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# The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role, Lawyering at the Extremes: The Representation of Tom Mooney, 1916-1939

## Cover Page Footnote

Associate Professor of Law, New York Law School; J.D., 2000, Harvard Law School; Ph.D, 2002, University of Chicago. I am grateful to Molly Beutz, Doni Gewirtzman, James Grimmelmann, and Benjamin Gruenstein for their thoughtful comments on earlier drafts.

# LAWYERING AT THE EXTREMES: THE REPRESENTATION OF TOM MOONEY, 1916–1939

*Rebecca Roiphe\**

## INTRODUCTION

In 1916, America, unhinged by its own labor disputes, fought bitterly over the question of whether to enter the war in Europe.<sup>1</sup> At a prowar rally in San Francisco, the two issues (which were never completely separate) collided when a bomb went off, killing nine people and wounding many others. A detective for hire, Martin Swanson, immediately had a suspect in mind: Thomas J. Mooney, a militant Socialist and labor activist, who had already been charged and acquitted several times of transporting explosives with the purpose of destroying the transmission lines of the Pacific Gas and Electric Company (PG&E). Mooney, along with several others, was arrested, tried, and convicted. Even at the time, observers noted the lack of evidence and the shaky unreliable witnesses, but Mooney was sentenced to death nonetheless.

This essay tells the story of the lawyers who represented Mooney during his twenty-three-year fight for freedom. This story, in turn, offers a lens through which to explore the difficulty of representing a client whose views are not only opposed to that of the lawyer but also fundamentally antithetical to all the institutions, laws, and rules the lawyer theoretically must obey. With obvious relevance to contemporary efforts to represent clients detained in Guantánamo Bay, this essay seeks to unearth some of the many ethical issues that arise in that context, with or without solutions. By traveling through this historical representation, this essay poses an even more fundamental question: are there representations that stretch the boundary of what is appropriate for a lawyer in contemporary democracy?<sup>2</sup>

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1. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925* (1955); RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925* (1987).

2. This issue brings two disparate areas of inquiry together. On one level it concerns a question of professional ethics. On another it addresses a question that scholars of international law have discussed in the context of the transition to democratic forms of government. Professors Gregory Fox and Georg Nolte, for instance, have argued that

If not, how does the lawyer reconcile his competing obligations to the client and to the system, which the client wishes to destroy.

Not only did communists in the 1920s and 30s in America espouse the destruction of all the laws and institutions to which lawyers pledged their loyalty, they also took cues from a country that regularly and fairly unabashedly suspended civil liberties—one of the central weapons in the lawyer's arsenal. While it was not until the thirties that most Americans grasped the extent of Joseph Stalin's terror, it was widely understood well before that that Stalin ruled without the process and protections to which Americans were accustomed. So, lawyers used free speech, the right to assemble, and all the protections given to criminal defendants to save radical clients, some of whom, at least, would have readily dispensed with those rights when the proper time came. Tom Mooney and his lawyers' battles with each other and with the courts help illuminate how lawyers could justify such a strange and seemingly irreconcilable tension.<sup>3</sup>

Communists, along with most radical labor activists, tended to distrust professionals of all stripes: doctors, professors, accountants, but most of all lawyers. After all, lawyers helped build the edifice of capitalist domination. According to the ideology, they secured its structure by giving a false sense of justice to workers and other poor and dispossessed people for whom there is, by nature, none. In the utopian vision of a communist future, professionals, as we know them, disappear. Everyone has the same status, and it is the laborers—not some self-ordained middle-class intellectuals—who rule.<sup>4</sup> How can a lawyer represent someone who wishes to annihilate

democracies can and should act to exclude antidemocratic actors from their ranks, because they represent a substantive threat to the emerging democracy. See Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1 (1995). In a recent article analyzing the transition to democratic forms of government, Professor Ruti Teitel argues that European countries in general view civil liberties as a means of preserving the underlying values of the democratic state rather than an end in themselves. These countries, which have a robust sense of the public sphere, are willing to suspend civil liberties when extending them would undermine the substantive values of the democratic government. Ruti Teitel, *Militating Democracy: Comparative Constitutional Perspectives*, 29 MICH. J. INT'L L. 49 (2007).

3. In the early twenties, the American Civil Liberties Union (ACLU), led by Roger Nash Baldwin, was a radical organization. It viewed civil liberties as essential in America, but unlike today, it considered those liberties as an essential part of the resistance against reactionary forces, which it believed dominated American politics. Civil liberties were not seen, as they are today, as an end in themselves. Civil liberties were viewed as a means to protect those who were attacked by the forces of reaction. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990). In the words of an early ACLU pamphlet,

There are many who regard such effort as useless because they feel that the reactionary forces in power will never yield until compelled to do so by superior force. Even if that contention is sound, the propaganda for civil liberty must have the effect of softening the conflict, both by making easier the way for the new forces and by creating a general distrust of the shams of our political system.

AM. CIVIL LIBERTIES UNION, THE FIGHT FOR FREE SPEECH: A BRIEF STATEMENT OF PRESENT CONDITIONS IN THE UNITED STATES, AND OF THE WORK OF THE AMERICAN CIVIL LIBERTIES UNION AGAINST THE FORCES OF SUPPRESSION 5 (1921).

4. This is, of course, an oversimplification of an incredibly complex and by no means unitary school of thought. There is a massive bibliography of books analyzing the intricacies

the legal profession? Either the lawyer must consider these clients innocuous, “poor and puny anonymities,” to use U.S. Supreme Court Justice Oliver Wendell Holmes, Jr.’s phrase, or he must, on some level, embrace his client’s ideology.<sup>5</sup> In other words, it is no real threat to the law and its institutions if the client is impotent to realize his vision. If, on the other hand, the threat is real, then the lawyer must consider the role of the lawyer (and perhaps even the entire justice system) to be transient, a means to a just society that lies at the other end. As this story reveals, lawyers have historically tried to run an elusive middle course. They have represented radical clients with whom they sympathize but do not entirely agree. They may feel the goals are noble but the means extreme. They may believe that the voice is valuable as a part of debate, which will lead to a better future—one that addresses some of their concerns without fulfilling the entire vision. The ethical code, which now governs the conduct of lawyers and guides their decisions, states with simplicity, “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”<sup>6</sup> But at these sorts of extremes, the idea that the lawyer’s faith in the client’s substantive beliefs is irrelevant to the representation is simply naïve and unworkable in fact.

Scholars have set out to describe the proper role of lawyers with respect to their clients and the public. The debate, in oversimplified terms, goes something like this: One group, which has come to be known as the libertarians or neutral partisans, argues that a lawyer must do whatever is legally permissible to help the client. A lawyer should neither judge nor cajole. Nor should he trouble himself with the moral implications of his client’s goals or the means of obtaining them. A lawyer need not concern himself with such things because he serves a critical role within the system. Functioning like a technician, he navigates the complicated and otherwise inaccessible world of law for his client. The neutral partisan (admittedly in caricature) believes that because the system is benign and the lawyer’s role

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of communist ideology. See, e.g., FRANÇOIS FURET, *THE PASSING OF AN ILLUSION: THE IDEA OF COMMUNISM IN THE TWENTIETH CENTURY* (1999); ROBERT GOLDSTON, *COMMUNISM: A NARRATIVE HISTORY* (1972); RICHARD PIPES, *COMMUNISM: A HISTORY* (2001). To the extent that American Communists embraced a particular ideology, they were largely Marxist-Leninists. The Trotskyites played a minor role but not until later on in the century. These American Communists, who were, to their comrades in the Soviet Union, hopelessly atheoretical, embraced a common belief that revolution would bring about a classless society in which all goods would be socially owned. This doctrine, even articulated in this general sort of way, gave little room for a professional class, including lawyers. For an interesting discussion of the complex and similarly strained role of intellectuals in the American Communist Movement, see IRVING HOWE & LEWIS COSER, *THE AMERICAN COMMUNIST PARTY: A CRITICAL HISTORY* (Frederick A. Praeger, Inc. 1962) (1957).

5. *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

6. MODEL RULES OF PROF’L CONDUCT R. 1.2(b) (2007). The comment to this rule explains, “Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.” *Id.* cmt. 5.

critical, the lawyer is always morally justified in helping his client achieve any end by whatever legal means possible. Fundamentally libertarian, this view assumes that every individual has an equal right to access the legal system regardless of his values.<sup>7</sup> Thus, according to the libertarian view, a lawyer ought to be “client-centered,” deferring to the client’s wishes rather than imposing his own goals or methods on the case.<sup>8</sup>

The opposing group, most commonly referred to as the moral activists, argues that a lawyer must work with the client to define and pursue his goals in a moral way. He must seek justice, not just advantage for the client. A lawyer’s resources are scarce so he must decide whom to represent and in doing so he ought to weigh the relative moral worth of a client’s claim. A lawyer should not use all permissible tactics to achieve a client’s goal. The rights of third parties, the integrity of the justice system, and the ultimate and relative moral worth of the client’s goals should determine the lawyer’s conduct.<sup>9</sup>

There are, of course, countless variations on these theories, some seeking compromise.<sup>10</sup> The Model Rules of Professional Conduct, at least on the surface, embody the instinct toward a middle ground by attempting to create a profession that both serves its clients zealously but also guards the integrity of the courts.<sup>11</sup> Representations at the extreme, in which lawyers represent a subversive client, illustrate how far apart these two perspectives are. At the extremes, lawyers can face a choice of either becoming a party

7. See generally MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS (3d ed. 2004); Charles Fried, *The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

8. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006).

9. See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS 138–40 (Harvard Univ. Press 2000) (1998); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Robert W. Gordon, *Why Lawyers Can’t Just Be Hired Guns*, in ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION (Deborah L. Rhode ed., 2000).

10. See, e.g., Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 YALE L.J. 177 (1995); W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

11. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.2(b) (2007) (“A lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”); *id.* R. 1.3 cmt. 1 (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.”); *id.* R. 1.6 (requiring a lawyer to keep her client’s confidences but laying out a few instances when a lawyer is permitted to reveal information to protect others); *id.* R. 1.16 (requiring a lawyer to withdraw if the representation would result in the violation of the rules and permitting her to withdraw if the client “insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement”); *id.* R. 2.1 (permitting a lawyer to use moral, economic, social, and political considerations to counsel a client); *id.* R. 4.1 & cmt. 1 (prohibiting lawyers from making misrepresentations of law or fact to third parties but not requiring lawyers to inform third parties of relevant facts).

to the client's subversive plans or defying their clients' wishes, at least on some level. These lawyers must either embrace their clients' ultimate end of overthrowing the government or they must refuse to pursue at least some of the clients' goals. If they choose not to serve as an agent of their client's more destructive desires, lawyers are left to fill the void with their own goals, which are inevitably distinct and, at times, in tension with those of their clients.<sup>12</sup>

By recounting the story of Tom Mooney, this essay explains why efforts to walk a middle ground, including the approach embodied in the Model Rules of Professional Conduct, seem artificial, flawed, and always unsatisfying. Underlying the two models of lawyering is a fundamental and perhaps irreconcilable disagreement about the role of the legal profession in a democracy. Libertarians view the legal profession as a means to ensure autonomy by giving individuals a voice in the administration of justice. Moral activists, on the other hand, see the profession as an agent of change, a potential force for reform and justice. The former emphasizes individual dignity, the latter communal values. While the two are not always opposed, they cannot be comfortably reconciled either. Any effort to find a sensible middle ground must grapple with the broader question of the role of the legal profession in a contemporary democracy. Is the professional simply an expert translator, a mechanism to give fully formed individuals a voice in a fully established system? Or, does the profession have a more active role in defining social justice?

