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SCOTTSBORO

MICHAEL J. KLARMAN*

I. INTRODUCTION

One of America's most infamous legal episodes began on March 25, 1931. Nine black youths from Georgia and Tennessee were accused of raping two white women on a freight train in northern Alabama. In hastily arranged trials, eight of them received death sentences. Their appeals, retrials, and subsequent legal proceedings riveted the attention of the nation and the world and ultimately produced two Supreme Court rulings in their favor and nearly twenty years of legal wrangling.

Known to history as Scottsboro, this episode teaches several lessons relevant to students of American constitutional law and history. The Scottsboro Cases illuminate why the modern revolution in American criminal procedure began mainly with cases involving black criminal defendants from the South. The episode also reveals how Supreme Court interventions in southern race cases tended to incite political backlashes that undermined implementation of the Court's decisions—thus making Scottsboro an important forerunner of *Brown v. Board of Education*.[1] The competition between the National Association for the Advancement of Colored People (NAACP) and the International Labor Defense (ILD) for the right to represent the Scottsboro defendants on appeal illustrates competing perspectives on the use of law as a method of social reform—a debate that reverberates to the

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My footnoting practices in this Article combine those used by historians and those of law professors. In general, I have combined the sources relevant to a particular paragraph in a single footnote at the end of that paragraph. However, for quotations and for other sentences containing specific details, I have adhered to conventional law review practices.

1. 347 U.S. 483, 495–96 (1954); *see* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 385–442 (2004).

present day.[2] The limited impact of the Supreme Court rulings in Scottsboro on the southern criminal justice system sheds light on another great debate in American constitutional law and theory: the capacity of the Supreme Court to compel social change.[3] Finally, the Scottsboro litigation illustrates not only some of the indirect benefits of litigation as a method of organizing social protest,[4] but also the intangible costs generated by Court victories that fail to appreciably change oppressive social practices.[5]

II. THE STORY OF SCOTTSBORO

A. A Fateful Train Ride

The freight train left Chattanooga for Memphis at 10:20 a.m. on March 25, 1931. Thirty minutes after it had pulled out of Stevenson, Alabama, the stationmaster there saw a group of white hoboes walking along the train tracks back toward the station. They told him that several black youths had thrown them off the train after a fight. The stationmaster telephoned ahead to the next stop, Scottsboro, but the train had already passed through. It was finally stopped at Paint Rock, where a sheriff's posse discovered nine black youngsters and, to everyone's surprise, two young white women dressed in men's overalls.[6]

The nine blacks, known to history as the Scottsboro boys, ranged in age from thirteen to twenty. Five of them were from Georgia, though they claimed not to know one another. The other four did know one another; they were from Chattanooga, Tennessee. All of the nine were vagrants, and most of them were illiterate.

Twenty minutes after the train had been stopped, one of the women, Ruby

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2. *See, e.g.*, Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151 (2009); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

3. *See, e.g.*, JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 192–209 (1978); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1st ed. 1991); Bradley C. Canon, *The Supreme Court and Policy Reform:* The Hollow Hope *Revisited*, *in* LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 215 (David A. Schultz ed., 1998); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 333–55 (1993); STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970).

4. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM, *supra* note 3, at 214–22 (discussing indirect benefits from law reform activity); KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 93–95, 162–67, 284–86, 365–69, 463–68; MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 10, 56–57, 279 (1994) (discussing indirect benefits of reform litigation activity).

5. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 95–96, 282–84.

6. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 3–5 (rev. ed. 1979); JAMES GOODMAN, STORIES OF SCOTTSBORO 3–4 (1994).

Bates, called over a posse member and told him that she and her companion, Victoria Price, had been gang-raped by the blacks. The boys were immediately arrested and taken to the Scottsboro jail. As the sheriff sent the women to two local doctors for medical examinations, news of the alleged attacks spread. By day's end, a crowd of several hundred people had gathered outside of the jail, demanding that the "niggers" be turned over for lynching.[7] Sheriff M.L. Wann pleaded with the mob to allow the law to take its course and threatened to shoot anyone who rushed the jail. He also telephoned the governor for assistance, and by 11:00 p.m., twenty-five armed guardsmen were on their way to Scottsboro. To ensure the boys' safety, they were moved to a sturdier jail in nearby Etowah. The local circuit judge, Alfred E. Hawkins, convened a special session of the grand jury to indict them; local citizens complained of the five-day delay. One local newspaper remarked, "It is best for the county that these things be disposed of in a speedy manner as it gives no excuse for people taking the law into their own hands."[8]

A decade or two earlier, black men charged with raping white women under similar circumstances might well have been executed without trial. Lynchings in the South peaked in the late 1880s and early 1890s, when well over a hundred were reported annually and in some years over two hundred. Most lynchings occurred in response to allegations of crime—usually murder or rape—though occasionally the alleged "offense" was as minor as breach of racial etiquette or general uppityness. Prior to World War I, lynchings typically enjoyed the support of local communities; efforts to prosecute even known lynchers were rare, and convictions were virtually nonexistent.[9]

By 1930, however, the number of reported lynchings had declined dramatically—from an average of 187.5 per year in the 1890s to 16.8 in the later years of the 1920s.[10] This decline was attributable to many factors, including the possibility of federal anti-lynching legislation, the diminishing insularity of the South, more professional law enforcement, and better

7. CARTER, SCOTTSBORO, *supra* note 6, at 6–8 (citation and internal quotation marks omitted).

8. *Id*. at 6–9, 16–17 n.11 (quoting the PROGRESSIVE AGE (Scottsboro, Ala.), Apr. 2, 1931) (internal quotation marks omitted); GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 21–22.

9. CARTER, SCOTTSBORO, *supra* note 6, at 105; KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 118–19; *see generally* W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930 (1993); GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890–1940, at 199–227 (1998); LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 280–325 (1998); NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 224–56 (1989); ARTHUR F. RAPER, THE TRAGEDY OF LYNCHING (1933); UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH (W. Fitzhugh Brundage ed., 1997) (discussing lynching in relation to racial violence, its regional and cultural contexts, and its legacy).

10. RAPER, TRAGEDY OF LYNCHING, *supra* note 9, at 25, 46–47.

education.[11] But the decline in lynchings probably also depended on their replacement with speedy trials that reliably produced guilty verdicts, death sentences, and rapid executions.[12] Some jurisdictions actually enacted laws designed to prevent lynchings by providing for special terms of court to convene within days of alleged rapes and other incendiary crimes.[13] In many instances, law enforcement officers explicitly promised would-be lynch mobs that black defendants would be quickly tried and executed if the mob desisted, and prosecutors appealed to juries to convict in order to reward mobs for good behavior and thus encourage similar restraint in the future.[14]

In such cases, guilt or innocence usually mattered little. As one white southerner candidly remarked in 1933, "If a white woman is prepared to swear that a Negro either raped or attempted to rape her, we see to it that the Negro is executed."[15] Prevailing racial norms did not permit white jurors to believe a black man's word over that of a white woman; prevailing gender norms did not allow defense counsel to closely interrogate a white woman about allegations involving sex. As one contemporary southern newspaper observed, the honor of a white woman was more important than the life of a black man.[16] And because most southern white men believed that black males secretly lusted after "their" women, they generally found such rape allegations credible. Congressman George Huddleston of Birmingham, whom the NAACP initially approached to represent the Scottsboro boys on appeal, repulsed the overtures, observing that they had been "found riding on the same freight car with two white women, and that's enough for me!"[17] Scottsboro whites told an investigator from the American Civil Liberties

11. *See, e.g.*, GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 565 (1944); GEORGE BROWN TINDALL, THE EMERGENCE OF THE NEW SOUTH 1913–1945, at 174, 554 (1967); Todd E. Lewis, *Mob Justice in the "American Congo": "Judge Lynch" in Arkansas During the Decade After World War I*, 52 ARK. HIST. Q. 156, 179–84 (1993).

12. On these "legal lynchings," see MCMILLEN, DARK JOURNEY, *supra* note 9, at 206–17; George C. Wright, *By the Book: The Legal Executions of Kentucky Blacks*, *in* UNDER SENTENCE OF DEATH, *supra* note 9, at 250–70.

13. *See, e.g.*, Bettis v. State, 261 S.W. 46, 47 (Ark. 1924); CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 298 (1940); LAWRENCE D. RICE, THE NEGRO IN TEXAS 1874–1900, at 253 (1971).

14. *See, e.g.*, RICHARD C. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND *BROWN V. MISSISSIPPI* 3–4, 8 (1986); Anne S. Emanuel, *Lynching and the Law in Georgia Circa 1931: A Chapter in the Legal Career of Judge Elbert Tuttle*, 5 WM. & MARY BILL RTS. J. 215, 228 (1996).

15. John Gould Fletcher, Letter to the Editor, *Is This the Voice of the South?*, 137 NATION 734, 734 (1933).

16. CARTER, SCOTTSBORO, *supra* note 6, at 134.

17. Excerpt from a Confidential Report on the Scottsboro Cases (May 7, 1931), *microformed on* Papers of the National Association for the Advancement of Colored People, pt. 6, reel 2, frames 893–94 (August Meier ed., Univ. Publ'ns of Am. 1982) [hereinafter *NAACP Papers*].

Union (ACLU) that, "We white people just couldn't afford to let these niggers off because of the effect it would have on other niggers."[18]

The Scottsboro defendants received precisely the sort of "justice" that often prevailed in trials that substituted for lynchings. Both local newspapers treated the defendants as obviously guilty even before the trial. The hometown newspaper of the alleged victims, the Huntsville *Daily Times*, "described the rapes as the most atrocious ever recorded in this part of the country, a wholesale debauching of society."[19] Judge Hawkins tried to assign all seven members of the Scottsboro bar to represent the defendants, but all but one of them declined. That one was Milo Moody, nearly seventy years old and later described by one investigator as "a doddering, extremely unreliable, senile individual who is losing whatever ability he once had."[20]

The trials began on April 6, just twelve days after the train incident. A crowd estimated at five to ten thousand gathered outside the courthouse, which was protected by national guardsmen wielding machine guns. Hawkins appointed as trial counsel a Tennessee lawyer, Stephen R. Roddy, who had been sent to Scottsboro by the defendants' families to look after their interests. Roddy was an alcoholic, and one observer reported that "he could scarcely walk straight" that morning.[21] When Roddy objected to his appointment on the grounds that he was unprepared and unfamiliar with Alabama law, Hawkins appointed Moody, the local septuagenarian, to assist him. Roddy was permitted less than half an hour with his clients before the trial began. Defense counsel moved for a change of venue based on the inflammatory newspaper coverage and the attempted lynching of the defendants. But Sheriff Wann now denied that the defendants had been threatened, and Judge Hawkins denied the motion.[22]

The state sought the death penalty against eight of the nine defendants—all but the one who was identified as being only thirteen years old. The nine were tried in four groups, beginning with Clarence Norris and Charley Weems. Victoria Price was the main prosecution witness, and she testified that the black youths had thrown the white boys off the train and then gang-raped her and Bates. According to one secondhand account, Price testified

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18. Hollace Ransdell, Report on the Scottsboro Case (May 27, 1931) [hereinafter *Ransdell Report*], *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 3, frame 175.

19. CARTER, SCOTTSBORO, *supra* note 6, at 20 (citation and internal quotation marks omitted).

20. Memorandum from Mrs. Hollace Ransdall [sic] on Visit to National Office on May 18, 1931 (May 19, 1931), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 3, frame 27; CARTER, SCOTTSBORO, *supra* note 6, at 17–18; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 26.

21. CARTER, SCOTTSBORO, *supra* note 6, at 21–22 (citation and internal quotation marks omitted).

22. *Id*. at 19–24.

"with such gusto, snap and wise-cracks, that the courtroom was often in a roar of laughter."[23]

Judge Hawkins blocked defense counsel's efforts to elicit admissions that the women were prostitutes and that they had had sexual intercourse with their boyfriends the night before the train incident, which could have explained the semen found in their vaginas during medical examinations. Testimony provided by the examining doctors raised serious doubts as to whether the girls had been raped: They were not hysterical when examined, nor had they incurred any serious physical injuries. Moreover, Price had so little semen in her vagina that a sequential rape by six men, as she alleged, was highly improbable. Finally, the sperm found in the women was non-motile, which virtually ruled out the possibility of intercourse within the preceding few hours. In their testimony, the two women also provided inconsistent accounts of various details of the incident, such as whether they had spoken with the white boys on the train and how long the interracial fracas had lasted. One man present when the train was stopped testified that he had not heard Price make any rape allegations.[24]

However, the admission by Norris on cross-examination that the women had been raped by all of the other eight defendants, though not by him, severely undercut his defense. (It later came out that Sheriff Wann had warned Norris that he would be killed if he did not admit that the girls had been raped.) Defense counsel prodded the illiterate and confused Norris to change his story, but he held firm. The defense called no witnesses and made no closing argument.[25]

While the jury deliberated on the fate of Norris and Weems, the trial of Haywood Patterson began. When the first jury returned to the courtroom to announce guilty verdicts and death sentences, crowds in and out of the courthouse erupted with delight. According to defense lawyer Roddy, "[i]nstantly, a wild and thunderous roar went up from the audience and was heard by those in the Court House yard where thousands took up the demonstration and carried it on for fifteen or twenty minutes."[26] Even though Patterson's jury heard this commotion, Judge Hawkins refused to declare a mistrial.[27]

The prosecution's case grew stronger with each trial, as previously

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23. *Ransdell Report*, *supra* note 18, at frame 181; *see also* CARTER, SCOTTSBORO, *supra* note 6, at 24–26.

24. CARTER, SCOTTSBORO, *supra* note 6, at 26–30.

25. *Id*. at 33–35.

26. Letter from Stephen R. Roddy, Attorney, to the Friends and Relatives of the Nine Negro Boys Charged with Rape, in Jackson County, Alabama (Apr. 11, 1931), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 2, frame 627.

27. CARTER, SCOTTSBORO, *supra* note 6, at 35–38.

unhelpful witnesses were dropped and the alleged victims improved their stories with each recounting. Within a five-minute span on the witness stand, Patterson contradicted himself as to whether he had seen the girls being raped or indeed had seen them on the train at all. Several of the other defendants also testified inconsistently. After less than twenty-five minutes of deliberation, the jury convicted Patterson and sentenced him to death.[28]

Five of the defendants were prosecuted together in a third trial. The state's case against them was even weaker because these defendants did not incriminate each other on cross-examination, the women were less certain in identifying them as the rapists, and one of the defendants was nearly blind while another had such a severe case of venereal disease that raping a woman would have been very difficult. The jury nonetheless returned five more death sentences. Judge Hawkins declared a mistrial in the case of the last defendant, Roy Wright, when the jury could not agree on whether to sentence the thirteen-year-old to life imprisonment or to death—a sentence the prosecution had not even sought. None of the four trials lasted more than a few hours.[29]

B. Representation on Appeal

The Communist Party quickly realized the potential for propaganda and fund-raising afforded by the Scottsboro episode, which it saw as the Sacco and Vanzetti case of the 1930s. Communists denounced the trials as "legal lynchings" and assailed the "parasite landlords and capitalist classes of the South."[30] Less radical voices also protested this "barbarous penalty" imposed on eight black youngsters.[31] By contrast, the NAACP, which was generally reluctant to intervene in criminal cases unless reasonably certain that the defendants were innocent, was slow to act. The NAACP's hesitation enabled the ILD, the legal arm of the Communist Party, to secure the defendants' consent to its representing them.[32]

Stung by criticism from supporters for its dilatory response and discovering that "public interest is so deep that we cannot afford not to be in the case," NAACP leaders aggressively challenged the ILD for control of the boys' appeals.[33] The NAACP convinced some black leaders in Chattanooga,

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28. *Id*. at 38–43; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 14–15.

29. CARTER, SCOTTSBORO, *supra* note 6, at 42–48.

30. *Id*. at 49 (citation and internal quotation marks omitted).

31. *Id*. at 50 (citation and internal quotation marks omitted).

32. *Id*. at 49–60; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 7–8, 25–29.

33. Letter from Walter White, Secretary, NAACP, to Bob & Herbert (May 3, 1931), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 2, frame 829; *see also* Letter from Roy Wilkins, Assistant Secretary, NAACP, to Walter White, Secretary, NAACP (May 7, 1931), *microformed on id*., frame 889 (noting that while the NAACP had been silent on the Scottsboro case,

which was home to several of the defendants, that communist involvement would be a millstone around the boys' necks, and the defendants were persuaded to retract their consent to ILD representation. The ILD responded by publicly attacking the NAACP as "[b]ourgeois [r]eformists" and "secret allies of the lynchers" who would help "lead the boys to the electric chair."[34] The communists declared that the boys could be saved only by mass protest, not by appeals to the ruling class. They ridiculed the NAACP for its willingness to "kiss the rope that hangs their brothers, if only the rope is blessed by a ruling class judge," and they accused the association generally of ignoring the interests of the black masses.[35]

In response, the NAACP accused the communists of using the case for their own selfish advantage and warned that their incendiary rhetoric would harm the defendants' chances of winning reversal on appeal or securing a commutation of their sentences from the governor. Walter White, the general secretary of the NAACP, told the mother of one of the boys, Eugene Williams, that "the odds against her son were terrific at best—that when Red prejudice was added to Black, she would practically insure her boy's execution by remaining tied up with the Communists."[36] White even accused the communists of calculating that "the boys dead will be worth more for propaganda purposes than alive."[37] By contrast, the NAACP's strategy on appeal would be to hire an eminent white lawyer from the South who would avoid publicity and try to win reversal or commutation on narrow legal grounds.[38]

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the ILD and the Communist Party had been publicizing it and "generally whooping it up" and that this was causing "no little embarrassment to the Association").

