ratified in 1901 was protected by Section 11.[72] Finding that the right to a jury trial in a will contest case existed both in pre-1819 common law and pre-1901 statutory law, the Court concluded that it was unconstitutional for the legislature to modify the number of jurors from twelve to six.

In reaching this conclusion, the Alabama Supreme Court announced several key principles concerning the interpretation of Section 11. First, federal law provides only a minimum standard protecting citizens' jury trial rights, which states can exceed.[73] Second, criminal defendants and civil litigants are entitled to the same constitutional jury rights.[74] Third, both Alabama caselaw and the proceedings of the 1901 constitutional convention should guide the Court in its interpretation of Section 11.[75] Finally, provisions that, like Section 11, appeared in multiple constitutions should be understood through the lens of their most recent enactments: "Where there have been several Constitutions, the right is in reference to its existence at the time of the adoption of the last one."[76]

But a decade later, the Alabama Court of Criminal Appeals took the opposite approach to determining the scope of the Section 11 jury trial right. In 1984, the ACCA issued an opinion in *Crowe v. State* dismissing the defendant's claim that the system of judicial override (in which juries issued merely "advisory verdicts") was unconstitutional under Section 11.[77] The *Crowe* court

72. *Id.*

73. *Id.* at 655. The court emphasized that the Alabama constitution went further than the minimum standards set by the U.S. Constitution, noting that "the states have the power and are free to provide greater safeguards and to extend this protection through their own organic law." *Id.* While it acknowledged recent U.S. Supreme Court decisions permitting six-member juries and holding that "the [federal] framers did not attach any constitutional significance" to the number twelve, the situation was different in Alabama. *Id.* Referring to the official proceedings of the 1901 constitutional convention, the Alabama court determined that, "To those who framed, amended, debated, and passed this organic article, the number 12 was not merely of mystical significance. It was virtually sacred." *Id.* at 656

74. *Id*. 1 at 655.

75. *Id.* As the Court characterized it, "We have often held that the reenactment of an ordinance by the people or their representatives, following our construction of the same, amounts to an implicit approval of that construction." *Id.* at 656.

76. *Id*. at 653 (quoting Alford v. State, 170 Ala. 178, 188–189).

77. This article does not examine the constitutionality of advisory non-unanimous sentences from before the 2017 elimination of judicial override, but its arguments suggest that the question must be taken up. Beyond both the many prudential reasons to doubt the wisdom of non-unanimous sentences and the problematic histories explored here, Alabama also has a lengthy judicial tradition denigrating treating juries as advisory bodies. As quoted above, the Carnes memo justifying the non-unanimity provision explained that part of its purpose was to "convey to the trial court judge the thinking on the punishment question of the 12 jurors who tried the case." Graddick, *supra* note 12, at 7. This feature is at odds with Alabama jurisprudence, which has routinely emphasized that judges are to be strictly shielded from knowledge of jury deliberations. As one late-nineteenth-century opinion explained, "polling the jury is the means provided by the statute of ascertaining that each juror agrees to the verdict. The motives which influenced, or the reasons that governed the juror, can not be inquired into." Winslow v. State, 76 Ala. 42, 49 (1884). "A jury," wrote the Court of Appeals nearly eighty years later, "is not a mere committee to explore and bring in majority and minority reports." Orr v. State, 40 Ala. App. 45, 52 (Ala. Ct. App. 1958), *aff'd*, 111 So. 2d 639 (1959). That desire to keep the black box of jury deliberations sealed has been enshrined in Alabama's Rules of Evidence, preventing jurors from

asserted that juries had had no role in sentencing in Alabama until 1841. According to this view, the 1819 Constitution—from which the language of Section 11 derived—could therefore not have intended to protect a defendant's right to have a jury determine the sentence. The only question, then, was whether the 1901 constitution had intended to incorporate the developments of the nineteenth century by guaranteeing defendants the right to jury sentencing.[78] Ignoring *Gilbreath* and the numerous Alabama cases it cited, as well as the extensive records of the 1901 constitutional convention, *Crowe* looked instead to five cases from Illinois, Missouri, Tennessee, and Texas. Based on those cases, *Crowe* held that Alabama's 1901 convention had not intended for Section 11 to apply to jury sentencing, which the Court characterized as a nineteenth-century innovation.[79] Contradicting *Gilbreath* without mentioning it, *Crowe* held that, "Article I, Section 11, confers the right of trial by jury as existed at common law and the time of Alabama's *first* state constitution" (emphasis added).[80] Jury sentencing, according to *Crowe*, was therefore outside the scope of Section 11 and not required to be unanimous.

2. Worsening Contradictions

This doctrinal incongruence got worse over the following fifteen years, as the Alabama Supreme Court was faced with two hotly contested political issues that pushed them simultaneously towards both the opposite jurisprudential directions *Gilbreath* and *Crowe* represented. The first was tort reform. From the late 1980s to the mid-1990s, Alabama was considered an exceptionally unfriendly jurisdiction for large companies facing lawsuits.[81] Parts of Alabama, and sometimes the whole state, were described as a "tort hell."[82] Fearing these judgments were driving businesses away, the Alabama legislature repeatedly passed laws to limit the damages juries could impose, only to have those laws

impeaching verdicts in which they participated, even by offering sworn testimony. Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1214 (Ala. 1999). As late as the mid-1990s, when Alabama had been employing a system of advisory verdicts for a decade and a half, the state Supreme Court was still disparaging the practice, warning against rendering "juries advisers of the trial judge rather than a positive force in the administration of justice." Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 160 (Ala. 1991).

78. Crowe v. State, 485 So. 2d 351, 364 (Ala. Crim. App. 1984).

79. *Id.*

80. *Id.* at 364.

81. This was due in part to jurors' sense that Alabama consumers were routinely being injured and defrauded by large companies which the law was failing to control. Anna Johns Hrom, Between Fraud Heaven and Tort Hell: The Business, Politics, and Law of Lawsuits (2018) (Ph.D. dissertation, Duke University), https://hdl.handle.net/10161/16898, 155–156. Interestingly, this sense may have been enhanced by Charles Graddick's early 1980s focus on consumer protection and harsh criticism of corporate fraud. *Id.* at 30.