Tom Mooney's legal struggle illustrates that the moral activist view is not always as easy as it seems. If the lawyer chooses to persist in the representation, he can sacrifice the client to the larger goals. He can end up fighting to obtain something not merely irrelevant but possibly antithetical to his client's wishes. This can strain the relationship, making effective representation difficult, if not impossible. As people close to him commented countless times, Mooney was a stubborn martyr. He refused to lend himself entirely to anyone's cause. In the words of Fremont Older, a radical journalist who helped unravel the evidence in his case, Mooney was a "monumental egotist" who "[felt] that he [was] a great figure in the civilized world."<sup>13</sup> So, lawyers came and went, fired and replaced. Several of those who served him loyally and selflessly felt abused, taken for granted in some disturbing plot. Others succeeded by keeping expectations low and maintaining geographic and emotional distance from Mooney.

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12. The Model Rules of Professional Conduct attempt to solve the problem of a lawyer's conflicting duty to the system and the client by stating that a lawyer must abide by his clients' objectives but has discretion in determining the means to carry out those objectives. *Id.* R. 1.2(a). This division, like so many others in the Model Rules, is arbitrary. First of all, it is difficult, if not impossible, to determine what counts as an objective as opposed to a means. Second, even if that were a coherent distinction, client objectives can undermine the system just as easily as tactics.

13. Letter from Fremont Older to Roger Nash Baldwin (May 14, 1929) (on file with New York Public Library, Frank P. Walsh Papers, Box 95).

The libertarian theory of lawyering is similarly flawed—a product of a state of general peace, prosperity, and security. It involves a denial of the fact that democracy has the potential to give its enemies the means to destroy it. Recent fear of terrorist attack has reminded us that this is not so. Lynne Stewart, lawyer to convicted terrorist Sheik Omar Abdel Rahman, was prosecuted for transmitting messages of her client to his followers in Egypt.<sup>14</sup> Stewart's supporters declared the prosecution and conviction an assault on the legal profession. They defended her by arguing that she was nobly fulfilling her duties as a lawyer.<sup>15</sup> This essay argues that the disagreement between Stewart's supporters and prosecutors reflects a fundamental divide over the nature of American democracy and the role of the legal profession within it.

To make these points and to explore the other ethical issues that arise under such circumstances, this essay will recount the story of Tom Mooney, the Preparedness Day Parade bombing, and his twenty-three-year fight for freedom. It uses letters, notes, and case files of the attorneys to reconstruct how the lawyers proceeded, how they reconciled their work to themselves, to Mooney, and to other lawyers. This evidence also demonstrates how Mooney himself manipulated his lawyers to serve his ends and maintained his own independent political agenda.<sup>16</sup> Finally, this essay uses this material to draw some conclusions about the nature of the lawyer-client relationship in a democracy, arguing that in some situations, a lawyer has no choice but to assess and critique his client's goals. He must direct the litigation toward goals that may at times be consonant with, though not necessarily identical to, those of his client.

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14. Julia Preston, *Lawyer Is Guilty of Aiding Terror: Stewart Carried Messages While Defending Sheik*, N.Y. TIMES, Feb. 11, 2005, at A1.

15. See Michael E. Tigar, *What Lawyers, What Edge?*, 36 HOFSTRA L. REV. 521, 526–27 (2007) (“[W]hat if excess of love Bewildered them . . . [?]” We would still ‘write . . . [their names] out in a verse[.]’” (first, fourth, and fifth alterations in original) (quoting WILLIAM BUTLER YEATS, *Easter, 1916*, in SELECTED POEMS AND FOUR PLAYS OF WILLIAM BUTLER YEATS 83, 85 (M.L. Rosenthal ed., Scribner Paperback Poetry 1996) (1903))); Preston, *supra* note 14.

16. I consulted the following archives in compiling my research: The Communist Party Papers at the Tamiment Library at New York University (CPUSA Papers), The International Labor Defense Records at the Schomburg Center for Research in Black Culture (ILD Papers), The Leo Gallagher Papers at the Southern California Library (Gallagher Papers), and The Frank P. Walsh Papers (FPW Papers) and The W. Bourke Cockran Papers (Cockran Papers) at the New York Public Library. Most of the collections contain confidential and privileged information. There is, of course, a rather substantial chance that the lawyers, or more likely the lawyers' families, made the information public without Tom Mooney's permission. Even if the attorneys violated their duties to the client, historians would nonetheless be permitted to use the information. The client (or the client's estate in this case) would have to file a complaint against the attorney. There is an argument, furthermore, that even the attorney is justified in revealing his client's confidences when the information is sought after the client's death for historical purposes. See Patrick Shilling, Note, *Attorney Papers, History and Confidentiality: A Proposed Amendment to Model Rule 1.6*, 69 FORDHAM L. REV. 2741 (2001) (proposing an exception to the confidentiality rules for lawyers donating files of deceased clients to historical archives as long as the benefit to historical research outweighs the harm to the client and his family).



This essay uses the story of Tom Mooney as a reminder that the dispute over the role of the legal profession involves a suppressed disagreement about the nature of democracy: Does democracy denote a system of processes in which each individual has his or her own say, or is democracy instead a set of substantive values defined by the interaction between individuals and the community? Is the legal profession supposed to preserve individual autonomy and dignity by providing access to the judicial system, or is its purpose to promote and ensure democratic values by mediating between the needs of individuals and the dictates of the law? Without pretending to provide an answer, the essay suggests that any coherent theory of lawyering must approach these fundamental questions.

### I. THE REPRESENTATION OF TOM MOONEY: THE TRIAL AND ITS AFTERMATH

On July 22, 1916, Mooney was arrested for setting off a bag of dynamite at a prowar rally in San Francisco, known as the Preparedness Day Parade. Mooney was, in many ways, an easy target. Born to an Irish immigrant mother and a coal miner father, Mooney began working in factories when he was just a child. One of his earliest memories was seeing his father in a gun fight with a scab at a mine pit in Indiana.<sup>17</sup> After a trip to Europe in 1907, Mooney joined the Socialist Party.<sup>18</sup> While initially drawn to Eugene V. Debs and the moderate Socialists, Mooney soon grew disenchanted. He began to associate with union radicals, members of the Industrial Workers of the World, and left-wing Socialists, who would later break off to form the American Communist Party.<sup>19</sup> Friends with Alexander Berkman, leader of the anarchist movement, and other radicals, Mooney had developed enemies in high places. In 1911, he founded a radical Socialist newsletter and began advocating industrial unionism.<sup>20</sup> Class war, at the time, was bitter. Companies hired private detectives to infiltrate the unions. Both sides used violence, but businesses often had the apparatus of the government to aid in the battle.<sup>21</sup> A few years before the parade, Mooney got involved in a strike against PG&E, the most powerful California utility.

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17. Thomas J. Mooney Biography I (n.d.) (unpublished manuscript, CPUSA Papers, 132.02, Box 5).

18. *Id.*

19. CURT GENTRY, *FRAME-UP: THE INCREDIBLE CASE OF TOM MOONEY AND WARREN BILLINGS* 40-41 (1967).

20. *Id.* at 41-43. The radical union at the time, the Industrial Workers of the World (IWW), advocated dual unionism, the separate organization of trade unions and industrial unions. According to the philosophy of the IWW, the two would ultimately merge into one big union. See generally MELVIN DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* (1977). Others, like William Z. Foster, who would later become a leader in the American Communist movement, advocated organizing small pockets of radicals within existing unions to change them from within. See MONTGOMERY, *supra* note 1, at 310-27. This question plagued the American Communist Party leadership for years to come. See THEODORE DRAPER, *THE ROOTS OF AMERICAN COMMUNISM* (1957).

21. CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985).

Unlike most protests, striking against a utility could not halt distribution of electrical power along the high-tension lines. So, workers resorted to sabotage, including blowing up the lines with dynamite.<sup>22</sup>

Martin Swanson, former head of the Pinkerton Detective Agency in San Francisco—the most famous private detective agency used by both government and corporate clients—was working, at the time, for PG&E. He had been after Tom Mooney and his confederate Warren Billings for quite a few years. With Swanson's assistance, Mooney had been arrested twice for possession of explosives in connection with a strike, but each time, he was acquitted.<sup>23</sup> Just before the parade, Mooney had embarked on his greatest professional challenge. He had tried to organize the railroad workers against the wishes of the Labor Council, the official organization of local unions.

The evening after the bomb went off at the prowar rally, known as the Preparedness Day Parade, Swanson met with San Francisco District Attorney Charles M. Fickert. Immediately thereafter, Swanson took leave from his job at PG&E and accepted a post as special investigator into the parade bombing incident.<sup>24</sup> Fickert assigned one of his toughest assistants, Edward Cunha, to the case. Cunha put the evidence together out of not much more than thin air. A local attorney, Maxwell McNutt, who had successfully defended Mooney in the prior cases, represented Mooney at trial. Sympathetic to the dispossessed, McNutt was rather ignorant of the left-wing movement.<sup>25</sup> In a letter to attorney Frank P. Walsh, Robert Minor, a radical young cartoonist and future influential member of the

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22. GENTRY, *supra* note 19, at 54–57.

23. Mooney's friend and confederate Warren K. Billings, who was arrested and convicted for the bombing of the Preparedness Day Parade along with Mooney, did not fare so well. In 1913, Martin Swanson had successfully helped prosecute Warren K. Billings for carrying a suitcase full of dynamite across the state. Mooney was also arrested in connection with this incident, but the prosecution could not prove that he knew about the suitcase containing explosives. GENTRY, *supra* note 19, at 56–58. In the second incident, Mooney was arrested after a search of a boat he was using to travel to the various strike meetings turned up guns, ammunition, and instruments to make explosives. *Id.* at 58–59. Puzzled by the fact that a sheriff who searched the boat found nothing while detectives from the Pinkerton Detective Agency discovered piles of evidence just minutes later, the jury hung twice and finally acquitted. *Id.* After the acquittal, the attorney from Pacific Gas & Electric Company (PG&E) reportedly stated to Mooney's attorney Maxwell McNutt, "Well, Mac, you got Mooney out of this but we put a red shirt on him and we will get something on him some day." *Id.* at 59 (internal quotation marks omitted).