34. CARTER, SCOTTSBORO, *supra* note 6, at 56–57, 61–62 (citations and internal quotation marks omitted).

35. *Id*. at 67 (citation and internal quotation marks omitted); *see also* Letter from William Patterson, Secretary, ILD, to NAACP (June 30, 1933), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 2, frames 459–72 (arguing that the freedom of the Scottsboro boys could be won "only by rousing the Negro masses in alliance with the white workers to a relentless struggle against the whole system of national oppression of the Negro people," and attacking the NAACP for trying to block such alliances while placing excessive faith in the courts).

36. Letter from Walter White, Secretary, NAACP, to Bob & Herbert, *supra* note 33, at frame 826.

37. Letter from Walter White, Secretary, NAACP, to Messrs. Fort, Beddow & Ray (Aug. 19, 1931), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 4, frame 146; *see also* Letter from Walter White, Secretary, NAACP, to Roy Wilkins, Assistant Secretary, NAACP (May 13, 1931), *microformed on id*., at reel 2, frames 973–75 (noting that the NAACP had cause to believe that "some of the Communists [felt] that if the boys [were] electrocuted after at least a semblance of legal action to save them [had] been made, it [would have been] even more valuable for the Communists in their appeal to Negroes for support").

38. *Murder from Afar*, PHILA. TRIB., Aug. 27, 1931, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 351; CARTER, SCOTTSBORO, *supra* note 6, at 69–72; *see also* Letter from Walter White, Secretary, NAACP, to Ludwell "Lud" Denny (Apr. 29, 1931), *microformed on*

NAACP leaders were torn between wanting not to jeopardize the defendants' chances of winning the support of moderate whites in the South and wishing not to alienate those of its members who demanded a vociferous condemnation of the white South for its willingness to execute the defendants on dubious evidence. By distancing itself from the ILD, the NAACP alienated the many blacks who saw little reason to repudiate the communists' assistance, which they saw as "sincere and wholehearted."[39] The editor of one black newspaper observed that the NAACP had "outlived its usefulness if it now feels that fighting the spread of communism is more important than fighting white Southerners who will lynch, massacre, and slaughter and expect to get away with it."[40] Another black editor accused the NAACP of having an "Uncle Tom attitude" in this case.[41] Yet Walter White was convinced that it would be "suicidal" for the NAACP "to be tied up in any way with that outfit of lunatics [the communists]."[42] Most black newspaper editors saw the battle between the NAACP and the ILD as "deplorable"[43] and a "sad spectacle,"[44] and one observed that "we have too few friends to have the quarrel as to which we shall lend a helping hand in any given case."[45]

After months of repeatedly changing their minds over the choice of legal representative, by the end of 1931 all of the defendants had settled on the ILD, partly because of the NAACP's occasionally condescending attitude toward them and their parents. For example, one NAACP official, William Pickens, referred to some of the boys' parents as "the densest and dumbest animals it has yet been my privilege to meet"—a statement that the ILD ensured the parents heard about.[46] The communists also sent small monthly checks to the

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NAACP Papers, *supra* note 17, at pt. 6, reel 2, frames 748–49 (noting that this case would have been "difficult enough to handle under normal circumstances, but the tactics of the Communists have inflamed feeling against the boys to fever pitch" and observing that the only way to save the boys' lives was to find a lawyer, "preferably an Alabamian, whose standing is such as to help mobilize effectively the considerable sentiment which, we are informed, exists in Alabama among white people of the decent sort, that the boys are innocent").

39. CARTER, SCOTTSBORO, *supra* note 6, at 69 (citation and internal quotation marks omitted).

40. *Id.* at 96 (citation and internal quotation marks omitted).

41. *The Conservative N.A.A.C.P*, OKLA. CITY BLACK DISPATCH, May 14, 1931, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 118.

42. Letter from Walter White to Bob & Herbert, *supra* note 33, at frame 828.

43. Editorial, *This We Regret*, CAL. NEWS, Jan. 7, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 469.

44. *An Offensive Defense*, CAROLINA TIMES, Jan. 9, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 507.

45. *The Reds at Scottsboro*, AFRO–AM. (Balt.), Jan. 9, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 489; *see also* CARTER, SCOTTSBORO, *supra* note 6, at 85–90.

46. Letter from William Pickens, Field Secretary, NAACP, to Walter White, Secretary, NAACP (June 6, 1931), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 3, frames 355–57.

defendants' families and treated their parents with kindness and respect.[47]

In a final effort to win back control of the cases, the NAACP persuaded Clarence Darrow to participate in the appeals.[48] Not wishing to be perceived as rejecting assistance from the nation's most eminent criminal defense lawyer, the ILD professed eagerness to have Darrow's help. But the organization insisted that Darrow sever his connections with the NAACP and take orders from the ILD. Confronted with such an ultimatum, Darrow and the NAACP withdrew from the case. One black newspaper predicted that the consequence of Darrow's withdrawal "is almost surely to be murder in Scottsboro" and warned that the defendants' "innocent blood will be a crimson stain on the [ILD]."[49]

Because communists generally viewed courts as simply "instruments of . . . class oppression," they did not place much faith in litigation.[50] Rather, they favored "revolutionary mass action outside of courts and bourgeois legislative bodies."[51] Communists believed that the Scottsboro cases could educate the masses and increase party membership, especially among blacks. Throughout the spring and summer of 1931, communists organized large demonstrations in the North—often featuring the defendants' mothers—to protest the boys' treatment and to petition Governor Benjamin Meeks Miller of Alabama and President Herbert Hoover for redress. In Dresden, Germany, communists threw rocks through the windows of the American consulate and

47. CARTER, SCOTTSBORO, *supra* note 6, at 91.

48. Letter from Walter White, Secretary, NAACP, to Clarence Darrow, Attorney (Aug. 31, 1931), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 4, frame 259 (stating that he had hoped it would have been unnecessary to ask Darrow to enter the Scottsboro case, but that with the white lawyers from Birmingham withdrawing, "we are frankly up against what is probably the most delicate and difficult situation of our history"); *see also* Letter from Walter White, Secretary, NAACP, to Willie Robinson [sic] (Sept. 11, 1931), *microformed on id.*, frame 268 (expressing great pleasure in telling Roberson that the NAACP had succeeded in retaining Darrow, "the greatest criminal lawyer in the United States if not in the world").

49. *Murder in Scottsboro*, PHILA. TRIB., Jan. 7, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 464; *see also* CARTER, SCOTTSBORO, *supra* note 6, at 97–103; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 37–38.

50. CARTER, SCOTTSBORO, *supra* note 6, at 138 (citation and internal quotation marks omitted); *see also Appeal to the American Workers for Effective Mass Action to Save the Scottsboro Boys*, DAILY WORKER (N.Y.), Jan. 20, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 532 [hereinafter *Appeal to the American Workers*] (asserting that the "main function" of courts "is to administer law made specifically as a means of persecuting the Negroes").

51. CARTER, SCOTTSBORO, *supra* note 6, at 138 (citation and internal quotation marks omitted); *see also Appeal to the American Workers*, *supra* note 50 ("[T]he hope for the nine Scottsboro victims of American lynch democracy, does not lie in the chambers of the Supreme Court of Alabama. It lies with the masses of American workers, who in vigorous protests and demonstrations will show their determination to end lynch law and to stop Negro persecution. . . . Confidence in the courts cannot bring justice. Only confidence in the might and power of the organized efforts of the American working class is the method of obtaining the freedom of these innocent boys.").

condemned the "bloody lynching of our Negro co-workers"—a scene that was repeated elsewhere in Europe that summer.[52] Even in Tallapoosa County, Alabama, communists used the "Scottsboro lynch verdict" to organize black sharecroppers into a union demanding higher wages and the release of the boys; whites responded with violence and murder.[53]

By the summer of 1931, Governor Miller was receiving thousands of abusive letters from around the world. One typical protest condemned "the brutal slave drivers of Alabama acting through a Ku Klux Klan judge and jury inflamed by race hatred . . . to send nine innocent children to the electric chair."[54] ILD attacks on white Alabamians as "lynchers" were reprinted in local newspapers, increasing resentment toward the Scottsboro boys. Local whites grew more defensive, insisting that the defendants had been given "as fair a trial as they could have gotten in any court in the world."[55] The Commission on Interracial Cooperation, which often supported the appeals of southern blacks convicted in obviously unfair trials, refused to support the Scottsboro defendants because of hostile public opinion. The governor's secretary explained that Scottsboro had become "a white elephant" for Miller and that the ILD's inflammatory statements had "tied his hands."[56] One white constituent warned the governor not to let any "threat or demand from dirty yankees or damn communists from the North and throughout the world . . . sway you."[57] Judge Hawkins confided to defense lawyer Roddy that he did not "really think the boys should be put to death, but . . . the Communists are more of an issue than are the FACTS of the case."[58] One white Alabamian captured the view of many, observing that "I might have been for acquittin' them at the first trial, but now after all this stink's been raised, we've got to

52. CARTER, SCOTTSBORO, *supra* note 6, at 142 (citation and internal quotation marks omitted); *see also Fight for Doomed Negroes*, N.Y. TIMES, July 1, 1931, at 9 (noting that communists protesting Scottsboro were responsible for recent mob attacks on the American consulates at Dresden and Leipzig, Germany); *Communist Uprising Is Police Idea*, BIRMINGHAM AGE-HERALD, June 18, 1931, at 1 (noting that youth in Dresden threw bottles through the windows of the American consulate containing messages stating, "Down with the bloody lynch law on our Negro comrades").

53. CARTER, SCOTTSBORO, *supra* note 6, at 121–30, 138–46, 167; *Labor Defense Charges "Murder,"* N.Y. TIMES, July 18, 1931, at 30; *Volleys Disperse Alabama Negroes*, N.Y. TIMES, July 18, 1931, at 30.

54. CARTER, SCOTTSBORO, *supra* note 6, at 145 (citation and internal quotation marks omitted).

55. *Id*. at 112 (citation and internal quotation marks omitted).

56. Letter from William Pickens, Field Secretary, NAACP, to Walter White, Secretary, NAACP (June 1, 1931), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 3, frame 252.

57. CARTER, SCOTTSBORO, *supra* note 6, at 136 n.90 (citation and internal quotation marks omitted).

58. *Id*. at 119 (citation and internal quotation marks omitted).

hang 'em."[59]

C. Alabama Supreme Court

It was in this climate that the Scottsboro verdicts were appealed to the Alabama Supreme Court. In recent decades, state supreme courts in the South had become somewhat more protective of the procedural rights of black criminal defendants, frequently reversing convictions, even in cases of murder or rape, on grounds such as prejudicial racial statements by prosecutors, the refusal of trial judges to change venue or grant defense counsel adequate time to prepare, and the use of coerced confessions.[60] To be sure, criminal justice for southern blacks remained grossly unequal: Blacks still could not serve on southern juries; black lawyers could not command fair hearings in southern courtrooms; black witnesses were treated as less credible than white witnesses; and the death penalty was never imposed on white rapists or on men who raped black women. Still, some progress had been made. Yet in explosive cases that generated outside criticism of the South or that were otherwise perceived to threaten white supremacy, southern courts regressed in their treatment of black defendants.[61]

Alabama whites were especially incensed by criticism over Scottsboro because they felt that they deserved praise for avoiding a lynching. The Scottsboro *Progressive Age* complimented local citizens for "their patience and chivalry"[62] after the alleged rapes, and the *Chattanooga Daily Times* praised them for setting "the rest of the South an impressive example in self-restraint."[63] A Georgia newspaper warned that appealing the convictions of black men for raping white women was "playing with fire"; a hasty trial was preferable to a lynching and indeed was "a first step, and a very important one."[64] Many southern newspapers predicted a resurgence in lynchings if outsiders persisted in criticizing trials such as those at Scottsboro.[65]

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59. *Id*. at 136 (citation and internal quotation marks omitted).

60. *E.g.*, Tannehill v. State, 48 So. 662, 662 (Ala. 1909); Williams v. State, 146 So. 422, 424 (Ala. 1933); Bell v. State, 20 S.W.2d 618, 622 (Ark. 1929); Graham v. State, 82 S.E. 282, 286 (Ga. 1914); State v. Jones, 53 So. 959, 961 (La. 1911); Byrd v. State, 123 So. 867, 870–71 (Miss. 1929); Story v. State, 97 So. 806, 807 (Miss. 1923); Sykes v. State, 42 So. 875, 875 (Miss. 1907); MANGUM, LEGAL STATUS OF THE NEGRO, *supra* note 13, at 343–49, 356–63; MCMILLEN, DARK JOURNEY, *supra* note 9, at 197–223.

61. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 130–31.

62. CARTER, SCOTTSBORO, *supra* note 6, at 105 (citation and internal quotation marks omitted).

63. *Id*. at 106 (citation and internal quotation marks omitted).

64. Emanuel, *Lynching and the Law in Georgia*, *supra* note 14, at 246–47 n.161 (quoting Editorial, *Playing with Fire*, FORUM (Washington, Ga.), June 25, 1931) (internal quotation marks omitted).

65. CARTER, SCOTTSBORO, *supra* note 6, at 105–16; *see also The Steffens–Dreiser Nonsense*, unidentified newspaper, May 22, 1931, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel

When the Scottsboro appeal reached the state supreme court, its justices were said to be seething with anger at the protests and threats directed at them.[66] The Communist Party newspaper, the *Daily Worker*, had called the court an "instrument of the Wall Street Imperialists," which would surely affirm the boys' convictions.[67] Chief Justice John C. Anderson publicly criticized such statements, which he said had been made with "the evident intent to bulldoze this court,"[68] and he insisted that the justices "will not be intimidated."[69]

In their appeals, the ILD lawyers briefly raised the issues of race discrimination in jury selection and the inadequacy of defense counsel, but they emphasized the unfairness of the trials and especially the mob's influence on the juries. In reply, the state attorney general denied that "a curious mob" had influenced the outcome of the trials.[70] The headline in the *Montgomery Advertiser*'s report of the oral argument observed, "Negro Partisans 'Dictate' Course to High Court."[71]

The Alabama Supreme Court had previously reversed convictions in similar cases of mob domination.[72] Other southern courts in less publicized cases had reversed convictions when defense counsel had been appointed even *a couple of days* before trial.[73] Yet on March 24, 1932, the Alabama Supreme Court voted 6–1 to uphold the death sentences of four of the defendants. The court granted a new trial to Eugene Williams because he had been a juvenile—thirteen years old—at the time of conviction.[74] The court emphasized that the speed of the trials was "highly desirable" because it instilled greater respect for the law and that the presence of national guardsmen surrounding the courthouse gave "notice to everybody that the strong arm of the state was there to assure the accused a lawful trial."[75] The

8, frame 134 (probably appearing in the MONTGOMERY ADV. and applauding the citizens of Jackson County for deporting themselves "with dignity and self-restraint" and noting that prompt action like that taken by the court in the Scottsboro cases is what critics of mob violence had always urged as a substitute for lynchings).

66. CARTER, SCOTTSBORO, *supra* note 6, at 156.

67. *Id*. at 156 (citation and internal quotation marks omitted).

68. *Id*. (citation and internal quotation marks omitted); GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 49.

69. *Defers New Action in Scottsboro Case*, N.Y. TIMES, Nov. 8, 1932, at 13.

70. CARTER, SCOTTSBORO, *supra* note 6, at 157.

71. *Id*. at 158 (citation and internal quotation marks omitted).

72. Seay v. State, 93 So. 403, 405 (Ala. 1922); Thompson v. State, 23 So. 676, 676 (Ala. 1898).

73. *E.g.*, McDaniel v. Commonwealth, 205 S.W. 915, 918 (Ky. 1918); Stroud v. Commonwealth, 169 S.W. 1021, 1022–23 (Ky. 1914); State v. Collins, 29 So. 180, 181–82 (La. 1900) (discussing numerous additional Louisiana cases).

74. Powell v. State, 141 So. 201, 213–14 (Ala. 1932), *rev'd*, 287 U.S. 45, 73 (1932).

75. *Powell*, 141 So. at 211, 213; *see also* CARTER, SCOTTSBORO, *supra* note 6, at 158 (internal quotation marks omitted).

court also ruled sufficient the appointment of counsel on the morning of trial. In a letter to the NAACP's Walter White, Chief Justice Anderson, the sole dissenter, explained that the communists had "been very imprudent and injected a lot of irrelevant bunk into the controversy and instead of helping it possibly injured these defendants."[76] Anderson, who had much preferred that "these defendants be tried under different circumstances," regretted that his colleagues had not been "above permitting outside influence to prejudice these defendants."[77] As a reward for his efforts, Anderson received a telegram from an ILD branch assailing him as a "traitor to the masses" for his willingness to abide by the majority's decision.[78]

The *Montgomery Advertiser* opined that the court's ruling "should satisfy all reasonable persons" that the Scottsboro boys had received fair trials.[79] Yet several other Alabama newspapers regretted that the court had not granted a new trial to allay doubts regarding the defendants' guilt. The *Birmingham Age-Herald* observed, "[t]he fact remains that there was an element of mob feeling in the air,"[80] and the *Birmingham News* insisted there was "ground for divergence of opinions concerning these cases."[81] Moderate whites in Alabama blamed the ruling on communist efforts at intimidation, which they suspected the state jurists had "leaned unconsciously backwards" to resist.[82] A black newspaper similarly concluded, "it is possible that the highest legal tribunal in Alabama affirmed these death sentences because it did no[t] want to appear as being swayed, cowed or bluffed by a group of radicals."[83] Communists thought the ruling revealed the "highest courts working hand in glove with owners of America against [the] working class."[84]

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76. Letter from John C. Anderson, Chief Justice, Supreme Court of Alabama, to Walter White, Secretary, NAACP (Apr. 25, 1932), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 5, frame 792.