82. Hugh Maddox, *Taking Politics out of Judicial Elections Commentaries*, 23 AM. J. TRIAL ADVOC. 330, 332 (1999).

struck down by the state Supreme Court.[83] The second issue was capital punishment, for which the whole country was developing a great deal of enthusiasm.[84] Alabama played a leading role in the trend, imposing "the death penalty more frequently per capita than any other state."[85] Capital punishment was especially on the minds of elected judges like Alabama's, where voters in judicial elections were increasingly inclined to oppose judges perceived as insufficiently pro-death penalty.[86]

These politics exacerbated the tension between *Gilbreath* and *Crowe* during the 1990s, as the Alabama Supreme Court articulated incompatible interpretations of the constitutional jury trial right.[87] In civil cases, the Court largely followed *Gilbreath* to strike down caps on damages, while in criminal cases, it tended to rely on *Crowe*'s rationale to uphold death sentences. For example, in a pair of 1991 cases—*Moore v. Mobile Infirmary Association* and *Clark v. Container Corporation of America*—the Court ruled against limits on jury-determined damage awards. Both implicitly and explicitly, these rulings relied on *Gilbreath*'s view that Section 11 had "frozen" the jury trial right "as that right existed in 1901, the date of the ratification of our present Constitution."[88] Two years later, in *Henderson v. Alabama Power Co.*, the Court struck down another statute limiting the amount of punitive damages for the same reason. The core of the Court's analysis was simple: "Was the jury used in punitive damages cases when the [1901] Constitution was adopted? Was the

83. Kristen LeBlond, *Bad Faith in Alabama's Civil Justice System: Tort Hell or Reformed Jurisdiction*, 14 CONN. INS. L.J. 149, 156 (2007).

84. *National support for the death penalty hit an all-time high in the mid-1990s, with 80% of Gallup respondents answering in favor in 1994.* GALLUP.COM (Oct. 24, 2006), https://news.gallup.com/poll/1606/Death-Penalty.aspx. That support has since declined significantly. *Death Sentencing Graphs By State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/sentencing-data/state-death-sentences-by-year (last visited Jan. 24, 2025).

85. FLYNT, *supra* note 18, at 202.

86. As a late-1990s article explained, "In recent years, voters have removed from the bench several judges after high-profile campaigns focusing on the judge's votes on a single issue, often the death penalty." Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 649 (1999). According to one study of Alabama judicial elections, a particularly high-profile 1986 fight in which three California Supreme Court justices were defeated for overturning death sentences seems to have had a significant effect on Alabama politics. After that election, Alabama judicial candidates began overriding jury recommendations of leniency and imposing death sentences significantly more often in the year before their own electoral contests than they had previously. Herbert Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 464 (2007).

87. Justice Gorman Houston of the Alabama Supreme Court suggested as much in a concurrence to one of the death penalty cases: "I regret that the abolition of caps on punitive damages was such a felt necessity of the times that the majority of this Court played a sleight-of-hand trick to justify striking these caps, while trying not to have to declare unconstitutional much of" the punishment section of the criminal code. Ex parte Jackson, 672 So. 2d 810, 812 (Ala. 1995).

88. *Moore*, 592 So. 2d at 159.

right of trial by jury in existence as to punitive damages at that time? The answer to these questions is clearly 'yes.'"[89]

The same year *Henderson* was decided, however, the Alabama Supreme Court simultaneously held that the opinion's Section 11 analysis could *not* be applied to the state's capital punishment scheme. In *Ex Parte Giles* (1993), another Section 11 challenge to judicial override, the Court reached the precisely opposite conclusion, writing, "we cannot hold, as Giles urges us to do, that the statutory procedure in effect in 1901 is 'frozen' by § 11."[90] *Giles* reiterated *Crowe*'s contention that, because common law juries did not sentence, the Alabama constitution did not protect a right to jury sentencing.[91] The Court continued its civil-criminal split throughout the 1990s,[92] while arguing that there was no real contradiction because *Giles* had not in fact overruled *Gilbreath*, which (it held) remained the key to interpreting the Section 11 right.[93]

At least one Alabama Supreme Court justice, Justice Gorman Houston, was greatly troubled by this contradiction, which he criticized repeatedly in both

89. Henderson By & Through Hartsfield v. Alabama Power, 627 So. 2d 878, 887 (Ala. 1993), *abrogated by* Ex parte Apicella, 809 So. 2d 865 (Ala. 2001).

90. Ex parte Giles, 632 So. 2d 577, 583 (Ala. 1993). The defendant pointed out the contradiction between *Crowe* and *Gilbreath*, arguing that *Gilbreath*'s logic should entitle him to a sentencing jury. *Gilbreath* held that Section 11 froze into constitutional law jury statutes in force in 1901. Since, Giles pointed out, capital juries were sentencing in 1901, he should therefore be entitled to the same procedure. In response, the *Giles* court attempted to limit *Gilbreath*'s scope, holding that *Gilbreath* applied *only* to the specific right in question (disputes over wills). The Court further explained that asserting *Gilbreath*'s protection for any other right required "an extensive analysis of the history of the claimed right." *Id.* at 580. Presumably, the Court was unpersuaded by Giles' historical analysis, relying instead *Crowe*'s contention that the history of capital jury sentencing did not go back far enough to warrant constitutional protection. However, the Court itself did not in fact engage in an "extensive analysis" of jury sentencing, other than to claim (as it had in *Crowe*) that its earliest instance in Alabama dated to 1841. Instead, the Court seemed to contradict itself within the same opinion about the importance of history. Rather than making an explicit historical claim, *Giles* instead reached its conclusion about Section 11's scope based on a contemporary reality that had nothing to do with Alabama law. *Giles* pointed to uncertainty about the U.S. Supreme Court's capital jurisprudence as the real reason that Section 11 did not outlaw judicial override: "Given the supremacy of federal law over state constitutional provisions, and the notoriously *ambulatory nature* of federal death penalty doctrine, we cannot hold, as Giles urges us to do, that the statutory procedure in effect in 1901 is 'frozen' by § 11." *Id.* at 583 (italics in original).

91. "[T]he common law did not invest juries with sentencing discretion in capital cases… On this ground, the Court of Criminal Appeals has held that Ala. Code 1975, § 13A–5–46, which designates merely as 'advisory' the jury's verdict in capital cases, does not violate § 11." *Giles*, 632 So. 2d at 580.

92. In two 1995 cases, the Court struck down caps on damages in suits against health care providers. Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995), *abrogated by* Ex parte Apicella, 809 So. 2d 865 (Ala. 2001); Ray v. Anesthesia Assocs. of Mobile, P.C., 674 So. 2d 525, 526 (Ala. 1995), *as corrected on denial of reh'g* (Dec. 15, 1995). Whereas in *Henderson* the justices found that Section 11 protected a *common law* jury trial right, *Schulte* extended Section 11 protection to a nineteenth-century *statutory* right. This was precisely the kind of right that *Crowe* had held was *not* covered by Section 11. Also in 1995, the Court again held that non-unanimous sentencing was not barred by Section 11, even though, Houston pointed out, "At the time of the ratification of the 1901 Constitution, this would not have been a valid sentence." *Ex parte Jackson*, 672 So. 2d at 811.