24. *Id.* at 92–93. Charles Fickert was deeply indebted to both PG&E and the railways for funding his election campaign. United Railroads supported him with the expectation that he would make the graft indictments go away. Fickert complied. He also remained in close touch with the attorney for the Chamber of Commerce, consulting him before prosecuting most cases. *Id.*

25. *Id.* at 118–19; Letter from Robert Minor to Frank P. Walsh (Aug. 19, 1916) (FPW Papers, Box 94). The son of a prominent Republican surgeon, McNutt had worked briefly as an assistant to Fickert. Disillusioned with what he learned about the office, McNutt started his own private practice. Without political conviction or even a sense of how the American Left operated, McNutt built his practice defending workers in labor disputes. GENTRY, *supra* note 19, at 59.

American Communist Party, urged Walsh to join the defense, describing McNutt as a man "of much standing, some ability, and no social vision."<sup>26</sup> Minor failed to recruit Walsh, who would lead the defense several years later, but Alexander Berkman was more successful with W. Bourke Cockran.

Cockran, a former congressman, well-known orator, and left-wing sympathizer, ultimately led the defense team at trial. At Berkman's request, Minor took over the publicity for the Mooney case. By trial, the defense committee had grown in size and momentum. A breeding ground for young radicals, the Kansas City branch of the Mooney Defense Committee was led by Earl Browder, the future leader of the American Communist Party, and James P. Cannon, the future leader of the Trotskyite opposition.<sup>27</sup> Berkman and fellow anarchist Emma Goldman managed to arrange protests all over the world, including a mass protest at the Ambassador's house in Petrograd.<sup>28</sup>

Cockran and McNutt were the first of many attorneys to join the case, in part because of the duration of Mooney's struggle for freedom but also because he was a difficult client. By all accounts, he was stubborn, insistent on his own view, and cautious of relinquishing power. His case was prone to discord because the cause lent itself to so many different champions, some of whom were sympathetic to his political goals, others of whom were not. Either way, Mooney's lawyers came to the representation with their own goals in mind.<sup>29</sup>

The vast majority of Mooney's lawyers were not radicals. They were progressives, liberals, and reformers. Sympathetic to left-wing causes to varying degrees, they maintained a fairly conservative attitude toward the legal institutions and their role as lawyers. Most of these lawyers approached the representation with the hope not only to free a wrongly convicted man but also to reform the legal institutions that they believed had been co-opted to further this injustice. Far from sharing their client's sense that courts and laws were hopelessly corrupt, Mooney's lawyers saw the representation as a chance to redeem the system. Drawn to Mooney's cause with the optimism and sense of purpose characteristic of Progressive Era intellectuals, several of these lawyers left disillusioned with Mooney.<sup>30</sup>

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26. Letter from Robert Minor to Frank P. Walsh, *supra* note 25..

27. GENTRY, *supra* note 19, at 175-76.

28. *Id.* at 216-18, 221-23.

29. The records, which are extensive, but not complete, make it such that some of his attorneys are here given a more vivid portrait than others. The variety of different lawyers who were drawn to the cause, however, is well documented.

30. Many historians have tried to capture the Progressive mood. Some of the more prominent accounts include ALLEN F. DAVIS, *SPEARHEADS FOR REFORM: THE SOCIAL SETTLEMENTS AND THE PROGRESSIVE MOVEMENT 1890-1914* (1967); ANDREW FEFFER, *THE CHICAGO PRAGMATISTS AND AMERICAN PROGRESSIVISM* (1993); HOFSTADTER, *supra* note 1; JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN AMERICAN AND EUROPEAN THOUGHT, 1870-1920* (1986); DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991); Daniel T. Rodgers, *In Search of Progressivism*, *REVS. AM. HIST.*, Dec. 1982, at 113.

Others persisted despite the fact that their goals were not his, hoping that they could help him achieve freedom without engaging in his larger political endeavor. This proved difficult, if not impossible.

An Irish immigrant, Cockran had worked as a school teacher, studying law in the evenings. Known for his oratorical skills, he grew interested in New York Democratic politics, defending many Tammany politicians. He went on to serve several terms in the U.S. Congress. While sympathetic toward the poor and dispossessed, Cockran was by no means a radical. More of a rogue, Cockran even struck some Democrats, at times, as conservative.<sup>31</sup> When approached with the request to represent Mooney, Cockran replied that he would never represent Mooney if he were guilty of the crimes charged. After reading the transcript of the trial, however, Cockran volunteered his services.<sup>32</sup>

While Cockran was preparing for trial, Berkman and Minor, neither of whom were lawyers, ran Mooney's defense committee. When Minor heard that Fickert might try to indict Berkman as a co-conspirator in the parade bombing, he arranged for Berkman to "make a little trip."<sup>33</sup> He then wrote to Morris Hilquit, a prominent Socialist and labor lawyer, asking him to prepare to appear before Governor Charles S. Whitman of New York to argue against extradition. Minor appeared before the grand jury. He later described the proceedings:

Charlie Fickert was standing in the middle of the big room, dirty drunk with such a fury on his face that I was sure he knew by that time that Berkman had gotten away.

....

Fickert rolled into action. From the very first the questions he asked did not have the slightest connection with anything related to the bombing of the preparedness parade. But every answer that I gave entirely ignored his questions and went straight to the subject of the preparedness parade murders and the frame-up of the trade union leaders. . . .

Charlie Fickert, about six feet, three inches tall, weighing about two hundred and forty pounds, with a broken nose achieved at college football, walked slowly to the other side of the room from me, wheeled, stuck his too-big chin forward, set his lips in a snarl showing his teeth and suddenly strode toward me on the witness stand bellowing like a bull: "Ain't it a fact, don't you know it to be a fact that Emma Goldman teaches birth control?"<sup>34</sup>

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31. See generally AMBROSE KENNEDY, *AMERICAN ORATOR: BOURKE COCKRAN, HIS LIFE AND POLITICS* (1948).

32. GENTRY, *supra* note 19, at 175; Letter from Tom Mooney to Officers and Members of the Int'l Molders' Union of N. Am. (Dec. 25, 1916) (FPW Papers, Box 94).

33. Robert Minor, *Bob Before Grand Jury—in Effort to Frame Him and Berkman in Preparedness Day Charges—for Murder 2-3* (n.d.) (CPUSA Papers, 132.02, Box 5).

34. *Id.* at 2-3.

The account may, of course, be exaggerated, but it illustrates the political nature of the case, if nothing else. The grand jury returned an indictment against Berkman for the bombing, but refused to indict Minor, who was also one of Fickert's targets. Minor's plan to help Berkman worked when the governor of New York declined to grant the extradition request.<sup>35</sup>

Mooney's own trial proceeded despite attempts to convince the District Attorney to drop the charges. The Wickersham Commission,<sup>36</sup> a group appointed by Herbert Hoover in 1929 to investigate the causes of criminality and suggest policies to address the problem, later described the witnesses as including, among others, "[a] victim of hallucinations; her daughter, whose credibility hinged on that of her mother[;] and a prostitute, with a record of conviction."<sup>37</sup> Among this motley crew was an unemployed waiter named John McDonald, who everyone suspected was a drug addict. McDonald initially gave a description of the suspected bombers that did not fit Mooney or any of the alleged conspirators. McDonald later admitted that he changed his story, identifying Mooney and the others, to match the prosecution's theory.<sup>38</sup> Based on the testimony of this witness and Tom Mooney's reputation and prior associations, the police made the arrest.<sup>39</sup> McDonald contradicted himself on the stand and ultimately admitted on cross-examination that he did not see Mooney at the corner of the explosion before 2:00 p.m., when a photograph placed him on the roof of his own building miles away.<sup>40</sup> Signed affidavits of McDonald's initial interrogation were not disclosed to the public for fourteen years.

The prosecution built the rest of the case after Mooney was in jail. Like McDonald, the remaining witnesses told stories that seemed to shift along with the needs of the prosecution. The key witness, however, was a man named Frank C. Oxman, a wealthy cattleman from Oregon, who was the only one to put Mooney at the scene of the explosion at the correct time. Oxman swore that he had seen Mooney and his assistant Warren Billings place a battered leather suitcase in front of a saloon at the site of the

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35. *Id.* Alexander Berkman served a two-year sentence shortly thereafter for campaigning against conscription. He was deported to the Soviet Union along with his companion and fellow anarchist Emma Goldman during the famous Palmer Raids of 1919. See GENE FELLNER & HOWARD ZINN, *EMMA GOLDMAN AND ALEXANDER BERKMAN* (1988).

36. See *infra* Part II.

37. SECTION ON LAWLESS ENFORCEMENT OF LAW, NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, MOONEY-BILLINGS REPORT 128 (draft 1931), reprinted in *THE MOONEY-BILLINGS REPORT: SUPPRESSED BY THE WICKERSHAM COMMISSION* (1932).

38. GENTRY, *supra* note 19, at 99.

39. Along with Mooney, they arrested his wife Rena Mooney, Warren K. Billings, Israel Weinberg, and Edward Nolan. Billings and Mooney were tried and convicted separately. The District Attorney eventually dismissed the charges against the remaining three defendants. Estelle Smith, a secretary to a dentist, came forward after the news stories and photographs appeared. She testified that she let someone carrying a suitcase who matched Billings's description up on the roof of her office building. The building, however, was three-quarters of a mile from the bomb site. *Id.* at 111-12.

40. *Id.* at 186-87.

explosion and he heard Mooney say, "Let's go; the bulls will be after us."<sup>41</sup> This was before 1:45 p.m., Oxman testified,<sup>42</sup> ample time for Mooney to return to his building where he had been photographed on the rooftop at 2:01 p.m., minutes before the explosion. Oxman seemed quite a reliable witness—wealthy, respectable, and generally affable.

The jury returned a guilty verdict on all counts. After the conviction, on the train ride back to New York, Cockran wrote a letter to Mooney in San Francisco county jail:

I think it can be shown clearly to all reasonable men that we are in the presence of another Dreyfus[] case. The only difference being that the object of the French perversion of legal procedure to perpetration of the very crimes which courts are organized to prevent, was exclusion (by force and threats of force) of Jews from the army, while the object of your prosecution for a crime repugnant to every element of your nature is to drive laborers from organizing by killing a man who has had the temerity to urge some of his fellows to form unions for their own protection.<sup>43</sup>

Cockran reflected on the case as a moment for the American justice system to prove its worth. In Cockran's mind, this conviction demonstrated how "the agencies organized to defend" liberty and character had been used perversely to destroy those very qualities.<sup>44</sup> It was the characteristic Progressive moment: decay and corruption offering the greatest hope for renewal. With optimism and faith in the ultimate benevolence of civilization and its institutions, Cockran assured Mooney that the calamity would surely be averted. By invoking the story of wrongfully convicted French Captain Alfred Dreyfus, who became a symbol for French nationalism, he turned the case into one about national redemption, dismissing Mooney's—and some of Mooney's other champions'—view of it as a symbol of the inherent inextricable evil of capitalist institutions.