77. *Id*.

78. CARTER, SCOTTSBORO, *supra* note 6, at 170 n.98 (citation and internal quotation marks omitted).

79. *Id*. at 159 (citation and internal quotation marks omitted).

80. *Id*. (citation and internal quotation marks omitted).

81. Editorial, *The Affirmation of the Scottsboro Cases*, BIRMINGHAM NEWS, Mar. 25, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 586.

82. CARTER, SCOTTSBORO, *supra* note 6, at 159 (citation and internal quotation marks omitted). *See also Scottsboro Boys Doomed*, SAVANNAH TRIB. (Ga.), Apr. 14, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 651 ("Even if the judges were inclined to be more merciful, the bombarding of them with letters and telegrams, many of these containing threats, would cause less favorable action.").

83. *The Scottsboro Appeal*, SAN ANTONIO INQUIRER, Apr. 8, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 631 (excerpting editorial from the HOUSTON DEFENDER, Apr. 2, 1932).

84. *Backs Conviction of Seven Negroes*, N.Y. TIMES, Mar. 25, 1932, at 6 (quoting a telegram from the ILD to Governor Miller of Alabama).

The *Daily Worker* predicted that review by the U.S. Supreme Court—just another "capitalist court"[85]—would be a "mere gesture aimed at facilitating the legal lynching of these children."[86] A black newspaper in the North professed greater faith in the high court, reasoning that "America, grasping for the moral leadership of the world, cannot afford to set the example of staging a legal lynching."[87] The liberal *Nation* agreed that the boys' prospects were "very bright" because "the conscience of the world [would] be profoundly shocked" if the Court affirmed their convictions and thus "encourag[ed] legal lynching in the South."[88]

D. The U.S. Supreme Court

In 1932 the U.S. Supreme Court was hardly the champion of racial equality that it would one day become in popular mythology. Around 1900, the Court had sustained the constitutionality of laws mandating racial segregation[89] and disfranchising blacks,[90] leading the fledging NAACP to conclude in 1915 that the Court "has virtually declared that the colored man has no civil rights."[91] To be sure, the Court in the second decade of the twentieth century struck down residential segregation ordinances,[92] certain laws that promoted peonage (compulsory labor to discharge debts),[93] and the grandfather clause (a device insulating illiterate whites from the disfranchising effect of literacy tests).[94] But in 1927 the Court strongly implied that state-mandated racial segregation in public schools was constitutionally permissible,[95] and in 1935 the Court would unanimously sustain the exclusion of blacks from Democratic Party primaries—the only

85. CARTER, SCOTTSBORO, *supra* note 6, at 160 (citation and internal quotation marks omitted).

86. *Id*. at 160 (citation and internal quotation marks omitted).

87. IOWA BYSTANDER, Jan. 30, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 562.

88. *The Scottsboro Case*, 135 NATION 320 (1932), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 745.

89. Berea Coll. v. Kentucky, 211 U.S. 45, 58 (1908); Plessy v. Ferguson, 163 U.S. 537, 550–52 (1896).

90. *E.g.*, Giles v. Teasley, 193 U.S. 146, 166–67 (1904); Giles v. Harris, 189 U.S. 475, 485–88 (1903); Williams v. Mississippi, 170 U.S. 213, 225 (1898); *see generally* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 8–60 (surveying the Court's performance in race-related cases during the Jim Crow era).

91. NAACP, FIFTH ANNUAL REPORT: REPORT OF THE CHAIRMAN OF THE BOARD OF DIRECTORS (1914), *reprinted in* 9 CRISIS 286, 293 (1915).

92. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

93. United States v. Reynolds, 235 U.S. 133, 150 (1914); Bailey v. Alabama, 219 U.S. 219, 245 (1911).

94. Guinn v. United States, 238 U.S. 347, 367 (1915); Myers v. Anderson, 238 U.S. 368, 382–83 (1915); *see generally* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 61–97 (surveying the Court's performance in race-related cases during the Progressive era).

95. Gong Lum v. Rice, 275 U.S. 78, 85–87 (1927).

elections that mattered in the one-party South.[96] In 1932, virtually nobody thought of the Court as a heroic defender of the rights of racial minorities.[97]

Nor had the Court yet taken substantial strides toward protecting the procedural rights of criminal defendants in state courts. Prior to *Moore v. Dempsey*[98] in 1923, the Court had reversed state criminal convictions on federal constitutional grounds in only a handful of cases involving race discrimination in jury selection.[99] In other cases, the Court had denied that the Fourteenth Amendment converted the procedural protections of the federal Bill of Rights into safeguards against *state* governments and had narrowly construed the Due Process Clause of that Amendment, which does explicitly constrain the states.[100]

Moore was the progenitor of modern American criminal procedure. The case arose from an infamous racial massacre in Phillips County, Arkansas, in 1919. Black tenant farmers and sharecroppers had tried to organize a union and hire white lawyers to sue planters for peonage practices. Local whites cracked down with a vengeance. When whites shot into a church where black unionists were meeting, blacks returned the gunfire. A white man was killed, and mayhem quickly ensued. Marauding whites, supported by federal troops ostensibly dispatched to quell the disturbance, went on a rampage, tracking down blacks throughout the countryside and killing dozens of them. Seventy-nine blacks, and no whites, were prosecuted and convicted for their actions during this "race riot," and twelve received the death penalty. The trials of those twelve lasted only an hour or two each, and the juries, from which blacks had been systematically excluded, deliberated for only a few minutes. Huge mobs of angry whites surrounded the courthouse, menacing the

96. Grovey v. Townsend, 295 U.S. 45, 53–55 (1935) (sustaining the exclusion of blacks from Democratic Party primaries when the decision to exclude was made by the party convention). *But cf.* Nixon v. Condon, 286 U.S. 73, 89 (1932) (striking down a state law authorizing party executive committees to exclude groups from participating in party primaries); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (striking down a state law barring blacks from participating in primary elections). *See generally* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 98–170 (surveying the Court's performance in race-related cases during the interwar period).

97. *Compare* Zechariah Chafee Jr., *Liberal Trends in the Supreme Court*, 35 CURRENT HISTORY 338, 339, 343 (1931) (noting a recent liberal trend on the Supreme Court in cases involving economic regulation and freedom of speech, but saying nothing about such a trend on race issues) *with* FRANK FREIDEL, F.D.R. AND THE SOUTH 92–94 (1965) (noting that some southern senators opposed President Roosevelt's Court-packing plan in 1937 partly because they saw the Court as a bulwark of white supremacy).

98. 261 U.S. 86, 91–92 (1923).

99. Rogers v. Alabama, 192 U.S. 226, 231 (1904); Carter v. Texas, 177 U.S. 442, 448–49 (1900); Neal v. Delaware, 103 U.S. 370, 397–98 (1881); Strauder v. West Virginia, 100 U.S. 303, 310, 312 (1880).

100. Twining v. New Jersey, 211 U.S. 78, 99 (1908); Maxwell v. Dow, 176 U.S. 581, 592–93 (1900); Hurtado v. California, 110 U.S. 516, 534–35 (1884).

defendants and the jurors and threatening a lynching. Five of the defendants appealed their death sentences to the Supreme Court, arguing that mob-dominated trials violate the Due Process Clause of the Fourteenth Amendment. By a vote of 6–2, the Supreme Court agreed, reversed the convictions, and ordered a federal district judge to conduct a hearing on whether the defendants' trials had been influenced by the mob.[101]

Moore offered some hope that the Scottsboro defendants might find justice in the Supreme Court. Their lawyers raised three constitutional claims in their appeal: mob domination of the trials in violation of the Due Process Clause; intentional exclusion of blacks from the grand and petit juries in violation of the Equal Protection Clause; and denial of the right to counsel in violation of the Due Process Clause.[102] On the day of the oral argument, extra police officers patrolled the Supreme Court building and grounds; the plaza facing the Capitol was cleared; and elaborate preparations were made to preempt the mass communist demonstrations that had been promised.[103] Mary Mooney, mother of the imprisoned California labor leader Tom Mooney (who had been wrongfully convicted for the Preparedness Day bombing in San Francisco in 1916), attended the Court session, noting her interest in seeing that other mothers' sons received justice.[104] Several of Alabama's congressmen also attended the argument, as did an unusually large number of blacks.[105]

A few weeks later, the Court reversed the defendants' convictions on the ground that the right to counsel had been denied, declining to reach the other two issues.[106] Perhaps the justices chose the basis for decision that they deemed least controversial. For the Court to have reversed the Scottsboro convictions on the basis of *Moore* might have required basic changes in Jim Crow justice: The Scottsboro trials were not quite so farcical as those of the Phillips County defendants. The Scottsboro boys received a genuine defense; their trials lasted for several hours (not forty-five minutes); the juries trying them deliberated more than the five minutes in *Moore*; their cases did not

101. RICHARD C. CORTNER, A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES 7–23 (1988); KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 98, 120–23; O.A. Rogers, Jr., *The Elaine Race Riots of 1919*, 19 ARK. HIST. Q. 142, 142–50 (1960).

102. *See* Brief for Petitioners at 3–4, 34–62, Powell v. Alabama, 287 U.S. 45 (1932) (Nos. 98, 99, and 100), *reprinted in* 27 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 299–300, 330–58 (Philip B. Kurland & Gerhard Casper eds., 1975).

103. *Guarded High Court Hears the Negro Pleas*, N.Y. TIMES, Oct. 11, 1932, at 19, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 743.

104. *Id*.; Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 98 (1987).

105. *Guarded High Court Hears the Negro Pleas*, *supra* note 103.

106. *Powell*, 287 U.S. at 73.

raise the broader implications of the Phillips County race riot; and they had not been tortured into confessing.[107] Similarly, to invalidate their convictions because of race discrimination in jury selection would have been far more provocative to white southerners because preserving white supremacy in the courtroom required excluding blacks from juries.[108] By contrast, overturning the convictions because the defendants had been denied the right to counsel was unlikely to affect the outcome of any retrials or Jim Crow justice in general.[109]

Prior to 1932, the Court had never ruled that due process requires the states to provide counsel to indigent defendants in capital cases, but neither had it rejected that position. Every state court confronting that issue had required the government to appoint counsel in such circumstances.[110] To be sure, Ozie Powell, whose appeal was the focus of the Supreme Court's first intervention in Scottsboro, *had* received a court-appointed lawyer. He made two arguments as to why this appointment failed to satisfy federal constitutional standards.[111] First, the state had not afforded him adequate opportunity to hire counsel of his own choice. Second, the court appointment was inadequate because it had been made the morning of the trial, and thus defense counsel was denied an adequate opportunity to consult clients, interview witnesses, and prepare a defense.

The Alabama court had deemed this last-minute appointment of counsel sufficient to satisfy the state constitutional requirement of a court-appointed lawyer in capital cases. In general, the U.S. Supreme Court has no authority to review state court interpretations of state law. Thus, for the Court to reverse Powell's conviction, it would have had to construe the Due Process Clause of the Fourteenth Amendment to require the assistance of counsel in capital cases. American constitutional history reveals that the justices are least reluctant to expand constitutional rights when doing so involves holding a few renegade states to the norm already espoused by the vast majority.[112] As of 1932, not a single state had rejected the right of indigent defendants in capital cases to state-appointed counsel. Indeed, one reason that state courts

107. *See generally* Brief for Respondent at 27–28, *Powell*, 287 U.S. 45 (Nos. 98, 99, and 100), *reprinted in* 27 LANDMARK BRIEFS, *supra* note 102, at 399–400 (arguing that the mob-domination claim was stronger in *Moore* than in *Powell*).

108. *See* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 273.

109. Alfred J. Cilella & Irwin J. Kaplan, Note, *Discrimination Against Negroes in Jury Service*, 29 ILL. L. REV. 498, 505–06 (1934).

110. Otto M. Bowman, Comment, *Constitutional Law—Due Process—Right of Counsel*, 12 OR. L. REV. 227, 228–30 (1933).

111. Brief for Petitioners at 48–59, *Powell*, 287 U.S. 45 (Nos. 98, 99, and 100), *reprinted in* 27 LANDMARK BRIEFS, *supra* note 102, at 344–55.

112. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16–17 (1996) (listing examples).

had not yet considered whether the Due Process Clause of the Fourteenth Amendment guaranteed such a right is that all of them confronting the issue had interpreted their own state constitutions to do so.

Once the justices determined that due process required the appointment of counsel for indigent capital defendants, reversing Powell's conviction was easy. First, Powell had been denied the opportunity to hire a lawyer of his own choice. Second, to most disinterested observers, the trial judge's appointment of counsel had been obviously inadequate. At the trials, although defense counsel did cross-examine prosecution witnesses, they made only a feeble effort to change the trial venue, presented neither opening nor closing arguments, and called none of their own witnesses other than the defendants, some of whom implicated each other in a desperate effort to avoid the death penalty.[113] The Scottsboro trials may not have been quite the sham affair under review in *Moore*, yet most lawyers would have considered obviously inadequate the representation afforded to the defendants.

Moreover, the trial record revealed a high probability that the defendants were innocent—a circumstance likely to be significant to Supreme Court justices reviewing their convictions, even if technically irrelevant to the merits of their appeal. Because criminal procedure safeguards often shield the guilty from punishment, they are usually controversial, and the justices are probably more inclined to identify new rights in cases where defendants have a strong claim of innocence. As we have seen, the medical evidence introduced at the Scottsboro trials raised serious doubts as to whether any rape had occurred, and the accusers had provided inconsistent testimony.[114] Moreover, the women possessed a clear motive for fabrication: avoiding a possible Mann Act prosecution for traveling across state lines for immoral purposes (prostitution).

Many newspapers, even in parts of the South, applauded the high court's decision in *Powell*. The *Richmond Times-Dispatch* went so far as to say that the ruling "will be welcomed throughout the country, with the possible exception of Alabama."[115] The *New York Times* likewise hailed the ruling, which it said "ought to abate the rancor of extreme radicals, while confirming the faith of the American people in the soundness of their institutions and especially in the integrity of their courts."[116] Professor Felix Frankfurter of

113. *See* Brief for Petitioners at 9–14, 51–59, *Powell*, 287 U.S. 45 (Nos. 98, 99, and 100), *reprinted in* 27 LANDMARK BRIEFS, *supra* note 102, at 305–10, 347–55 (enumerating the inadequacies of defense counsel).

114. *See supra* text accompanying notes 23–24.

115. *The Scottsboro Case*, RICHMOND TIMES-DISPATCH, Nov. 9, 1932, at 10.

116. *The Scottsboro Case*, N.Y. TIMES, Nov. 8, 1932, at 20. For other newspapers applauding the decision, see *The Scottsboro Case*, N.Y. HERALD TRIB., Nov. 8, 1932, at 20; *The Scottsboro Cases*, BALT. SUN, Nov. 9, 1932, at 10 (noting that the decision is "in conformity with the principles of fair dealing and will awaken approving echoes in every part of the nation"); *Righteously*

the Harvard Law School called the decision "a notable chapter in the history of liberty" and observed that the same Court that had recently served the interests of property owners was now protecting "illiterate" and "vagrant" blacks from oppression.[117] A black newspaper proclaimed the ruling "a great stroke in the name of justice,"[118] and the NAACP saw it as a "vindicat[ion]" of its view that victories for racial justice "are best won by strictly legal means."[119] By contrast, the *Daily Worker* condemned *Powell* for instructing Alabama authorities on "how 'properly' to carry through such lynch schemes."[120] The liberal lawyer Morris Ernst likewise assailed the decision as "empty and meaningless" and "cunningly uncourageous" because it disregarded the issues of "deep social significance" and left the defendants in "horrid shape" for a retrial, which was likely to feature a half-hearted lawyer "who will saunter . . . before a white jury while mobs outside sing anthems and shout for hangings."[121]

E. On Remand

The Supreme Court's ruling seemed only to make Alabama whites more defensive. After the initial trials, some of them had doubted whether the defendants had been treated fairly. However, after what the *Birmingham Post* called the high court's "stinging rebuke" of the state supreme court, anyone publicly expressing doubts about the defendants' guilt or the fairness of their trials was courting physical danger.[122] White Alabamians also greatly resented northern newspaper accounts that portrayed them as barefooted, tobacco-chewing illiterates. Judge Hawkins opined with regard to the retrials that "[t]he presence of troops will be more imperative now than ever."[123]

The ILD asked Samuel Leibowitz, a New York Jew and one of the nation's leading criminal defense lawyers, to represent the defendants at their new trials. Leibowitz agreed to serve without fee in exchange for a promise of independence in orchestrating the defense and a commitment from the ILD

Remanded, RICHMOND NEWS LEADER, Nov. 8, 1932, at 8 (noting that "hysteria was responsible for conviction" and expressing approval of the result).