93. *Schulte*, 671 So. 2d at 1343.

dissents and concurrences throughout the 1990s.[94] If the legislature could not limit civil jury damages awards because no such limitations existed in 1901, he argued, it likewise could not eliminate capital jury sentencing, which *had* been the practice in 1901.[95] Houston saw no reasonable way to harmonize the civil and criminal lines of Section 11 cases,[96] writing that the Court's oscillation between its two historical standards had made Section 11 "its plaything."[97] He concluded that the only explanation for the court's different approaches in civil and criminal cases was that it simply cared more about "liability and lucre" than about "life or liberty."[98]

C. The Standard

The foregoing history is crucial to grasping the Alabama Supreme Court's current approach to Section 11, which it laid out in the 2001 case of *Ex Parte Apicella*. *Apicella* could attempt to resolve the *doctrinal* conflict only because

94. For example, Justice Houston pointed out that the majority in *Giles* held that the Section 11 right incorporated only law pre-1819 rather than pre-1901, which "is contrary to the holding in *Gilbreath v. Wallace,* etc." *Giles*, 632 So. 2d at 588. Houston could not understand the *Giles*' majority's contention that it had not overruled *Gilbreath*, asking, "What, pray tell, did *Giles* do if it did not overrule *Gilbreath,* at least as it applied to criminal law?" *Id.*

Houston's own view was that the 1901 Constitution broadly empowered the legislature to establish both civil and criminal penalties, so the Court should reconcile its approaches by dropping the idea that the legislature could not set a cap on how much juries could force civil defendants to pay. *Henderson*, 627 So. 2d at 905. *Henderson* and *Schulte* should be overruled, allowing the legislature to impose caps on damages and leaving in place the Court's previous rulings upholding non-unanimous jury decisions and override. *Jackson*, 672 So. 2d at 812. That Houston held such a view should perhaps be unsurprising, since he "complained that punitive damages in Alabama had gotten 'out of hand.'" Hrom, *supra* note 81 at 243. He seems to have owed his judicial seat at least in part to the perception that he would support the corporate interests most in favor of tort reform. Brooks Boliek, *Houston Raised Most PAC Funds*, MONTGOMERY ADVERTISER, June 7, 1988, at 2. His sympathies clearly lay with the corporations disadvantaged in the line of civil cases, rather than with the criminal defendants whose lives were threatened or ended through dubiously novel sentencing regimes: "If there is a due process or equal protection violation as a result of this waffling by the majority, it would be the civil defendants whose property was taken in excess of legislatively mandated amounts who would have a right to have that violation redressed, not the criminal defendants whose punishment has been legally prescribed by legislation." *Jackson*, 672 So. 2d at 812–813.

He also warned his colleagues that maintaining a commitment to one policy preference risked causing enormous harm to another. If they continued to allow the jury the unfettered right to decide penalties in their civil cases, that doctrine risked spilling over to their criminal docket. To Houston's mind, this was an especially fearsome possibility for the lawlessness it could unleash on the state, since it would mean that "all sentences to death, imprisonment, and fines imposed for murder, manslaughter, rape, robbery, and many other offenses that occurred after 12:01 A.M. on July 1, 1981, [when jury sentencing was statutorily eliminated] are unconstitutional under § 11 of the Alabama Constitution." *Henderson*, 627 So. 2d at 905.

95. *Henderson*, 627 So. 2d at 905–906.

96. "If a double standard has *not* been created, then the majority of this Court has returned to a pre-*Giles* interpretation of *Gilbreath v. Wallace,* having paused long enough to carve out a single exception to the rule stated in *Gilbreath v. Wallace* for the purpose of upholding Giles's death sentence." *Schulte*, 671 So. 2d at 1354.

97. *Jackson*, 672 So. 2d at 812.

98. *Giles,* 632 So. 2d at 589.

the *political* conflict that created it had ended. The state's business community, frustrated with the state Supreme Court's repeated invalidations of pro-business legislation,[99] invested heavily and successfully in inverting the Democratic domination of the Court;[100] the last Democrat lost to a Republican in 2004.[101] Justice Houston, who had served as a Democrat since 1985, was a part of this transformation, becoming a Republican in 1997 in the middle of the Court's term.[102] By the time *Apicella* was decided in 2001, therefore, the Republican takeover of the Alabama Supreme Court was nearly complete, and the old political imperative—striking down limitations on tort damages—for identifying 1901 as the key date for interpreting the scope of the constitutional protection was gone.

But while the removal of this roadblock allowed a single opinion to *try* to bring order to the Court's interpretation of Section 11, the justices were still far from united: only four of them joined the Section 11 analysis.[103] Enough disagreement remained to ensure that the *Apicella* opinion retained much of the confusion of the precedents on which it drew. Houston, who wrote the opinion, upheld *Gilbreath*'s standard, writing that Section 11 protects rights that "existed by way of statute at the time of the adoption of the Constitution of Alabama of 1901."[104] He also recognized that Alabama statutes conferred sentencing authority on juries when the 1901 Constitution was ratified.[105] Nevertheless, Houston ruled that "the statutory right of the jury to determine punishment" was *not "*frozen into the constitutional 'right to a trial by jury.'"[106]

How could both things be true? *Apicella* recognized the contradictions that had emerged after *Gilbreath*,[107] which Houston purported to resolve by overruling *Henderson* and another civil case "[t]o the extent they held that § 11 restricted the Legislature from removing from the jury the unbridled right to punish."[108] He did *not*, however, attempt to resolve the conflict between

99. Hrom, *supra* note 81, at 245–258.

100. *Id.* at 258.

101. *Id.* at 286.

102. *Id.* at 285.

103. Springhill Hospitals, Inc. v. West, 388 So. 3d 648, 686 n.26 (Ala. 2023). Houston's effort to maintain his fragile coalition likely complicated efforts to write more expansively.

104. *Apicella*, 809 So. 2d at 873 (Ala. 2001).

105. *Id.*

106. *Id.*

107. In *Jackson* and *Giles*, "This Court has indicated that the constitutional right to trial by jury does not encompass assessing punishment in capital cases." *Id.* In *Schulte* and *Henderson*, "However, this Court has held that in civil cases the constitutional right to trial by jury does encompass the assessment of punishment." *Id.*

108. *Apicella*, 809 So. 2d at 874. The opinions states simply that "*Henderson* and *Schulte* were wrongly decided" where they infringed on legislative authority to set punishments, without further explanation. *Id.* This was sufficiently surprising that the single piece of scholarship mentioning *Apicella* noted it as a particularly stark example of the Alabama Supreme Court's uneasy relationship with precedent more generally: "The court's casual disregard of stare decisis was exemplified by the main opinion, which displayed an intent to overrule an established line of constitutional precedent without mentioning stare decisis and without explaining the basis of its decision." Mark Sabel, *Role of Stare*

Gilbreath (Section 11 protects pre-1901 practices) and *Giles* (Section 11 protects only pre-1819 practices), a conflict Houston himself had identified and decried multiple times.[109] Instead, he introduced a new consideration, absent from any of the previous cases and unsupported by any citations: "[T]he question resolves," Houston wrote, "into the issue whether the punishment a defendant is to receive is a question of fact that must be determined by a unanimous jury?"[110] Simply asserting that punishment was not a "fact," he held that defendants therefore had no right to jury unanimity in sentencing.

