

1-1-2008

# *People v. Coughlin* and Criticisms of the Criminal Jury in Late Nineteenth-Century Chicago

Elizabeth Dale

University of Florida Levin College of Law, edale@ufl.edu

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## Recommended Citation

Elizabeth Dale, *People v. Coughlin and Criticisms of the Criminal Jury in Late Nineteenth-Century Chicago*, 28 N. Ill. U. L. Rev. 503 (2008), available at <http://scholarship.law.ufl.edu/facultypub/330>

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# *People v. Coughlin* and Criticisms of the Criminal Jury in Late Nineteenth-Century Chicago

ELIZABETH DALE\*

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## I. INTRODUCTION

The last decades of the nineteenth century and the first decades of the twentieth century are typically characterized as the era in which the criminal jury trial came to an end.<sup>1</sup> Although criminal juries did not completely

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\* J.D./Ph.D. Affiliate Associate Professor, Levin College of Law; Associate Professor of Legal History, Department of History, University of Florida. This article is part of a larger project on the presumption of innocence in nineteenth-century American law. I appreciate the assistance of Stacey Skeeters of the Illinois State Archives, Springfield, Illinois, who helped me locate and get a copy of the voluminous record on appeal in *People v. Coughlin* and the suggestions made by my colleagues Jeffrey Adler and Chris Slobogin, Valerie Hans of Cornell Law School, and Tom Green from the University of Michigan Law School.

1. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 250-52 (Basic Books 1993) [hereinafter FRIEDMAN, CRIME AND PUNISHMENT]; KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 211-46 (Oxford Univ. Press 1989) [hereinafter HALL, MAGIC MIRROR].

disappear, their role became smaller and smaller across that time frame.<sup>2</sup>

Most studies of this phenomenon attribute that decline to the rise of plea bargains in that same period.<sup>3</sup> Specifically, these studies lead to the conclusion that institutional factors, such as case loads and the political pressure on elected prosecutors to be “tough on crime,” made plea bargains an increasingly attractive option for the State.<sup>4</sup> They are based on the assumption that the rise of plea bargains caused the decline of criminal juries.

As suggested below, that explanation does not appear to fit the case of late nineteenth-, early twentieth-century Chicago. In that period the felony courts in Chicago, like felony courts in Los Angeles, Philadelphia, and Boston, did make increasing use of plea bargains and jury trials declined, as well.<sup>5</sup> But the data suggests that the greater use of pleas did not *lead to* the decline of criminal juries, so much as *result from* efforts to avoid jury trials. To explore this possibility, this article begins with a review of studies of plea bargaining in the Chicago and Cook County felony courts.<sup>6</sup> The data in that scholarship suggests that the desire to avoid trials prompted the resort to plea agreements.

Then, to consider why that might be so, this article explores the contemporary views of criminal juries by unpacking a trial from late nine-

2. FRIEDMAN, CRIME AND PUNISHMENT, *supra* n. 1, at 251; HALL, MAGIC MIRROR, *supra* note 1, at 183-84; Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928-1929); Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 6 (1979). See also George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (tracing the rise of plea bargains in Massachusetts courts); ROGER LANE, MURDER IN AMERICA: A HISTORY 194 (Ohio State Univ. Press 1997) (describing the rise of pleas in criminal cases in Philadelphia in the last decades of the nineteenth-century); LAWRENCE M. FRIEDMAN & ROBERT V. PERCEIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910 (Univ. of N.C. Press 1981) (describing the rise of plea bargains in the criminal courts in Los Angeles and the surrounding areas).

3. Moley, *supra* note 2, at 105 (table showing the percent of felony cases resolved through pleas in various jurisdictions in the 1920s); Alschuler, *supra* note 2, at 6; FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 1, at 251.

4. See, e.g., MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY (Hart Publishing 2005) (the need for elected district attorneys to appear “tough on crime” led to a rise of plea agreements in New York by increasing the conviction rate); GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (Stanford Univ. Press 2003) (attributing the rise of plea bargaining in Massachusetts to a combination of increased prosecutorial power and case load pressures); Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and Law in the Process of State Formation, 1830-1860* 33 LAW & SOC'Y REV. 161 (1999) (attributing the rise of the plea bargain before the Civil War to elite efforts to increase the power of the State); see generally Michael Willrich, *Dickering for Justice: Power, Interests and the Plea Bargaining Juggernaut* 31 REV. IN AMERICAN HIST. 430 (2003) (noting the institutional focus of this research).

5. Moley, *Vanishing Jury*, *supra* note 2, at 105.

6. Part II, *infra*.

teenth-century Chicago, *People v. Coughlin*.<sup>7</sup> That case, also known as the Cronin Murder Trial, was a murder and conspiracy trial conducted in the Circuit Court of Cook County in Chicago in 1889.<sup>8</sup> Five defendants were on trial for conspiring to murder a prominent local doctor, Patrick Henry Cronin,<sup>9</sup> but the details of the case were far more romantic than that summary suggests. The crime involved allegations of corruption at the highest levels of the Chicago police department, secret meetings of conspirators, financial fraud, and an international plot to bomb the English House of Parliament.<sup>10</sup> In the months leading up to the trial, news accounts emphasized those sensational aspects.<sup>11</sup> When the case came to an end in December 1889, however, commentators were more preoccupied with what the trial revealed about the role of juries in criminal cases.<sup>12</sup>

After setting out the history of the crime and trial,<sup>13</sup> this article considers the various objections to the jury that arose at different moments in the trial.<sup>14</sup> These objections, made by new accounts, judges, lawyers, legal scholars and political figures, reveal the full range of ambivalence about criminal juries in Chicago at the end of the nineteenth century. Yet as deep as that unhappiness was, Illinois law failed to respond to those concerns, in part because they were challenges to fundamental aspects of the Anglo-American common law tradition.<sup>15</sup> That resistance to reform may have reflected an abiding commitment to the ideal of the jury, but it made plea agreements an attractive alternative.

7. 33 N.E. 1 (Ill. 1893). Strictly speaking there were *two* trials in *People v. Coughlin*. The first, a conspiracy trial, took place in the fall of 1889. The second, the retrial of a single defendant, Daniel Coughlin, took place over the fall and winter of 1893-1894. This article focuses only on the conspiracy trial.

8. *The Cronin Suspects*, N.Y. TIMES, Aug. 30, 1889, at 1 (start of the trial).

9. *The Cronin Murder Trial*, THE TIMES OF LONDON, Dec. 17, 1889, at 9 (listing the alleged plots of the Clan-na-Gael). See generally HENRY M. HUNT, CRIME OF THE CENTURY (H.L. & D.H. Kochersperger 1889) [hereinafter HUNT, CRIME OF THE CENTURY].

10. HUNT, CRIME OF THE CENTURY *supra* note 9; ANON., THE GREAT CRONIN MYSTERY (Laird & Lee 1889); Paul Luning, *Irish Blood*, 22 CHI. HIST. 20 (1993) [hereinafter Luning, *Irish Blood*]; *Coughlin v. People*, 33 N.E. 1 (Ill. 1893).

11. Luning, *Irish Blood*, *supra* note 10.

12. *Ex-President Hayes on American Juries and Crime*, THE TIMES OF LONDON, Jan. 10, 1890, at 10 (in a statement regarding criminal law and jury trials, Hayes points to the Cronin case as one where jury abuses helped prevent justice from being done); *Our Jury System*, N.Y. TIMES, Dec. 21, 1889, at 2 (outcome in Chicago case is evidence of problems with juries in criminal trials); *Unanimous Juries*, CHI. TRIB., Dec. 22, 1889, at 12 (the same); *Practicable Jury Reform*, CHI. TRIB., Dec. 22, 1889, at 12 (the same); *Additional Material*, 30 CENT. L.J. 277, 277 (1890) (the same); Editorial, 3 HARV. L. REV. 378 (1889-1890) (the same); *The Verdict in the Cronin Case*, 24 AM. L. REV. 110 (1890) (the same).

13. See Part III, *infra*.

14. See Parts IV, V, VI, VII, *infra*.

15. Part VIII, *infra*.

## II. PLEA BARGAINS IN CHICAGO AND COOK COUNTY

Studies of plea bargains have established that they increased in jurisdictions that had several key factors in place: a modern police department, a full-time prosecutor, and a well-established prison system.<sup>16</sup> The criminal justice system in Chicago and Cook County had all those structural and institutional factors in place in the second half of the nineteenth century.<sup>17</sup> And as one might expect, studies also show that there was an increased use of plea bargains in Chicago and Cook County after the turn of the century.<sup>18</sup> But a close look at the only well-developed data set, a snapshot survey from 1926, suggests the move toward plea bargaining in Chicago and Cook County was a complicated one.<sup>19</sup>

Data gathered by the Illinois Association for Criminal Justice establish that in 1926, 5253 cases were brought before the felony courts in Chicago and Cook County.<sup>20</sup> Of those, 39% were dismissed before arraignment,<sup>21</sup> another 40% were resolved on a plea of guilty,<sup>22</sup> and 21% of the cases proceeded to trial.<sup>23</sup> Of the 1103 cases that went to trial, over half (610) ended without a verdict of guilty,<sup>24</sup> and 493 of the cases resulted in a verdict of

16. Mark Haller, *Plea Bargaining in the Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273-78 (1979) (listing the creation of a modern police department, full-time prosecutors, and "the development of incarceration as a standard penalty for crime" as the key factors).

17. Mark H. Haller, *Urban Crime and Criminal Justice: The Chicago Case*, 57 J. AM. HIST. 619 (1970) (demonstrating that Chicago's criminal justice system had all these factors in place at the end of the nineteenth-century); Jeffrey Adler, "It's His First Offense, We Might as Well Let Him Go:" *Homicide and Criminal Justice in Chicago, 1875-1920*, 40 J. SOC. HIST. 5, 5-6 (2006) (the same).

18. Moley, *Vanishing Jury*, *supra* note 2; Alschuler, *Plea Bargaining*, *supra* note 2, at 26 & *infra* note 27 (citing data reported by Raymond Moley); Haller, *Urban Crime*, *supra* note 16, at 633-34.

19. ILLINOIS ASSOCIATION FOR CRIMINAL JUSTICE, THE ILLINOIS CRIME SURVEY (Patterson Smith 1968) (1929) [hereinafter CRIME SURVEY].

20. *Id.* at 78, Table D-2. *But see* Moley, *Vanishing Jury*, *supra* note 2, at 117 (citing different numbers for Chicago and Cook County in 1926). Moley, a consultant for the CRIME SURVEY, relied on preliminary data for his article, Moley, *Vanishing Jury*, *supra* note 2, at 102 n.23, while this article uses the final data, set out in the CRIME SURVEY, instead of Moley's preliminary data.

21. CRIME SURVEY, *supra* note 19, at 78 (2048 of the total 5253 felony cases ended with the charges dropped before arraignment). *See also id.* at 81 Table D-3.