117. Felix Frankfurter, *A Notable Decision*, N.Y. TIMES, Nov. 13, 1932, at E1.

118. *The Scottsboro Mob Justice*, INDIANAPOLIS RECORDER, Nov. 12, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 784.

119. *Scottsboro Case Vindicates Methods of the N.A.A.C.P. Says Walter White*, AFRO-AM. (Balt.), Nov. 19, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 794.

120. CARTER, SCOTTSBORO, *supra* note 6, at 163 (citation and internal quotation marks omitted).

121. Morris L. Ernst, *Dissenting Opinion: Scottsboro*, 135 NATION 559 (1932); *see also* CARTER, SCOTTSBORO, *supra* note 6, at 163–65.

122. CARTER, SCOTTSBORO, *supra* note 6, at 190.

123. *Id*. at 180–81 (citation and internal quotation marks omitted); *see also* F. Raymond Daniell, *Governor Pledges Negroes Fair Trial*, N.Y. TIMES, Mar. 12, 1933, at 27.

to lower its public profile regarding Scottsboro. Upon arriving in Alabama, Leibowitz sought to distance the case from the communist issue and professed no intention to tell Alabamians how to run their affairs.[124]

As the retrials began, Leibowitz moved for a change of venue, which was granted, to Decatur, Alabama, fifty miles west of Scottsboro. Yet nearly all whites in Decatur were already convinced of the defendants' guilt. A large crowd attended the first of the retrials, though the threat of violence that pervaded the original proceedings was initially absent. The Scottsboro episode had attracted so much national attention by then that representatives of several New York newspapers and the wire services were in attendance.[125]

As the retrial proceedings began, Leibowitz moved to quash the original indictments on the ground that no blacks had served on grand juries in Jackson County since Reconstruction, even though they were nearly 10% of the county's population. Summoned to testify, the county's jury commissioners denied that blacks were excluded because of their race. Leibowitz also called as witnesses several blacks from Jackson County to demonstrate that they satisfied the statutory jury-selection standard of "integrity, good character and sound judgment."[126] The prosecutor tried to humiliate and intimidate these black witnesses, but they held up well under cross-examination, and Leibowitz established that they were as well qualified as many whites to serve as jurors. Nevertheless, Judge James Edwin Horton overruled the motion to quash the indictments.[127]

Leibowitz then challenged the jury-selection system in Morgan County, site of the new trials. He called as witnesses ten prominent blacks from the county to demonstrate their qualifications to serve as jurors. These educated and refined blacks, most of whom held college degrees, made impressive witnesses.[128]

Leibowitz's trial tactics provoked outrage among the local white citizenry. When he demanded that the prosecutor refer to black witnesses with courtesy titles, courtroom spectators were merely puzzled, but when he questioned the honesty of county jury commissioners, they grew visibly angry. A crowd of 200 young men gathered in town to "protest against the manner in which Mr. Leibowitz has examined the State's witnesses."[129] After Judge Horton

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124. CARTER, SCOTTSBORO, *supra* note 6, at 181–85.

125. *Id*. at 183–84, 189–92; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 118–20, 152; F. Raymond Daniell, *Fight for Negroes Opens in Alabama*, N.Y. TIMES, Mar. 28, 1933, at 6.

126. CARTER, SCOTTSBORO, *supra* note 6, at 197 (citation and internal quotation marks omitted).

127. *Id*. at 194–99; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 120–23.

128. CARTER, SCOTTSBORO, *supra* note 6, at 199–201; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 123–24.

129. F. Raymond Daniell, *Warning by Judge at Alabama Trial*, N.Y. TIMES, Apr. 6, 1933, at 13 (internal quotation marks omitted).

rejected the defense's challenge to jury selection, he admonished courtroom spectators about the death threats being made against Leibowitz on Decatur streets and warned that he would order the national guardsmen to shoot to kill if any effort was made to harm the defendants.[130]

The prosecution's strategy at Patterson's retrial was to have Victoria Price testify as graphically as possible about the rapes. Leibowitz's cross-examination was brutal, as he tried to demonstrate that Price was a prostitute and that her account of what happened on the train was riddled with contradictions. Price proved a feisty witness who yielded no ground, although Leibowitz was able to elicit from her some contradictory statements. Any damage he did to Price's credibility, however, came at the cost of alienating courtroom whites, who were outraged at this attack on the chastity and honesty of a southern white woman. One spectator whispered to another, "It'll be a wonder if ever he leaves town alive," and angry local residents again gathered in town, this time to protest the manner in which Leibowitz had cross-examined Price.[131] Once again, Judge Horton responded by strongly defending the rule of law, denouncing the "mob spirit,"[132] and insisting that he would defend the lives of the defendants and anyone else involved in the case.[133]

One of the examining physicians, Dr. R.R. Bridges, testified that all of the sperm found in Price's vagina was non-motile, which should have been conclusive exculpatory evidence, given that the alleged rapes had occurred only ninety minutes before the medical examination. A second doctor, Marvin Lynch, privately confessed to Judge Horton that he had never believed that the young women had been raped. But Lynch rejected Horton's exhortations to state this view publicly, explaining that "[i]f I testified for those boys I'd never be able to go back into Jackson County."[134] The defendant's medical expert, Dr. Edward A. Reisman, testified that a woman raped by six men, as alleged, could not possibly have in her vagina only the small traces of semen found in the medical examination of Price. Reisman also declared that women who had just been repeatedly raped could not have appeared as calm and collected as Price and Bates had been. One local resident was unimpressed by this testimony: "When a nigger has expert

130. CARTER, SCOTTSBORO, *supra* note 6, at 198, 200–03, 223–24; Daniell, *supra* note 129; F. Raymond Daniell, *Negro Defense Gets Test of Juror List*, N.Y. TIMES, Mar. 31, 1933, at 9.

131. CARTER, SCOTTSBORO, *supra* note 6, at 223 (citation and internal quotation marks omitted).

132. *Id*. at 224 (citation and internal quotation marks omitted).

133. *Id*. at 204–13, 223–24; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 125–27.

134. CARTER, SCOTTSBORO, *supra* note 6, at 215 (citation and internal quotation marks omitted).

witnesses, we have a right to ask who is paying for them."[135]

The star witness for the defense was Ruby Bates, who made a dramatic entrance and retracted her earlier allegations of rape. However, her credibility, necessarily compromised by her contrary testimony in the original trials, was further impeached by the prosecution's suggestion that she had been paid to testify—an allegation that apparently convinced most locals. In closing arguments, one prosecutor referred to the "fancy New York clothes"[136] worn by Bates and, pointing at the Jewish defense attorneys (Leibowitz and Joseph Brodsky of the ILD), appealed to the jury to prove that Alabama justice could not be bought "with Jew money from New York."[137] Another prosecutor told the jury, "If you acquit this Negro, put a garland of roses around his neck, give him a supper and send him to New York City" where Dr. Harry Fosdick (the liberal Protestant minister who had provided support for Bates) would "dress him up in a high hat and morning coat, gray-striped trousers and spats."[138]

Even if this had been a run-of-the-mill, black-on-white rape case, it would have been difficult for a jury of southern whites to have acquitted Patterson. But Scottsboro was no ordinary case. With communists attacking white Alabamians as lynchers, and Leibowitz assailing southern white jury commissioners as liars, an acquittal was out of the question. The trial had ceased to be about determining Patterson's guilt or innocence and had become instead a challenge to southern white supremacy. With the issue framed this way, the jury took just five minutes to convict (though one juror held out against the death penalty for hours before finally capitulating). Leibowitz called the result "a triumph of bigotry," and the *Chicago Defender*, one of the leading black newspapers in the country, denounced the trial "as a mockery, a pretension of justice and a crime against our national honor."[139] New York newspapers professed "shock" at the verdict,[140] while some southern newspapers blamed any unfairness on outside agitation, which Alabama whites naturally resented.[141]

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135. *Id*. at 213–16, 227–28 (citation and internal quotation marks omitted); *see* GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 128, 130–31.

136. CARTER, SCOTTSBORO, *supra* note 6, at 235 (citation and internal quotation marks omitted).

137. *Id*. at 235 (citation and internal quotation marks omitted).

138. *Id*. at 231–40 (citations and internal quotation marks omitted); *see* GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 131–34; F. Raymond Daniell, *New York Attacked in Scottsboro Trial*, N.Y. TIMES, Apr. 8, 1933, at 30.

139. Editorial, *The Mock Trial Ended*, CHI. DEFENDER, Apr. 15, 1933, at 14 (quoting Leibowitz).

140. Editorial, *The Decatur Verdict*, N.Y. TIMES, Apr. 10, 1933, at 12; *A Blow to Justice*, N.Y. HERALD TRIB., Apr. 10, 1933, at 14.

141. CARTER, SCOTTSBORO, *supra* note 6, at 239–42; *see also* Editorial, *"Sorry,"* MERIDIAN

The day Patterson was convicted, 20,000 blacks in New York City signed a petition promising to join a protest march in Washington, D.C., later that spring. Huge crowds gathered in New York to hear Ruby Bates proclaim herself a victim of the oppression of the Scottsboro ruling class and to hear Leibowitz denigrate Alabama whites as "bigots whose mouths are slits in their faces, whose eyes pop out like a frog's, whose chins drip tobacco juice, bewhiskered and filthy."[142] The New York press faithfully reported such comments, which were then widely reprinted in Alabama newspapers, making Leibowitz even more anathema to southern whites. One Alabama journal retorted, "The New York Jew says there is no such thing as a fair trial in Alabama. . . . It seems to this paper . . . [that] this recent recruit from Russia is a poor sort of chap to try to blight the good name of Alabama."[143]

After pronouncing sentence on Patterson, Judge Horton delayed the other retrials because Leibowitz's statements to the press were a "millstone around the necks of the defendants."[144] Meanwhile, for the first time, some southern newspapers outside of Alabama declared the boys innocent. Douglas Southall Freeman, editor of the *Richmond News Leader*, observed that "[t]he men are being sentenced to death primarily because they are black" and because of the "'unwritten law' that when a white woman accuses . . . a Negro he must prove his innocence."[145] Josephus Daniels, editor of the *Raleigh News and Observer*, called the verdict "shocking"[146] and "outrageous."[147] The *Chattanooga News* declared that one could not "conceive of a civilized community taking human lives on the strength of this miserable affair."[148] By contrast, newspapers in the Deep South tended to defend the fairness of the trials.[149]

In Alabama, the few whites who continued to raise doubts about the

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STAR (Miss.), Apr. 11, 1933, at 4 (calling the trial "fair-square" and denouncing Leibowitz's charge of bigotry as "without a shred of fact or evidence").

142. CARTER, SCOTTSBORO, *supra* note 6, at 244 (citation and internal quotation marks omitted).

143. *Id*. at 243–50 (citation and internal quotation marks omitted); *see generally Negro Protest Paraders Battle Police for Hour*, N.Y. HERALD TRIB., Apr. 11, 1933, at 32.

144. CARTER, SCOTTSBORO, *supra* note 6, at 246 (citation and internal quotation marks omitted).

145. *Id*. at 253 (citation and internal quotation marks omitted); *see also The South Split over the Scottsboro Verdict*, LITERARY DIGEST, Apr. 22, 1933, at 4.

146. Editorial, *A Shocking Verdict*, RALEIGH NEWS & OBSERVER, Apr. 10, 1933, at 4.

147. Editorial, *A Suggestion to the South*, RALEIGH NEWS & OBSERVER, Apr. 11, 1933, at 4.

148. *The South Split over the Scottsboro Verdict*, *supra* note 145, at 4 (citation and internal quotation marks omitted); *see also* Editorial, *"Justice" in Alabama*, RICHMOND TIMES-DISPATCH, Apr. 12, 1933, at 6 (calling it "inconceivable that the jury should have brought in a verdict of guilty" and deeming Patterson probably innocent).

149. CARTER, SCOTTSBORO, *supra* note 6, at 252–53; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 153.

fairness of the defendants' treatment were forcefully suppressed. A sociology professor at Birmingham-Southern College who was sympathetic to the defendants was denied an extension of his contract. Rabbi Benjamin Goldstein, another supporter, was forced to resign from his temple in Montgomery and then to leave the state; his congregants worried that the rabbi's controversial stand on Scottsboro would unleash a wave of anti-Semitism. One observer noted that many whites conceded the defendants' probable innocence but nonetheless insisted, "If we let Negroes get by with this case, no white woman will be safe in the South."[150] Many moderates apparently hoped that the governor would commute the sentences to life imprisonment, apparently deeming this an acceptable compromise for black men falsely accused of raping white women.[151]

In June 1933, Judge Horton, whom Leibowitz had called "one of the finest jurists I have ever met,"[152] granted the defense motion for a new trial, explaining that he found the evidence against Patterson unconvincing. Horton secretly hoped that his action would forestall further prosecutions of the defendants.[153]

The *Birmingham Post* applauded Horton's decision and declared the defendants probably innocent, but it was the only newspaper in the state to do so.[154] Some prominent whites in Alabama, including the president of the state bar association, also endorsed Horton's ruling, but the predominant reaction in the state was hostile. Tom Heflin, a former U.S. Senator from Alabama, declared that Horton's ruling was "putting wicked thoughts in the minds of lawless negro men and greatly increasing the danger to the white women of Alabama."[155] The state attorney general who had helped prosecute the case, Thomas E. Knight, Jr., sought to have the judge—whom one critic derided as having "no more backbone than in an angle worm"—removed from the case.[156] The following year, Horton, who had faced no opposition when he stood for election six years earlier, was defeated for reelection. By contrast, Knight was elected lieutenant governor.[157]

The Scottsboro retrials resumed in November 1933. Recent developments raised doubts as to whether the defendants and their lawyers could be protected from mob violence. That summer in Tuscaloosa, three ILD lawyers defending blacks charged with raping and killing a white woman had been

150. CARTER, SCOTTSBORO, *supra* note 6, at 261 (citation and internal quotation marks omitted).
151. *Id*. at 253–62.
152. *Id*. at 239 (citation and internal quotation marks omitted).
153. *Id*. at 264–70; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 176–82.
154. CARTER, SCOTTSBORO, *supra* note 6, at 253.
155. *Id*. at 271–72 (citation and internal quotation marks omitted).
156. *Id*. at 271 (citation and internal quotation marks omitted).
157. *Id*. at 270–73.

turned over by deputy sheriffs to a firing squad, and two of them were killed. In September, an elderly black man accused of raping a mentally retarded white woman—even the police found the allegation incredible—was lynched. The local newspaper blamed the ILD for spreading communist propaganda among "our contented Negro population,"[158] while the *Montgomery Advertiser* attributed the lynchings to "hotheads who . . . fear[ed] that outside interference would block the course of justice."[159] Yet, with Birmingham newspapers noting an "extremely grave" probability of a massacre,[160] Judge W.W. Callahan, the new trial judge, declined to request militia protection for the trials, and the governor sent none. Callahan also denied the defense motion for another change of venue, despite sworn statements in affidavits submitted by ILD investigators that a national guardsman had conceded he and his colleagues would offer only token resistance to a lynching attempt and that local whites had admitted they would conceal their belief that the boys should be executed in order to get on the jury.[161]

Before the new trials had begun, the jury commissioners in Jackson County, where the defendants had been originally indicted, had altered the jury lists by adding the names of several blacks. A defense handwriting expert testified that the names of most or perhaps all of the blacks had been fraudulently added after the lists had been initially compiled. Despite this uncontradicted testimony, Judge Callahan invoked the presumption that jury commissioners had acted lawfully and rejected the defense motion to quash the indictments.[162]

At Patterson's retrial, Judge Callahan refused to permit Leibowitz to question Victoria Price about whether she had had sexual intercourse the night before the train trip, and he nearly ruled Leibowitz in contempt when the lawyer persisted in trying to get such evidence before the jury.[163] Callahan

158. *Id*. at 277 (citation and internal quotation marks omitted).

159. *Id*. (citation and internal quotation marks omitted).

160. F. Raymond Daniell, *Roosevelt Is Asked to Intervene to Protect Scottsboro Negroes*, N.Y. TIMES, Nov. 20, 1933, at 1.

161. CARTER, SCOTTSBORO, *supra* note 6, at 276–80; *Lynchings Feared in Scottsboro Case*, N.Y. TIMES, Nov. 10, 1933, at 7; Tom Cassidy, *Troop Threat to Scottsboro Boys Bared*, DAILY NEWS (n.p.), Nov. 10, 1933; *Plans to Lynch Scottsboro Boys Exposed by Detectives*, WASH. SENT., Nov. 25, 1933, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 9, frame 262; *see also* Memorandum from Roy Wilkins, Assistant Secretary, NAACP, on the Scottsboro Case, Nov. 3, 1933, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 2, frames 516–17 (noting that Will Alexander of the Southern Commission on Interracial Cooperation had recently visited the NAACP office in New York and stated that bringing the Scottsboro boys to trial in Decatur at this time "will be practically an invitation to a wholesale lynching party").

162. CARTER, SCOTTSBORO, *supra* note 6, at 281–84; F. Raymond Daniell, *Jury Roll Upheld in Alabama Case*, N.Y. TIMES, Nov. 26, 1933, at 1.