Apicella seems to have been the last word on the Alabama Supreme Court's interpretation of the Section 11 jury trial right. Moreover, the state Supreme Court appears to have understood it largely as upholding *Crowe*'s approach to Section 11, despite the opinion's repeated and approving invocations of the directly contradictory *Gilbreath* opinion. In a case from 2016, the Court explained its view of *Apicella*'s holding:

> Section 11, at most, preserves the right to a jury trial "as [it] existed at common law and [at] the time of Alabama's first state constitution." Crowe v. State, 485 So. 2d 351, 364 (Ala. Crim. App. 1984)… In other words, it protects only the core "traditional jury function of determining guilt or innocence," Crowe, 485 So. 2d at 364, but does not prevent the Legislature from delineating the "extent of the punishment" imposed based on that determination…[111]

On this reading—which significantly mischaracterizes *Apicella* by ignoring its upholding of *Gilbreath*—the rule for interpreting Section 11 is to look at common law and statutory practices prior to 1819. Because, according to *Crowe* and the cases that cite it, juries had no role in sentencing at that time, Section 11 provides no right to have the jury decide a sentence unanimously. By this logic, non-unanimous sentencing in capital cases therefore remains constitutional.

Decisis in Construing the Alabama Constitution of 1901 Symposium: Celebrating the Centennial of the Alabama Constitution: An Impetus for Reflection, 53 ALA. L. REV. 273, 277 (2001). Perhaps the key to Houston's thinking can be found in his *Henderson* dissent, which he references in a footnote in *Apicella*, and in which he argues that the legislature has a broad authority to regulate punishments that supersedes any jury practices beyond the core functions he sees as the only recipients of constitutional protection. *Apicella*, 809 So. 2d at 873 n.9. In addition, as he had before, Houston emphasized that one of the biggest problems with fully adopting the most obvious reading of *Gilbreath*'s standard was practical, rather than logical: "If the statutory right of the jury to determine punishment was frozen into the constitutional 'right to a trial by jury,'" he wrote, then the whole death penalty scheme (giving final sentencing authority to the judge rather than the jury) would be unconstitutional. "[E]very death sentence imposed by an Alabama court for an offense that occurred after 12:01 a.m. on July 1, 1981… would be unconstitutional and every sentence to life imprisonment without parole imposed for a capital offense and every felony sentence imposed… would violate the Alabama Constitution." *Id.* at 873.

109. "What, pray tell," he had asked, "did *Giles* do if it did not overrule *Gilbreath,* at least as it applied to criminal law?" *Smith*, 671 So. 2d at 1353–1354.

110. *Apicella*, 809 So. 2d at 873.

111. *Springhill Hospitals, Inc.*, 388 So. 3d at 686 n.26.

III. UNANIMOUS JURIES

But both *Apicella* and the cases that come after it overlook the uniquely privileged position jury unanimity has enjoyed in Alabama. As Ed Carnes, the author of the death penalty bill and its non-unanimity provision, wrote in his memo to the Alabama senate, "The only traditional requirement of jury unanimity in Alabama law is that the jury must unanimously agree on those matters about which the jury makes the actual, binding determination."[112] What he was gesturing to is one of the triumphs of Alabama legal history: an unwavering commitment to jury unanimity as one of the oldest and most foundational cornerstones of individual liberty as ensured by Anglo-American common law.[113] While Alabama has a tradition of regulating the role of juries in sentencing (limiting it to certain crimes, limiting the possible sentences), what it does *not* have, prior to 2017, is a tradition of allowing juries to decide sentences (or, indeed, almost anything) non-unanimously.

A. Alabama Doctrine

The earliest relevant Alabama case, *Davis v. Tuscumbia*, reflects the ancient common law commitment to unanimity. In 1833, the Alabama Supreme Court invalidated a law giving a railroad company the power to expropriate private lands through the decisions of a specially assembled seven-member "jury." The Court held that this body could not be a real jury, most importantly because its decisions did not have to be unanimous. "If there be any one feature that characterises [sic] a jury," the opinion stated, "from all other deliberative assemblies, known to government, it is this, that they must be unanimous."[114] Such a "jury" was unconstitutional because it violated the common law tradition that the 1819 jury trial right had incorporated.[115] *Davis* was just the beginning of a long series of Alabama opinions describing unanimity as one of the bedrocks of the Alabama jury right. One of the most-quoted statements on juries holds

112. Graddick, *supra* note 12, at 6.

113. The unanimity requirement does not quite date to the inception of the jury itself, but it is very old. Some scholars claim it goes back to the fourteenth century. Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 203 (2006). At the very latest, unanimity had become the rule by the seventeenth century and was widely praised in the eighteenth. THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 189 (1985). This history has long enjoyed the respect of the Alabama courts. In case after case, those courts have reaffirmed the truth of the eminent legal historian John Langbein's simple description of the English jury system: "The twelve jurors had to agree upon their verdict in order to convict." John H Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY, 1700-1900 14, 38 (Antonio Padoa Schioppa ed., 1987).

114. Davis v. Tuscumbia, C. & D.R. Co., 4 Stew. & P. 421, 430 (1833).

115. "If the right intended to be guarded was certain, where were the evidences of what this right was? I answer, the evidences were to be found in the common law, which, at the time of the adoption of the constitution, was the law of this State. It was the trial by jury, as known and made certain by this common law, which they intended to protect, by declaring that it should 'remain' as it then was." *Id.* at 431–432.

that: "Being selected for their impartiality and qualifications to judge facts, and unanimity of opinion and conclusion being required, their verdicts are presumed to be correct."[116]

B. The 1901 Constitution

When Alabama drafted its last constitution in 1901, almost every other state was abandoning strict constitutional requirements of jury unanimity, and loud voices in the convention were calling for Alabama to follow suit. But, after fierce debate, the delegates voted overwhelmingly to uphold that requirement, reflecting Alabama's unusually tenacious commitment to the principle of unanimity.