It did not take long for the evidence to unravel. Before the trial, Oxman had written a letter to Ed Rigall, an Indiana pool hall owner and friend of his son's, asking him whether he would like a free trip to San Francisco.<sup>45</sup> In exchange, Oxman wrote cryptically, all Rigall would have to do is testify in court.<sup>46</sup> Taken with the idea of a free trip to California, Rigall accepted the offer.<sup>47</sup> When he got there, it became clear that Oxman wanted Rigall to buttress his testimony by falsely stating that Rigall was with Oxman in San Francisco at the time of the bombing.<sup>48</sup> Rigall played along, allowing

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41. GENTRY, *supra* note 19, at 187–91; ESTOLV ETHAN WARD, *THE GENTLE DYNAMITER: A BIOGRAPHY OF TOM MOONEY* 24 (1983) (internal quotation marks omitted).

42. GENTRY, *supra* note 19, at 188–89.

43. Letter from W. Bourke Cockran to Thomas J. Mooney (Feb. 11, 1917), *reprinted in* ROBERT MINOR, *TOM MOONEY MOLDERS DEF. COMM., SHALL MOONEY HANG* 38 (n.d.) (CPUSA Papers, 132.02, Box 5).

44. *Id.*

45. WARD, *supra* note 41, at 28.

46. *Id.*

47. *Id.*

48. *Id.*

the police and prosecutors to buy him dinner and entertain him, but when District Attorney Cunha interviewed him formally, he told the truth, denying that he was in San Francisco with Oxman on the day at issue.<sup>49</sup> Cunha thanked him for his time and tried the case without him.

Meanwhile, Oxman had sent a letter home to Rigall's mother as well, offering her too a free trip in exchange for her testimony. After Rigall arrived home, he learned that Mooney had been convicted on the testimony of his friend. Disturbed by that news, he approached a lawyer in Indiana and shared the letters he received from Oxman urging him to come testify at the trial. After holding out for more money, the lawyer ultimately confronted the prosecution with this information. The court had not yet heard motions to set aside the verdict but Cunha, ignoring Rigall's revelation, proceeded to make an impassioned argument, and the verdict was sustained. The execution date was set for May 17, 1917.<sup>50</sup>

Bourke Cockran had convinced his friend Ed Nockels, secretary of the Chicago Federation of Labor, to organize a series of mass meetings to elicit support for Mooney. Eventually, the defense team gathered sufficient funds to investigate. They ultimately learned of Ed Rigall, and, after they agreed to pay him some unknown sum, Rigall shared his letters. The defense gave the letters to Fremont Older, a radical journalist who worked at the *Bulletin*, a San Francisco newspaper.<sup>51</sup> The defense convinced a sympathetic detective to seek a warrant, and Oxman was arrested for suborning perjury.<sup>52</sup> After a short trial before a judge who was unsympathetic to Mooney's plight, Oxman was acquitted.<sup>53</sup>

Despite the trial judge's conviction that Mooney deserved a new trial, the prosecutors claimed that the Oxman story was fabricated by the "blood-thirsty anarchists."<sup>54</sup> The trial judge prevailed upon the California Attorney General to move for a new trial, but the California Supreme Court denied the motion, reasoning that California law barred newly discovered evidence, including evidence of perjury, from being admitted in court after the trial had concluded.<sup>55</sup> Because of the class war implications as well as the connection to preparedness and the war, Mooney's case drew national attention.

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49. *Id.* at 28–30.

50. GENTRY, *supra* note 19, at 197–200; WARD, *supra* note 41, at 33. The defense gathered information on other witnesses too. For instance, one witness who had been taken to prison to identify Mooney told a co-worker later that day that Mooney was not the man she had seen at the parade. GENTRY, *supra* note 19, at 201–02. The officer who took her to the prison later confirmed her failure to identify Mooney and gave the defense his notes recording the incident. *Id.* Another witness told contradictory stories—one that she was at the corner where the explosion occurred and another that she was at the building about which Smith testified. After the trial, she explained to defense investigators that her physical body was at one location and her "astral body" at another. *Id.* at 207.

51. GENTRY, *supra* note 19, at 204–06.

52. *Id.* at 210–12.

53. *Id.* at 227–28.

54. *Id.* at 214.

55. *Id.* at 227, 242.

Agitated by the international protests and his desire to keep some semblance of peace between labor and capital as the country entered the war, President Woodrow Wilson urged California Governor William S. Stephens to commute Mooney's sentence to life in prison.<sup>56</sup> After several such pleas, on November 28, 1918, Governor Stephens complied, reiterating his certainty of Mooney's guilt.<sup>57</sup>

Frank P. Walsh, a friend of Cockran's and liberal lawyer devoted to the cause of the working class, took over the case shortly after the trial ended. Walsh was the most successful of Mooney's attorneys in maintaining his client's confidence throughout the representation. As he put it, he was initially drawn to the case based on his "duty as a lawyer and under the urge of common humanity."<sup>58</sup> Like Cockran, Walsh hoped to achieve justice for Mooney while rehabilitating the broken system. But Walsh was a pragmatist, and he turned to what he saw as the only possible next step, applying for a gubernatorial pardon.

## II. WORLD WAR I, 1920S, AND THE NEW TRIAL

Shortly after the United States entered the war, xenophobia and the antiradical sentiment gripped the country.<sup>59</sup> Trade union leaders denounced the anarchists, communists, and other radical elements and distanced themselves from Mooney's cause.<sup>60</sup> Meanwhile, the federal government had fairly effectively depleted the ranks of the various different radical groups. Emma Goldman and Alexander Berkman were in jail. One hundred members of the Industrial Workers of the World were tried in Chicago for treason. The radical element was weakened but not quite purged.

When the war ended, American radicals were energized. The immediate rise in the cost of living and unemployment fed labor unrest. Radicals thrived under these conditions, and the red scare continued unabated.<sup>61</sup> This atmosphere lent a new urgency to the cause, and the fight to free Tom Mooney continued. With his wife Rena Mooney heading the defense committee, Mooney gave orders from prison. But he could never quite control his followers. In 1919, the defense committee organized the first Mooney Congress, a rally to publicize his case and demand a pardon. The Congress, however, was as much a forum for factional disputes within the American Left as it was a means to free Tom Mooney.<sup>62</sup>

Fremont Older, the radical journalist, who had printed Oxman's letters to Rigall in the *Bulletin* was now editor of the *San Francisco Call*. Older soon found out that U.S. Secretary of Labor William B. Wilson had

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56. *Id.* at 222; WARD, *supra* note 41, at 50-53.

57. GENTRY, *supra* note 19, at 260-61.

58. Letter from Frank P. Walsh to Cyrus B. King (Dec. 3, 1932) (FPW Papers, Box 96).

59. See generally HIGHAM, *supra* note 1.

60. See GENTRY, *supra* note 19, at 232-36.

61. See HIGHAM, *supra* note 1; TOMLINS, *supra* note 21.

62. See GENTRY, *supra* note 19, at 266.



commissioned J. B. Densmore, the Director General of the U.S. Employment Service, to investigate District Attorney Fickert, following his every move and tapping his telephones.<sup>63</sup> The Densmore report revealed Fickert's fondness for prostitutes, but, more to the point, it cast doubt on the District Attorney's Office and its handling of the Mooney case by suggesting that the prosecutor had known the testimony was false.<sup>64</sup> Mooney used this momentum as well as the general atmosphere of labor agitation to attempt to organize a general strike for his freedom. Distrustful of labor leaders, Mooney always had much more success with the rank and file, but he could not pull off this feat from behind bars.

As time passed, the spotlight grew bored of its subject. Mooney did not help matters. Irascible at times, angry and belligerent at others, Mooney trusted no one. In his eyes, his friends seemed to turn into traitors with only a moment's notice. Several of his more prominent supporters, including Robert Minor—future Communist Party leader and popular political cartoonist—defected after growing disillusioned with Mooney as the martyr.<sup>65</sup> In 1920, however, an incident reignited interest in the old case: Draper Hand, one of the detectives involved in the case, admitted that he had been hired by the prosecution to coach witnesses, some of whom admitted that their testimony was fabricated.<sup>66</sup> After reading the story, John McDonald, the drug user who had testified that he saw Mooney at the site of the bombing, contacted Mooney's new counsel Frank P. Walsh in New York and gave a detailed statement recanting his trial testimony. McDonald reported that, after he had given the District Attorney a description of the bomber entirely inconsistent with Mooney, the District Attorney worked with McDonald until all the details changed. Eventually, the District Attorney brought McDonald to see Mooney in his cell and urged him to identify Mooney as the man with the suitcase.<sup>67</sup> Another witness came forward, admitting that Frank Oxman did not arrive in San Francisco until well after the bomb exploded.<sup>68</sup>

While Mooney continued to rally the masses through his defense committee, Walsh urged Paul Scharrenberg, the secretary of the California Federation of Labor, to dissuade his followers from signing petitions and resolutions drafted by the International Labor Defense (ILD), a legal defense organization controlled by the Communist Party, calling for Mooney's pardon.<sup>69</sup> Walsh reasoned, "Manifestly the individuals who sign such petitions or who vote for such resolutions cannot have made a first hand study of all material bearing upon the case. I am certain also that there is not one of them who would ask that a prisoner be pardoned solely

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63. *See id.* at 254–55.

64. *See id.* at 255–59.

65. *Id.* at 275–76.

66. *Id.* at 279–81.

67. *Id.* at 282–83.

68. *Id.* at 286–87.

69. Letter from Frank P. Walsh to Paul Scharrenberg (Sept. 9, 1929) (FPW Papers, Box 95).

because he belonged to a labor union."<sup>70</sup> Unlike Mooney and the ILD, Walsh felt that the governor might be inclined against the pardon by massive requests from the public. Mooney and the ILD were convinced that the only way to win was through the politics of mass persuasion, while Walsh believed, to the contrary, that the governor would be persuaded by the justice of the situation.

The statutory scheme in California required Mooney's codefendant Billings, who had prior felony convictions, as opposed to Mooney, to apply to the California Supreme Court for a recommendation on the pardon. The court recommended against it. On rehearing, the court examined the syphilitic John McDonald, who by that point was wild and incoherent.<sup>71</sup> The proceedings were a meandering indictment of radicalism. One of the original prosecutors, for instance, spent hours testifying to his beliefs about the guilt of Ferdinando Nicola Sacco and Bartolomeo Vanzetti, famous anarchists and labor activists convicted and sentenced to death in 1927 for armed robbery and murder, and other radical prisoners.<sup>72</sup> Despite the mass protests and letters from all ten living jurors, stating that, given the newly discovered evidence, they would not have found Tom Mooney guilty,<sup>73</sup> Governor Stephens and his successors Friend Richardson and Clement Calhoun Young denied his plea for pardon.<sup>74</sup>

Meanwhile in 1929, President Herbert Hoover, who had just been elected, appointed a National Commission on Law Observance and Enforcement, known as the Wickersham Commission after its senior member George W. Wickersham, to investigate causes of criminal activity and recommend appropriate government responses. A subcommittee, including Harvard Law School Professor and First Amendment champion Zechariah Chafee, Jr., had been given the task of investigating and reporting on the Tom Mooney case. Without hesitation, the report declared that Mooney had indeed been framed. The Commission, however, decided to suppress this part of the report, noting that it was "beyond its province to investigate individual cases with a view to making recommendations to their disposition."<sup>75</sup> Burton K. Wheeler, a U.S. Senator from Montana, successfully passed a resolution in the Senate demanding that the report be made public. The Attorney General released the report to the Senate, but

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70. *Id.*

71. GENTRY, *supra* note 19, at 340.

72. *Id.* at 341.