163. F. Raymond Daniell, *Accuser Renames Scottsboro Negro*, N.Y. TIMES, Nov. 28, 1933, at 11 (noting that Judge Callahan warned Leibowitz while he was cross-examining Price that he must

repeatedly rescued Price when she became bogged down in contradictions, and he denied Leibowitz the opportunity to undermine the credibility of prosecution witnesses. Intimidated by death threats and recovering from surgery in a New York hospital, Ruby Bates refused to return to Alabama to testify. The prosecution used against Patterson his earlier admission that he had seen some of the black youths raping the women. Yet the prosecutor's most effective point may have been the question he posed to jurors in his closing argument: Did they really wish to believe the defendant's account, which essentially charged their neighbors in Scottsboro with doing "a lot of awful things over there"?[164]

Callahan instructed the jury that "there is a very strong presumption under the law that [a white woman charging rape] would not and did not yield voluntarily to intercourse with . . . a Negro" and that this was true "whether she be the most despised, ignorant and abandoned woman of the community, or the spotless virgin and daughter of a prominent home of luxury and learning."[165] The judge glowered at Leibowitz while instructing the jury to ignore any of defense counsel's intimations regarding Price's prior sexual history, then forgot—until Leibowitz reminded him—to give the jury the instruction form for rendering a verdict of acquittal. The jurors would have been unlikely to miss the significance of this oversight.[166] The jury convicted Patterson and sentenced him to death, and then a second jury did the same in the retrial of Clarence Norris. Leibowitz left the courtroom under heavy guard because of death threats.[167]

On appeal, both defendants challenged their convictions on the ground of race discrimination in jury selection. Supreme Court precedents from around 1900 made it very difficult to prove such discrimination.[168] The Alabama Supreme Court rejected Norris's claim on the basis of these precedents.[169]

"treat the lady with more respect") (internal quotation marks omitted).

164. CARTER, SCOTTSBORO, *supra* note 6, at 285–94 (citation and internal quotation marks omitted); GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 226–27.

165. CARTER, SCOTTSBORO, *supra* note 6, at 297 (citation and internal quotation marks omitted); F. Raymond Daniell, *Scottsboro Case Given to the Jury Which is Locked Up*, N.Y. TIMES, Dec. 1, 1933, at 1.

166. Allen Raymond, *Judge Tells Alabama Jury How to Find Negro Guilty*, N.Y. HERALD TRIB., Dec. 1, 1933, at 1.

167. CARTER, SCOTTSBORO, *supra* note 6, at 297–302; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 227–29; *President Keeps "Hands Off" Decatur; Rights of State Supreme; Leibowitz on Job*, CAL. EAGLE, Nov. 24, 1933, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 9, frame 253.

168. *E.g.*, Franklin v. South Carolina, 218 U.S. 161, 166–67 (1910); Martin v. Texas, 200 U.S. 316, 319 (1906); Brownfield v. South Carolina, 189 U.S. 426, 427–29 (1903); Tarrance v. Florida, 188 U.S. 519, 521–25 (1903); Gibson v. Mississippi, 162 U.S. 565, 575–76, 584–92 (1896); *see* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 40–43.

169. Norris v. State, 156 So. 556, 558–59, 563 (Ala. 1934).

The court refused to presume discrimination by the jury commissioners, denied any affirmative duty to place blacks on juries, and deferred to the commissioners' denials of race discrimination. With regard to the appellant's claim that Callahan's administration of the trial was reversible error, the Alabama jurists found only that "on one or two occasions [he had] manifested slight impatience."[170] The court did not even reach the merits of Patterson's appeal because of an arguable failure to comply with Alabama's rules of appellate procedure. The flaw was highly technical: Patterson's claim was untimely only if the ninety-day period in which to file a bill of exceptions commenced at the date of judgment rather than the date of sentencing and if his new-trial motion, which would have tolled the ninety-day period, was nugatory because filed after expiration of the trial court's term. (And even then, the bill of exceptions had been filed late only because of a plane crash.) Technical though it was, this procedural snafu placed Patterson's life in jeopardy. The Alabama Supreme Court refused to consider the merits of his jury-discrimination claim,[171] which apparently meant that the U.S. Supreme Court could not do so either, even though Patterson's appeal rested on precisely the same ground as Norris's.[172]

F. The U.S. Supreme Court—Again

Late in 1934, two ILD attorneys were caught trying to bribe Victoria Price to change her story. An infuriated Leibowitz declared that the ILD had "assassinated the Scottsboro boys with that sort of business," and he threatened to terminate his involvement with the case unless the communists withdrew.[173] The *Daily Worker* responded by accusing Leibowitz of joining forces with the "Alabama lynch rulers," and the ILD tried to fire him on the pretense that he was inexperienced in constitutional appeals.[174] But Leibowitz convinced Patterson, Norris, and their parents to stick with him. As in 1931, however, a subsequent visit from ILD lawyers promptly convinced the boys and their families to change their minds. Another unseemly battle for control of the case ensued—this time between Leibowitz and the ILD. Only after the defendants had switched back and forth numerous times was a compromise finally reached: Leibowitz represented Norris in the Supreme Court, while other lawyers hired by the ILD represented Patterson.[175]

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170. *Id*. at 564.

171. Patterson v. State, 156 So. 567, 568–69 (Ala. 1934).

172. CARTER, SCOTTSBORO, *supra* note 6, at 303–08; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 238; KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 127–28.

173. CARTER, SCOTTSBORO, *supra* note 6, at 311 (citation and internal quotation marks omitted).

174. *Id*. at 312 (citation and internal quotation marks omitted).

175. *Id*. at 308–19; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 238–41; *Held as*

Norris's appeal focused on race discrimination in jury selection. Alabama responded by invoking *Thomas v. Texas*,[176] which held that the U.S. Supreme Court must defer to state court findings of fact on that issue. During Leibowitz's argument, Chief Justice Charles Evans Hughes interrupted to ask if the lawyer could prove his allegation that the names of blacks had been forged on the jury rolls. Leibowitz said that he could, and in a moment of high drama, the justices examined the jury rolls of Jackson County through magnifying glasses—apparently the first time they had ever engaged in independent evidence-gathering in appellate proceedings.[177]

Six weeks later, the justices overturned Norris's conviction—the first time in decades the Court had done so on the ground of race discrimination in jury selection. To be sure, *Norris* created no new substantive constitutional law: Since *Strauder v. West Virginia*[178] in 1880, the Court had consistently construed the Equal Protection Clause to bar race discrimination in jury selection. However, *Norris* did alter the critical rules governing how such claims were to be proved; for over a generation, these rules had doomed to failure virtually all such claims. The justices now reinvigorated the long-dormant dicta of *Neal v. Delaware*,[179] which approved inferring intentional discrimination from the lengthy absence of blacks from jury service.[180] If, under such circumstances, the state was not obliged to go beyond simply denying the existence of race discrimination, then the constitutional safeguard "would be but a vain and illusory requirement."[181] Further, *Norris* held, when an alleged federal constitutional violation turned on disputed facts, the federal courts must find those facts for themselves, not simply defer to state court findings.[182]

For two reasons, *Norris* was an appealing case for the justices to reconsider the rules governing proof of race discrimination in jury selection. First, not only had blacks been absent for decades from juries in these

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"Bribers" in Scottsboro Case, N.Y. TIMES, Oct. 2, 1934, at 7; *Leibowitz Ousts Communists in Scottsboro Case*, N.Y. HERALD TRIB., Oct. 11, 1934, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 9, frames 468–69; *Negroes Pick Leibowitz*, N.Y. TIMES, Oct. 21, 1934, at 28; *Norris Picks Leibowitz in Final Action*, AMSTERDAM NEWS (N.Y.), probably Feb. 18, 1935, at 1, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 9, frame 532.

176. 212 U.S. 278, 282 (1909).

177. CARTER, SCOTTSBORO, *supra* note 6, at 319; *Hits Alabama Jury Book*, N.Y. TIMES, Feb. 16, 1935, at 2; *United States Supreme Court*, N.Y. TIMES, Feb. 19, 1935, at 42; Norris v. Alabama, 294 U.S. 587, 589, 593 n.1 (1935).

178. 100 U.S. 303, 310 (1880).

179. 103 U.S. 370, 397 (1881).

180. *Id*.

181. *Norris*, 294 U.S. at 598.

182. *Id*. at 588–89; Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1476–83 (1983); KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 126; CARTER, SCOTTSBORO, *supra* note 6, at 321–24.

Alabama counties, but local court officers had been caught in an embarrassing lie, the only plausible explanation for which was their desire to cover up the intentional exclusion of blacks from juries. Second, by 1935, the innocence of the Scottsboro boys, in the words of one northern journal, had "long been established before the bar of public opinion."[183] Most Americans apparently found Ruby Bates's recantation more persuasive evidence of the defendants' innocence than had the Morgan County jury. Even many southern newspapers "rejoic[ed]"[184] in the Court's decision reversing Norris's conviction because, as one of them put it, "The conscience of the nation and the world is convinced that the seven Negroes are not guilty of the crime of which they were charged."[185]

The reversal of Norris's conviction need not necessarily have helped Patterson because of the alleged procedural flaw in his appeal. Yet the justices, after acknowledging Alabama's right to dismiss federal claims not raised in compliance with the state's own appellate procedure rules, nonetheless remanded Patterson's case to the state court to reconsider in light of *Norris*.[186] As justification for this unprecedented move, the justices professed themselves unwilling to believe that Alabama judges would have condemned Patterson to death because of procedural flaws in his appeal had they foreseen that the Supreme Court would soon invalidate the jury-selection procedures used in his case.[187]

G. Subsequent History

The ILD regarded its victory in the high court as "another proof of the

183. *Scottsboro—What Now?*, 82 NEW REPUBLIC 270–71 (1935).

184. *The South and Scottsboro Ruling*, LITERARY DIGEST, Apr. 13, 1935, at 10.

185. Editorial, *Where the Stars Fell*, RALEIGH NEWS & OBSERVER, Apr. 3, 1935, at 4; Editorial, *Justice for Negroes*, N.Y. TIMES, Apr. 2, 1935, at 20 (noting that the case "has become a public symbol of the mischief that may be wrought when prejudice is allowed to invade the place dedicated to impartial justice"); Editorial, *The Scottsboro Decision*, N.Y. HERALD TRIB., Apr. 2, 1935, at 18 (predicting that "[t]here will be relief that a gross miscarriage of justice has again been averted"); Editorial, *The Scottsboro Decision*, WASH. POST, Apr. 3, 1935, at 8 (observing that "[f]rom the beginning the atmosphere of these cases has been that of a miscarriage of justice"); Editorial, *New Scottsboro Opinion*, BALT. SUN, Apr. 3, 1935, at 12 (noting after *Norris* that "[i]t is a pretty fair suspicion . . . that the learned jurists acted as they acted because they don't believe the Scottsboro boys are guilty"). *But see* CARTER, SCOTTSBORO, *supra* note 6, at 326 (noting that "many Southern newspapers urged their readers to remain calm" and asserting that the [Supreme Court's] jury decision would be circumvented by 'lawful' means") (citation omitted).

186. Patterson v. Alabama, 294 U.S. 600, 604–07 (1935).

187. Note, *Recent Decisions—Federal Jurisdiction—Remand by Supreme Court Because State Court Might Reverse Decision—Noncompliance with State Procedural Requirement as "Adequate Non-Federal Ground,"* 35 COLUM. L. REV. 941–42 (1935); *Justice for Negroes*, *supra* note 185; *New Trial Ordered By Supreme Court in Scottsboro Case*, N.Y. TIMES, Apr. 2, 1935, at 1; *Scottsboro—What Now?*, *supra* note 183, at 271.

might of mass pressure and mass protest."[188] By contrast, Leibowitz saw it as a "triumph for American justice and . . . an answer to all those subversive elements who seek to engender hatred against our form of government."[189] The *New York Times* similarly declared that the decision "shows that the highest court in the land is anxious to secure and protect the rights of the humblest citizens."[190]

Governor D. Bibb Graves of Alabama proclaimed that the Court's decisions were the "supreme law of the land" and that "we must put the names of Negroes in jury boxes in every county."[191] He even mailed a copy of the rulings to all circuit judges in the state with instructions to comply. Newspapers outside of the South applauded the governor's stance, but in the Deep South the reaction was different. The Charleston *News and Courier* declared that putting blacks on juries was out of the question because it "would revolutionize Southern jurisprudence and demoralize Southern civilization."[192] Thus, the Supreme Court decision could and would be "evaded."[193] Because the Fourteenth Amendment had been "imposed on the South when it was bound hand and foot and gagged . . . [it was] not binding upon [the] honor or morals" of the South.[194]

The Court's second round of Scottsboro reversals did not, as some had hoped, deter Alabama from trying again. Leibowitz endeavored to persuade Governor Graves to block further prosecutions, but the Court's interventions had only further inflamed public opinion in Alabama. The state's high court faithfully quashed the indictments but clarified that this would not prevent retrials, and Lieutenant Governor Knight immediately announced that he

188. CARTER, SCOTTSBORO, *supra* note 6, at 324 (citation and internal quotation marks omitted).

189. *Id*. at 324–25 (citation and internal quotation marks omitted) (alteration in original).

190. *Justice for Negroes*, *supra* note 185; *see also The Scottsboro Ruling*, WASH. POST, Apr. 7, 1935, at B7 (quoting the *Philadelphia Inquirer*, which called *Norris* "conclusive proof that the highest court in the land is determined that substantial justice shall be accorded to all citizens").

191. CARTER, SCOTTSBORO, *supra* note 6, at 325 (citation and internal quotation marks omitted).

192. Editorial, *A "One Big State" Decision*, NEWS & COURIER (Charleston, S.C.), Apr. 3, 1935, at 4.

193. CARTER, SCOTTSBORO, *supra* note 6, at 326 (citation and internal quotation marks omitted).

194. Editorial, *The Realities*, NEWS & COURIER (Charleston, S.C.), Apr. 5, 1935, at 4-A; Editorial, *The Greater Menace*, NEWS & COURIER (Charleston, S.C.), Apr. 11, 1935, at 4 (predicting that "there [would] be no general compliance 'in spirit' with the court's decision" or with the governor's order); *see also Graves Orders Negro Jurors for Alabama*, N.Y. HERALD TRIB., Apr. 6, 1935, at 30; *Negroes in the Courts*, N.Y. TIMES, Apr. 7, 1935, at E8 (declaring that the governor "deserve[d] the approbation of the country"); *The South and Scottsboro Ruling*, *supra* note 184; *see generally* CARTER, SCOTTSBORO, *supra* note 6, at 325–29 (discussing reactions to *Norris*).

would "prosecute[the cases] to their conclusion."[195]

Meanwhile, organizations supporting the Scottsboro defense effort were beginning to quell their intramural divisions. After the Communist International in 1935 decided to support a popular front with liberal organizations against the "towering menace of fascism," the ILD ceased attacking NAACP leaders as "capitalist lackeys" and agreed to share control of the Scottsboro retrials.[196] The ILD, the NAACP, the ACLU, and other organizations now formed the Scottsboro Defense Committee (SDC), which orchestrated the defense for the next round of trials, relegated Leibowitz to the background, and enlisted a respected white lawyer from the South to do most of the courtroom work. For the first time, some Alabama moderates were willing to form a state Scottsboro committee, but they resisted affiliating with Leibowitz, whose ILD connections and intemperate remarks had thoroughly alienated white Alabamians, and they wanted the ILD muzzled. Even if these conditions were satisfied, most of them were not willing to commit themselves publicly on the defendants' guilt or innocence, and some of them insisted that the defendants accept compromise prison sentences. The Alabama Scottsboro Fair Trial Committee that they formed accomplished little—most notably, failing in efforts to secure a new trial judge and prosecutor.[197]

Late in 1935, a new grand jury in Jackson County, consisting of thirteen whites and one black, returned another indictment against all nine of the defendants. (Alabama law required agreement by only a two-thirds supermajority of the grand jury to return an indictment.) Early in 1936, Patterson was retried. Twelve blacks appeared on the hundred-person venire from which his trial jury was drawn, but actually getting blacks to serve was another matter. Seven of the prospective black jurors were excused at their own request—"looking anything but regretful" as they left the courthouse, according to one newspaper reporter.[198] The prosecutor used peremptory challenges to strike the other five blacks from the jury. Many whites on the venire admitted that they believed blacks were biologically inferior, but Judge Callahan refused to strike them for that reason.[199]

At the trial, the state concocted new evidence against Patterson, producing a prison guard who testified to a supposed confession he had made. Although

195. *Scottsboro Case to Be Reopened*, N.Y. TIMES, Apr. 3, 1935, at 7; CARTER, SCOTTSBORO, *supra* note 6, at 328–29 (citation and internal quotation marks omitted).

196. CARTER, SCOTTSBORO, *supra* note 6, at 331 (citation and internal quotation marks omitted).

197. *Id*. at 330–38, 352–59.

198. *Id*. at 341 (citation and internal quotation marks omitted).