State constitutional protections of jury rights had been weakening throughout the nineteenth century. Almost all late-eighteenth century state constitutions guaranteed the right to trial by jury as it had existed in the English and American common law,[117] but the tide had decisively turned against expansive constitutional language protecting that right a century later.[118] Many states began allowing non-unanimous jury verdicts.[119] In 1901, some conventioneers wanted Alabama to follow this national trend. As the Alabama Supreme Court explained in *Gilbreath*, "The second most hotly debated issue during the entire term of the convention was the preservation of the right of trial by jury and in what that right consisted."[120] The Official Proceedings of the Constitutional Convention of 1901 record that some of the drafters proposed that civil verdicts require the agreement of no more than three-fourths of jury members. They argued that rigid adherents to jury unanimity were stuck in the past, that non-unanimous juries were just as much a part of progress as electric lights and railways.[121] They pointed to the fact that many other state constitutions

116. Cobb v. Malone, 92 Ala. 630, 633 (1891), *overruled by* Jawad v. Granade, 497 So. 2d 471 (Ala. 1986). Another explains that "legislative restrictions or amplifications must not be of such character as to deny or impair any of the fundamental requisites of a jury; that is, they may not vary the constituent number, nor provide for other than an unanimous verdict, nor introduce regulations leading away from impartiality. These original factors are necessary for the integrity of the jury and the jury trial, being 'impliedly, if not expressly, fixed by the Constitution.'" Baader v. State, 77 So. 370, 372 (1917). Among many other examples, *Clark v. Container Corporation of America* cited *Baader*—along with numerous other cases, a law review article, and the Official Proceedings of the 1901 Constitutional Convention—to define the three "fundamental requisites of a jury" which the legislature could not restrict: "that the jury be composed of 12 persons, that they be impartial, and that their verdict be unanimous." 589 So. 2d at 188.

117. Renee Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 819 (2013).

118. *Id.* at 822–823.

119. *Id.* at 822.

120. *Gilbreath*, 292 So. 2d at 656.

121. ALA. CONST. CONVENTION, PROCEEDINGS OF THE ALABAMA CONSTITUTIONAL CONVENTION, 1901 (VOLUME 2) 1679 (1901), http://archive.org/details/alabama-constitutional-convention-proceedings-1901-v2.

contained provisions like theirs;[122] that legal luminaries past and present had inveighed against unanimity;[123] that mistrials were more common when juries could be hung by a single holdout juror who had been bribed by the defendant.[124] They also argued that non-unanimous juries, from which it would be easier to secure judgements, would be more likely to make big businesses like railroads more accountable to injured citizens.[125]

Their opponents called the proposal to water down the unanimity requirement "the most revolutionary subject yet introduced in this Convention."[126] They explained that, although Alabama had held multiple previous constitutional conventions, "yet this grand and this true law has remained unshaken and unmolested."[127] To now suddenly allow non-unanimous verdicts would reduce confidence in the outcome[128] and would increase the likelihood that the jury would make a mistake.[129] Requiring unanimity, on the other hand, would counteract these evils by forcing jurors to deliberate and to listen to those with whom they disagreed.[130] Most crucially, unanimity protected the most vulnerable, "those who are unpopular in the community and who would otherwise be oppressed under the laws of God; but there is always one man at least who can be found who will stand up for the right, though the heavens fall."[131] The proposal to allow non-unanimous verdicts failed by a vote of 81 to 29,[132] making Alabama one of only two states to leave its constitutional jury right unchanged in the nineteenth and early twentieth centuries.[133] That vote reflected the delegates' overwhelming belief that a jury's verdict was entitled to the confidence of the accused and of their community because it was reached

122. *Id.* at 1680.
123. *Id.* at 1682–1683.
124. *Id.* at 1684.
125. *Id.* at 1703–1704.
126. *Id.* at 1705.
127. *Id.* at 1706.
128. "[L]et [a] man believe that there are three intelligent men standing up to him, three men who saw the facts as he saw them, and just nine men against him, he will say, 'There were three men for me, and I will renew my fight and I will strengthen up my line and I will present the case, and these three perhaps will be multiplied.['] *Id.* at 1707.
129. "They act on the spur of the moment. They act sometimes under excitement. They act under the stress of popular prejudice: and to authorize them to bring in a verdict by a bare majority is to give speed to hasty and ill-considered verdicts in disposition to truth, and right, and justice." *Id.* at 1710. As one delegate put it, "once say that nine men shall decide a case… deliberation is gone, and you have what you seem to be hunting for, quick and speedy justice, without sale, denial or delay." *Id.* at 1722. Another warned that adopting the proposal would "absolutely destroy the chances for deliberation, in a jury box." *Id.*
130. One delegate argued that "the verdict of twelve men if rationally obtained is more likely to be correct than that of nine out of twelve." ALA. CONST. CONVENTION, *supra* note 121, at 1711. Jurors who were forced to "sit down and reason together" would "in the large majority of cases… find where the truth is, and declare it in their verdict." *Id.* at 1722.
131. ALA. CONST. CONVENTION, *supra* note 121, at 1711.
132. *Id.* at 1727.
133. Lerner, *supra* note 117, at 823.

through a deliberative process that appropriately weighed the interests of disadvantaged minorities.

In more recent decisions, the Alabama Supreme Court has looked to these records of the convention to reaffirm the importance of jury unanimity. In 1997, for example, the Alabama senate asked the state Supreme Court justices whether it would be constitutional to do away with the requirement of jury unanimity in civil cases.[134] The justices reviewed the Official Proceedings of the Constitutional Convention of 1901 and answered that because the convention's delegates had rejected non-unanimity, the Court was constrained to reject it, too.[135] Their assessment of the Official Proceedings led them to reiterate the importance of one of the conclusions in *Gilbreath* (the only case cited in this opinion) that "if such a radical restructuring of the judicial process to authorize less than unanimous verdicts is deemed wise or necessary, it must be accomplished by an amendment to Alabama's Constitution."[136]

IV. SENTENCING JURIES IN COMMON AND STATUTORY LAW

Jury unanimity has clearly been a foundation of Alabama law for centuries. What the state judiciary has not realized is that jury *sentencing* has a long history, too, one that predates the state's 1819 Constitution. That history does not necessarily mean that all criminal defendants have the constitutional right under Section 11 to be sentenced by juries rather than judges. But defendants have *always* had the right to have juries decide on sentences unanimously when those juries were asked to do so, which they often were. Even accounting for the Alabama Supreme Court's most restrictive view of the role of past practices in interpreting constitutional guarantees—the view laid out in *Crowe*—this fact implies that sentencing juries are required to be unanimous under Section 11.