22. CRIME SURVEY, *supra* note 19, at 78 (2110, or 40.2%, of the 5253 total felony cases were pled out).

23. CRIME SURVEY, *supra* note 19, at 78 (1103, or 21.0%, of the 5253 total felony cases went to trial).

24. CRIME SURVEY, *supra* note 19, at 78 (the 610 cases represented 11.61% of the 5253 total felony cases).

guilty.<sup>25</sup> In the end, less than half (just over 49%) of the 5253 total felony cases resulted in a conviction.<sup>26</sup> Of the convictions, over 80% resulted from a guilty plea.<sup>27</sup>

This confirms Raymond Moley's preliminary conclusion that the felony courts in Chicago and Cook County followed the general trend toward resolving criminal cases with plea agreements.<sup>28</sup> But a careful look at the data reveals two quirks:

- Of the 3205 defendants who were arraigned, 1825, or 57% refused to plead guilty initially. Instead, they changed their pleas and entered a second, guilty plea at a later point.<sup>29</sup> That means that nearly three-fifths of the people who went through arraignment changed their plea to avoid trial.
- Of the 2100 defendants who were found guilty, either as a result of a plea or a trial, over 78% (1646) were sentenced for a lesser charge.<sup>30</sup>

This implies that both parties to plea agreements negotiated from weakness: defendants held out as long as they could, but in the end the majority of them chose to plead out their cases rather than go to trial; prosecutors, who lost more than half the trials they brought, were willing to accept pleas to lesser charges in the vast majority of the cases, suggesting that both parties saw pleas as the preferred alternative to going to trial. It is suggested below that anxiety about criminal juries seems to have been an important factor in shaping those preferences.

### III. THE MURDER OF DOCTOR CRONIN

#### A. A MYSTERIOUS DISAPPEARANCE

About 8:00 p.m. on May 4, 1889, Dr. Patrick Henry Cronin walked out of his office on North Clark Street in Chicago and got into a buggy drawn

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25. CRIME SURVEY, *supra* note 19, at 78 (the 493 cases represented 9.39% of the 5253 total felony cases).

26. CRIME SURVEY, *supra* note 19, at 78 (there was a conviction in 2582, or 49.15%, of the total felony cases).

27. CRIME SURVEY, *supra* note 19, at 78 (of the 2582 total convictions, 2100 were the result of pleas).

28. Moley, *Vanishing Jury*, *supra* note 2, at 105 (chart demonstrating that the plea rate in felony courts in Chicago and Cook County were equivalent to the rates in similar jurisdictions). See also Moley, *Vanishing Jury*, *supra* note 2, at 120-23 (reporting that interviews with prisoners and anecdotal evidence indicate a steadily rising rate of plea agreements in Chicago and Cook County since the 1870s).

29. CRIME SURVEY, *supra* note 19, at 78 (these defendants are indicated by entries that read "not guilty, guilty" or "not guilty, guilty lesser charge").

30. CRIME SURVEY, *supra* note 19, at 78.

by a single white horse.<sup>31</sup> He had been called out, his landlady subsequently recalled, by a man from Patrick O'Sullivan's ice house, who said one of the workers there had been seriously injured.<sup>32</sup>

Cronin never returned, and within a day of his disappearance, his friends were complaining to the police and the local papers that he had been assassinated at the command of leaders in the Clan-na-Gael,<sup>33</sup> an Irish nationalist group to which Cronin, a strong supporter of Irish independence,<sup>34</sup> belonged.<sup>35</sup> Cronin had been involved in a bitter internecine battle within the Clan, challenging the financial dealings and secretive ways of its leadership.<sup>36</sup> His friends claimed that as a result of his bold opposition he had been expelled from the organization briefly and subject to harassment after he was reinstated.<sup>37</sup> Undeterred, he continued to press his cause, prompting his opponents to take the final step to silence him.<sup>38</sup>

31. *Dr. Cronin's Disappearance*, N.Y. TIMES, May 7, 1889, at 1; *Latest Intelligence*, THE LONDON TIMES, May 8, 1889, at 7 (reporting Cronin's disappearance); *Where is Dr. Cronin?*, CHI. TRIB. May 6, 1889, at 1.

32. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 19-20.

33. Luning, *Irish Blood*, *supra* note 10, 22, 26-27. See generally Thomas Fleming, *The Green Flag in America* 30 AM. HERITAGE 50 (1979) (describing the Clan-na-Gael); Michael F. Funchion, *Irish Nationalists and Chicago Politics in the 1880s*, 10 EIRE-IRELAND 3 (1975) (describing the Clan-na-Gael in Chicago); JOSEPH P. O'GRADY, IRISH-AMERICANS AND ANGLO-AMERICAN RELATIONS, 1880-1888 10, 88, 102 (Arno Press 1976) (Ph.D. dissertation, University of Pennsylvania, 1965) (discussing the Clan and Cronin's ties to it; note that O'Grady misreports Cronin's first name as William and Philip throughout the dissertation).

34. See, e.g., *Parnell Can't Come*, CHI. TRIB., Dec. 24, 1885, at 6 (Cronin's involvement in efforts to arrange a convention of Irish nationalists); *Wearing of the Green*, CHI. TRIB., Mar. 18, 1886, at 5 (Cronin's important role in helping arrange St. Patrick's Day celebrations and mass meeting); *Friends of Parnell*, CHI. TRIB., July 28, 1887, at 3 (Cronin in attendance at this meeting); P[atrick] H[enry] Cronin, Letter to the Editor, CHI. TRIB., June 13, 1888, at 10 (objecting to claims made by another Chicagoan on behalf of Irish Nationalists); *The Special Commission*, THE TIMES OF LONDON, Mar. 7, 1889, at 6 (a report on an ongoing British investigation into Irish nationalist groups mentions Cronin); *Dr. Cronin's Disappearance*, N.Y. TIMES, May 7, 1889, at 1 (characterizing him as a well-known Irish Nationalist).

35. Luning, *Irish Blood*, *supra* note 10, at 26-27, 30.

36. *Cronin's Bitter Enemies*, N.Y. TIMES, May 24, 1889, at 1 (describing the split in the Clan-na-Gael and the allegations of financial fraud); *The Cronin Murder Trial*, THE TIMES OF LONDON, Dec. 17, 1889, at 9 (the same); *News*, THE TIMES OF LONDON Dec. 17, 1889, at 9 (noting that Cronin's disagreements with the Clan-na-Gael leadership was limited to objecting to their financial dealings).

37. *Cronin's Bitter Enemies*, N.Y. TIMES, May 24, 1889, at 1 (reporting that Cronin had been harassed with threatened malpractice suits and other legal matters); *Those Sham Lawsuits*, N.Y. TIMES, June 11, 1889, at 4 (reporting that in the previous two years Cronin had been subject to a number of lawsuits as a means of harassing him).

38. *Dr. Cronin's Disappearance*, N.Y. TIMES, May 7, 1889, at 1 (citing Michael Breslin to this effect, but dismissing the claim as unfounded); *"Patriot" Cronin's Fate*, N.Y. TIMES, May 11, 1889, at 1 (again reporting, and dismissing, the claims of Cronin's friends

The initial evidence, though conflicting, seemed to suggest otherwise. Two witnesses, a passenger and a ticket collector, reported seeing Cronin riding a streetcar the evening of May 4, apparently headed for the train station.<sup>39</sup> Another witness reported seeing Cronin late that night with other men, in circumstances that strongly suggested that Cronin had been called out to perform an illegal abortion that had failed.<sup>40</sup> There were reports he had been sighted in other parts of Chicago,<sup>41</sup> in Toronto,<sup>42</sup> and in London.<sup>43</sup> A reporter for the *Chicago Tribune* claimed he spoke to Cronin in Canada and that Cronin told him that he had moved there to escape the increasingly bitter battles with his fellow nationalists.<sup>44</sup> Others speculated he was an English spy and had returned to England to report on Irish doings in America.<sup>45</sup>

Then, ten days after Cronin's disappearance, residents in Lake View reported foul smells coming out of a blocked up sewer near the corner of Fifty-Ninth Street and Evanston Avenue.<sup>46</sup> Three days after the first complaints were made, a team of sewer workers went to investigate.<sup>47</sup> In the

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that he had been killed to keep him from revealing the financial fraud perpetrated by the leaders of the Clan-na-Gael). See also Luning, *Irish Blood*, *supra* note 10, at 22-23.

39. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 102-05; Luning, *Irish Blood*, *supra* note 10, at 28; *The United States*, THE TIMES OF LONDON, May 11, 1889, at 9 (reporting that people had seen Cronin on a train, heading east).

40. "Patriot" *Cronin's Fate*, N.Y. TIMES, May 11, 1889, at 1 (reporting that the evidence of a witness, Frank Woodruff, indicates that Cronin ran "away to escape the consequences of a fatal criminal operation performed by him that evening"). But see *The Cronin Mystery*, N.Y. TIMES, May 12, 1889, at 3 (reporting that while the investigation into the abortion theory continued, the theory had been weakened by evidence that the girl who was allegedly the victim of the failed abortion was still alive).

41. *Dr. Cronin's Disappearance*, N.Y. TIMES, May 7, 1889, at 1 (sighted at a tavern in Chicago).

42. "Patriot" *Cronin's Fate*, N.Y. TIMES, May 11, 1889, at 1 (reporting that Cronin went to Canada to escape prosecution for a botched abortion); *The United States*, THE TIMES OF LONDON, May 13, 1889, at 5 (Cronin sighted in Toronto); *Dr. Cronin*, THE TIMES OF LONDON, May 14, 1889, at 5 (Cronin in Toronto).

43. *Dr. Cronin in Toronto*, CHI. TRIB., May 12, 1889, at 9 (special report by unnamed *Tribune* reporter who claimed to have interviewed Dr. Cronin in Toronto); *The United States*, THE TIMES OF LONDON, May 9, 1889, at 5 (repeating reports that Cronin was in London).

44. *Dr. Cronin's Flight*, N.Y. TIMES, May 13, 1889, at 4.

45. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 118-19. This was not as far-fetched as it seemed. See Edward R. Lewis, Jr., *The British Spy in Illinois Pharmacy*, 14 PHARMACY IN HIST. 83 (1972) (recounting the adventures of an Illinois doctor and pharmacist, Thomas Miller, known as Le Caron, who did spy for the English and was Cronin's contemporary). See also *Cronin and His Enemies*, N.Y. TIMES, June 10, 1889, at 1 (reporting that Cronin's enemies tried to link him to Le Caron); *Dr. Cronin in Toronto*, CHI. TRIB., May 12, 1889, at 9 (reporting that Cronin made wild claims about Le Caron).

46. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 127-28.

47. *Id.* at 128-33.



sewer's catch basin they found the decomposing body of a man; that night, the body was identified as Dr. Cronin.<sup>48</sup> An autopsy established that he had been killed, murdered by a series of blows to the head delivered with a sharp, pointed instrument and had been dead for several days.<sup>49</sup>

#### B. INVESTIGATION AND ARRESTS

Suspicion immediately focused on Patrick O'Sullivan, in whose name Cronin allegedly had been called out the night he disappeared.<sup>50</sup> O'Sullivan had been questioned the day after Cronin disappeared; at that point he denied sending a man to get Cronin.<sup>51</sup> Interrogated a second time after the discovery of the body, O'Sullivan once again denied knowing anything about the mysterious man who picked Cronin up in the evening of May 4.<sup>52</sup> He did, however, tell the police that he had seen strange activities in a small cottage near his home late in the evening of Cronin's disappearance.<sup>53</sup> The police immediately went to that cottage, broke the lock, and went in.<sup>54</sup> Inside, they found evidence of a bloody fight.<sup>55</sup> Convinced that this was an important clue, they questioned the owners of the cottage, who lived nearby.<sup>56</sup> The owners told a strange tale: A man who said his name was Frank Williams rented the cottage from them in mid March, telling them that he needed it for members of his family who were moving from Baltimore. No tenants ever appeared, but Williams paid the next month's rent in the middle of April and moved some furniture into the cottage. Then, in the middle of May, he sent a short note to the owners advising them that his family's plans had changed and that he no longer wanted to rent the cottage.<sup>57</sup> After Williams broke his lease the landlords went into the cottage and found the bloody evidence. Frightened by their discovery, they kept silent; they did not explain why they did not clean the cottage out.<sup>58</sup>

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48. *Dr. Cronin Was Murdered*, N.Y. TIMES, May 23, 1889, at 5 (reporting that the body, which was in an advanced stage of putrefaction, was identified by means of a religious medal found around the victim's neck, which was identical to one Cronin always wore; by a doctor who was well-acquainted with Cronin; and by Cronin's dentist's examination of the victim's teeth).