199. *Id*. at 338–41; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 253–55; *Scottsboro Jury Includes Negro*, N.Y. POST, Nov. 13, 1935, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 9, frame 588.

the defense demonstrated that it was almost certainly a fabrication, Callahan admitted the confession into evidence. He also obstructed defense counsel at every turn, failed to disguise his irritation with them, and glared at Patterson while defining the crime of rape. One prosecutor informed jurors of their duty to "protect the fair womanhood of this great State"[200] and reminded them that after returning a verdict they would have to go home and face their neighbors.[201]

Observers were shocked when the jury imposed only a seventy-five-year prison sentence on Patterson. A Birmingham newspaper called this "probably the first time in the history of the South that a Negro has been convicted of a charge of rape upon a white woman and has been given less than a death sentence."[202] The jury foreman reported that he had been convinced of Patterson's innocence, but his colleagues had felt that an acquittal would effectively banish them from their communities; the lengthy prison sentence was a compromise.[203]

Soon after Patterson's conviction, three of the Scottsboro defendants—Norris, Powell, and Roy Wright—were in a car returning them to the Birmingham jail when Powell slashed a sheriff with a knife and then was himself shot in the head (though not fatally). Whether Powell had been provoked was disputed, though the stabbing was not. Northern newspapers tended to doubt the veracity of the sheriff's account that the shooting was in self-defense.[204]

By 1936, Alabama officials, reflecting growing public weariness over the Scottsboro episode, began hinting at a compromise on sentences less than death. The SDC was reluctant to have the defendants plead guilty to crimes they had not committed, but some members worried that the grounds for federal appeals were disappearing and that refusing to compromise could lead to more death sentences. A deal was negotiated under which some of the defendants would be released immediately, while others would be prosecuted only for assault and receive sentences of less than five years in prison. By the summer of 1937, editorial opinion in Alabama both supported and predicted a compromise solution. But Judge Callahan blocked it, insisting that the

200. F. Raymond Daniell, *Scottsboro Case Goes to the Jury*, N.Y. TIMES, Jan. 23, 1936, at 1.

201. CARTER, SCOTTSBORO, *supra* note 6, at 341–46; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 255–57.

202. CARTER, SCOTTSBORO, *supra* note 6, at 347 (citation and internal quotation marks omitted).

203. *Id*. at 347–48.

204. *Id*. at 348–51; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 258–61; F. Raymond Daniell, *Scottsboro Negro Shot Trying Break as He Stabs Guard*, N.Y. TIMES, Jan. 25, 1936, at 1; Editorial, *Alabama Must Answer*, N.Y. POST, Jan. 25, 1936, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 9, frame 608.

defendants be retried in his courtroom.[205]

Norris went on trial again in Decatur in the summer of 1937, and the jury returned another death sentence. Enlightened public opinion, as reflected in newspaper editorials urging a compromise, apparently went unrepresented on Morgan County juries. The prosecutor now hinted that with the convictions of the two "ringleaders of the crime"—Patterson and Norris—the state was prepared to compromise.[206] Andy Wright was the next defendant to be retried, and the state did not even seek the death penalty. The prosecutor delivered an impassioned attack on New York City, and the jury imposed a ninety-nine-year prison sentence. Next, Charley Weems was re-prosecuted, convicted, and sentenced to seventy-five years in prison. The state then dropped the rape charges against Powell and charged him only with assaulting the deputy sheriff; he pled guilty and received a twenty-year sentence. The state abandoned its cases against the other four defendants—the two youngest and the two most physically disabled at the time of the alleged rapes—and they were released. One observer wryly noted that this resolution left Alabama in the "anomalous position of providing only 50 per cent [sic] protection for the 'flower of southern womanhood.'"[207]

Newspapers outside of Alabama treated the dropping of charges against the four defendants as a virtual admission that all of the boys were innocent. Later in 1937, the Supreme Court, having exhausted all plausible grounds under the federal Constitution for reversing the Scottsboro defendants' convictions, declined to review Patterson's seventy-five-year prison sentence. The justices probably believed the boys were innocent, but that was not, unfortunately, a sufficient basis for reversing their convictions.[208]

With grounds for judicial appeals evaporating, the SDC shifted its focus to securing a gubernatorial pardon. Governor Graves agreed that Alabama could not justifiably continue to imprison some of the boys on evidence deemed insufficient to hold the others. Late in 1937, he told the boys' representatives that he would release them before his term expired. In the summer of 1938, after the Alabama Supreme Court had affirmed the death sentence of Norris and the prison sentences of the others, Graves commuted Norris's sentence to

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205. CARTER, SCOTTSBORO, *supra* note 6, at 362–66; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 290–93.

206. CARTER, SCOTTSBORO, *supra* note 6, at 372 (citation and internal quotation marks omitted).

207. *Id*. at 369–77 (citation and internal quotation marks omitted); GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 304–08; F. Raymond Daniell, *Scottsboro Case Ends as 4 Go Free; 2 More Get Prison*, N.Y. TIMES, July 25, 1937, at 1.

208. CARTER, SCOTTSBORO, *supra* note 6, at 377–79; *see also New Scottsboro Opinion*, *supra* note 185 (noting after *Norris* that "[i]t is a pretty fair suspicion . . . that the learned jurists acted as they did because they don't believe the Scottsboro boys are guilty").

life imprisonment. Leading Alabama newspapers now supported clemency for the remaining prisoners, but the governor had a last-minute change of heart and reneged on his promise to free them.[209]

Walter White then went to the White House to ask Eleanor Roosevelt to urge the president to intervene.[210] President Roosevelt wrote to Graves, a political supporter, and urged him to pardon the remaining Scottsboro prisoners. But the governor had tested the waters and concluded that releasing them would finish him politically. This pattern of negotiated compromise followed by repudiation was repeated several times over the next eleven years. Members of the parole board feared that if they recommended release, "some candidate may seize upon it as an issue and endeavor to discredit the whole parole and probation system."[211] Finally, in 1943–1944, three more of the Scottsboro prisoners were released. But two of them promptly violated the terms of their parole by heading North in search of better employment opportunities, and the prison board threw them back in jail. The last of the Scottsboro prisoners, Andy Wright, was not freed until 1950. The nine Scottsboro boys together spent more than 100 years in prison. Not until 1976 had the racial attitudes of whites in Alabama changed sufficiently for Governor George Wallace to issue an unconditional pardon to Norris, which effectively acknowledged his innocence.[212]

IV. LESSONS

A. Long-Term Ramifications

The Supreme Court's interventions probably saved the Scottsboro boys from execution, though not from years of wrongful incarceration. What were the broader consequences of these decisions for black criminal defendants in the South?

Justice George Sutherland wrote a narrow opinion in *Powell*; not only did it cover only capital cases, but it was explicitly limited to the circumstances of the Scottsboro boys—"the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces."[213] In 1942, the Court in

209. CARTER, SCOTTSBORO, *supra* note 6, at 379–91; GOODMAN, STORIES OF SCOTTSBORO, *supra* note 6, at 315–18; Letter from Allan Chalmers, Chairman, Scottsboro Defense Committee, to Bibb Graves, Governor of Alabama (Dec. 19, 1938), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 2, frames 283–88.

210. *See* Letter from Eleanor Roosevelt, First Lady, White House, to Walter White, Secretary, NAACP (Dec. 10, 1938), *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 2, frame 277.

211. CARTER, SCOTTSBORO, *supra* note 6, at 406 (citation and internal quotation marks omitted).

212. *Id*. at 391–426.

213. Powell v. Alabama, 287 U.S. 45, 71 (1932).

Betts v. Brady[214] refused to extend *Powell* to all indigent felony defendants. However, several subsequent decisions held that under certain circumstances, such as a defendant's youth or low intelligence, state-appointed counsel is constitutionally required in felony prosecutions. Most of these cases involved white defendants from northern states. The facts were generally less egregious than those in *Powell*, and the justices usually divided.[215]

Despite these extensions of *Powell*, the justices said almost nothing about the *quality* of defense representation the Constitution requires. The one partial exception was *Avery v. Alabama*[216] in 1940, where the Court ruled that an appointment of counsel three days before a capital murder trial began was permissible unless the defendant could show prejudice resulting from the shortness of time for trial preparation. Thus, despite *Powell* and its progeny, southern blacks could be woefully underrepresented without there being a constitutional violation. And so they were. Because the value of most constitutional rights depends on having competent lawyers to raise them, southern blacks benefitted little from those rights to which they were entitled.[217]

Most black criminal defendants in the South could not afford to hire their own lawyers, and thus their fates rested upon court-appointed counsel. The NAACP financed a few cases that its lawyers considered likely to succeed. But the association rarely got involved in criminal litigation until after trial. It had limited funds for such cases, and it did not regard itself as a legal aid bureau. Thus, the NAACP's involvement was limited to cases where "there is injustice because of race or color and where there is a possibility of establishing a precedent for the benefit of Negroes in general."[218] These restrictive ground rules led the association to reject many cases of obvious racial injustice.

Even the rare black defendant who could afford to hire a lawyer could not be certain that he was getting his money's worth. Very few black lawyers practiced in the South in the 1930s or 1940s. The number in Mississippi declined from twenty-one in 1910 to three in 1940, and the number in South Carolina fell from seventeen to five.[219] Outside of major cities, there were essentially none. Furthermore, the few black lawyers who did exist were a

214. 316 U.S. 455, 473 (1942).

215. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 230 (citing and discussing several cases).

216. 308 U.S. 444, 445–47 (1940).

217. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 230–31, 271.

218. Letter from Thurgood Marshall, Special Counsel, NAACP, to John Henry Joseph (July 10, 1941), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 7, frame 426.

219. AUGUST MEIER & ELLIOTT RUDWICK, ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE 130 (1976).

distinct liability in most Jim Crow courtrooms, both because of the racial prejudice of white judges and jurors and because of the inferior legal training most of them had received (being barred from southern law schools).[220]

Yet one might at least presume that black lawyers generally would have had the best interests of their clients at heart. Black defendants never knew what they were getting with white lawyers. To be sure, some white lawyers proved genuinely committed to serving their clients' interests and pursued cases without adequate compensation while risking reprisals for representing unpopular defendants. But most white lawyers shared the prejudices of their communities, assumed their clients deserved whatever sentences they received, and barely went through the legal motions to collect a fee.[221]

Willie Francis, a sixteen-year-old Louisiana black who was sentenced to death for murdering a white man, was victimized by this sort of inept lawyering. Francis achieved national prominence in 1946–1947 when Louisiana sought to execute him "by installments"[222] after the electric chair malfunctioned during the initial execution attempt. At trial, Francis's two court-appointed lawyers had failed to challenge the all-white jury or to file a change-of-venue motion, even though Francis had been transferred to another county's jail to protect him from threatened mob violence. Defense counsel also failed to object to Francis's possibly coerced confession, which was the only direct evidence linking him to the crime. His lawyers made no opening argument, called no witnesses, and neglected to inform the jury that the police had "lost" the alleged murder weapon. Then they failed even to appeal Francis's conviction, thus forfeiting any valid constitutional claims he may have had. Francis may have been innocent of the charge of murder, yet no appellate court ever scrutinized his trial record. His case was unique, however, not because of this inept lawyering—which was all too common in the trials of indigent southern blacks—but because of the bungled execution attempt. In 1947, the U.S. Supreme Court, by a 5–4 vote, rejected Francis's claim that a second execution attempt would constitute cruel and unusual punishment or violate due process.[223] The justices did not even consider whether his trial representation had been adequate.[224]

White lawyers risked severe social sanctions for defending black clients too vigorously when local communities were demanding blood. Most chose not to do so. Sonny Dobbs, a black man charged with murdering a white man

220. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 156, 271.

221. *Id*. at 271–72.

222. *See generally* ARTHUR S. MILLER & JEFFREY H. BOWMAN, DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS (1988).

223. Louisiana *ex rel*. Francis v. Resweber, 329 U.S. 459, 460–66 (1947).

224. MILLER & BOWMAN, DEATH BY INSTALLMENTS, *supra* note 222, at 23–27; KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 272.

in Attala County, Mississippi, in 1946, was defended by court-appointed whites, whom the NAACP thought did an excellent job under the circumstances.[225] Still, they "lived in Mississippi and wanted to stay [t]here"[226] and thus dared not take the measures that were essential to an effective defense, such as demanding a change of venue or challenging race discrimination in jury selection. White lawyers who refused to capitulate to such pressure found their legal practices crippled, and sometimes they suffered physical violence. In 1939–1940, Joseph Murray ably represented two blacks from McCormick, South Carolina, who were accused of murder—probably falsely. As a result, Murray reported that he had "incurred the ill will of so many people here that I am now unable to secure any practice and it looks as if I might have to move to some other place and begin over to try and again build up a practice."[227] Stanley Belden, a white ACLU lawyer who in 1941 conscientiously represented a black man facing possibly trumped-up murder charges in Hugo, Oklahoma, saw his legal practice ruined and was forced to leave the state.[228]

Southern courts refused to extend *Powell* to require effective representation of indigent defendants. The justices had ruled that appointment of counsel on the morning of trial was inadequate, so southern judges would appoint lawyers a few days before trial. Black defendants whose lives were in jeopardy were routinely provided lawyers so near to trial that no serious investigation of facts or preparation of trial strategy was possible.[229] In the most explosive cases, moreover, court-appointed lawyers were strongly

225. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 273.

226. Supplementary Brief for Appellant at 22, Dobbs v. State, 29 So. 2d 84 (Miss. 1947) (No. 36195), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 4, frame 398.

227. Letter from Joseph Murray, Attorney, to Thurgood Marshall, Special Counsel, NAACP (Feb. 9, 1940), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 1, frames 494–96.

228. Letter from Stanley D. Belden, Attorney, to Thurgood Marshall, Special Counsel, NAACP (Apr. 26, 1941), *microformed on NAACP*, *supra* note 17, at pt. 8, series B, reel 8, frame 947. The case was *Lyons v. Oklahoma*, 322 U.S. 596, 597–99 (1944), which is discussed in KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 171, 229–30, 283, and, more comprehensively, in John F. Blevins, Note, Lyons v. Oklahoma, *The NAACP, and Coerced Confessions Under the Hughes, Stone, and Vinson Courts, 1936–1949*, 90 VA. L. REV. 387 (2004).

229. Avery v. Alabama, 308 U.S. 444, 447–53 (1940) (appointment three days before trial was sustained by the Supreme Court); McGee v. State, 26 So. 2d 680, 681 (Miss. 1946) (lawyer appointed three days before trial); MILLER & BOWMAN, DEATH BY INSTALLMENTS, *supra* note 222, at 23 (detailing the *Francis* case, in which a lawyer was appointed six days before trial); Letter from James H. Kimmel, Jr., Attorney, to NAACP (Dec. 2, 1941), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 1, frames 749–50 (noting Kimmel's appointment as Oscar Beachem's lawyer the day before Beachem's trial); Memorandum from Roy Wilkins, Editor, CRISIS, to Walter White, Secretary, NAACP (Feb. 26, 1940), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 2, frame 305 (discussing a case of four black boys whose lawyer was appointed seven days before their murder trial).

discouraged from seeking continuances by threats to lynch their clients.[230] Lawyers who persevered against such pressure generally saw their motions for continuances denied anyway, or else judges granted much shorter delays than they had sought.[231]

Placing blacks on southern juries probably would have benefitted black defendants more than ensuring adequate representation of defense counsel would have. This is why contemporary observers believed the jury-discrimination claim of the Scottsboro defendants was more significant than their right-to-counsel argument.[232] Yet, in practice, *Norris* had little impact on black jury service in the South.

Southern newspapers predicted that *Norris* would be easily circumvented. The Jackson (Mississippi) *Daily News* deemed the decision only a minor nuisance because lawyers would have to invest time in evading it.[233] In states such as Mississippi and South Carolina, where jury service was linked to voter registration, *Norris* made little if any difference because blacks remained almost universally disfranchised in the 1930s.[234] *Norris* also left open the possibility of using jury-selection schemes that vested enormous discretion in the hands of (white) jury commissioners. Proving race

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230. Motion for New Trial, State v. Dobbs (Miss. 1946) (No. 36195), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 4, frame 305.

231. *E.g.*, RICHARD B. SHERMAN, THE CASE OF ODELL WALLER AND VIRGINIA JUSTICE, 1940–1942, at 21–22 (1992) (one–week continuance); Steven F. Lawson et al., *Groveland: Florida's Little Scottsboro*, 65 FLA. HIST. Q. 1, 11 (1986) (a continuance of a few days granted after a month's continuance was requested); Letter from James H. Kimmel, Jr., to NAACP, *supra* note 229 (continuance denied to lawyer appointed the day before the trial); Letter from J.C. Bird, Attorney, to Roy Wilkins, Editor, CRISIS (Jan. 22, 1940), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 2, frames 276–78 (continuance denied to lawyer appointed just one week before trial).

232. *See supra* notes 106–09 and accompanying text.

233. CARTER, SCOTTSBORO, *supra* note 6, at 326 (citation omitted). For contemporary predictions that *Norris* would be evaded, see MANGUM, LEGAL STATUS OF THE NEGRO, *supra* note 13, at 333; BERNARD H. NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920, at 82 (1946) (quoting the "sober and realistic" view of William Pickens of the NAACP); J.F. Barbour, Jr., Note, *Constitutional Law—Equal Protection of Laws—Exclusion of Negroes from Jury Service—Effect on Defendant's Right to a New Trial*, 8 MISS. L.J. 196, 200–01 (1935); *The Scottsboro Decision*, 71 SURVEY 144 (1935) (quoting the *Star* of Wilmington, North Carolina, which noted after *Norris* that "it does not follow that Alabama will rush to the fore with mixed juries" and predicted that the names of blacks might be put on jury rolls but some method would be found for continuing to exclude blacks from actual service on juries) (internal quotation marks omitted).