A. Jury Sentencing

Alabama courts have overlooked key features of the historical sentencing power of common law juries for at least a century and a half.[137] There are many

134. They posed this question: "Without violating Section 11 of the Constitution and other constitutional safeguards of the right to trial by jury, can the Legislature by law dispense with the historic requirement of a unanimous jury verdict and provide that the verdict in all civil cases tried to a jury shall be the verdict agreed to by not less than nine jurors?" Opinion of the Justs., 692 So. 2d 115, 115 (Ala. 1997).

135. *Id.* at 123.

136. *Id.*

137. For example, in 1872, the Alabama Supreme Court contended that, "By the common law, the jury determined merely the guilt or innocence of the prisoner; and, if their verdict was guilty, their duties were at an end. They had nothing whatever to say as to the punishment to be inflicted." Fields v. State, 47 Ala. 603, 606 (1872).

examples of this neglect,[138] most notably (in the capital context) in *Crowe*[139] and the cases based on it, including *Giles* and *Apicella*. *Giles* arrived at its holding by relying on *Crowe*'s understanding of jury sentencing: namely, that common law juries never sentenced and that Alabama's statutes did not allow jury sentencing until 1841.[140] *Crowe* had an expansive idea of what this history meant, holding that since there was no jury sentencing prior to the Constitution of 1819, it could not be subject to constitutional regulation.[141] State courts have continued to accept both the view that sentencing juries are a relatively recent arrival in the law relevant to Alabama and the *Crowe* court's conclusion that they are therefore not governed by Section 11 of the 1901 Constitution.[142]

But these historical claims are wrong in several ways. First, contrary to what Morris Hoffman, the author of a much-cited article on jury sentencing, calls "a powerful myth,"[143] some English common law juries *were* explicitly involved in sentencing.[144] For example, there are records of sixteenth-century juries that created their own sentencing "by-laws," including sets of standard punishments.[145] While such practices were far from universal,[146] jury sentencing did exist in English common law,[147] despite what Alabama courts have claimed.

Second, even when English juries had no such clearly defined responsibility to pass sentence, judges were often so constrained in the punishments they were allowed to impose that the verdict *was* in effect the

138. Another instance: in 1916, the Court (citing the 1872 case) repeated the view that that "at common law… the jury had nothing to do with the punishment." Warren v. State, 72 So. 624, 635 (1916).

139. *Crowe*, 485 So. 2d at 364.

140. Although he does not mention the case directly, Houston was clearly importing *Crowe*'s understanding of the history of juries, as demonstrated by a footnote referencing the same five out-of-state cases as *Crowe*. *Apicella*, 809 So. 2d at 873 n.9. One of the *Apicella* concurrences *did* explicitly cite *Crowe*: "Because the jury had no role in sentencing until 1841, after the ratification of our first constitution in 1819, our jury-override statute does not violate § 11, ALA. CONST. 1901." *Id.* at 874.

141. *Crowe*, 485 So. 2d at 364.

142. For example, the Alabama Court of Criminal Appeals held that "the jury had no role in sentencing at common law and, therefore, no particular numerical vote could be required by Article I, Section 11." Frazier v. State, 562 So. 2d 543, 551 (Ala. Crim. App.), *rev'd sub nom.* Ex parte Frazier, 562 So. 2d 560 (Ala. 1989) (citing *Crowe*, 485 So. 2d at 364). The Alabama Supreme Court continues to rely on *Crowe* to justify non-unanimous sentencing. *Springhill Hospitals, Inc.*, 388 So. 3d at 686 n.26.

143. Hoffman, *supra* note 58, at 958.

144. Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines (Sentencing Symposium)*, 44 ST. LOUIS U. L.J. 299, 310 (2000).

145. JOHN BRIGGS ET AL., CRIME AND PUNISHMENT IN ENGLAND: AN INTRODUCTORY HISTORY (2005). Thomas Green likewise discusses a tradition of jury "law-finding," in which they construed statutes for themselves, giving them a great deal of influence over the outcomes of the criminal process. GREEN, *supra* note 113, at 98.

146. Few practices of any kind were in early modern English law. "The single consistent tendency over approximately the past three centuries about the role of judges in setting criminal sentences has been the absence of any consistency." Bowman, *supra* note 144, at 310.

147. "At some times, in some places, judges have had near-monopolies on the sentencing function. At other times, and sometimes in the same places, judges have been mere executors of decisions made by legislatures or juries." *Id.*

sentence.[148] In a system in which, "[i]n practice, the jury had more discretion in sentencing than the judge,"[149] juries could and did find defendants guilty of different crimes in order to determine the punishment they would receive, giving them "a de facto sentencing discretion"[150] and making the eighteenth-century criminal jury trial in England "primarily a sentencing proceeding"[151] at which "judges sentenced in name only."[152]

Third, explicit jury sentencing flourished in the common law and statutory contexts from which Alabama constitutional law draws: the American colonies and the early states prior to 1819.[153] Virginia adopted the first formal state jury sentencing law in 1796 and other states quickly followed.[154] Many Americans deplored what they understood to be the formal English practice of judicial sentencing and so permitted jurors to decide "both capital and noncapital sentencing."[155] Jury sentencing was widely practiced and deeply entrenched in early America. Numerous studies attest to the fact that "jury sentencing was the norm rather than the exception in the states of the young republic."[156] Widespread limitations on jury sentencing are a relatively recent development in

148. Hoffman, *supra* note 58, at 962.

149. Langbein, *supra* note 113, at 36.

150. "Suppose, for example, that the defendant were accused of burglary — the indictment alleged that he broke into a house at night and stole five pounds worth of goods. Although the indictment charged burglary, for which the sanction was death, the jury had the power to convict the defendant of a lesser offense. It might (and it often did) return a verdict of 'not guilty of burglary, but guilty of the theft.' The effect of this formulation was to spare the defendant from the death penalty, and to consign him to transportation (later imprisonment) for grand larceny. If the jury were extraordinarily concerned to be lenient, it could (but seldom did in such a case) find the defendant guilty of a theft to the value often pence, hence mere petty larceny, for which the main sanction was whipping. Thus, the jury in this example could choose among three sentences — death, transportation, or whipping — by manipulating the offense." *Id.* at 37.

151. *Id.*

152. Hoffman, *supra* note 58, at 963.

153. Hoffman acknowledges that, "Historical records related to colonial sentencing practices are almost nonexistent. This lack of evidence has left scholars in some disagreement about the extent to which colonial juries did or did not participate in noncapital sentencing." However, "This dispute is really only a matter of timing, since it is well settled that jury sentencing was widespread by the early 1800s," i.e., by the time of the ratification of Alabama's first constitution. *Id.* at 963 n.43.

154. Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 V A. L. REV. 311, 317–318 (2003).