73. *Id.* at 331.

74. *Id.* In 1927, the American Federation of Labor (AFL) refused to pass a resolution demanding a pardon from California Governor Clement Calhoun Young, who, unlike his predecessors, was a Progressive and might have been influenced by such a demand. *Id.* at 313. Under the leadership of William Green, the successor to Samuel Gompers, the AFL had grown more conservative, shying away from such controversial causes. See TOMLINS, *supra* note 21.

75. Burton K. Wheeler, *Introduction to THE MOONEY-BILLINGS REPORT: SUPPRESSED BY THE WICKERSHAM COMMISSION*, *supra* note 37.

the Senate Judiciary Committee once again suppressed it.<sup>76</sup> Ultimately, the report was leaked and privately published as a book in 1931.<sup>77</sup>

### III. THE GREAT DEPRESSION, NEW TRIAL, AND PUBLICITY

As the Depression deepened, Mooney's legal defense team relied more heavily on organized protest. By the early 1930s, the Communist Party was the most powerful force of the American Left, which is not saying all that much. The International Labor Defense, the Communist Party front organization set up to conduct its legal work, orchestrated mass protests across the country, combining its appeal for Mooney with its fight for the Scottsboro boys, nine black teenagers who were tried and convicted of raping two white women by all-white juries in Alabama in 1931.<sup>78</sup> The radical protest continued in 1932 when six young men and women ran out onto the field of the Olympic Games, which were being held in Los Angeles, with "Free Tom Mooney" banners.

At the same time, Walsh had been working with Cyrus B. King, a young and inexperienced local attorney, and Aaron Sapiro to petition California Governor James Rolph for a pardon. King volunteered his services largely in hopes of building his career and his reputation with some of the more prominent attorneys on the case. Sapiro was known for leading the movement to organize farm co-operatives in the 1920s.<sup>79</sup> He began volunteering his services to the American Civil Liberties Union (ACLU) in 1931, and Roger Nash Baldwin recommended that he work with Walsh on the new trial.<sup>80</sup>

In 1931, after several pleas from Frank Walsh, the Mayor of New York, James Walker, announced that he would travel to California to make a plea to the governor to pardon Tom Mooney.<sup>81</sup> On December 1, Rolph welcomed Walker at an open hearing in the San Francisco chambers of the California Supreme Court. Outside, the International Labor Defense had assembled 2000 protestors.<sup>82</sup> Oddly symbolizing the tension within the Mooney defense team, the courtroom was the epitome of order while the demonstration ended in a riot resulting several injuries and the arrest of twenty-five protestors. Governor Rolph referred the pardon request to his chief legal advisor, Matthew I. Sullivan, announcing that he would need at

76. *Id.*, Letter from Roger Nash Baldwin to Judge William S. Kenyon (Oct. 2, 1931) (FPW Papers, Box 95) (urging Judge Kenyon, who was a member of the Wickersham Commission, to make the report public).

77. Letter from Gardner Jackson to Frank P. Walsh (Dec. 14, 1931) (FPW Papers, Box 95); Letter from Frank P. Walsh to Gardner Jackson (Dec. 21, 1931) (FPW Papers, Box 95).

78. GENTRY, *supra* note 19, at 365. For a history of the Scottsboro Boys' trial, see generally DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1979).

79. Grace H. Larsen & Henry E. Erdman, *Aaron Sapiro: Genius of Farm Co-operative Promotion*, 49 *MISS. VALLEY HIST. REV.* 242, 242 (1962).

80. Letter from Roger Nash Baldwin to Warren K. Billings (Nov. 22, 1932) (FPW Papers, Box 96).

81. GENTRY, *supra* note 19, at 355–57.

82. *Id.* at 357.

least three months to fully study the case.<sup>83</sup> The report, like the court's hearing on Billings' petition for rehearing, was largely a discourse on radicalism, replete with evidence of the defendants' past activities and their connections with radical labor groups and individuals. Sullivan issued a negative recommendation.

Sapiro drafted a reply to the recommendation delineating all the errors, all the failures of logic, and all the evidence that dictated a different result. Mooney was nonetheless enraged by Sapiro's submission. In the course of his argument, Sapiro had conceded a few facts that were helpful to the prosecution. Mooney insisted that he should have denied them despite the fact that they were true. Mooney recounted, "I said, but you are my counsel and you are not supposed to say anything that will hurt or reflect badly upon me in the [eyes] of the law or the public and what you said in this instance does hurt me. You have conceded to my enemies the very things they framed up against me . . . ."<sup>84</sup> Mooney's tirade made clear that, in his mind, the courtroom was a battleground to confront the enemy, not a source of reasoned justice. Ultimately, the spat turned into a brawl. Mooney claimed that Sapiro had insisted on his position, refusing to defer to Mooney because he was acting as the attorney for the ACLU.<sup>85</sup> Mooney concluded that Sapiro was too invested in the institutions of the capitalist class: "[H]is are the [tactics] that please my enemies . . . . He still says [Governor] Rolph is an honorable man . . . ."<sup>86</sup> Mooney forced the resignation of both Sapiro and King, who he believed supported Sapiro's position.<sup>87</sup> Over Mooney's ardent protest, Baldwin retained Sapiro as "of counsel" on the Mooney matter as a representative of the ACLU.<sup>88</sup>

Meanwhile, Mooney's defense committee discovered information about a new witness who claimed that he had evidence that the District Attorney had bribed jurors. Walsh, Baldwin, King, and Sapiro all doubted the veracity of the information and urged Mooney not to pursue the issue. Without consulting the attorneys, Mooney and his committee submitted a letter brief, demanding that the new District Attorney present the

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83. *Id.* at 361–63.

84. Letter from Thomas J. Mooney to Frank P. Walsh (Nov. 16, 1932) (FPW Papers, Box 96).

85. *Id.* Cyrus King had a very different account of the same dispute, emphasizing Aaron Sapiro's professional demeanor and repeated attempts to accommodate Mooney's unreasonable demands. See Letter from Cyrus B. King to Frank P. Walsh (Nov. 11, 1932) (FPW Papers, Box 96); Cyrus B. King, Statement to the Press (n.d.) (FPW Papers, Box 96).

86. Letter from Thomas J. Mooney to Frank P. Walsh (Nov. 25, 1932) (FPW Papers, Box 96).

87. Letter from Aaron Sapiro to Thomas J. Mooney (Oct. 14, 1932) (FPW Papers, Box 96); Letter from Thomas J. Mooney to Frank P. Walsh, *supra* note 86; Letter from Cyrus B. King to Frank P. Walsh (Nov. 29, 1932) (FPW Papers, Box 96); Letter from Frank P. Walsh to Cyrus B. King, *supra* note 58.

88. Letter from Cyrus B. King to Frank P. Walsh, *supra* note 85; Letter from Cyrus B. King to Mooney Def. Comm. (Nov. 14, 1932) (FPW Papers, Box 96); Letter from Thomas J. Mooney to Cyrus B. King (Nov. 15, 1932) (FPW Papers, Box 96); Telegram from Frank P. Walsh to Anna Mooney (Nov. 21, 1932) (FPW Papers, Box 96).

information to a grand jury, which was summarily denied. When he found out, King complained that Mooney would alienate the government and jeopardize the District Attorney's faith that McDonald and Oxman had perjured themselves, the more persuasive aspect of Mooney's cause.<sup>89</sup> Mooney insisted on exposing the extent of the corruption perhaps because it was fundamental to his sense of his own historical and political role.

Walsh remained neutral in these disputes and accepted his client's decision without protest, resorting to a refrain that he would repeat in one form or another throughout the representation:

My mind always reverts to asking myself the same question:

What would my mental state be, and how would I have acted throughout the experiences of Mooney, isolated from those who were trying to help me, harassed by the cruelties of prison life, smarting under the horrible injustice of my fate, and in a living tomb?<sup>90</sup>

While Walsh was able to remain deferential and respectful of Mooney's wishes, he was also always at a remove. He rarely visited Mooney in prison, for which he repeatedly issued excuses and apologies. He left the daily decisions to co-counsel. His diplomacy and his relatively peaceful relationship with Mooney seemed to require emotional and physical distance from his client.

When the appeal to Governor Rolph failed, followed by the District Attorney's refusal to open a grand jury investigation into Mooney's claim that all of the prosecution's witnesses had been induced to lie, Mooney tried to resort to the courts once more. Mooney had originally been named in eight indictments, charging him with setting off the dynamite at the parade and identifying different victims. He had been tried and convicted on one. Fickert had dismissed six, and one remained. Against his own attorneys' protest, Mooney urged prosecutors to try him on the one remaining indictment. Mooney hoped an acquittal on this final charge, which would have no effect on his sentence, would result in a public outcry. He assumed that the publicity would in turn force the governor to accept defeat in the face of a stronger popular will.<sup>91</sup> In 1933, after successive attempts to obtain a pardon from the governor had failed, Walsh and Mooney's new counsel Leo Gallagher moved the court to have him tried on the final indictment. The team hoped that an acquittal on what was essentially the same charge as the others would force the governor to issue the pardon.

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89. Telegram from Cyrus B. King to Frank P. Walsh (Oct. 17, 1932) (FPW Papers, Box 96).

90. Letter from Frank P. Walsh to Aaron Sapiro (Nov. 26, 1932) (FPW Papers, Box 96). For repetition of this thought, see, for example, Letter from Frank P. Walsh to Cyrus B. King, *supra* note 58.

91. *New Trial for Mooney on Untried Charge in Hope Acquittal Will Bring a Pardon*, N.Y. TIMES, Mar. 26, 1933, at A1; *Unused 1916 Indictment to Be Used—April 26 Set*, N.Y. POST, Mar. 25, 1933 (ILD Papers, Reel 13).