234. State v. Grant, 19 S.E.2d 638, 640–41 (S.C. 1941); NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO, *supra* note 233, at 82–83; Barbour, *supra* note 233, at 201–04; *Negroes and Jury Service in the Southern States*, BIRMINGHAM NEWS, Apr. 5, 1935, at 8; NEWS & COURIER (Charleston, S.C.), Apr. 13, 1935, at 4; *see also* BIRMINGHAM NEWS, Apr. 30, 1935, at 1, *reprinted in* THE ATTITUDE OF THE SOUTHERN WHITE PRESS TOWARD NEGRO SUFFRAGE 1932–1940, at 2 (Rayford W. Logan ed., 1940) (noting that after *Norris* a bill was introduced into the Alabama senate that would have limited jury service to registered voters); Editorial, *Alabama Undeterred*, PITTSBURGH COURIER, Apr. 27, 1935, at 12 (same).

discrimination in the administration of such schemes was difficult, especially because state courts still made the initial factual determinations.[235]

Southern whites correctly concluded that *Norris* could be circumvented by placing the names of a few blacks on the jury rolls. Such blacks were often superannuated, dead, disabled, or departed, and they never appeared in numbers approximating the percentage of a county's black population.[236] Even those blacks making it onto the rolls were rarely called for service, and if they were, they could often be intimidated.[237] When a black college president in Texas refused to be excused from jury service in 1938, white hoodlums removed him from the jury room and threw him head first down the steps of a Dallas courthouse.[238] Moreover, the presence of an occasional black on a grand jury could be nullified by rules requiring only a supermajority, not unanimity, for indictment.[239] The even more occasional black called for service on trial juries could be excluded through challenges for cause, over which trial judges exercised enormous discretion, or through prosecutors' peremptory challenges, the number of which some states increased after *Norris*.[240]

The most that *Norris* seems to have accomplished was to place a single black on an occasional jury in large cities of the peripheral South.[241] In the Deep South and in rural areas throughout the region, exclusion of blacks from juries remained the rule. In a Louisiana case that reached the Supreme Court

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235. Bernard S. Jefferson, *Race Discrimination in Jury Service*, 19 B.U. L. REV. 413, 433–34 (1939).

236. *See, e.g.*, Reece v. Georgia, 350 U.S. 85, 88 (1955) (noting that of the few blacks making it onto the grand jury lists, one did not actually reside in the county, two were over eighty years old, one was partially deaf, and another very ill); Patton v. Mississippi, 332 U.S. 463 (1947); *cf.* Letter from W.A. Bender, President, Jackson Branch NAACP, to Thurgood Marshall, Special Counsel, NAACP (June 2, 1948), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 7, frames 981–82 (asserting that all the blacks called for jury service in Hinds County, Mississippi, were "Uncle Toms who begged to be excused").

237. CARTER, SCOTTSBORO, *supra* note 6, at 340–41 (noting intimidation of those blacks making it onto the venire in one of the Scottsboro retrials); NAACP Press Release (Jan. 21, 1948), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 7, frames 592–93 (noting that in Maury County, Tennessee, blacks sometimes appeared on the jury lists but never actually served on juries).

238. *Federal Action Sought in Texas Jury Case*, 45 CRISIS 366 (1938).

239. CARTER, SCOTTSBORO, *supra* note 6, at 338 n.20 (noting that the grand jury that re-indicted the Scottsboro boys in 1935 consisted of thirteen whites and one black).

240. *Id*. at 341 (noting the prosecutor's use of peremptory challenges to exclude blacks from the jury in one of the Scottsboro retrials); ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915–1972, at 128 (1995) (noting blacks making it onto the trial venire being excluded by peremptory challenges); NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO, *supra* note 233, at 82–83 n.100 (noting that North Carolina increased the number of peremptory challenges after *Norris*).

241. *See* NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO, *supra* note 233, at 84.

in 1939, a rural parish with a black population of nearly 50% had "complied" with *Norris* by placing the names of three blacks, one of whom was dead, on a jury venire of 300.[242] A study conducted in 1940 found that the vast majority of rural counties in the Deep South "have made no pretense of putting Negroes on jury lists, much less calling or using them in trials."[243]

Because southern states reformed their jury-selection practices so little after *Norris*, the justices continued to find easy cases for reversing convictions on the ground of race discrimination in jury selection.[244] By the late 1940s, they were growing frustrated at the inefficacy of their decisions,[245] but they still declined to take the steps necessary actually to place blacks on southern juries. The Court refused to condemn the practices of limiting jury service to registered voters[246] or of conferring virtually unfettered discretion over jury selection to commissioners.[247] The Court did not even flatly prohibit the insidious practice of commissioners limiting prospective jurors to their personal acquaintances—meaning white people.[248] In *Akins v. Texas*[249] in 1945, the Court inexplicably deferred to a state court's finding that there had been no race discrimination in jury selection despite the testimony of all three jury commissioners that they had refused to permit more than one black to sit on Akins's grand jury. The justices declined even to hear a case contesting the constitutionality of prosecutors using peremptory challenges to exclude blacks from juries because of their race.[250] As a result, southern juries remained almost entirely white for another generation. Every one of the fifteen black men executed by the *border state* of Kentucky between 1940 and 1962 had been convicted of a crime against a white person by an all-white jury.[251]

The famous Martinsville Seven case illustrates how the exclusion of blacks from jury service invited racial injustice. Seven young black men were charged with raping a white woman in the Southside region of Virginia in 1949. The woman had indisputably been raped, and all seven defendants had indisputably engaged in forcible intercourse with her or been present as

242. Pierre v. Louisiana, 306 U.S. 354, 359 (1939).

243. MYRDAL, AN AMERICAN DILEMMA, *supra* note 11, at 549–50 (quoting a study by sociologist Arthur Raper) (internal quotation marks omitted).

244. *See, e.g.*, Hill v. Texas, 316 U.S. 400, 404 (1942); Smith v. Texas, 311 U.S. 128, 131 (1940).

245. *See* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 226.

246. Patton v. Mississippi, 332 U.S. 463, 468 (1947).

247. *See Smith*, 311 U.S. at 131–32.

248. *See Hill*, 316 U.S. at 404.

249. 325 U.S. 398, 406–07 (1945).

250. People v. Roxborough, 12 N.W.2d 466, 471 (Mich. 1943), *cert. denied*, 323 U.S. 749 (1944).

251. Wright, *supra* note 12, at 266.

accomplices. No lynch mob attempted to execute the defendants, and the trial was conducted in a mob-free atmosphere. The defendants were not beaten into confessing. The trials did not occur until five months after the crime, and defense counsel was appointed four months before trial. Both the judge and the prosecutor avoided references at trial to the defendants' race. Three blacks sat on the grand jury that indicted the defendants, and blacks appeared in each of the jury pools for the six separate trials. Although black newspapers and some radical journalists compared these proceedings to those at Scottsboro twenty years earlier, the dissimilarities are actually more striking: The Martinsville Seven had real trials with real lawyers that were conducted with relative dispassion before a fair judge.[252]

Yet the trials, convictions, and executions of the Martinsville Seven were fundamentally unjust for two reasons having to do with race. First, although blacks were in the jury pools for all of the defendants' trials, every one of the seventy-two jurors who tried and convicted them was white. Blacks were excluded from the juries because of their opposition to the death penalty or through the prosecutors' use of peremptory challenges. Second, every one of the forty-five death sentences imposed for rape or attempted rape in Virginia between 1908 and 1950 involved a black man and a white woman. (Similarly, between 1925 and 1950, Florida executed thirty-three blacks and only one white for rape, and in its entire history Mississippi had executed no whites for rape.)[253]

Thus, although the Martinsville Seven enjoyed ostensibly fair trials, their fate ultimately depended on their race. In rape cases in Virginia, only blacks who assaulted whites ever received the death penalty, and only white jurors adjudicated their guilt and imposed sentences. Oliver Hill, a black lawyer from Richmond who helped represent the Martinsville Seven, concluded that white Virginians knew that "[w]e don't need to lynch the niggers. We can try them and then hang them."[254] Virginia executed the Martinsville Seven in February 1951—the largest mass execution or lynching for rape in American history.[255]

Black jurors probably would have benefitted black defendants in other cases as well, assuming their independent judgment could have been guaranteed (quite possibly an unwarranted assumption in the South of this era). Odell Waller was another black Virginian whose death sentence attracted national attention. He was a sharecropper convicted of murdering a

252. *See generally* ERIC W. RISE, THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT (1995) (describing the background of the Martinsville Seven case).

253. *Id*. at 85, 102, 120, 124–26, 156–57.

254. *Id*. at 3 (citation and internal quotation marks omitted).

255. *Id*. at 1.

white farmer, Oscar Davis, in Pittsylvania County, Virginia, in 1940. Waller had undeniably killed Davis, but he had a plausible self-defense claim. The two men had an unpleasant history, including Davis's mutilation of Waller's dog. Immediately before Davis's death, they had quarreled over the distribution of crop shares. Waller claimed that Davis was known to carry a gun and that he was reaching for it when Waller shot him. The all-white jury rejected Waller's self-defense claim. How could having blacks on Waller's jury—one-third of Pittsylvania County's population was black—not have made a difference? When the race of the defendant and decedent were reversed in another sharecropper homicide case in Pittsylvania County around the same time, the all-white jury deliberated just fifteen minutes before acquitting the defendant, apparently crediting his self-defense claim. Yet Governor Colgate Darden repulsed entreaties to commute Waller's death sentence, and he was executed in 1942.[256]

Because most white men in the South presumed that sex between a black man and a white woman was rape, black defendants who pleaded consent as a defense to charges of raping white women had essentially no chance before all-white juries. Even black defendants who pled mistaken identity might have benefitted from having blacks on their juries. In 1935, a white Birmingham physician was quoted as saying that if a black man raped a white woman, "an example and a spectacle of punishment" was necessary. "If possible get the right Negro and string him up. String up one or two of his nearest relatives, at the same time. And if the right one can't be found, take some other Negro."[257] It seems safe to assume that all black jurors would have disagreed with that sentiment.

B. Why Powell *and* Norris *Were So Inefficacious*

One reason decisions such as *Powell* and *Norris* had so little impact is that southern black defendants could not ordinarily appeal their convictions and sentences. State appellate and federal judges were more likely than state trial judges to vindicate the constitutional rights of southern blacks because they were better educated, more professionalized, and more independent of local opinion that often proved hostile to those rights. Yet cases of black criminal defendants usually did not proceed beyond trial courts, mainly because state provision of counsel to indigents did not generally extend to appeals, but also because procedural defaults frequently insulated trial errors from appellate

256. SHERMAN, THE CASE OF ODELL WALLER AND VIRGINIA JUSTICE, *supra* note 231, at 1–14, 25–31, 99–115, 123–28, 155–65; Waller v. Commonwealth, 16 S.E.2d 808, 809 (Va. 1941).

257. VIRGINIUS DABNEY, BELOW THE POTOMAC: A BOOK ABOUT THE NEW SOUTH 189–90 (1942) (quoting a letter the physician had sent to a prominent southern newspaper columnist) (internal quotation marks omitted).

review.[258]

The criminal cases that reached the Supreme Court did so only because of outside financial assistance. Incidents such as the racial massacre in Phillips County, Arkansas, and the alleged rapes and ensuing trials at Scottsboro captured national attention. Because the criminal trials emerging from these incidents revealed Jim Crow at its worst, they afforded outstanding fund-raising opportunities for the NAACP and the ILD, respectively. However, the NAACP took relatively few criminal cases, and the association was absent from most of the rural South and thus could not intervene in cases at the moment when it would have done the most good—when the trial record was being created. Thus, in run-of-the-mill criminal cases, indigent black defendants were represented not by elite legal talent hired by these organizations, but by court-appointed lawyers, who could not invariably be counted upon to aggressively defend their clients' rights because of the "personal odium" that attached to those challenging "the venerable system" of white supremacy.[259]

Furthermore, enlistment of competent counsel on appeal frequently came too late to do defendants much good, as inept or careless lawyering at trial produced procedural defaults that insulated constitutional violations from appellate review. The issue of race discrimination in jury selection was procedurally defaulted in both *Powell* and in *Moore* (the Phillips County race-riot case) and was very nearly so in *Patterson*.[260] In *Brown v. Mississippi*,[261] the landmark decision in 1936 holding that criminal convictions based on coerced confessions violate due process, that issue nearly failed to gain a hearing in the Supreme Court because defense counsel had challenged the voluntariness of the confessions at the wrong point of the trial. Until the Supreme Court in the 1960s changed the rules regarding federal court deference to state procedural defaults, many valid federal constitutional claims were denied a hearing in any appellate court.[262]

The ruthlessness of the Jim Crow system made it difficult for lawyers to compile the sort of trial record necessary for effective appellate review. Fear

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258. *See* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 155–58; *see also When Negro Convicts Kill*, NEWS & COURIER (Charleston, S.C.), Apr. 9, 1935, at 4 (noting that "negroes will not get their cases into the [S]upreme [C]ourt unless some agency or society shall put up the money to hire lawyers . . . and pay the expenses of the appeal").

259. Letter from W.G. Cornett, Attorney, to Arthur Garfield Hays, Counsel, ACLU (Aug. 30, 1938), *microformed on NAACP Papers*, *supra* note 17, at pt. 4, reel 1, frame 867; KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 156.

260. Powell v. State, 141 So. 201, 210 (Ala. 1932); Hicks v. State, 220 S.W. 308, 309–10 (Ark. 1920) (appeal of Hicks, Moore, and four other co-defendants); Patterson v. State, 156 So. 567, 569 (Ala. 1934), *vacated*, 294 U.S. 600, 604–07 (1935).

261. 297 U.S. 278, 286–87 (1936).

262. *E.g.*, Fay v. Noia, 372 U.S. 391, 398–99 (1963).

of economic and physical reprisals deterred all but the most intrepid blacks from signing affidavits supporting a change in trial venue.[263] When Walter White of the NAACP traveled to Phillips County to investigate the facts that gave rise to *Moore*, he was nearly lynched.[264] One of the blacks whom Leibowitz had called to testify at the hearing challenging race discrimination in jury selection in Morgan County had a cross burnt on his front yard for "stepping out of line."[265] Rigorous cross-examination of white witnesses, especially women in rape cases, not only alienated white jurors but also jeopardized the safety of defense counsel.[266]

Finally, public officials in the South had little direct incentive to abide by the constitutional rights of black defendants because civil and criminal sanctions for violations were generally unavailable. After *Screws v. United States*[267] in 1945, it was far from certain whether the justices would permit the imposition of federal criminal liability even on sheriffs who beat defendants into confessing.[268] Nor was it clear in the 1940s that courts would construe federal civil rights statutes to authorize the imposition of monetary liability on public officers who contravened state law as well as the federal Constitution,[269] and every state already required the appointment of counsel for indigent capital defendants and forbade race discrimination in jury selection.[270]

For all these reasons—the inability of most southern black defendants to afford counsel, the relative absence of alternative sources of legal assistance such as the NAACP, the difficulty of maneuvering around state procedural default rules, the obstacles to compiling a favorable trial record, and the

263. McGee v. State, 26 So. 2d 680, 682 (Miss. 1946); Letter from Joseph Murray, Attorney, to Thurgood Marshall, Special Counsel, NAACP (Jan. 13, 1940) *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 1, frames 465–66; Letter from Walter D. Coleman, Attorney, to Marian Wynn Perry, NAACP Legal Defense and Educational Fund (Feb. 17, 1947), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 8, frames 121–22.

264. CORTNER, A MOB INTENT ON DEATH, *supra* note 101, at 26, 91–92.

265. CARTER, SCOTTSBORO, *supra* note 6, at 201 n.21 (citation and internal quotation marks omitted).

266. *See id*. at 210, 223; MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM 84, 88 (1999).

267. 325 U.S. 91, 100, 107, 113 (1945) (narrowing federal criminal liability for willful deprivation of federal rights and reversing, for a new trial, the conviction of a sheriff who beat a black prisoner to death).

268. Even in *Screws*, where the sheriff had wantonly murdered a black prisoner, several justices balked at applying the federal statute criminalizing civil rights violations. *Id*. at 92–93, 97–98 (plurality opinion); *id*. at 142 (dissenting opinion).

269. Monroe v. Pape, 365 U.S. 167, 170–72 (1961).

270. On appointment of counsel, see *supra* text accompanying notes 110–12. No state expressly barred blacks from serving on juries after the Supreme Court invalidated such laws in *Strauder v. West Virginia*, 100 U.S. 303, 310–12 (1880).

absence of effective sanctions against rights violators—few criminal cases like *Powell* and *Norris* reached the Court. As one black newspaper observed after *Powell*, "Out of the thousands of cases where Negroes are convicted without fair trials few ever reach the [S]upreme [C]ourt, and even if they do the results are rarely altered. . . . We are afraid it will take more than decisions of the Supreme [C]ourt to rectify these flagrant evils of our judicial system."[271]

C. Intangible Benefits of Litigation

Litigation in defense of the rights of southern blacks may have been more important for its intangible effects: convincing blacks that the racial status quo was malleable, educating them about their rights, helping to mobilize protest, and instructing northern whites about the barbarities of Jim Crow. A social movement for racial reform faced intimidating obstacles in the South. One of the most formidable was simply convincing blacks that the status quo of racial subordination was contingent rather than inevitable. As Walter White observed, the NAACP's greatest difficulty was "getting over to the masses of our folks the significance of these fights."[272]

In theory, black protest could have assumed a variety of forms: migration, violent revolt, political mobilization, economic pressure, street demonstrations, or litigation. In practice, however, options were limited. Violent protest would have been suicidal, given overwhelming white physical power and the will to use it. Political protest was unavailable to southern blacks, who remained almost universally disfranchised. Few southern blacks commanded sufficient financial resources to leverage social change through economic pressure. Street demonstrations, which proved so effective in the 1960s, were not yet a realistic option: The South was still too violent, segregation and disfranchisement too deeply entrenched, and the threat of national intervention too remote. As one black leader observed, no doubt correctly, a Gandhian strategy of nonviolent protest in the South would have led to "an unprecedented massacre of defenseless black men and women."[273] Only two protest options were realistically available to southern blacks before World War II: migration and litigation. Many hundreds of thousands pursued the former; far fewer chose the latter.