155. Hoffman, *supra* note 58, at 963–964.

156. Bowman, *supra* note 144, at 311. According to one study, "In many American jurisdictions, juries at criminal trials served at one time as the primary sentencing institutions. Statutes in as many as half of the states during the nineteenth century granted the criminal jury the power to set the sentence after reaching a guilty verdict in a non-capital case." Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1373 (1999). *See also*, Iontcheva, *supra* note 154, at 316. "In most states, jury sentencing was introduced almost immediately after entry into the Union and was included in the state's original criminal code." Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1791 (1999). Another author goes so far as to say that the jury was granted "the power to determine the law" as "the available evidence suggests that trials in the colonies were notable for the presence of robust jury powers and an impotent judiciary." Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 103 (2006).

American law.[157] The colonial and early republican legal environment that gave rise to the formalization and spread of sentencing juries clearly constitutes part of the common law on which Alabama courts rely in interpreting the state constitution.[158]

Fourth, sentencing juries were explicitly sanctioned in Alabama statutes *before* 1819, contrary to the Alabama Supreme Court's many claims that they first appeared in 1841. Jury sentencing is explicitly required in at least three places in the 1807 *Statutes of the Mississippi Territory*, which governed Alabama before it became a state in 1819 with the ratification of its first constitution.[159] Juries had the power to determine the maximum fines in all cases in which they were imposed[160] and were specifically responsible for setting fines in cases of manslaughter[161] and assault with intent to commit murder, rape, or robbery.[162] Jury sentencing was already a part of Alabama statutory law before the constitutional jury trial right was first enacted.

In sum, despite what the Alabama Supreme Court has often asserted, many juries decided on punishment in English and American common law and in Alabama statutory law, and they did so at the times the Court has declared important to determining the scope of the Section 11 jury trial right.

B. "A Question of Fact"

Houston's ruling in *Apicella* that the defendant was not entitled to a sentencing jury relied significantly on a consideration that had previously played little role in the Alabama Supreme Court's Section 11 jurisprudence. Because the opinion found that "the determination of punishment is not a question of fact," Section 11 therefore "does not require that a jury determine the punishment of a criminal defendant."[163] In *Apicella*, Houston distinguished between, on the one hand, facts and verdicts—on which defendants are constitutionally entitled to unanimous jury findings—and, on the other, sentences, on which they are not. The logic of this distinction continues to influence the Alabama Supreme Court's

157. "It was early in the twentieth century when states started to limit or abandon jury sentencing and to give judges the power to set the initial sentence in every case." Wright, *supra* note 156, at 1374.

158. The Alabama Supreme Court has held that the common law on which the writers of the state's constitutions relied (and which was thus implicitly incorporated into state constitutional law) included "a great body of American laws, the American common law, together with some written laws, the acts of the Alabama and Mississippi territorial Legislatures, the Constitution of the United States, and the acts of Congress." Ex parte Rhodes, 79 So. 462, 463–64 (1918).

159. Nancy King notes this fact. Nancy King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHICAGO-KENT L. REV. 937, 990–991 (2003).

160. MISSISSIPPI, THE STATUTES OF THE MISSISSIPPI TERRITORY, REVISED AND DIGESTED BY THE AUTHORITY OF THE GENERAL ASSEMBLY 327 (1807).

161. *Id.* at 306.

162. *Id.* at 307.

163. *Apicella*, 809 So. 2d at 874. The opinion provides no citation to cast light on its conception of "fact" in this context, but it does approvingly cite the view stated in *Gilbreath* and other cases going back to 1855 that defendants have the constitutional right "to have a 12-person, impartial jury unanimously decide the facts." *Id.* at 872.

holdings on non-unanimity. Both *Apicella* and the numerous recent Alabama Court of Criminal Appeals cases dismissing challenges brought under *Ramos* insist that the constitutional jury trial right and its guarantee of unanimity extend to "verdicts" but not to "sentences."

But this distinction is a recent one. There is no question that the right to unanimous jury sentencing predated the 1819 Constitution, because the difference between verdict and sentence barely even existed when that constitution was written. The language of the 1807 statutes governing Alabama clearly shows that its authors conceived of verdicts as encompassing both guilt and punishment. For example: "no person shall on conviction be fined in a greater sum than shall be assessed by the verdict of a jury."[164] In other words, prior to 1819, the common practice was for juries to render their verdicts at a single moment, rather than in separate guilt and sentencing proceedings.[165] Where those juries were called upon to sentence, their verdicts included determinations of both culpability and punishment. And the verdicts had to be unanimous.[166]

Nineteenth-century opinions confirm the idea that an Alabama jury's "verdict" was long understood to include both a determination of guilt or innocence *and* a sentence when it was empowered to decide one. The Alabama Supreme Court recognized on many occasions that a "verdict" included both culpability and consequence.[167] The Court's recognition of the jury's role in

164. MISSISSIPPI, *supra* note 160, at 327.

165. Talia Fisher, *Constitutionalism and the Criminal Law: Rethinking Criminal Trial Bifurcation*, 61 U. TORONTO L. J. 811, 815 (2011). Criminal trials were "unitary hearings, including information that concerned both the offence and the character of the defendant… Many historians go even further and claim that criminal trials looked very much like sentencing hearings." Anat Horovitz, *The Emergence of Sentencing Hearings*, 9 PUNISHMENT & SOC'Y 271, 275 (2007). Actual "[s]entencing for a very long time was largely a ceremonial rather than a decision making process." *Procedural Due Process at Judicial Sentencing for Felony Note*, 81 HARV. L. REV. 821, 821 (1967). It was not until "the end of the 18th century" that separate "sentencing hearings began to emerge." Horovitz, *supra* note 165, at 281.

166. As the 1901 constitutional convention delegates explained, "this grand and this true law" of jury unanimity "has remained unshaken and unmolested" in Alabama, a claim attested to by subsequent caselaw. ALA. CONST. CONVENTION, *supra* note 121, at 1706.