After Mooney fired Sapiro, Walsh and Mooney agreed that Mooney would be better represented by a lawyer who shared his political agenda.<sup>92</sup> Mooney suggested Gallagher, an attorney at the International Labor Defense to take over as local counsel.<sup>93</sup> Unlike Walsh and his predecessors, Gallagher was a radical. He had devoted his career to battling California criminal syndicalism laws, which made it a crime to advocate the violent overthrow of the existing political and economic order, and defending the subjects of antiradical raids. He was ultimately fired from Southwestern University Law School after he defended the young men and women who were arrested for protesting Mooney's imprisonment at the 1932 Olympic Games. While he never officially joined the Communist Party, Gallagher belonged to Communist Party front organizations and spent much of his career defending its members.<sup>94</sup> Gallagher was the only Mooney attorney to write on the Mooney Molder Defense Committee letterhead, symbolizing that he adopted not only the legal but also the political goals of his client.<sup>95</sup> At the outset, Walsh acknowledged that Gallagher had a different sort of role to play, and so he wrote to the recently retained Gallagher,

For strategic, and other reasons that seemed wise, I agreed with Mooney several years ago that I should take no part in the propaganda end of the effort, and devote myself solely to what might be called the legal end of the effort. Inasmuch as you have taken such a prominent and powerful part in the recent public agitation, it seems to me that it would be a loss to the general movement for Mooney's liberation for you to take a similar attitude as mine.<sup>96</sup>

Part of the purpose of retaining Gallagher was that the "legal" and the "political" aspects of the representation were increasingly hard to distinguish. Even Walsh, who had invented the distinction for the purpose of the representation, admitted as much. Walsh seemed to acknowledge that Mooney needed a lawyer who would be comfortable supporting Mooney's political agenda as well as his legal cause.

Not surprisingly, these two lawyers from such disparate political backgrounds disagreed on tactics. Walsh wanted to avoid making the claim that Mooney was framed, focusing instead on the perjured testimony. He thought it best to put aside Mooney's claims that the District Attorney in conjunction with the captains of industry and political leaders conspired to frame Mooney—not necessarily because he did not believe it was so, but

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92. King issued a statement to the press supporting Sapiro's actions and stating that Sapiro withdrew "because of his sincere belief that Mooney's case can be presented better to the proper authorities by attorneys who are more in sympathy with his ideas." Cyrus B. King, Statement to the Press, *supra* note 85.

93. Letter from Leo Gallagher to Frank P. Walsh (Dec. 2, 1932) (FPW Papers, Box 96).

94. Press Release, Int'l Labor Def. (Apr. 26, 1933) (ILD Papers, Reel 13); Leo Gallagher Biography (n.d.) (unpublished manuscript, Leo Gallagher Papers).

95. See, e.g., Letter from Leo Gallagher to Frank P. Walsh (Jan. 31, 1933) (Leo Gallagher Papers).

96. Letter from Frank P. Walsh to Leo Gallagher (Dec. 8, 1932) (Leo Gallagher Papers).

for tactical reasons. Gallagher, however, disagreed. He began the proceedings for a trial on the unused indictment shouting, "We want to show the world, through this trial, that Tom Mooney was the victim of a frame[-]up by the Police Department and District Attorney's Office of San Francisco. Tom Mooney was framed and the whole world knows it!"<sup>97</sup> Gallagher, unlike his co-counsel, embraced the protestors outside the courtroom. Walsh meanwhile tried to distance the defense from the radical protest activity. At least on the surface, Walsh agreed with the judge who had proclaimed that the workers and the organizations supporting Mooney were "injuring him more than helping him in flooding this court and the newspapers with letters and misguided statements."<sup>98</sup> Walsh was always deferential and careful not to alienate the judge. Gallagher, however, made impassioned pleas, often before the jury and over the judge's repeated reprimands.<sup>99</sup> It was not that Gallagher was sacrificing his client to the Communist cause as much as that he did not see a distinction between the two.

While Walsh deferred to Mooney's wish to retain Gallagher and seemed to acknowledge the unique and perhaps even critical value of a lawyer who shared his client's political views, the liberal lawyers also expressed concern about Gallagher's effectiveness as an advocate for Mooney.<sup>100</sup> Familiar with Gallagher's style, Roger Nash Baldwin wrote to Walsh, urging him to participate in the coming trial in Gallagher's stead: as a colleague of Baldwin's put it, "We think Leo Gallagher might possibly lose the case by subordinating everything else to communist propaganda."<sup>101</sup> Walsh agreed, adding, "We have this to contend with at every juncture of this case since I have been engaged in it. It is just another deplorable and irritating element in the case."<sup>102</sup> Disputes amongst defense counsel as to the proper tactics were not, however, the greatest problem.

The new District Attorney Matthew Brady refused to try the case on Mooney's unusual request. Brady insisted that it would be unethical to participate in transforming the courtroom into a public stage. The defense hoped to use the trial, with its obvious lack of evidence, to pressure the governor to pardon Mooney, but Brady moved to dismiss the indictment based on the fact that the government lacked sufficient evidence to convict, a result that the defense ironically protested. Brady explained,

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97. Press Release, Tom Mooney Molders' Def. Comm. (May 26, 1933) (ILD Papers, Reel 13) (internal quotation marks omitted).

98. *New Trial for Mooney on Untried Charge in Hope Acquittal Will Bring a Pardon*, *supra* note 91.

99. *Mooney on Trial; Jury Panel Passed*, N.Y. TIMES, May 24, 1933, at 16.

100. Letter from Frank P. Walsh to Roger Nash Baldwin (Apr. 11, 1933) (FPW Papers, Box 96).

101. Letter from John Beardsley to Roger Nash Baldwin (Apr. 8, 1933) (FPW Papers, Box 96) (enclosed in Letter from Roger Nash Baldwin to Frank P. Walsh (Apr. 10, 1933) (FPW Papers, Box 96)).

102. Letter from Frank P. Walsh to Roger Nash Baldwin, *supra* note 100.

The duty of a prosecutor is to present the evidence he has at the time of the trial, and, if any evidence is then lacking, to say so.

You sugg[e]st the trial be handled along other lines. In your judgment, the case should be so tried as to give the widest further publicity to the details of the history of the evidence during the past sixteen years. . . .

I am sorry to have to say I cannot agree. The attorney for the State in this action is employed for a definite purpose—to conduct a trial. That means he should present the evidence the State has now and have a judgment entered that follows from the evidence in this trial and on this indictment. If he took any other course, he would be assuming functions not given to him.

. . . Whatever happens in this trial, Mooney's release would have to come from a Governor and it is difficult to conceive of a Governor giving greater weight to Mooney's showing because it had been injected, in an irregular manner, into a pretended trial.<sup>103</sup>

While Mooney's attorneys disagreed amongst themselves as to how much this legal representation ought to be waged in the public, the District Attorney was convinced that such was not a proper use of the courtroom. Leo Gallagher wrote a letter in protest to the California Attorney General, urging that the trial was necessary in the "interests of justice" because it would benefit both the State and the defendant to finally acknowledge the farcical nature of the original trial.<sup>104</sup> Acknowledging that the evidence was insufficient to support a conviction, Gallagher insisted that such ethical concerns ought to give way to the ultimate justice of the new trial.<sup>105</sup>

In the end, the judge insisted that Mooney should be tried on the unused indictment but refused to require the prosecution to put on a case. The prosecution rested without presenting any evidence and the judge ultimately thwarted the defendant's desire for a show trial, directing the jury to return a verdict of not guilty.<sup>106</sup> After the "trial," Gallagher ran for election to the California Superior Court. Hoping to replace a conservative incumbent,

103. Letter from Matthew Brady to Fremont Older (Apr. 4, 1933) (FPW Papers, Box 96). A prominent member of the legal community and former president of the California Bar Association agreed with Brady that the trial was improper given that the government did not have faith in its own case. Letter from Leo Gallagher to Frank P. Walsh (Apr. 10, 1933) (FPW Papers, Box 96).

104. Letter from Leo Gallagher to Ulysses S. Webb, U.S. Attorney Gen. (Mar. 27, 1933) (FPW Papers, Box 96).

105. *Id.* Model Rule of Professional Conduct 3.8 states that a prosecutor should "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008). The American Bar Association's Standards for Criminal Justice similarly state that a prosecutor should not "permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause," or "in the absence of sufficient admissible evidence to support a conviction." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9(a) (1993).

106. GENTRY, *supra* note 19, at 373; Letter from Leo Gallagher to Frank P. Walsh (Apr. 14, 1933) (FPW Papers, Box 96).



Gallagher ran a campaign in keeping with his lawyering style. Aggressive and unabashedly revolutionary in tone, Gallagher alienated moderates. In December 1936, the California State Bar instituted disbarment proceedings against him, charging that he baselessly accused his opponent of falsifying the record on appeal to deprive criminal defendants of justice in the higher courts.<sup>107</sup> Gallagher seemed to view his role as lawyer as instrumental—perhaps a way to use the master’s tools to dismantle the master’s house. Some of his contemporaries seemed to think that the bar ought not to accommodate this particular approach to the profession.

#### IV. APPLICATIONS FOR WRITS OF HABEAS CORPUS

Shortly after the jury returned the verdict on the unused indictment, Walsh recruited John F. Finerty, a Washington, D.C., lawyer who had worked for Sacco and Vanzetti and would later serve as legal counsel for the Joint Commission of Inquiry that conducted Leon Trotsky’s countertrial, to join the legal team. Together, they found George Davis, a local defense attorney with an unusually good record for acquittals. With no particular affiliation with left-wing politics, Davis, who had just recently graduated law school, joined the team. The three of them designed a new strategy: they would file a petition for a writ of habeas corpus in federal court, arguing that Mooney was denied due process of law.<sup>108</sup> The district court denied the petition, and the U.S. Court of Appeals for the Ninth Circuit affirmed.<sup>109</sup> In January 1935, the U.S. Supreme Court handed down its decision, denying the petition on the ground that Mooney had not made this particular appeal to the California Supreme Court.<sup>110</sup> Mooney felt betrayed, but the attorneys were pleased with the Court’s seeming affirmation of their theory, albeit in dicta: the Court noted that due process is

a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the

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107. Press Release, Int’l Labor Def. (Dec. 2, 1936) (ILD Papers, Reel 13); Letter from Rose Chernin to Tom Mooney (Nov. 14, 1936) (ILD Papers, Reel 14). The press release reprinted a letter from Tom Mooney to Leo Gallagher. Mooney wrote,

May I at this time express my sincere regret at the attempt of the reactionary forces in Los Angeles to disbar you. . . . This is to be expected. Every true fighter in behalf of the workers must eventually go on the block. . . . [Y]ou are honored and respected, admired and loved by your co-workers.

Press Release, Int’l Labor Def., *supra*.

108. GENTRY, *supra* note 19, at 377.

109. *Mooney v. Holohan*, 7 F. Supp. 385 (N.D. Cal. 1934), *aff’d*, *In re Mooney*, 72 F.2d 503 (9th Cir. 1934).