Most civil rights leaders appreciated the limited transformative potential

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271. Editorial, *The Scottsboro Case*, CHI. BEE, Nov. 20, 1932, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 797.

272. Letter from Walter White, Secretary, NAACP, to Edward S. Lewis, Baltimore Urban League (Sept. 8, 1937), *microformed on NAACP Papers*, *supra* note 17, at pt. 3, series A, reel 2, frames 818–19; *see also* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 162–67, 284–86.

273. E. Franklin Frazier, *The Negro and Non-Resistance*, 28 CRISIS 58, 59 (1924).

of litigation given prevailing constraints. Charles Houston, the principal legal strategist of the NAACP in the 1930s, recognized that law "has certain definite limitations when it comes to changing the *mores* of a community," because "[i]t is too much to expect the court to go against the established and crystallized social customs."[274] Yet even if litigation could not "bring on a social revolution," as Ralph Bunche observed,[275] it could advance long-term objectives. Litigation educated blacks about their rights and inspired them to challenge the racial status quo. The NAACP's national office wrote letters to southern blacks explaining their rights and the obligation of whites to respect them. Some black communities in the South felt so hopeless and isolated that for the national office merely to make inquiries on their behalf would "do a lot of good."[276] A memorandum by Houston declared that a principal objective of litigation should be "to arouse and strengthen the will of local communities to demand and fight for their rights."[277]

Houston and his successor at the NAACP, Thurgood Marshall, thought that organizing local communities in support of litigation was nearly as important as winning lawsuits. They frequently made speeches at mass rallies while visiting southern communities for court appearances. "On occasion," one biographer writes, Marshall "appears to have been brought to town nominally to work on pending litigation but actually to rally the troops."[278] Perceiving the need "to back up our legal efforts with the required public support and social force," Houston referred to himself as "not only lawyer but evangelist and stump speaker."[279] Because cases arising from episodes such as Scottsboro demonstrated to blacks the importance of binding together in self-defense, they provided unparalleled fund-raising and branch-building opportunities for the NAACP. As one black editorialist observed, "Whatever else happens in the Scottsboro case, . . . [i]t has given us one of the greatest chances for consolidated action we have had since emancipation."[280]

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274. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 103, 135 (1983) (emphasis in original) (citations and internal quotation marks omitted).

275. RALPH J. BUNCHE, THE POLITICAL STATUS OF THE NEGRO IN THE AGE OF FDR 108 (Dewey W. Grantham ed., 1973).

276. Letter from J. Rice Perkins to Walter White, Secretary, NAACP (May 7, 1935), *microformed on NAACP Papers*, *supra* note 17, at pt. 3, series A, reel 4, frame 367.

277. Memorandum from Charles H. Houston, Special Counsel, NAACP, to the Joint Comm. of the NAACP and the Am. Fund for Pub. Serv. (Oct. 26, 1934), *microformed on NAACP Papers*, *supra* note 17, at pt. 3, series A, reel 1, frames 859–60.

278. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 30 (1994).

279. MCNEIL, GROUNDWORK, *supra* note 274, at 145 (citation and internal quotation marks omitted).

280. William N. Jones, *Day by Day*, AFRO-AM. (Balt.), Apr. 22, 1933, at 6.

Litigation also provided southern black communities with salutary examples of the accomplishments and courage of black Americans. Watching a skilled black lawyer subject a white sheriff to a grueling cross-examination educated and inspired southern blacks, who virtually never witnessed such scenes of blacks confronting whites on an equal footing.[281] Bold and capable performances by black lawyers in southern courtrooms seemed to contravene the very premises of white supremacy.

Marshall explained this dynamic in connection with a criminal trial in Hugo, Oklahoma, in 1941, where no black lawyer had ever before appeared in the courtroom. Marshall and his white co-counsel, Stanley Belden of the ACLU, had agreed that Marshall would cross-examine all of the police officers on the issue of whether the defendant's confession had been coerced, "because we figured they would resent being questioned by a Negro and would get angry and this would help us. It worked perfect. They all became angry at the idea of a Negro pushing them into tight corners and making their lies so obvious."[282] Marshall continued:

> Boy, did I like that—and did the Negroes in the Court-room like it. You can't imagine what it means to those people down there who have been pushed around for years to know that there is an organization that will help them. They are really ready to do their part now. They are ready for anything.[283]

Litigation may also have raised the salience of the race issue for whites. Houston acknowledged that "[t]he truth is there are millions of white people who have no real knowledge of the Negro's problems and who never give the Negro a serious thought."[284] As Bunche noted, "[c]ourt decisions, favorable or unfavorable, serve to dramatize the plight of the race more effectively than any other recourse; their propaganda and educative value is great."[285] Criminal cases may have afforded the best educational opportunities available, as they revealed Jim Crow at its worst—southern blacks, possibly or certainly innocent of the crimes charged, being railroaded to the death

281. FAIRCLOUGH, RACE & DEMOCRACY, *supra* note 240, at 129; RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN VS. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 150–53 (1976); MEIER & RUDWICK, ALONG THE COLOR LINE, *supra* note 219, at 149–52.

282. Letter from Thurgood Marshall, Special Counsel, NAACP, to Walter White, Secretary, NAACP (Feb. 2, 1941), *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 8, frames 886–88.

283. *Id*.

284. Charles H. Houston, *Don't Shout Too Soon*, 43 CRISIS 79, 79 (1936).

285. BUNCHE, THE POLITICAL STATUS OF THE NEGRO IN THE AGE OF FDR, *supra* note 275, at 108.

penalty through farcical trials. As one black newspaper observed, "No single event touching the Negro question in this country has been forced into the conscience, the life and the public opinion of the American people as has the Scottsboro case."[286]

Finally, litigation, when successful, provided blacks with one of their few reasons for optimism before World War II. As one black leader observed in 1935, even if court victories produced little concrete change, at least they "keep open the door of hope to the Negro."[287] Roscoe Dunjee, the NAACP's principal agent in Oklahoma, noted after one such court victory, "It is just such rifts in the dark clouds of prejudice which cause black folk to know that a better day is coming by and by."[288]

D. Intangible Harms of Litigation Victories

Rulings such as *Powell* and *Norris* may have produced intangible harms as well as benefits. By 1950 or so, lynchings were nearly obsolete in the South, and legal lynchings had been tempered and confined to narrower portions of the Deep South. Yet nowhere in the South did blacks serve as jurors in inflammatory cases of alleged black-on-white crime. All-white juries applied unwritten substantive liability rules decreeing that only black men could be executed for raping white women and only whites were permitted to kill other whites in self-defense. Criminal justice outside of the Deep South may have acquired a veneer of legitimacy by the 1940s. The justices could find no constitutional error in cases such as those of the Martinsville Seven or that of Odell Waller because the trials had ostensibly been fair. Yet black men were still being executed under circumstances where whites almost surely would not have been.[289]

Given this state of affairs, one may wonder whether the Court's criminal interventions did not have insidious consequences. In landmark decisions protecting the rights of southern black defendants, the justices employed some of their grandest rhetoric about the high court's heroic role in defending unpopular minorities from majoritarian oppression. For example, in 1940 in *Chambers v. Florida*,[290] which extended *Brown v. Mississippi*'s bar on coerced confessions to cover interrogation practices other than physical

286. *Group of National Negro Leaders Will Attack All Segregation and Injustice*, RICHMOND PLANET, Mar. 4, 1933, at 1, *microformed on NAACP Papers*, *supra* note 17, at pt. 6, reel 8, frame 810.

287. NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920, *supra* note 233, at 106 n.177 (quoting Kelly Miller, former Dean of the College of Arts and Sciences at Howard University) (citation omitted).

288. Charles H. Martin, *Oklahoma's "Scottsboro" Affair: The Jess Hollins Rape Case, 1931–1936*, 79 S. ATL. Q. 175, 179 (1980) (citation and internal quotation marks omitted).

289. *See* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 281–82.

290. 309 U.S. 227, 240 (1940).

violence, the Court proudly proclaimed the obligation of judges to "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[291] Newspapers reported the decision in banner headlines such as, "Justices Rededicate Themselves as a Haven of Refuge for all Non-Conforming Victims of Public Prejudice."[292] A glowing editorial in the *Nation* quoted some of the Court's rhetoric and basked in the happy ending of *Chambers*: Americans were to "be proud" because the Court had freed "obscure and humble" black men who implicated no larger political or economic concerns.[293]

Yet *Chambers* apparently had little effect on southern sheriffs, who continued to coerce confessions from black suspects.[294] Nor, as we have seen, did rulings such as *Powell* and *Norris* significantly alter Jim Crow justice. Were blacks clearly better off because of rulings that had little practical consequence for southern criminal justice but that enabled the Court to trumpet the vigilant defense that judges offered against racial prejudice in law? Before the Court's interventions, at least everyone could see mob-dominated trials for what they were—farcical substitutes for lynchings. After such rulings, however, casual observers might have been misled into believing, along with the *New York Times*, that "the high court stands on guard with flaming sword over the rights of every one of us."[295]

Blacks could be excused if they demurred from such sentiments. Even in states such as Virginia, where the formal requirements of due process were more attentively observed, blacks did not sit on juries in racially explosive cases, and all-white juries applied informal liability rules that discriminated against blacks. In the postwar period, the Court had opportunities to redress such injustices. Defendants appealed to the Court cases that challenged the racially motivated use of peremptory challenges by prosecutors and racial disparities in the administration of the death penalty. The justices refused even to grant review.[296] Not until the 1970s would the Court invalidate the discriminatory administration of the death penalty,[297] and not until the 1980s

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291. *Id*. at 241.

292. WASH. DAILY NEWS, Feb. 12, 1940, at 1, *microformed on NAACP Papers*, *supra* note 17, at pt. 8, series B, reel 2, frame 810.

293. *Four Negroes*, 150 NATION 269, 270 (1940).

294. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 271.

295. Editorial, *Due Process*, N.Y. TIMES, Mar. 12, 1940, at 22.

296. People v. Roxborough, 12 N.W.2d 466, 471 (Mich. 1943), *cert. denied*, 323 U.S. 749 (1944); Hampton v. Commonwealth, 58 S.E.2d 288, 292 (Va. 1950), *cert. denied*, 339 U.S. 989 (1950).

297. Coker v. Georgia, 433 U.S. 584, 600 (1977); Furman v. Georgia, 408 U.S. 238, 239–40

would it forbid the race-conscious use of peremptory challenges.[298] Yet the rhetoric of *Chambers* suggests that the justices believed they had already taken enormous strides toward eliminating race discrimination from southern criminal justice. They had not. Their accomplishments were fairly trivial—more a change in form than in substance. To the extent that the justices and their admirers were deluded into thinking otherwise, these criminal rulings may have caused actual harm to the interests of southern blacks.[299]

The Court's refusal to review a case technically does not indicate approval of the lower court's decision (though it may imply this, given the justices' self-proclaimed role as heroic defender of minority rights). Yet this Court did not simply fail to intervene against certain racial inequalities in the criminal justice system of the South; it actually affirmed unjust convictions. In *Akins v. Texas* in 1945, each of the jury commissioners had admitted his intention to limit the number of blacks per grand jury to one, yet somehow the justices found the record unclear on this point. Moreover, Akins had an especially compelling case for reversal of his murder conviction because his self-defense claim almost certainly would have prevailed had he been white. Yet the justices affirmed his death sentence.[300] *Lyons v. Oklahoma*[301] in 1944 was the most atrocious coerced confession case since *Brown v. Mississippi*; the record contained convincing testimony by several whites that Lyons, a black man, had been savagely beaten with a blackjack for several hours in an effort to obtain his confession.[302] Lyons, too, had a strong claim of innocence. Yet the justices decided to defer to the jury's determination that Lyons's second confession, obtained just twelve hours after his brutal beatings had ended, was voluntary. For anyone convinced by the *Chambers* rhetoric, the force of the claims by Lyons and Akins that they had been unjustly treated was necessarily diminished. A Court serving as a "haven[] of refuge for . . . [the] helpless,

(1972) (per curiam); *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (contending that "[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race . . . or if it is imposed under a procedure that gives room for the play of such prejudices").

298. Batson v. Kentucky, 476 U.S. 79, 86 (1986).

299. *Cf.* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 80–81, 108–09 (1999) (noting how the theoretical existence of rights that mean little in practice has the principal effect of legitimizing an unjust system); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 150–51 (1993) (noting how a system that purports to protect minority rights can end up legitimizing existing racial inequalities); Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 717 (1992) (noting how *Brown v. Board of Education*, by defining racial equality to mean non-segregation, served "to legitimate current arrangements" under which many blacks remain "poor and disempowered").

300. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 283.

301. 322 U.S. 596, 597–99 (1944).

302. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 1, at 171, 229–30.

weak, . . . or . . . non-conforming victims of prejudice"[303] would surely have intervened on behalf of these defendants had their claims been meritorious. But their claims *were* meritorious. By affirming their convictions, the Court probably helped legitimize the unjust treatment of black criminal defendants.

V. CONCLUSION

It was no accident that modern American criminal procedure was born in cases involving southern black defendants. For the Supreme Court to begin seriously monitoring the state criminal process required a departure from 150 years' worth of tradition and legal precedent grounded in federalism concerns. The justices were not prepared to take that step in cases of marginal unfairness, but only where the trial had been a complete sham. Such legal travesties occurred most frequently in the South in cases involving black defendants charged with interracial rape or murder.

The state-imposed death penalty in such cases was little more than a formalization of the lynching process. The purpose of a mob-dominated trial was simply to avoid a lynching, and the purpose of a lynching was as much to ensure black subordination as it was to punish guilt. The southern appellate courts and the U.S. Supreme Court applied different paradigms when reviewing such trials. Southern courts saw praiseworthy progress in the mere avoidance of lynchings. By contrast, Supreme Court justices expected criminal trials to be about adjudicating guilt or innocence, not simply preempting a lynching.

The trials in such cases were so egregiously unfair that national public opinion probably endorsed the Court's interventions. Even within the South, these rulings had many supporters, as they simply bound southern states to behavioral norms that they usually had embraced on their own. Thus, these early criminal procedure rulings probably do not represent the sort of countermajoritarian judicial decision making one often associates with landmark decisions such as *Mapp*[304] or *Miranda*[305]; it is more accurate to see them as the Court imposing a national consensus on recalcitrant outliers. Indeed, southern state courts themselves might have rectified the obvious injustices involved in these cases had the circumstances been slightly different. In the early decades of the twentieth century, southern courts had become more committed to procedural fairness, even in cases involving black defendants charged with serious interracial crimes. Yet in cases that

303. Chambers v. Florida, 309 U.S. 227, 241 (1940).

304. Mapp v. Ohio, 367 U.S. 643 (1961).

305. Miranda v. Arizona, 384 U.S. 436 (1966). *But see* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363–65 (2004) (denying the countermajoritarian nature of the Warren Court's criminal procedure decisions, even *Mapp* and *Miranda*).

generated outside criticism of the South or that were perceived to pose broader challenges to white supremacy, southern appellate courts regressed. Cases that might otherwise not have reached the U.S. Supreme Court slipped through the state system uncorrected and thus provided the occasion for landmark criminal procedure rulings.

Considered against the backdrop of the Court's other contemporaneous race decisions, these early criminal procedure rulings demonstrate that not all Jim Crow measures were of a piece. During this era, the Court unanimously affirmed the constitutionality of public school segregation,[306] the white primary,[307] and the poll tax.[308] The justices apparently thought it was one thing to segregate and disfranchise blacks and quite another to execute possibly innocent blacks after farcical trials.

Finally, evaluating the consequences of decisions such as *Powell* and *Norris* is complicated. The Court probably saved the lives of the Scottsboro boys, but it could not protect them from unjust prison sentences. The more the Court intervened on their behalf, the more determined white Alabamians seemed to punish them. Thus, despite two Supreme Court rulings in their favor, the Scottsboro boys each served from five to twenty years in prison for crimes they did not commit.

In terms of broader effects, the rulings proved disappointing. The quality of defense representation for indigent southern blacks did not significantly improve as a result of *Powell*, and few if any blacks sat on southern juries as a result of *Norris*. The litigation producing these and other decisions may have had intangible benefits for the civil rights movement: teaching blacks about their rights, convincing them that racial change was possible, helping them to organize, and educating whites about the atrocities of Jim Crow. But by implying that the Court had effected meaningful changes in southern criminal justice when in fact it had not done so, decisions such as *Powell* and *Norris* may also have harmed southern blacks by lending legitimacy to a system that remained deeply oppressive.

306. Gong Lum v. Rice, 275 U.S. 78, 85–87 (1927).

307. Grovey v. Townsend, 295 U.S. 45, 55 (1935).

308. Breedlove v. Suttles, 302 U.S. 277, 282–84 (1937).