167. In 1866, for example, the Court wrote that "the punishment to be inflicted on a verdict of guilty, is an essential ingredient of the verdict; and no sentence of punishment by the court is authorized, unless the verdict shows the punishment to be inflicted." In that case, it found a verdict legally insufficient for simply stating, "We, the jury, find the defendant guilty, in manner and form as charged in the bill of indictment," and it emphasized the significance of having the jury's sentence reflected in the verdict. Turner v. State, 40 Ala. 21, 28–29 (1866). "This right is of no minor importance; for, if the question of punishment is considered, the milder or less rigorous may be imposed; and to sustain a verdict silent upon this question, would place the accused in a position powerless for redress, if the jury should, either from incompetency, negligence, or willful refusal, fail to accord to him this clear legal right." *Id. See also* McKinney v. State, 17 Ala. App. 474, 474 (Ala. Ct. App. 1920). The next year, a trial court admonished a jury for failing to "complete their verdict by adding the punishment." Waller v. State, 40 Ala. 325, 327–328 (1867). The Supreme Court held that "the jury must, by their verdict, determine both the character and the extent of the punishment" because judges had no say in the matter: "The entire punishment for this crime, is in the discretion of the jury, and the court has nothing to do in

sentencing did not prevent it from regulating that role: in a number of instances, it found that the jury had no authority to impose the kind of sentence it returned.[168] Yet in case after case, the Court also acknowledged the (at the time) obvious fact that some verdicts included sentences,[169] reflecting the pre-1819 common law reality that juries frequently sentenced and that defendants had a right for them to do so unanimously. In the words of *Apicella*'s standard, therefore, unanimous jury sentencing constitutes a situation "in which that right existed at the time of the adoption of Alabama's first constitution and those in which that right existed by way of statute at the time of the adoption of the Constitution of Alabama of 1901."[170] As Ed Carnes wrote in his memo, under Alabama law, whatever jurors decided definitively, they have always had to decide unanimously.[171]

CONCLUSION

In Alabama law, jury unanimity has mattered a great deal for a long time. Unanimity was upheld by the delegates to the constitutional convention of 1901, when many other states were doing away with it. Hundreds of Alabama Supreme Court cases have praised the requirement for hundreds of years and continue to do so. Alabama courts have been so hostile to non-unanimity that they have even outlawed jurors averaging their proposed awards in damages cases (so-called "quotient verdicts") because judges believe the process interferes with each juror's responsibility to individually consider the facts and the outcome in each case.[172]

This tradition of unanimity—so deeply embedded in the state's legal tradition and so central to protecting the lives, liberty, and property of its citizens—is threatened by the state's death penalty law. As has long been true in Alabama, the threat is greatest to its Black citizens. At the same moment at which the law was being debated, in the spring of 1981, Mobile police were charging several white men with the lynching of a young Black man whose body they left

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the matter, but to pronounce the sentence of the jury." Weatherford v. State, 43 Ala. 319, 320–321 (1869).

168. Gunter v. State, 3 So. 600, 601–03 (1888); Lacey v. State, 58 Ala. 385, 386–87 (1877).

169. *See, e.g.*, Croker v. State, 47 Ala. 53, 58 (1872); Richmond & D.R. Co. v. Freeman, 11 So. 800, 802 (1892); W. Union Tel. Co. v. Cunningham, 14 So. 579, 581 (1893); Spicer v. State, 16 So. 706, 707 (1894); Sampson v. State, 18 So. 207, 208 (1895); Evans v. State, 19 So. 535, 539–40 (1896); Washington v. State, 23 So. 697, 697–98 (1898); Henson v. State, 25 So. 23, 25 (1899); Bankhead v. State, 26 So. 979, 980 (1899); Sudduth v. State, 27 So. 487, 489 (1900); Lide v. State, 31 So. 953, 956–57 (1902); Durrett v. State, 32 So. 234, 235 (1902); Powell v. State, 60 So. 967, 970 (Ala. Ct. App. 1912); Ex parte Robinson, 63 So. 177, 178 (1913); Cunningham v. State, 69 So. 982, 985–86 (Ala. Ct. App. 1915); Bishop v. State, 84 So. 784, 785 (Ala. Ct. App. 1920).

170. *Apicella*, 809 So. 2d at 872.

171. The Alabama Court of Criminal Appeals' view of a rigid distinction between verdicts and sentences is also strikingly at odds with the instructions given to Alabama capital jurors, which refer multiple times to "sentencing verdicts." *Alabama Judicial System*, "Penalty Phase Capital 18+," *supra* note 14, at 6.

172. *See, e.g.*, Volkswagen of Am., Inc. v. Marinelli, 628 So. 2d 378, 387–88 (Ala. 1993).

hanging from a tree.[173] While it was being passed almost entirely along racial lines, via nearly unprecedented parliamentary maneuvers to defeat the filibuster of Black legislators, members of that same police force were being acquitted for their role in staging a mock lynching of their own. The juries that acquitted them were all white.[174] Attorney General Charles Graddick dismissed these incidents as "routine," unconnected to the state's history of racial terror.[175] He claimed the same thing about the death penalty law his deputy Ed Carnes wrote and he himself championed, asserting "all along that race is not an issue."[176] But race was very much an issue. It was an issue when the death penalty bill was passed in 1981 as part of the state's reaction to increasing Black political activity, and it is still an issue today: in 2024, African Americans made up about a quarter of Alabama's population and about half of death row.[177] As the introduction to this article explains, non-unanimous sentencing is responsible for more than three-quarters of that death row's inhabitants.

Today, Alabama is considering lengthening its list of death-eligible crimes, to include those who kill while creating a "great risk of death to multiple persons"[178] or who rape young children.[179] As the state contemplates expanding the use of capital punishment, it should be particularly wary of building that expansion on non-unanimity, a mechanism which was grounded in racial discrimination and which produces racially discriminatory results. Non-unanimity increases the risk of convicting potential innocents like Christopher Barbour, and it casts doubt on the legitimacy of the process by which the government exercises one of its most fearsome powers. Fortunately, Alabama has taken steps before to grapple with the legacy of racism in its capital punishment system—as when it eliminated the practice of judicial override in 2017—and it can do so again. All that is required is the restoration of the commitment to jury unanimity that has long defined the state's legal tradition.

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173. *Three Whites Charged In Black Youth's Death*, OPELIKA-AUBURN NEWS, Mar. 25, 1981, at 1.

174. *Killing like a Nightmare for Black Community*, ALEXANDER CITY OUTLOOK, Mar. 26, 1981, at 6.

175. *Id.*

176. Nutt, *supra* note 43.

177. Aaryn Urell, *Diverse Juries More Reliable, Less Likely in Alabama Death Penalty* EQUAL JUST. INITIATIVE (Feb. 18, 2025), https://eji.org/news/diverse-juries-more-reliable-less-likely-in-alabama-death-penalty/.

178. Ralph Chapoco, *Prefiled Bill Would Add Death Penalty-Eligible Offense in Alabama,* ALA. REFLECTOR (July 15, 2025), https://alabamareflector.com/2025/07/15/legislator-files-bill-to-expand-situations-that-state-can-impose-death-penalty/.

179. *Alabama House Joins Florida and Tennessee to Advance Unconstitutional Expansion of Death Penalty That Advocates Say Would Harm Children,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/alabama-house-joins-florida-and-tennessee-to-advance-unconstitutional-expansion-of-death-penalty-that-advocates-say-would-harm-children (last visited Oct. 31, 2025).