110. *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam); *Mooney Case Sent Back to California*, N.Y. TIMES, Jan. 22, 1935, at 1; *Mooney Loses in High Court; No Gold Ruling*, N.Y. POST, Jan. 21, 1935, at 1.

rudimentary demands of justice as is the obtaining of a like result by intimidation.<sup>111</sup>

When the Supreme Court denied Mooney's petition for a writ of habeas corpus, Walsh and his cohort took Chief Justice Charles Evans Hughes's suggestion of returning to the state courts. With little hope for relief, they filed for a writ in the California Supreme Court, which referred the hearings on the denial of due process to a referee. The hearings lasted for close to a year, and an endless parade of witnesses came through.<sup>112</sup>

The dispute over the extent to which the defense should emphasize the conspiracy continued with Walsh urging Mooney to focus on the charges they could prove. Mooney, however, insisted on presenting evidence that the prosecutor had tampered with the jury—evidence that was shaky at best. Walsh and Davis pleaded with Mooney to abandon the point, but he refused. Walsh and Davis, who clearly believed the testimony was false, resigned as counsel for Mooney during that portion of the proceedings.<sup>113</sup>

In issuing his temporary resignation to the California Supreme Court, Walsh struggled with his duties to the court and his client:

I have been a practitioner at the Bar of this country for a great many years. I have always followed what I understand to be the principles of conduct which must govern me as a lawyer. One of these is that, as an officer of the Court, I cannot properly attempt to introduce evidence which I am convinced is irrelevant as well as otherwise improper . . . Neither, in conscience can I *command* the petitioner to waive any of the rights to which he deems he is entitled, nor deprive him of the opportunity which he craves and demands to do everything legitimately possible in this final effort to show his innocence and expose the means which were used to accomplish his unjust conviction.<sup>114</sup>

Despite this valiant effort to reconcile his obligation to his client and the court, Walsh ultimately concluded that all that remained was to resign.

Mooney also insisted that Walsh allow him to voice his political views.<sup>115</sup> Mooney took the stand, proudly asserting that he was still a social revolutionary. In an eloquent speech, Mooney explained his position with regard to labor, the redistribution of wealth, and the founding of the

111. *Mooney*, 294 U.S. at 112.

112. 'Framing' Charge Backed by Billings, N.Y. TIMES, Sept. 27, 1935, at 6; *Mooney Lawyers Hear Macdonald Tell of Perjury*, N.Y. POST, Aug. 14, 1935, at 12; *Names Detective as Foe of Mooney*, N.Y. TIMES, Sept. 26, 1935, at 48.

113. California Supreme Court, Transcript of Conference (Dec. 4, 1935) (FPW Papers, Box 96). Frank Walsh explained to the court,

I can't take responsibility for the presentation of this further evidence, but I can't deny that the man who has been behind bars for nineteen years and who is the only man who knows whether he was at Steuart and Market Streets at the time of the Preparedness Day bombing has the privilege of making his last stand for freedom as he sees fit.

*Walsh Quits Hearing in Row with Mooney*, N.Y. TIMES, Dec. 5, 1935, at 52; see also Press Release, Tom Mooney Molders' Def. Comm. (Dec. 14, 1935) (ILD Papers, Reel 13).

114. California Supreme Court, *supra* note 113.

115. Letter from Tom Mooney to Frank P. Walsh (Mar. 21, 1936) (FPW Papers, Box 96).

worker's state.<sup>116</sup> Walsh advised against it, but Mooney testified nonetheless to his belief that the workers would ultimately prevail and that America would become a classless society. He explained, "[T]hat is my purpose to bring that about[]—that classes will be abolished and all will be workers."<sup>117</sup> Over his own attorney's objection, Mooney continued to catalog his belief in the principles of the International Workers of the World, a radical labor group, whose teachings closely tracked those of the Communist Party.<sup>118</sup> In a letter to Walsh, Mooney explained his decision to speak about his political commitments:

I know . . . you . . . thought that it would be unwise. . . . There is more than just a mere criminal case attached to this proceeding. There is the entire social philosophy of life bound up in this proceeding, and we must not place ourselves in the defensive position of shrinking from our sworn duty to defend truth, justice and the welfare of mankind.<sup>119</sup>

Mooney believed that his lawyers shared his political mission; he had no other way to conceive of their devotion to the cause. But Walsh and the others distanced themselves from the "social philosophy," in part by dividing the case into two distinct arenas—one legal and the other political. To Mooney, such a distinction was not only false but also impossible. Despite Mooney's wishes, Walsh objected to the testimony and the court struck it from the record, but Anna Damon, the acting secretary of the International Labor Defense, publicized the expunged testimony and praised Mooney for raising the real political issues and throwing "it in the teeth of the California Supreme Court, which has been trying to cover its infamy with legal mumbo-jumbo."<sup>120</sup>

The proceedings dragged on. Walsh returned east and Finerty soon followed, leaving the junior member of the team to conduct the proceedings. The most notable new witness was Detective Duncan Matheson, who testified that the police adopted Detective Swanson's theory of the bombing and that Thornwell Mullally, grand marshal of the parade, member of the Law and Order Committee, and director of the United Railroads, had initially approached the police and informed them that Mooney had committed the crime.<sup>121</sup> Despite the impressive display, the referee found that Mooney had not been framed, that witnesses had not perjured themselves at trial, and no evidence had been suppressed. The California Supreme Court adopted the findings and denied Mooney's petition.<sup>122</sup> In doing so, the court concluded that Mooney failed to prove

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116. GENTRY, *supra* note 19, at 392; Press Release, Int'l Labor Def., Transcript of Testimony Expunged from Record of Hearing Before Referee 2 (Sept. 18, 1935) (ILD Papers, Reel 13).

117. 'Proud of Record,' *Mooney Testifies*, N.Y. TIMES, Sept. 20, 1935, at 12 (ILD Papers, Reel 13); Press Release, Int'l Labor Def., *supra* note 116, at 2.

118. See Press Release, Int'l Labor Def., *supra* note 116.

119. Letter from Tom Mooney to Frank P. Walsh, *supra* note 115.

120. Press Release, Int'l Labor Def., *supra* note 116, at 1.

121. GENTRY, *supra* note 19, at 400.

122. See *Ex parte Mooney*, 73 P.2d 554 (Cal. 1937).

the perjury, and more importantly that there was no evidence that the prosecutors knew that they were introducing perjured testimony.<sup>123</sup> The court dismissed the evidence of such prosecutorial misconduct as carefully contrived propaganda:

One needs only to examine the voluminous record in this proceeding to conclude that, underlying the Mooney defense, from its inception, has been a determined and vigorous campaign of propaganda and vilification directed with all its force against the state and its witnesses in an effort to accomplish the release of petitioner. The purpose of such a prolonged and determined campaign finds eloquent expression in many letters and documents written and received by petitioner and his associates. . . . The purpose is concededly "public agitation to change the psychology of the people," regardless of the guilt or innocence of the petitioner.<sup>124</sup>

Mooney was a stubborn and frequently obstinate client. He could even, at times, be characterized as somewhat paranoid about the motives of those who had volunteered their time to help with his defense. He was also particular about how he wanted to conduct his defense and so he formed his own defense committee, replacing the council led by Minor and Berkman. He kept tight control over this organization throughout his years in prison and made his own decisions about publicity. While it clearly backfired in the California Supreme Court, in his view, publicity was the only way to win the case. The courts were too corrupt, too much an organ of capitalism and the governing class. The only way to win, according to Mooney, was for workers to force judges to decide against the interests of their class.<sup>125</sup> According to Mooney, the courts were a podium for his political views and a tool of capitalist oppression, which could be moved only by the force of public opinion.

Mooney repeatedly disagreed with his attorneys over publicity, jealously guarding his territory.<sup>126</sup> He refused to ascribe to what he considered a liberal notion that mass protests and grassroots letter writing campaigns could adversely affect a court's decision and consistently rejected his attorneys' advice to the contrary. Walsh, in his typically diplomatic fashion, repeatedly claimed that he only managed the "legal" aspect of the case and disowned the publicity, deferring to Mooney and the defense committee.<sup>127</sup> Of course, Walsh could not really separate the two and was consistently drawn into the public debate and faced with legal obstacles due to the aggressive publicity campaign.

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123. *See id.* at 590–92.

124. *Id.* at 558.

125. Mooney Molders' Def. Comm., Workers of America: Free Your Working Class Leaders Rotting in the Bosses' Prisons. Demand "Amnesty!" for Mooney and Billings and the Imperial Valley Organizers (San Francisco) (n.d.) (CPUSA Papers, 132.02, Box 5).

126. Letter from Thomas J. Mooney to George T. Davis (Jan. 13, 1938) (FPW Papers, Box 97); Letter from George T. Davis to Thomas J. Mooney (Jan. 17, 1938) (FPW Papers, Box 97) (discussing Mooney's contention that Davis was trying to hold himself out as controlling Mooney's campaign for freedom).

127. Letter from Frank P. Walsh to Cyrus B. King, *supra* note 58.

Finerty was quite clear about his motives for accepting the case and his intentions in conducting the representation. Finerty felt there had been a miscarriage of justice. He wanted the Supreme Court to condemn the procedures under which Mooney was kept in prison. In so doing, he hoped to salvage the justice system from the shambles of the case. He hoped to prove that the courts could correct the error, redeeming the entire system in the process.<sup>128</sup> Mooney, of course, had different goals in mind. When the habeas petition seemed to drag, Mooney directed the defense committee to organize rallies and push for a new governor. Finerty insisted that this would undermine their position before the courts and eventually resigned when Mooney refused to suspend his campaign in the streets on behalf of the battle in the courts.

Roger Nash Baldwin, who raised most of the money for Mooney's defense fund, conducted his own publicity campaign often at odds with Mooney's. Mooney never forbade Baldwin from running what he called the National Mooney-Billings Defense Committee—Baldwin, after all, raised funds that enabled Mooney to maintain his expensive defense apparatus. But Mooney threatened to repudiate the National Committee if it continued to release pamphlets that had not been previously authorized by Mooney.<sup>129</sup> Mooney complained to Baldwin, insisting that the ACLU had co-opted his case and that Baldwin's objectives were not his own.<sup>130</sup> Mooney denounced one of the National Mooney-Billings Defense Committee pamphlets, "saying that it might well have been written by the 'open shoppers,'"<sup>131</sup>—those who advocated against compulsory union membership.

The International Labor Defense—the communist front organization that conducted the party's legal work—also raised funds for Mooney and ran its own publicity campaign. The objective, according to the ILD, was to win the war between capital and labor, the forces of evil and those of good. Law and the courtrooms were just one battleground, and the Mooney case was just one battle. Linking Mooney's cause with the Scottsboro boys, the ILD organized rallies before almost every important court appearance. Mooney appreciated the Communist Party's effort and he was mostly sympathetic to its mission. Walsh, Finerty, and Davis however, frequently complained about how the ILD was doing more harm than good, using Mooney as a martyr for their own cause rather than helping him obtain his freedom.<sup>132</sup>

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128. Letter from John F. Finerty to Thomas J. Mooney (Nov. 25, 1938) (FPW Papers, Box 97).