49. *Dr. Cronin Was Murdered*, N.Y. TIMES, May 23, 1889, at 5; HUNT, CRIME OF THE CENTURY *supra* note 9; Luning, *Irish Blood*, *supra* note 10.

50. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 158.

51. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 28-29, 38.

52. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 158.

53. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 158-59.

54. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 159.

55. *Unraveling the Mystery*, N.Y. TIMES, May 25, 1889, at 1; HUNT, CRIME OF THE CENTURY, *supra* note 9, 159-60.

56. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 168-69.

57. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 169-74.

58. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 174-75.

No sooner had this story come to light than the investigation took a shocking turn. It was revealed that the horse and buggy in which Dr. Cronin had been spirited away had been hired by a Chicago police detective, Daniel Coughlin, who paid to rent the buggy in the morning of May 4 and told the owner of the livery stable that a friend would come by to pick it up later that evening.<sup>59</sup> Coughlin was questioned by the chief of police and then arrested over his protestations that he was innocent.<sup>60</sup> That arrest was promptly followed by the arrest of Patrick O'Sullivan.<sup>61</sup> Shortly thereafter, on May 28, the grand jury met and indicted both men, along with a third, Frank Woodruff.<sup>62</sup> Woodruff had come to police attention on several occasions: first when he volunteered a story that suggested that Cronin had performed a botched abortion the day he disappeared,<sup>63</sup> then when he explained that he had helped dispose of Cronin's body.<sup>64</sup>

The investigation did not end with the indictments. A coroner's inquest was convened, as law required in cases of sudden death.<sup>65</sup> Over a pe-

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59. Luning, *Irish Blood*, *supra* note 10, at 28, 30; HUNT, CRIME OF THE CENTURY, *supra* note 9, at 196-97. Further investigation revealed that another detective, Michael Whalen, (who was Coughlin's first cousin) and Coughlin's supervisor, Michael Schaak, had helped conceal Coughlin's involvement in the case. *Cronin's Indiscrete Words*, N.Y. TIMES, May 26, 1889, at 2 (reporting suspicions that Coughlin's supervisor had helped Coughlin cover up his role in the crime); *The Suspected Detective*, N.Y. TIMES, May 26, 1889, at 2 (more on Coughlin's role); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 204-09 (reporting suspicions about Whalen and Coughlin), both men were suspended. *Id.* at 210-211, 239.

60. *The Suspected Detective*, N.Y. TIMES, May 26, 1889, at 2 (reporting the arrest of Coughlin); *Coughlin Formally Held*, N.Y. TIMES, May 28, 1889, at 1; HUNT, CRIME OF THE CENTURY, *supra* note 9 at 210-11.

61. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 217.

62. *The Cronin Murderers*, N.Y. TIMES, May 29, 1889, at 1 (reporting the indictments of the three); Luning, *Irish blood*, *supra* note 10, at 30.

63. *The Cronin Murderers*, N.Y. TIMES, May 29, 1889, at 1 (Woodruff's role and his changing story).

64. *The Cronin Murderers*, N.Y. TIMES, May 29, 1889, at 1; HUNT, CRIME OF THE CENTURY, *supra* note 9, at 289-90. Woodruff told a number of stories. *See also The Murderers of Cronin*, N.Y. TIMES, June 16, 1889, at 2 (recounting yet another of Woodruff's explanations of the case); *Woodruff Talks Again*, N.Y. TIMES, June 17, 1889, at 5 (in an interview with the New York Times, Woodruff ties Sullivan to the Cronin murder).

65. *Arranging the Evidence*, N.Y. TIMES, May 30, 1889, at 1 (reporting that the coroner's inquest was impaneled and then adjourned, lest "the taking of evidence in public . . . hamper the police in their work of investigating clues"); *The Cronin Murder*, N.Y. TIMES, June 2, 1889, at 5 (reporting that the coroner's jury would meet shortly to hear evidence); *The Cronin Inquest*, N.Y. TIMES, June 4, 1889, at 2 (inquest resumes); *Mr. Sullivan in Danger*, N.Y. TIMES, June 5, 1889, at 5 (coroner's jury hears evidence that implicates Sullivan); *Sullivan Not Yet Arrested*, N.Y. TIMES, June 6, 1889, at 2 (the same); *Mr. Sullivan Must Account*, N.Y. TIMES, June 7, 1889, at 1 (more on the coroner's jury investigation); *Sullivan and Dr. Cronin*, N.Y. TIMES, June 8, 1889, at 2 (more on the inquest); *The Secret Still Hidden*, N.Y. TIMES, June 9, 1889, at 5 (more testimony before the coroner's inquest); *Sullivan Not Yet Arrested*, N.Y. TIMES, June 11, 1889, at 1 (reporting further scenes from the inquest);

riod of days, that jury heard evidence from Cronin's friends and associates about the doctor's battles with the leadership of the Clan-na-Gael.<sup>66</sup> One witness, Patrick McGarry, told the jury that on "numerous occasions" Cronin told him that Alexander Sullivan, a well-known Chicago lawyer, would kill him someday.<sup>67</sup> Other members of the Clan-na-Gael told the jury of similar conversations and reported that Sullivan had made violent speeches and statements denouncing Cronin.<sup>68</sup>

Ultimately, the coroner's jury found that Cronin had been murdered and recommend that a grand jury indict Sullivan for the crime.<sup>69</sup> Sullivan was duly arrested.<sup>70</sup> His lawyers promptly filed a petition for writ of habeas corpus<sup>71</sup> and after a hearing that revealed Sullivan had resigned from the Clan-na-Gael four years previously, he was released on bail.<sup>72</sup> Because there was no evidence that tied Sullivan to a plot hatched by members of an organization that he was no longer a part of, the grand jury refused to indict<sup>73</sup> and the State ultimately dropped its efforts to charge him.<sup>74</sup>

66. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 239-40.

67. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 240-41; *Sullivan Not Yet Arrested*, N.Y. TIMES, June 6, 1889, at 2 (recounting McGarry testimony and summarizing other evidence regarding Cronin's fears about Sullivan). See also *The Cronin Conspiracy*, N.Y. TIMES, May 31, 1889, at 1 (reporting that Cronin's friends were pushing the story that Sullivan was behind the murder).

68. *Sullivan and Dr. Cronin*, N.Y. TIMES, June 8, 1889, at 2 (Luke Dillon provides coroner's inquest with circular written by Sullivan denouncing Cronin); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 241, 246, 247, 249. The fact that Sullivan had been charged, and tried twice, for murdering a man who insulted his wife (he was ultimately acquitted), *id.* at 273; *Tightening the Halter*, N.Y. TIMES, June 12, 1889, at 1 (reporting the incident and asserting that "the power of the Roman Catholic Church" saved Sullivan that time), doubtless made these threats seem more ominous. See also *Cronin's Serious Charges*, N.Y. TIMES, June 3, 1889, at 2 (reporting that the theory against Sullivan was that he had invested Clan-na-Gael money with the Board of Trade and lost it all, and that Cronin was going to expose him).

69. *Tightening the Halter* N.Y. TIMES June 12, 1889, at 1 (reporting the findings and recommendation of the coroner's jury); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 261. The coroner's jury also denounced the Clan-na-Gael as a secret society "injurious to American interests." *Id.* at 261-63. It was not unusual for the coroner's jury to make policy statements of this sort. See ELIZABETH DALE, THE RULE OF JUSTICE 37 (Ohio State Univ. Press 2001) (coroner's jury denounces a boot heel factory for employing boys and girls, black and white).

70. *Tightening the Halter*, N.Y. TIMES, June 12, 1889, at 1 (arrest of Sullivan).

71. *Sullivan Still in Jail*, N.Y. TIMES, June 13, 1889, at 1 (reporting that the petition for writ of habeas corpus had been filed, but that the hearing on the writ had been put over for a day).

72. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 297-98, 300.

73. *The Cronin Grand Jury*, N.Y. TIMES, June 29, 1889, at 5 (confidently predicting Sullivan would be indicted); *The Cronin Murderers*, N.Y. TIMES, June 30, 1889, at 2 (noting that Sullivan was not indicted but reporting that the police vowed to continue to look for evidence against him).

74. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 300.

Two other members of the Clan-na-Gael with reputations for hating Cronin were not so fortunate. One, Martin Burke, was identified by the police as the man who had called himself Frank Williams and rented the cottage in which Cronin was allegedly murdered.<sup>75</sup> Burke fled to Canada and was captured there.<sup>76</sup> After lengthy legal proceedings, he was extradited back to Chicago to stand trial.<sup>77</sup> Another Chicago lawyer, John F. Beggs, an officer in the camp, or branch, of the Clan-na-Gael that the police believed actually plotted and carried out Cronin's murder,<sup>78</sup> also was arrested.<sup>79</sup> The police took a third man, John Kunze, into custody on the theory he had helped cover up the murder.<sup>80</sup> While Beggs, Burke and Kunze were brought before a second grand jury and indicted<sup>81</sup> several other men were arrested in connection with the case, but not charged.<sup>82</sup> A final suspect, Patrick Cooney, was indicted, but escaped and was never captured.<sup>83</sup>

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75. *Arrested in Winnipeg*, N.Y. TIMES, June 18, 1889, at 1 (recounting Burke's alleged role in the plot); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 308-09 (the identification of Burke).

76. *Arrested in Winnipeg*, N.Y. TIMES, June 18, 1889, at 1 (reporting Burke's arrest, incorrectly calling him William Burke in the story).

77. *The Extradition of Burke*, N.Y. TIMES, July 4, 1889, at 5 (beginning the process to extradite Burke); *The Cronin Suspects*, N.Y. TIMES, July 6, 1889, at 1 (reporting on the procedures to extradite Burke); *The Cronin Murder Case*, N.Y. TIMES, July 9, 1889, at 2 (possible problems with the efforts to extradite Burke); *The Burke Extradition Case*, N.Y. TIMES, July 27, 1889, at 1 (extradition hearing comes to an end); *The Cronin Murder Case*, N.Y. TIMES, July 31, 1889, at 2 (Canadian court ruled that Burke should be extradited); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 309-31.

78. *The Inner Circle Did It*, N.Y. TIMES, June 25, 1889, at 1 (detailing the police theory of the conspiracy); *Secrets of Camp Twenty*, N.Y. TIMES, June 28, 1889, at 1 (the same).

79. *John F. Beggs Arrested*, N.Y. TIMES, June 27, 1889, at 5; HUNT, CRIME OF THE CENTURY, *supra* note 9, at 288.

80. *The Cronin Murder Case*, N.Y. TIMES, July 2, 1889, at 2 (reporting that Kunze had confessed his part in the crime to the police); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 367-68.

81. *Martin Burke Indicted*, N.Y. TIMES, June 20, 1889, at 1 (grand jury indicated Burke, who was still in Winnipeg); *The Cronin Murderers*, N.Y. TIMES, June 30, 1889, at 2 (announcing the indictments).

82. *Suspects Arrested Here*, N.Y. TIMES, June 12, 1889, at 2 (reporting arrest of John J. Maroney and Charles McDonald in New York); *Moroney and McDonald Set Free*, N.Y. TIMES, June 18, 1889, at 1 (neither man could be identified by witnesses, so both were released).

83. *Camp Twenty Disbands*, N.Y. TIMES, June 26, 1889, at 1; Luning, *Irish Blood*, *supra* note 10, at 30-31.

## C. THE TRIAL OF THE CENTURY

In early August, the police closed their investigation. The defendants were arraigned on August 26, 1889,<sup>84</sup> and trial for five of the defendants (Woodruff's case was severed)<sup>85</sup> began on August 30, 1889.<sup>86</sup> Not quite four months later, on December 16, 1889, the jury rendered its verdict.<sup>87</sup> It acquitted one defendant, Beggs,<sup>88</sup> and found another, Kunze, guilty of manslaughter, sentencing him to three years in prison.<sup>89</sup> The jury found the remaining three, Coughlin, O'Sullivan, and Burke, guilty of murder, but to the disappointment of many, sentenced them only to natural life in prison.<sup>90</sup> A month later, Judge McConnell granted Kunze's motion for a new trial, but rejected the post-trial motions filed by the other defendants.<sup>91</sup> Although Coughlin, O'Sullivan, and Burke appealed their convictions to the Illinois Supreme Court,<sup>92</sup> both O'Sullivan<sup>93</sup> and Burke<sup>94</sup> died in prison before the

84. *The Cronin Suspects*, N.Y. TIMES, Aug. 6, 1889, at 2 (reporting the arraignment, the defendants pled not guilty); *Martin Burke Arraigned*, N.Y. TIMES, Aug. 10, 1889, at 1 (Burke arraigned, pleads not guilty).

85. Defendants for Separate Trials, Record on Appeal, Coughlin v. People, General No. 2843, Vault No. 25934, Illinois Supreme Court Records, Illinois State Archives, Springfield, Illinois, roll No. 30-5515, pp. 2-41 [hereinafter Record on Appeal]. See *The Cronin Suspects*, N.Y. TIMES, Aug. 30, 1889, at 1 (motions to sever denied except for the motion to sever Woodruff); see also *The Cronin Suspects*, N.Y. TIMES, Aug. 3, 1889, at 2 (all the defendants filed motions for separate trials and for change in venue); *The Cronin Suspects*, N.Y. TIMES, Aug. 6, 1889, at 2 (motion for change in venue granted, trial transferred from Branch No. 1 of the Criminal Court to Branch No. 2, where Judge McConnell presided); *They Want Separate Trials*, N.Y. TIMES, Aug. 25, 1889, at 2 (motions for separate trials); *The Cronin Murder*, N.Y. TIMES, Aug. 27, 1889, at 2 (the same); *The Cronin Murder Case*, N.Y. TIMES, Aug. 29, 1889, at 1 (recounting the arguments made for and against separate trials).

86. Trial transcript, People v. Coughlin, et al, Record on Appeal, *supra* note 85, rolls 30-5515 to 30-5518 (the transcript does not contain the closing arguments of the attorneys).

87. *Result in the Cronin Case*, N.Y. TIMES, Dec. 17, 1889, at 1; Luning, *Irish Blood*, *supra* note 10, at 36.

88. *Result in the Cronin Case*, N.Y. TIMES, Dec. 17, 1889, at 1.

89. *Id.*

90. *Id.*

91. *The Cronin Murder*, N.Y. TIMES, Jan. 15, 1890, at 5 (ruling on the motions for a new trial). See generally *Result in the Cronin Case*, N.Y. TIMES, Dec. 17, 1889, at 1 (motions for new trial); *The Cronin Murderers*, N.Y. TIMES, Jan. 11, 1890, at 1 (defense attorneys file memoranda of law in support of the motions for a new trial).

92. Notice of Appeal, Record on Appeal, *supra* note 85, at roll No. 30-5514. Under the Illinois Constitution of 1870 all appeals from criminal cases went to the Illinois Supreme Court. ILL. CONST. of 1870, art. VI, § 11 (1874).

93. *Cronin Murder Case Revived*, N.Y. TIMES, Jan. 20, 1893, at 1 (noting the death of O'Sullivan); Luning, *Irish Blood*, *supra* note 10, at 36. But see *Doubts O'Sullivan's Death* N.Y. TIMES, May 8, 1889, at 16 (reporting that some believed O'Sullivan had escaped, not died).

appeal was resolved.<sup>95</sup> Finally, in January 1893, the Illinois Supreme Court released its opinion in the case, reversing the verdict on the ground that two of the jurors who heard the case should have been excluded for cause.<sup>96</sup> The retrial began in December 1893,<sup>97</sup> and ended with Coughlin's acquittal in March 1894.<sup>98</sup>

#### IV. PROBLEMS IMPANELING THE JURY

Jury selection in the first trial took nearly two months, from August 30th to October 22nd.<sup>99</sup> Not surprisingly, that lengthy process outraged many. Critics objected because the voir dire delayed trial.<sup>100</sup> They also objected to the use of both challenges for cause, which they complained encouraged jurors to lie to avoid jury service,<sup>101</sup> and the use of peremptory challenges, which they claimed allowed defense attorneys to manipulate the potential jurors.<sup>102</sup> However, those objections were to well-established legal practice: Illinois followed the modified common law rule,<sup>103</sup> giving each defendant twenty peremptory challenges.<sup>104</sup> This was in contrast to many other states, which typically limited only the prosecution to twenty peremptory challenges,<sup>105</sup> while Illinois allowed the prosecutor to have twenty peremptory challenges for each defendant.<sup>106</sup> But even that deviation from the norm had been recently reaffirmed by the Illinois Supreme Court.<sup>107</sup>

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94. *One of Cronin's Slayers Dead*, N.Y. TIMES, Dec. 10, 1892, at 1 (Burke's death); *Cronin Murder Case Revived*, N.Y. TIMES, Jan. 20, 1893, at 1 (noting the death of Burke).

95. *See* Luning, *Irish Blood*, *supra* note 10, at 36.

96. *Coughlin v. Illinois*, 33 N.E. 1 (1898).

97. *The Cronin Case Under Way*, N.Y. TIMES, Dec. 8, 1893, at 8 (reporting the retrial had begun).

98. *Coughlin Not Guilty*, N.Y. TIMES, March 9, 1884, at 6.

99. HUNT, *CRIME OF THE CENTURY*, *supra* note 9, at 384, 397.

100. *Criminal Justice in France and America*, CHI. TRIB., Aug. 4, 1894, at 12.

101. *Men with Opinions*, CHI. TRIB., Sept. 4, 1889, at 1.

102. *Criminal Justice in France and America*, CHI. TRIB., Aug. 4, 1894, at 12 (citing the Coughlin case as an instance in which defense attorneys abused voir dire, delaying the trial).

103. WILLIAM BLACKSTONE, 4 COMMENTARIES 348 (English common law initially allowed for thirty-five challenges per defendant, but that number was reduced in the sixteenth century by an Act of Parliament that limited the parties to twenty challenged apiece); 1 SEYMOUR DWIGHT THOMPSON, A TREATISE ON THE LAWS OF TRIALS IN ACTIONS CIVIL AND CRIMINAL 38-39 (1889) [hereinafter 1 THOMPSON, TRIALS].

104. ILL. REV. STAT. ch. 38 ¶ 492 (1885). *See also* *The Cronin Suspects*, N.Y. TIMES, Aug. 30, 1889, at 1 (noting this rule).

105. 1 THOMPSON, TRIALS, *supra* note 103, at 40-41.

106. ILL. REV. STAT. Ch. 38 ¶ 492 (1885).

107. *Spies v. Illinois*, 12 N.E. 865, 993 (1887) ("The defendants claim that, although they were entitled to 160 peremptory challenges, yet the state was entitled to only 20; and they charge it as error that the state was allowed to peremptorily challenge more than 20

In the Coughlin trial, the defense had 100 peremptory challenges altogether and used all but three of them, while the State had 100 peremptory challenges and used 78 of them.<sup>108</sup> Although startling, that large number of peremptory challenges played only a minor role in dragging out jury selection. Over the course of the selection process more than 1100 prospective jurors were questioned.<sup>109</sup> Of those, over 900 were excused for cause by the court<sup>110</sup> while 175 were removed by means of peremptory challenges.<sup>111</sup> And the main reason that so many jurors were dismissed for cause was that, to quote one history of the case, it seemed as if there was no one in Chicago “who had not already formed a positive opinion, one which could not be removed by any evidence, as to the guilt of the prisoners.”<sup>112</sup> Although the *Chicago Tribune* scoffed at this claim,<sup>113</sup> the defense challenged the jury pool on the grounds that the entire pool had been tainted by the fact that the newspapers had published most of the State’s evidence before trial.<sup>114</sup> That effort did not succeed, but the trial court wrestled with the problems caused by the news coverage of the crime throughout jury selection.<sup>115</sup>

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talesmen. The statute says: ‘The attorney prosecuting on behalf of the [P]eople shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to.’ (citation omitted) We can not conceive how language can be plainer than that here used. It explains itself, and requires no further remark.”)

108. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 397; *A Cronin Jury at Last*, N.Y. TIMES, Oct. 23, 1894, at 4.

109. *A Cronin Jury at Last*, N.Y. TIMES, Oct. 23, 1889, at 4; HUNT, CRIME OF THE CENTURY, *supra* note 9, at 397.

110. *A Cronin Jury at Last*, N.Y. TIMES, Oct. 23, 1889, at 4; HUNT, CRIME OF THE CENTURY, *supra* note 9, at 397. See also ILL. REV. STAT. ch. 78 ¶ 14 (1874) (setting out the grounds for a challenge for cause).

111. *A Cronin Jury at Last*, N.Y. TIMES, Oct. 23, 1889, at 4; HUNT, CRIME OF THE CENTURY, *supra* note 9, at 397.

112. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 369.

113. See *Jurors in the Cronin Case*, CHI. TRIB., Sept. 1, 1889, at 4 (an editorial suggesting that the claim by many that they had a fixed opinion that they could not shake was a sham); *City and Country Jurors*, CHI. TRIB. Sept. 5, 1889, at 4 (dismissing the idea that pretrial publicity tainted the pool, asserting that in the city, few people were preoccupied by the trial or spent much time reading or thinking about it, contrasting this to murders that happened in the country where people had nothing better to do than to read news accounts and discuss spectacular crimes). But see *How the “Tribune” Helped the Prosecutors*, CHI. TRIB., Dec. 20, 1889, at 4 (reprinting an article from the *Adrian Times and Expositor* (Mich.) praising the *Tribune* for the help it provided the prosecution in tracking down suspects and evidence in the case and publishing them).