129. Letter from Frank P. Walsh to Fremont Older (May 16, 1929) (FPW Papers, Box 95).

130. Letter from Tom Mooney to Roger Nash Baldwin (Nov. 9, 1928) (FPW Papers, Box 95).

131. Letter from Frank P. Walsh to Fremont Older, *supra* note 129.

132. Letter from Roger Nash Baldwin to Frank P. Walsh, *supra* note 101 (enclosing Letter from John Beardsley to Roger Nash Baldwin, *supra* note 101); Letter from Frank P. Walsh to Roger Nash Baldwin, *supra* note 100.

Motives are hard to ascertain but the ILD did use Mooney as a platform for its war against the American Federation of Labor (AFL) to the apparent detriment of the case. Repeatedly publicizing how reluctant the AFL had been to assist in Mooney's cause, the ILD used Mooney rallies and publicity to advertise its message that the AFL had betrayed the working class. While Mooney was suspicious of organized labor leaders, the ILD was overtly hostile, alienating not just the leadership but also some members of the rank and file.<sup>133</sup>

The ILD also pushed for the most sensational story, urging Mooney at every moment to publicize evidence even if it was shaky and unreliable. Over the course of Mooney's twenty-three years of imprisonment, several individuals confessed to bombing the parade. Others accused people who had died in the interim. Mooney's lawyers investigated these bits of promising evidence but none seemed convincing. The ILD urged Mooney to use these confessions in court and broadcast them to the public, clearly hoping to draw more publicity to the political cause.<sup>134</sup>

John Beardsley, chairman and founder of the ACLU of Southern California, wrote, "Speaking for myself alone, I think the communists are active in the Mooney case for the advantage of the communist cause, just as they are in the Scottsboro case and others."<sup>135</sup> Finerty complained that Mooney's own defense committee, which was closely linked to the ILD, was draining the defense funds for communist "propaganda."<sup>136</sup> Mooney's defense committee also invited witnesses to speak at public rallies over the objection of the attorneys.<sup>137</sup> But the ILD's philosophy of treating Mooney's case as a part of a larger cause was in many ways more consistent with Mooney's own approach than that of his other lawyers.

#### V. THE LEGISLATIVE PARDON AND FEDERAL CONGRESSIONAL INVESTIGATION

By the midthirties, Mooney's health was failing, his patience worn thin. Three separate times in 1935, the state legislature considered the Mooney case. One Democratic assemblyman introduced a resolution calling for a change in the habeas corpus law, which would have led to an immediate

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133. Letter from Tom Mooney to Frank P. Walsh (July 11, 1929) (FPW Papers, Box 95).

134. Letter from Frank P. Walsh to Robert Minor (Jan. 27, 1934) (FPW Papers, Box 96) (explaining to Communist Party activist Robert Minor that the policy is not to publicize or use the confessions).

135. Letter from John Beardsley to Roger Nash Baldwin, *supra* note 101 (enclosed in Letter from Roger Nash Baldwin to Frank P. Walsh, *supra* note 101). For an analysis of the International Labor Defense's role in the Scottsboro case, see generally CARTER, *supra* note 78.

136. Letter from John F. Finerty to George T. Davis (Feb. 13, 1935) (FPW Papers, Box 96).

137. Telegram from C. A. Griffin to Frank P. Walsh (Nov. 4, 1935) (FPW Papers, Box 96); Telegram from Frank P. Walsh to C. A. Griffin (Nov. 6, 1935) (FPW Papers, Box 96); Letter from Frank P. Walsh to Belle Hammerberg (Nov. 6, 1935) (FPW Papers, Box 96).

investigation of the Tom Mooney case. Another called for the commutation of his sentence to time served. The latter passed, but the governor, Frank Merriam, ignored the appeal. Two years later, the political makeup of the legislature had shifted in Mooney's favor, and a new resolution passed declaring Mooney innocent, resolving that he be granted a full pardon, and ordering the warden of San Quentin to set him free.<sup>138</sup> Despite the strong symbolic significance, the resolution had no practical impact, since only the governor had the power to grant a pardon. Mooney's supporters tried unsuccessfully several more times in the following years.<sup>139</sup>

One of his champions in the California Senate was a liberal outspoken attorney from Los Angeles named Culbert L. Olson. In 1937, Olson approached Davis to ask for Mooney's support in his bid for governor. Mooney agreed. In exchange, Olson promised that his first act would be to pardon Tom Mooney. Olson won the primary in part due to the force of Mooney's propaganda.

The Senate meanwhile had grown interested in the case. In 1935, thirteen Senators and eighteen congressmen wrote a letter to the President urging him to help effect Mooney's release. In 1937, twenty-five senators and eighty-six congressmen signed a petition to the President requesting an investigation. Mooney's attorneys Frank Walsh and George Davis appeared before both the House of Representatives and the Senate, urging them to introduce a resolution to subpoena Mooney to appear before Congress.<sup>140</sup>

Nothing came of any of these measures, and Mooney and his attorneys directed their attention elsewhere. They were waiting to hear from the Supreme Court. Mooney was confident that the public pressure would work and he would be freed. On October 10, 1938, however, the Supreme Court denied his petition for certiorari without explanation.<sup>141</sup> Mooney, in an angry gesture, renewed his petition for pardon before Governor Frank Merriam. Just a month or so later, Olson was elected governor. On January 7, 1939, Olson issued a full pardon, attesting to Mooney's innocence. Mooney could hardly speak but managed to utter the following words:

I am not unmindful of the fact that this case is, in reality, not the case of an individual charged with the crime of murder. I know that it symbolizes our whole economic, political and social life and all the forces that go to make it up. . . . They are simple. In the biological world, they are conception, birth, growth, decay and death, and those rules also govern in the sociological world; and so it is with our present economic system. It was conceived like we were; it was born, it grew to maturity and now it is in a state of decay, not only here but throughout the world, and in its

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138. GENTRY, *supra* note 19, at 407.

139. *Id.* at 408.

140. *Id.* at 410.

141. *Mooney v. Smith*, 305 U.S. 598 (1938).

place, just as in our place, it will be replaced by a new and I hope a better social order.<sup>142</sup>

Mooney then led a victory march down Market Street where the bomb had exploded twenty-three years before.<sup>143</sup>

Mooney proved a difficult martyr, and his influence did not last long after his release from prison. He appeared at meetings and rallies organized by one or another Communist Party front group. His biographer speculates that Robert Minor or one of the ILD lawyers must have promised to pay his debts in exchange. But his power ebbed and he drifted into the background, remembered only in certain circles.

#### CONCLUSION: REFLECTIONS ON THE ROLE OF LAWYERS IN A DEMOCRACY

History, like most narrative, does not lend itself to easy morals. The lessons are complex, hidden, and often best left unstated. But the difficulties that the various lawyers faced in representing Tom Mooney lead to a few relatively simple and perhaps somewhat obvious conclusions.

The lawyers in the Mooney case and Mooney himself disagreed fundamentally over the role of law, courts, and lawyers in the American system. Most of the lawyers—Walsh, Finerty, Davis, and even Roger Nash Baldwin for instance—viewed the courts as an imperfect institution desperately in need of reform. They saw judges as human, corruptible, and flawed but not irretrievably so. Thus they hoped to secure justice for Mooney through the courts while reforming them at the same time. Mooney, the ILD, and Leo Gallagher, however, saw the courts as a tool of capitalist domination. Far from dismissing the justice system as a result, they hoped to transform it into a central battleground for the workers' revolution. To do so, the court would have to be a stage, a public forum where the antiquated rules that supposedly served justice but in fact perpetuated oppression would fall in the face of protest.

Academic theories and models for lawyering fail in this context. The client-centered approach to lawyering, in these sorts of situations, is nearly impossible for most lawyers to maintain. To be the client's loyal servant, to give him voice in the legal system, would in this instance subvert the client's own interest and in some ways undermine the legal system itself. In situations like these, deferring to client's wishes can transform the court proceedings into theater, rendering the whole notion of justice a mockery. This raises the question of whether the democratic system ought to tolerate or even encourage lawyers who facilitate the transformation of the courts into sites of protest or civil disobedience. Even if neutral partisan lawyers manage to navigate the representation without undermining the justice system, they may harm the client's chances of success, at least in traditional terms, by pursuing the client's political goals. Thus the libertarian view of

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142. GENTRY, *supra* note 19, at 422–23.

143. *Id.* at 424–25.



the legal profession in a very concrete way faces the same problem as the civil libertarian view of democracy itself: pluralism cannot tolerate the destruction of pluralism.

The moral activist approach is similarly inadequate. Rendering legal services by the book can poison the relationship. It can further the lawyer's own institutional goals—including a desire to improve the justice system or promote a political agenda—at the cost of the client's interest or political message.<sup>144</sup> Walsh, who valiantly tried to reconcile his obligations to the profession with a deferential attitude toward his client, ultimately had to withdraw at one point, leaving Mooney to his own devices. While Mooney presented his own defense in that instance, not all defendants would be able to do the same. If we dispense with notions of dignity and autonomy so central to the libertarian approach, we are left with a legal world in which true opposition will not be heard.

Lawyers in America play a role in a system that is, at this point in history, relatively stable. This gives the legal profession an advantage. Lawyers can represent clients without the fear that they are, in essence, giving those clients the tools with which to destroy the legal system, undermine the rule of law, and obliterate the legal profession. The relative strength of the American democracy and legal system can, however, mask deeper tensions. It can obscure the complex and unresolved role of the lawyer in a democratic system. It can make it easy to ignore the essential conflict in the roles that lawyers might choose to play. Ironically, the two models of lawyering and the Model Rules' effort at compromise similarly mask the larger problem.

The libertarian approach assumes that lawyers should give their clients a voice in the legal process. They are there to ensure that their clients—and citizens in general—maintain dignity and autonomy throughout. Moral activists to the contrary argue that lawyers are expected to work within the system to make sure that justice is reached in their own case and more frequently in future cases. The conversation between the individual and the legal system, a dialog mediated by the lawyer, ought to yield this result. This conflict tracks a similar conflict in our understanding of the role of the judicial system as a whole. Some see it as a forum for individual and group expression. In this view, a day in court is an end in itself. Others treat it as a means to ensure the just result, regardless of the psychological well-being of the participants.<sup>145</sup> Many of Mooney's lawyers, just like many advocates today, aspired to serve both these ends. It is certainly tempting to think that there is some middle ground. Mooney's story, however, highlights how

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144. See generally JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1986).

145. This conflict plays itself out in the opinions in *Strickland v. Washington*, 466 U.S. 668 (1984). Justice Sandra Day O'Connor, writing for the majority, assumes that the role of the lawyer and the justice system is to achieve the just result. See *id.* at 686. Justice Thurgood Marshall, in dissent, assumes, to the contrary, that the lawyer serves a broader purpose by ensuring the dignity and autonomy of his or her client. See *id.* at 711–12 (Marshall, J., dissenting).

elusive that compromise must be because of the unreconciled, and perhaps irreconcilable, conflict in our understanding of the role of the law and the legal profession in contemporary democracy.