114. *Proper Questions*, CHI. TRIB., Sept. 3, 1889, at 1 (reporting one defense attorney’s arguments to that effect).

115. *Id.* at 1 (stating that the defense was not “reassured” by evidence that everyone reads newspapers). For stories that revealed the problems posed by jurors who had read news accounts about the trial, see *Four Had Formed Opinions*, CHI. TRIB., Aug. 31, 1889, at 2; *He Held Strong Opinions*, CHI. TRIB., Sept. 1, 1889, at 2; *Must be Opinionless*, WASH. POST, Sept. 3, 1889, at 1; *Men With Opinions*, CHI. TRIB., Sept. 4, 1889, at 2; *How Newspa-*

## A. PRETRIAL PUBLICITY AND THE PRESUMPTION OF INNOCENCE

First, there was the problem of the publicity itself. Most of the more than 900 men excluded from the jury for cause<sup>116</sup> were like George Rapp, a salesman who testified that he had read the papers and formed an opinion about the case that it would require evidence to overcome. Rapp admitted that he doubted he could give the defendants a fair trial and was excused for cause.<sup>117</sup> Others, like J.H. Vohmiller, were excused for showing their bias in other ways—during voir dire Vohmiller referred to the defendants, twice, as “those murderers over there.”<sup>118</sup>

Since 1874, the rule in Illinois was that “it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state, on oath, that he believes he can render an impartial verdict, according to the law and the evidence.”<sup>119</sup> The Illinois Supreme Court had applied the Act of 1874 without question in 1880<sup>120</sup> and declared it constitutional in 1887, in

*per Reports Are Read*, CHI. TRIB., Sept. 6, 1889, at 4; *A Lenient Judge*, CHI. TRIB., Sept. 8, 1889, at 9; *The Law Exalts Common Sense*, ATL. CONST., Oct. 6, 1889, at 50; *Perversion of Jury Law*, CHI. TRIB., Oct. 14, 1889, at 4.

116. See Transcripts of Jury Selection, Record on Appeal, *supra* note 85, at Roll 30-5515.

117. *Men with Opinions*, CHI. TRIB., Sept. 4, 1889, at 2. Some jurors were excluded for other reasons, typically because they had religious scruples that would not allow them to impose the death penalty, HUNT, CRIME OF THE CENTURY, *supra* note 9, at 391, or because they admitted they were prejudiced against the Catholic Church, the Clan-na-Gael or secret societies more generally. *A Talesman Excused for Cause*, N.Y. TIMES, Sept. 5, 1889, at 1 (reporting that one prospective juror was dismissed for cause because he belonged to an organization that objected to having Roman Catholics hold political office).

118. *Men with Opinions*, CHI. TRIB., Sept. 4, 1889, at 2. Not all the jurors were rejected because they prejudged the case. Some were rejected because they admitted to bias against the Irish or Roman Catholics, *see, e.g., A Talesman Excused for Cause*, N.Y. TIMES, Sept. 5, 1889, at 1 (W.P. Turner excused for cause when he announced that he was a member of the American League, which had as its “object” preventing “members of the Roman Catholic Church from holding or controlling political offices in this country”), some because they were biased against secret societies. HUNT, CRIME OF THE CENTURY, *supra* note 9, 387.

119. ILL. REV. STAT. ch. 78 ¶ 14 (1874). The statute continued:

*And provided further*, that in a trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes that he can fairly and impartially render a verdict therein, in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement.

*Id.* Other states had similar statutes. See 1 THOMPSON, TRIALS, *supra* note 102, at 77.

120. *Wilson v. Illinois*, 94 Ill. 299, 306-07 (1880).



*Spies v. Illinois*,<sup>121</sup> when it affirmed the verdict in the infamous Haymarket trial.<sup>122</sup>

In *Spies*, the Illinois Supreme Court relied on Chief Justice Marshall's ruling in the trial of Aaron Burr to interpret the Act of 1874.<sup>123</sup> At his trial, Burr's attorneys challenged a number of the potential jurors for cause,<sup>124</sup> arguing that they were so influenced by rumors and reports about Burr's alleged treason that they could not serve as the impartial jurors guaranteed by the United States Constitution.<sup>125</sup> As Burr noted, shortly after the argument, the constitutional guarantee was intended to make sure that the jurors who heard his case began the trial with the presumption of innocence, and jurors who began the trial with the opinion that he was guilty were unable to do that.<sup>126</sup>

Marshall held that "[t]hose strong and deep impressions, which will close the mind against the testimony which may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to a juror."<sup>127</sup> He added that a weakly held opinion was not enough to allow a challenge for cause if the opinion was weak enough that the prospective juror was able to keep his mind open to the evidence as he heard it.<sup>128</sup> In *Spies*, the Illinois Supreme Court turned that rule on its head.<sup>129</sup> Where Marshall declared that the strength or weakness of the opinion depended on whether or not the prospective juror appeared willing and able to view all evidence equally,<sup>130</sup> without regard to the source of the opinion, the *Spies* court held that so long as the prospective juror's views were a result of news reports and he stated that he would be willing to have his mind changed by evidence, his opinions were weak and not grounds to challenge him for cause.<sup>131</sup>

121. 12 N.E. 865, 991-92 (1887).

122. See generally JAMES GREEN, DEATH IN THE HAYMARKET (2006).

123. *Spies*, 12 N.E. at 992 (citing 1 REPORTS OF THE TRIAL OF COLONEL AARON BURR 415 (1808) [hereinafter BURR'S TRIALS]). The case arose in the circuit court of the United States in Richmond Virginia, where Marshall was sitting as a trial judge as part of his circuit duties. BURR'S TRIALS, at 415.

124. BURR'S TRIALS, *supra* note 123, at 385-427 (containing the arguments of counsel and Marshall's ruling).

125. BURR'S TRIALS, *supra* note 123, at 386-39' (stating the arguments of Martin, attorney for Burr).

126. BURR'S TRIALS, *supra* note 123, at 425.

127. BURR'S TRIALS, *supra* note 123, at 416.

128. BURR'S TRIALS, *supra* note 123, at 416.

129. *Spies v. Illinois*, 12 N.E. 865, 992 (1887).

130. BURR'S TRIALS, *supra* note 123, at 416.

131. *Spies*, 12 N.E. at 992.

Judge McConnell tried to stay true to Marshall's vision in the Cronin Trial. Not quite a week into jury selection, he advised the lawyers and prospective jurors that:

It seems to me that it is not compatible with human nature if men do not have a sort of bias. Often, in cases where men are indicted, jurymen naturally enter upon the case with the presumption that the state has not taken up men and brought them into court and indicted them without . . . some reason for it. In other words, the mere matter of indictment is likely to create in many instances a slight bias in the mind of a juror. The question is, whether the juror can enter upon the legal presumption that the defendants are innocent until they are proven guilty, and where the prejudice is so strong that they cannot give the defendants a fair trial, they are, of course, disqualified.<sup>132</sup>

And he made the same point at several moments during voir dire.<sup>133</sup>

But as *Spies* made clear, that was not the standard applied by the Illinois Supreme Court. In *Sullivan v. City of Oneida*<sup>134</sup> that court explained that the "law ought not to be guilty of such harshness and absurdity as to require a man to prove his innocence when there is not even the suspicion

132. *Jurors in the Cronin Case*, CHI. TRIB., Sept. 7, 1889, at 4.

133. See, e.g., Examination of Kersten, Record on Appeal, *supra* note 85, at roll 30-5516, p. 97; *Coughlin v. Illinois*, 33 N.E. 1, 4-5 (1893). Judge McConnell's examination of one prospective juror stated:

Perhaps I could state it in this way to find out your attitude in this matter: These men, according to the law, are presumed to be innocent, for the reason that they have had no trial. There has been no sworn evidence against them. They have never seen the witnesses against them. The witnesses, when they were testifying, if they have ever testified anywhere, have never been cross-examined. It has been an ex parte examination before the grand jury, and it resulted in an accusation, nothing but an accusation, not estimated in the law beyond that, except as a mere charge, a formal pleading. This is the first time these men have ever been brought to trial, and they are to be tried now upon the evidence of sworn witnesses, brought here to confront them. We want to try the case also before twelve fair men, men who are willing to act upon that presumption of innocence, that is to say, will consider them innocent all through this case until there is evidence enough to convict them; who will listen to the state's evidence and listen to the defendants' evidence fairly and impartially, and bring in a verdict warranted by the evidence, and based solely upon the evidence. Could you sit here as one of the twelve men, and do that kind of thing?

*Coughlin*, 33 N.E. at 4-7.

134. 61 Ill. 242 (1871) (involving the violation of a city charter and ordinances).

of guilt.”<sup>135</sup> In *Spies*, the court added a corollary: where there was a suspicion, however, it was all right for a prospective juror to ask that the defendant disprove guilt.<sup>136</sup>

#### B. OTHER OBJECTIONS TO THE PROCESS

Defense counsel generally had no complaints about Judge McConnell’s treatment of the presumption of innocence, but they did have other problems with jury selection. Midway through the process the defense objected to the venire.<sup>137</sup> On the first day of jury selection, the court exhausted the regular panel of twenty four assigned to the case<sup>138</sup> and began to call a series of special venires whose members were selected by Canute Mattson, the Cook County Sheriff.<sup>139</sup> Ultimately, the court entered over thirty orders authorizing special venires before jury selection was complete.<sup>140</sup>

Defense counsel particularly objected to the demographics of the special venires Sheriff Mattson produced, noting that the most recent school census<sup>141</sup> suggested that there were nearly six times as many people with Irish surnames in Chicago as there were people with English surnames. The proportion in the jury pool was nearly reversed, with five men with an English surname for every man whose last name sounded Irish.<sup>142</sup> Defense counsel also objected to the fact that members of the jury pool were predominantly Protestant, even though a large proportion of Chicago’s population was Roman Catholic, and that the economic class of the prospective

135. *Sullivan*, 61 Ill. at 245.

136. *Spies*, 12 N.E. at 991 (citing *Wilson v. Illinois*, 94 Ill. 299, 305-06 (1880)).

137. Challenge to the Array, filed September 16, 1889, Record on Appeal, *supra* note 85, at Roll No. 30-5518. See also HUNT, CRIME OF THE CENTURY, *supra* note 9, at 393.

138. ILL. REV. STAT. ch. 78 ¶ 12 (1874) (providing for a regular panel of twenty-four).

139. August 30, 1889 Order Directing the Calling of a Special Venire of 50 men from Cook County. Record on Appeal, *supra* note 85, Roll. No. 30-5518. See also *Farmers for the Cronin Jury*, N.Y. TIMES, Sept. 2, 1889, at 1 (reporting that the special venire was ordered without notice to the attorneys for the defendants); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 393; ILL. REV. STAT. ch. 78 ¶ 12-13 (1874) (outlining methods for obtaining prospective jurors once the regular panel was exhausted).

140. Record on Appeal, *supra* note 85, at Roll No. 30-5518 (containing the orders for special venires entered by Judge McConnell. The first order was entered on August 30, 1889, the last on October 22, 1889).

141. 22 CHICAGO BOARD OF EDUCATION, REPORT OF THE SCHOOL CENSUS (1888) (reporting that the Board of Education produced a school census every two years).

142. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 393 (reporting that defense counsel argued that the school census showed Chicago had a population of 114,000 Irish compared to 20,000 of English ancestry). Cf. *Proper Questions*, CHI. TRIB., Sept. 3, 1889, at 1 (reporting that two of the defense attorneys objected to the ethnic mix of the venire even earlier).

jurors seemed slanted towards men in certain occupations.<sup>143</sup> Finally, the defense argued that the special venire was being called too often, since according to the statute the regular panel should be relied on every two weeks and the special venire called only after those regular panels were exhausted.<sup>144</sup>

The defense's claims were substantiated by the accounts in the press, which reported that Sheriff Mattson was targeting particular people—specifically those who lived outside Chicago—when he made up the special venire pool.<sup>145</sup> The account in the *New York Times* added that the State's Attorney was using a combination of Chicago police officers and Pinkerton detectives to investigate prospective jurors listed on the Sheriff's returns before they were brought into court.<sup>146</sup>

But the objections failed.<sup>147</sup> Calling a special venire was left to the discretion of the court,<sup>148</sup> and while common law allowed challenges to the jury pool (known as challenges to the array),<sup>149</sup> the rule was that it was no grounds to challenge the array because the members of the venire were of a different economic class from the defendants or had different religious beliefs.<sup>150</sup> Judge McConnell denied the motion.<sup>151</sup> However, he did make adjustments to the process on several occasions: Beginning on October 1, McConnell removed the Sheriff of Cook County from the process, appointing special bailiffs to gather the members of the special venires from that point on.<sup>152</sup> Beginning a few days later, on October 4, the returns on the orders directing the gathering of a special venire indicated the addresses of the members of the venire, making it easier to determine whether prospec-

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143. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 393.

144. *The Cronin Murder Trial*, N.Y. TIMES, Sept. 17, 1889, at 5.

145. *Farmers for the Cronin Jury*, N.Y. TIMES, Sept. 2, 1889, at 1 (reporting that the venire being brought in on the second day of trial was coming from various parts of the county); *Jurors in the Cronin Case*, CHI. TRIB., Sept. 2, 1889, at 4 (reporting that the venire included a number of "farmers" from outside the city).

146. *Farmers for the Cronin Jury*, N.Y. TIMES, Sept. 2, 1889, at 1.

147. Ruling denying the challenge to the array, September 16, 1889, Record on Appeal, *supra* note 85, at Roll No. 30-5518.

148. ILL. REV. STAT. ch. 78 ¶ 12-13 (1874) (outlining methods for obtaining prospective jurors once the regular panel was exhausted).

149. 1 THOMPSON, TRIALS, *supra* note 103, at 28-29.

150. 1 THOMPSON, TRIALS, *supra* note 103, at 31.

151. Ruling Denying the Challenge to the Array, September 16, 1889, Record on Appeal, *supra* note 85, at Roll No. 30-5518. See also HUNT, CRIME OF THE CENTURY, *supra* note 9, at 394.

152. Returns on Orders Directing the Calling of Special Arrays, Record on Appeal, *supra* note 85, at Roll No. 30-5518 (returns are made in the name of various special bailiffs); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 394.

tive jurors came from Cook County or Chicago.<sup>153</sup> In the end, the jury selected to hear the trial contained no men with Irish surnames and no Catholics.<sup>154</sup> Accounts which reported that the State was using its peremptory challenges to remove Irishmen from the panel suggest that was no accident.<sup>155</sup>

### C. CONDUCTING VOIR DIRE

Others, including the State's Attorney, complained that the trial judge did not exercise sufficient control over the voir dire.<sup>156</sup> The *Chicago Tribune* leapt on this objection and claimed that Illinois' practice, which allowed lawyers to ask questions, was inconsistent with the common law.<sup>157</sup> Two other Illinois judges, Elliott Anthony and Oliver Horton, agreed with that position,<sup>158</sup> and declared that henceforth they would conduct voir dire in their courtrooms.<sup>159</sup> The *Chicago Tribune* applauded their stance, but expressed grave doubts that other judges would "show equal courage."<sup>160</sup>

To justify his new rule, Judge Horton argued that in other states the power to conduct voir dire was given to the judge,<sup>161</sup> and Judge Anthony asserted that the judge's control over voir dire had been well-established in common law.<sup>162</sup> These claims missed a key point. Under English common law defendants in felony cases had no right to an attorney, so the power was vested in judges on their behalf.<sup>163</sup> In addition, the right of the parties to put

153. Returns on Orders Directing the Calling of Special Arrays, Record on Appeal, *supra* note 84, at Roll No. 30-5518.

154. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 418-19. A list of the jurors, indicating ethnicity, religious affiliation and occupation is at Appendix A to this article.

155. *Farmers for the Cronin Jury*, N.Y. TIMES, Sept. 2, 1889, at 1. ("The defense wants Irishman, and won't take any Germans if it can help it; the State wants a jury of intelligent native-born Americans, and will not have an Irishman among the twelve.")

156. See, e.g., *Perversion of the Jury Law*, CHI. TRIB., Oct. 18, 1889, at 4 (asserting that the Illinois Supreme Court had allowed lawyers to take control of the voir dire process).

157. See, e.g., *Perversion of Jury Law*, CHI. TRIB., Oct. 14, 1894, at 4 (asserting that the common law was being ignored).

158. *Jury Reform—How Not to Get It*, CHI. TRIB., Jan. 16, 1890, at 4 (Judge Horton); *Perversion of Jury Law*, CHI. TRIB., Oct. 14, 1889, at 4 (Judge Anthony).

159. *Let the Judges Examine the Venire Men*, CHI. TRIB., Jan. 11, 1890, at 4; *Jury Reform—How Not to Get It*, CHI. TRIB., Jan. 16, 1890, at 4.

160. *Jury Reform—How Not to Get It*, CHI. TRIB., Jan. 16, 1890, at 4 (urging the legislature to pass a law mandating that judges conduct voir dire). See also *Judges and Jury Selection*, CHI. TRIB., Apr. 14, 1888, 4 (complaining about lawyers doing voir dire).

161. *Judge Horton on Selecting Jurors*, CHI. TRIB., Feb. 17, 1890, at 4 (stating Horton's assertion that he had a duty to take the power back, because he had a duty to protect jurors from extensive questioning).

162. *Perversion of Jury Law*, CHI. TRIB., Oct. 14, 1889, at 4 (adding that the Illinois Supreme Court had allowed this common law power to be taken over by lawyers).

163. See, e.g., WILLIAM BLACKSTONE, 4 COMMENTARIES 348-49.

questions to prospective jurors was well-established in American law.<sup>164</sup> Seymour Davis Thompson, in his two-volume study of American trials noted that although “[t]he court may conduct the examination [of prospective jurors] for its own information, . . . this cannot be done so as to deprive a party of his right to re-examination.”<sup>165</sup>

Regardless, according to his critics Judge McConnell allowed the defense counsel to manipulate the prospective jurors through their questions.<sup>166</sup> In fact, he did rein in voir dire, repeatedly.<sup>167</sup> At the close of the first day of jury selection, the judge expressed distress with the scope of the questions defense counsel asked.<sup>168</sup> The next morning, some of the attorneys for the defendants submitted a list of ten questions, with subparts, that they insisted they were entitled to ask.<sup>169</sup> For the rest of the day the attorneys argued the propriety of those questions, and at day’s end the court ruled that the attorneys were limited to five questions that would elicit the prospective jurors’ perceptions of the crime.<sup>170</sup> He then gave them those five questions.<sup>171</sup> In addition, Judge McConnell interjected himself into the voir dire on several occasions, to clarify answers,<sup>172</sup> to stop repetitive questioning,<sup>173</sup> and to forestall inappropriate examination.<sup>174</sup>

## V. DELIBERATIONS

The jury was finally selected and sworn on October 22, 1889. Over the next month and a half, the parties put on their evidence. The bulk of the time was spent by the prosecution, which closed its case in chief on No-

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164. 1 THOMPSON, TRIALS, *supra* note 103, 99-100.

165. 1 THOMPSON, TRIALS, *supra* note 103, at 101.

166. *Perversion of the Jury Law*, CHI. TRIB., Oct. 18, 1889, at 4. *See also Ex-President Hayes on American Juries and Crime*, TIMES OF LONDON, Jan. 10, 1890, at 10 (making the same point and citing the Cronin case as an example of the problem).

167. *Jurors in the Cronin Case*, CHI. TRIB., Sept. 1, 1889, at 4.

168. *Fighting for Jurors*, N.Y. TIMES, Sept. 3, 1889, at 1; *No Progress in the Cronin Case*, CHI. TRIB., Sept. 3, 1889, at 4.

169. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 387.

170. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 387-88.

171. *The Cronin Trial*, N.Y. TIMES, Sept. 4, 1889, at 1. These questions are reprinted in Appendix C to this article. *See generally* 1 THOMPSON, TRIALS *supra* note 103, at 101.

172. *See, e.g.*, Examination of Lathrop, Record on Appeal, *supra* note 85, at roll 30-5515, p. 71; Examination of Clark, Record on Appeal, *supra* note 85, at roll 30-5516, p. 4358.

173. *See, e.g.*, Examination of Bryan, Record on Appeal, *supra* note 85, at roll 30-5516, p. 1382.

174. *See, e.g.*, Examination of Lillibridge, Record on Appeal, *supra* note 85, at roll 30-5515, p. 49; Examination of Clark, Record on Appeal, *supra* note 85, at roll 30-5516, p. 1354.

vember 16.<sup>175</sup> The defense put on some alibi witnesses, and closed on November 25.<sup>176</sup> Then, after the State put on some brief rebuttal evidence,<sup>177</sup> the closing arguments began on November 29 and lasted through December 13.<sup>178</sup> The case went to the jury the next day, and much to the chagrin of the newspapers covering the case,<sup>179</sup> the jurors did not reach a verdict on that first night. Ultimately, it only took three days for the jury to reach its verdict,<sup>180</sup> but the consensus was that the jurors took far too long and the verdict was far too lenient.<sup>181</sup>

News accounts blamed a single recalcitrant juror—John Culver—and offered several explanations for his lack of cooperation: he was a religious crank,<sup>182</sup> a pigheaded Scot,<sup>183</sup> and had taken the jury duty on simply because he wanted the income.<sup>184</sup> The State's Attorney publicly denounced Culver for what he characterized as his obstruction of justice.<sup>185</sup> But ac-

175. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 455.

176. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 461.

177. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 462-63.

178. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 468.

179. *No Verdict Reached*, CHI. TRIB., Dec. 14, 1889, at 1.

180. *Murder, Arrests and Trials*, CHIC. TRIB., Mar. 9, 1894, at 8 (recounting the events and time line of the 1893 trial).

181. *No Verdict Reached*, CHI. TRIB., Dec. 14, 1889, at 1 (indicating surprise with the delay); *The Cronin Jury Still Out*, N.Y. TIMES, Dec. 15, 1889, at 2 (large audience disappointed by lack of verdict); *Cursing Culver*, N.Y. TIMES, Dec. 16, 1889, at 2 (reporting Chicago ready to riot in frustration over delays in the verdict); *Dissatisfied with the Results* N.Y. TIMES, Dec. 17, 1889, at 1 (reporting frustration with the verdict); *English View of It*, N.Y. TIMES, Dec. 17, 1889, at 1 (reporting that one English paper characterized the verdict as surprising); *Editorial*, N.Y. TIMES, Dec. 17, 1889, at 4 (verdict in Cronin case an "outrageous miscarriage of justice"); *The Cronin Murder Trial*, THE TIMES OF LONDON, Dec. 18, 1889, at 5 (reporting that papers in various US cities were outraged by the verdict); *The Obstinate Juror*, CHI. TRIB., Dec. 23, 1889, at 4. *Cf. Coughlin Not Guilty*, CHIC. TRIB., Mar. 9, 1894, at 6 (expressing surprise that the jury in the retrial brought back a verdict in less than 8 hours).

182. *The Obstinate Juror*, CHIC. TRIB., Dec. 23, 1889, at 4 (calling Culver a "crank"). Culver was a member of the Methodist Episcopal church. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 418. *Cf. The Cronin Verdict*, N.Y. TIMES, Dec. 18, 1889, at 4 (suggesting that Culver's problem was that he was a "chuckle-head").

183. *The One Obstinate Juror*, N.Y. TIMES, Dec. 23, 1889, at 4 ("Culver is said to be a Scotch Presbyterian, which may suggest an explanation of the old Scotch rule allowing a verdict to be rendered by a majority of the jury."). Culver's mother had been born in Scotland. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 418.

184. *The One Obstinate Juror*, N.Y. TIMES, Dec. 23, 1889, at 4. That article goes on to note that it had been alleged that Culver had been corrupted. *See also Juror Culver's Suit for Damages*, CHI. TRIB., May 13, 1891, at 2 (reporting Culver's suit against the *Chicago Herald* for allegations that he had been bribed).

185. *What Ailed the Cronin Jury*, CHI. TRIB., Dec. 20, 1889, at 2 (State's Attorney Longenecker denounced the jury's verdict as being "Culverized").

counts of the deliberations published subsequently<sup>186</sup> revealed that he was not the only juror with questions about the State's case.<sup>187</sup>

A. THE UNANIMOUS JURY "PROBLEM"

Culver, who was one of the first jurors chosen, became skeptical of the State's case during jury selection.<sup>188</sup> His skepticism increased as the evidence went on: he confided to one juror that he did not find one of the State's key witnesses, Cronin's landlady, credible, and told others he was not convinced by the State's theory of the crime.<sup>189</sup> Even before deliberations began, the other jurors were hostile to Culver.<sup>190</sup> In an effort to appease him, the jurors agreed to allow him to begin their deliberations (and their vote on the foreman) with a prayer.<sup>191</sup>

Deliberations began with a simple vote on guilt or innocence, and that first ballot was 11-1 in favor of a guilty verdict for all the defendants.<sup>192</sup> In a second vote, Culver was the lone juror voting that the State's theory of the case—that Cronin had been lured to the cottage and killed by some or all of the defendants—was not proved.<sup>193</sup> For the next day, and into the evening, the other jurors argued and pleaded with Culver to find the defendants guilty.<sup>194</sup> When those efforts failed, one of the jurors attacked Culver, knocking him down.<sup>195</sup>

Still, Culver stood firm. The next morning, the pressure to reach a verdict of guilty began again, but slowly, the various positions changed. A vote on the question of the guilt of Coughlin, O'Sullivan, and Burke came out 12-0.<sup>196</sup> A subsequent vote on the guilt of Beggs came out 7-5 in favor of a guilty verdict, a second vote on that question came out 10-2 in favor of finding him not guilty, and a third came out 12-0 in favor of finding him not guilty.<sup>197</sup> The jury then turned to vote on Kunze's guilt and once again hit

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186. *Cronin Jurors Explain*, CHI. TRIB., Dec. 29, 1889, at 4.

187. *Cf. Our Jury System*, N.Y. TIMES, Dec. 21, 1889, at 2 (reporting that one of the jurors claimed he was approached during deliberations by some influential men, who pressured him to find the defendants guilty).

188. *Cronin Jurors Explain*, CHIC. TRIB., Dec. 29, 1889, at 4 (stating he believed in the defendants' likely guilt before that).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Cronin Jurors Explain*, CHIC. TRIB., Dec. 29, 1889, at 4.

195. *Culver Assaulted*, CHIC. TRIB., Dec. 16, 1889, at 1; H.D.M., *That Twelfth Juror*, CHIC. TRIB., Dec. 18, 1889, at 1.

196. *Cronin Jurors Explain*, CHIC. TRIB. Dec. 29, 1889, at 4.

197. *Id.*



an impasse.<sup>198</sup> The first vote was 8-4 in favor of finding him guilty. Subsequent votes indicated some movement, but a continued divide.<sup>199</sup> At someone's suggestion, the juror asked Judge McConnell if they could find Kunze guilty of the lesser charge of manslaughter; he advised them they could, and they quickly voted 12-0 in favor of finding him guilty of manslaughter.<sup>200</sup> They also quickly voted to sentence him to three years in prison.<sup>201</sup>

The jury then returned to the question of sentencing Coughlin, O'Sullivan and Burke.<sup>202</sup> They had two options: death and life in prison. Two rounds of balloting on Sunday revealed divisions.<sup>203</sup> For Burke and Coughlin, the jurors were divided 11-1 in favor of the death penalty, with Culver as the sole vote against death.<sup>204</sup> For O'Sullivan, there were two votes against death, Culver and another man the reports did not name.<sup>205</sup>

The jury took a break for the night, and then began voting and discussing again early Monday morning.<sup>206</sup> Culver began the day by announcing that he was willing to vote to give the three men twenty-five years in prison, but no one else would agree to budge.<sup>207</sup> Over the course of the morning, the jury cast ten ballots. By the last, the vote was 7-5 for life in prison.<sup>208</sup> At that point, the five holdouts who insisted on the death penalty—Marlor, Hall, Bryan, Pierson, and Bontecou—were prevailed upon to change their vote and the next ballot was 12-0 in favor of life in prison.<sup>209</sup> One juror complained that even as Benjamin Clark, the jury foreman, drew up the verdict form, Culver continued to maintain that he believed all the defendants were innocent.<sup>210</sup>

Complaints about the requirement that a jury verdict be unanimous began immediately after the verdict came down<sup>211</sup> and continued for several months.<sup>212</sup> In May 1890, Sigmund Zeisler, a Chicago defense attorney who

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198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* Jurors in Illinois had the power to sentence. *See* *Blevings v. Illinois*, 2 Ill. (1 Scam.) 171, 172 (1835).

202. *Cronin Jurors Explain*, CHIC. TRIB., Dec. 29, 1889, at 4.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Cronin Jurors Explain*, CHIC. TRIB., Dec. 29, 1889, at 4.

209. *Id.*

210. *Id.*

211. *Compelling Jurors to Find a Verdict*, CHIC. TRIB., Dec. 17, 1889, at 4; *The One Obstinate Juror*, N.Y. TIMES, Dec. 23, 1889, at 4.

212. *Ex-President Hayes on American Juries and Crime*, THE TIMES OF LONDON, Jan. 10, 1890, at 10. Actually, the complaints continued for years. *See, e.g., Illinois Association*

first made a name for himself working for the defendants in the Haymarket Trial,<sup>213</sup> wrote an article for *The Forum* explaining that the requirement of a unanimous jury was wrong.<sup>214</sup> His article was a laundry list of the common complaints against the unanimous jury requirement: it gave a stubborn minority the right to block a verdict that the majority of the jurors deemed correct, which was inconsistent with the democratic practices of the country and the rest of the court system.<sup>215</sup> At the same time, he argued, given the diversity of the population, it was unlikely that twelve men from different economic groups, faiths, and educational backgrounds could come to a unanimous decision.<sup>216</sup> The result was that political differences, racial or religious bias, or mere stubbornness on the part of one or two men could block a verdict.<sup>217</sup> The only way to resolve this was a compromise verdict, which led to public frustration with the legal system,<sup>218</sup> or no verdict and a mistrial.<sup>219</sup>

#### B. JURY NULLIFICATION

Judge McConnell began his charge to the jury with the reminder that:

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*for Criminal Justice Completes Crime Survey*, 15 A.B.A. J. 426, 426-27 (1929) (questioning whether the unanimous jury requirement should be abolished).

213. GREEN, DEATH IN THE HAYMARKET, *supra* note 122, at 209-10.

214. Sigmund Zeisler, *Jury Verdicts on Majority Vote*, 9 THE FORUM 209 (May 1890) (he deplored the extent to which the unanimity requirement was continued as a result of deference to historical forces).

215. *Id.* See also William P. Black, *Speech to the Union College of Law (Chicago)*, 16 W. JURIST 511 (1882) (stating that unanimity is inconsistent with the ideal of majority rule).

216. Zeisler, *Jury Verdicts*, *supra* note 214, at 317. Cf. I. N. Stiler, *The Jury Rule of Unanimity: Why it Should be Abrogated*, 1 LAW MAG. LAWYERS AND LAYMEN 135, 136 (1890) (arguing that these differences kept the best men off juries because they knew they could never break through the prejudice of the less intelligent).

217. Zeisler, *Jury Verdicts*, *supra* note 214, at 318. See also *Compelling Jurors to Find a Verdict*, CHI. TRIB., Dec. 17, 1889, at 4 (making the same point using the Coughlin case as evidence of this problem); *The One Obstinate Juror*, N.Y. TIMES, Dec. 23, 1889, at 4 (the same, also using the Coughlin case as an example); *Ex-President Hayes on American Juries and Crime*, THE TIMES OF LONDON, Jan. 10, 1890, at 10 (supporting the same point, also using the Coughlin case as an example). Cf. Ben B. Lindsey, *The Unanimity of Jury Verdicts*, 5 VA. L. REG. 133, 136-37, 144-45 (1899) (arguing that unanimity made bribery cost effective, since only one juror had to be bribed, relying on examples of jury bribing from Chicago); Black, *Speech to Union College*, *supra* note 215 (making the same argument about bribery).

218. Zeisler, *Jury Verdicts*, *supra* note 214, 315-16, 320. Cf. Charles J. Bonapart, *Lynch Law and Its Remedy* 8 YALE L. J. 335, 337 (1899) (lack of public satisfaction with verdicts leads to lynching); *Notes*, 18 AMER. L. REV. 451, 455 (1884) (making the same point).

219. Zeisler, *Jury Verdicts*, *supra* note 214, at 319.

[the] jury are the judges of the law and the fact in this case, and if they can say upon their oaths that they know the law better than the court itself they have the right to do so; but before assaying so solemn a responsibility they should be sure they are not acting from caprice or prejudice, that they are not controlled by their will or wishes, but from a deep and confident conviction that the court is wrong and they are right. Before saying this upon their oaths it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court. If, under all circumstances, they are prepared to say that the court is wrong in its exposition of the law the statute has given them that right.<sup>220</sup>

McConnell's instruction was based on a statute that dated back to the Illinois Criminal Act of 1842.<sup>221</sup> For several commentators, this right lay at the heart of the problems in the *Coughlin* case because it justified the jurors' decisions to acquit Beggs and sentence the others to terms of imprisonment rather than sentence them to death.<sup>222</sup>

The practice was not unique to Illinois,<sup>223</sup> at least nine other states recognized similar rights in statutes or their constitutions.<sup>224</sup> In 1879, the Pennsylvania Supreme Court ruled that the right, which was recognized in the state constitution, was "one of the most valuable securities guaranteed by the Bill of Rights."<sup>225</sup> But the decision of the Pennsylvania Supreme Court

220. Instructions to the Jury, Dec. 13, 1889, Record on Appeal, *supra* note 85, Roll No. 30-5518; *No Verdict Reached*, CHI. TRIB., Dec. 14, 1889, at 1-2 (setting out the entire charge to the jury).

221. ILL. REV. STAT. ch. 38 ¶ 491 ("Juries in all criminal cases shall be judge of the law and the facts."). See also Ill. 17, 1859 Ill. LEXIS 276 (1859); *Wohlford v. Illinois*, 148 Ill. 296, 301 (1894) (reaffirming that principle).

222. *The Cronin Murder Trial*, THE TIMES OF LONDON, Dec. 17, 1889, at 9 (noting this aspect of Illinois law).

223. See generally 1 THOMPSON, TRIALS, *supra* note 103, at 892 and 2 SEYMOUR DWIGHT THOMPSON, A TREATISE ON THE LAWS OF TRIALS IN ACTIONS CIVIL AND CRIMINAL 1504 (1889) [hereinafter 2 THOMPSON, TRIALS].

224. See 2 THOMPSON, TRIALS, *supra* note 223, at 1520-21 (listing Massachusetts, Maine, Indiana, Tennessee, North Carolina, Louisiana, Connecticut, Vermont, and Pennsylvania, in addition to Illinois). Several other states recognized the right in a more limited fashion, restricting the jury's power to find the law to trials of specific crimes—usually prosecutions for libel. See *South Carolina v. Syphrett*, 2 S.E. 624, 626 (1887) (state constitution provides that jurors are judges of the law in prosecutions for libel, citing the South Carolina Constitution, Art. 1, § 8); *Benton et al. v. New Jersey*, 36 A. 1041, 1043 (1897) (jury is judge of law in libel cases, citing the New Jersey Constitution, Art 1, §5). See generally 2 THOMPSON, TRIALS *supra* note 223, at 1452-54 (explaining the history of this particular practice).

225. *Kane v. Pennsylvania*, 89 Pa. 522, 527 (1879).

was roundly criticized by legal scholars like Francis Wharton,<sup>226</sup> and by the late nineteenth century, courts in several of the states that recognized that right had begun to limit it.<sup>227</sup> In Alabama, the Supreme Court ruled that in the absence of an express statutory provision granting jurors the right to be judges of the law and the facts, they were only judges of the facts.<sup>228</sup> In Louisiana, where the right was enshrined in the state constitution,<sup>229</sup> the Supreme Court declared it was reversible error to refuse to instruct the jury that they were judges of the law,<sup>230</sup> but in another case upheld an instruction that told jurors that they were judges of the law and the facts but “were expected to receive the laws given to them by the judge.”<sup>231</sup> In 1890, the Indiana Supreme Court ruled that the failure to instruct a jury that it was the judge of the law and the facts was not reversible error when the instruction was not requested.<sup>232</sup> Additionally, in a series of cases between 1870 and 1885, the Georgia Supreme Court first limited the right,<sup>233</sup> then declared it was no longer a right recognized in the state.<sup>234</sup> Illinois, however, remained more than steadfast in its commitment to the rule.<sup>235</sup> Interestingly, the greatest support for the right came from an unexpected source. While most critics assumed that the rule benefited defendants, in the Cronin Trial the

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226. Francis Wharton, *Disputed Questions of Criminal Law*, 5 S. L. REV. (new series) 352, 363, 364 (1879) (jurors, voting political or racial prejudices, posed the greatest threat to the liberty of defendants). See also Decius S. Wade, *Jurors as Judges in Criminal Cases*, 3 CRIM. L. MAG. 484, 492-93 (1882) (letting jurors judge the law undermined the fundamental principle of common law—precedent).

227. See, e.g., *Massachusetts v Anthes*, 71 Mass. 185, 198 (1855) (Shaw, C.J.) (concluding that allowing jurors to judge the law undermines precedent and threatens individual rights); *Connecticut v. Main*, 69 Conn. 123 (1897); *Vermont v. Burpee*, 65 Vt. 1 (1892).

228. *Washington v. Alabama*, 63 Ala. 135, 136-37 (1879).

229. 2 THOMPSON, TRIALS, *supra* note 223, at 1522.

230. *Louisiana v. Vinson*, 37 La. Ann. 792, 793-94 (1885).

231. *Louisiana v. Tally*, 23 La. Ann. 677, 678 (1871).

232. *Keyes v. Indiana*, 122 Ind. 527, 23 N.E. 1097, (1890). See also R. STAT. IND. § 1823 (1881), and the discussion in 2 THOMPSON, TRIALS, *supra* note 103, at 1525 n.1.

233. *Brown v. Georgia*, 40 Ga. 689, 697 (1870) (jurors are judges of the law and the facts, but they must get the law from the court); *Edwards v. Georgia*, 53 Ga. 428, 432-33 (1874) (not reversible error for court to refuse to instruct jurors that they were the judges of the law); *Hooper v. Georgia*, 52 Ga. 607, 612-13 (1874) (upholding as reasonable an instruction that advised the jury that “it is presumed that the court is familiar with the law, and you ought to pay deference to those opinions and not contemptuously disregard them”).

234. *Ridenhour v. Georgia*, 75 Ga. 382, 385-86 (1885) (rejecting the line of cases that recognized the principle that juries were judges of the law and the facts in criminal cases).

235. See *Spies*, 122 Ill. 1 (1887); see generally Elizabeth Dale, *Not Simply Black or White: Jury Power and the Law in Late -Nineteenth-Century Chicago*, 25 SOC. SCI. HIST. 7 (2001). But see 2 THOMPSON, TRIALS, *supra* note 223, at 152 n.1 (suggesting that some courts in Illinois tried to limit the reach of the rule).

instruction was tendered by the State<sup>236</sup> and Judge McConnell gave it over the objections of the defense.<sup>237</sup>

## VI. ATTEMPTS TO BRIBE THE JURORS

One of the arguments against the unanimous jury requirement was that it encouraged attempts to bribe or influence the jury.<sup>238</sup> Other commentators argued that jury bribing was inevitable because the “best men” refused to serve on juries with the result that juries were made up of poor and working class men, who presumably were more susceptible to bribes.<sup>239</sup>

Those conclusions may be suspect, but there were problems with jury tampering in the Cronin Trial. Just over a month into jury selection,<sup>240</sup> on October 11,<sup>241</sup> one of the men on the venire reported that he had been approached by a bailiff and offered \$1,000 if he got on the jury and voted to acquit the defendants.<sup>242</sup> Judge Horton impanelled a special grand jury to hear evidence concerning this claim.<sup>243</sup> At midnight, the evening of the day the report was made, the special grand jury indicted six men, including two court bailiffs.<sup>244</sup> The charge was trying to bribe prospective jurors and jurors who had already been selected.<sup>245</sup> The next day, the grand jury met again and indicted a clerk working for A.S. Trude, a prominent Chicago defense attorney,<sup>246</sup> as part of the plot.<sup>247</sup> For good measure, the State’s At-

236. Jury Instruction #1, Record on Appeal, *supra* note 85, at roll 30-5518, p. 2707.

237. Jury Instruction #1, Record on Appeal, *supra* note 85, at roll 30-5518, p. 2707 (the notation under the instruction indicates that Coughlin, Burke, and Sullivan objected to the instruction).

238. See discussion, *supra* note 218.

239. *Notes*, 18 AM. L. REV. 451, 455 (1884) (making this argument in the context of a jury bribing scandal in Ohio).

240. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 399.

241. *Cronin Suspects Arrested*, N.Y. TIMES, Oct. 12, 1889, at 1 (reporting that the state’s attorney asked that court be adjourned for the day to investigate an important matter); *Plot Disclosed*, CHI. TRIB., Oct. 12, 1889, at 1 (reporting that trial was adjourned to investigate).

242. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 405-06.

243. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 403. See ILL. REV. STAT. ch. 78 ¶ 19 (providing that a special grand jury could be called when a “judge of any court of record . . . [was] of opinion that public justice require[d] it.”).

244. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 403-04; *Three Confessions*, CHI. TRIB., Oct. 14, 1889, at 1 (recounting the purported confession of one of the bailiffs).

245. *The Cronin Murderers*, N.Y. TIMES, October 14, 1889, at 5 (reporting further investigations into the bribery allegations); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 403-04.

246. THE BENCH AND BAR OF CHICAGO, BIOGRAPHICAL SKETCHES 164-66 (1883).

247. *Put up the Money*, CHI. TRIB., Oct. 15, 1889, at 1; *Trude on the Jury Bribing*, CHI. TRIB., Dec. 24, 1889, at 8; HUNT, CRIME OF THE CENTURY, *supra* note 9, at 408-09 (the clerk worked for A.S. Trude).

torney directed the arrest of two clerks working for Alexander Sullivan's firm, as well,<sup>248</sup> but the grand jury found there was insufficient evidence to indict Sullivan's clerk.<sup>249</sup>

Reports in the press laid blame for the plot on the Clan-na-Gael,<sup>250</sup> and alleged that several of the suspects were members of that organization.<sup>251</sup> The case seemed open and shut to the reporters covering it, especially since this was neither the first, nor the last allegation of jury bribing in late nineteenth-century Chicago.<sup>252</sup> But matters were not as clear-cut as the first reports made out. The indictments by the first, special grand jury, were then superseded by indictments by a second grand jury,<sup>253</sup> yet ultimately, the charges fizzled out. The case against one of the men, Kavanaugh, was dismissed for lack of evidence.<sup>254</sup> Another man, Graham, the law clerk for the attorney Trude, fled the jurisdiction of the court and was never recaptured.<sup>255</sup> The others were never brought to trial.<sup>256</sup>

That was not the only reported attempt to influence the jury. The *New York Times* reported that during the trial and deliberations, several members of the jury were approached by men who tried to influence their votes.<sup>257</sup> One juror, Boutecou, claimed that he was approached by "a prominent man—a very prominent man" who told him to "do [his] duty and hang every one of 'em."<sup>258</sup> The paper also reported that another, unnamed juror

248. *Sullivan to the Front Again*, N.Y. TIMES, Oct. 17, 1889, at 2 (reporting the arrest of Sullivan's clerk and that detectives have Sullivan's house under surveillance); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 409.

249. *The Cronin Murder Case*, N.Y. TIMES, Oct. 18, 1889, at 5 (Sullivan's clerk brought before the special grand jury, refuses to answer questions and asserts that he is being held unlawfully); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 409-10.

250. *Three Confessions*, CHI. TRIB., Oct. 14, 1889, at 1 (tying suspects to the Clan-na-Gael); *Put up the Money*, CHI. TRIB., Oct. 15, 1889, at 1 (the same); HUNT, CRIME OF THE CENTURY, *supra* note 9, at 408. Although the *Chicago Tribune* tried to insinuate that the defense attorneys were involved in the scheme as well, the state's attorney's office rebuffed that argument. *Put up the Money*, CHI. TRIB., Oct. 15, 1889, at 1.

251. HUNT, CRIME OF THE CENTURY, *supra* note 9, at 408.

252. *Jury Bribing in Chicago*, N.Y. TIMES, July 15, 1889, at 2 (reporting that the state's attorney for Cook County estimated that there were 100 authenticated cases of jury bribing); *Jury Bribing in Chicago*, N.Y. TIMES, Mar. 31, 1882, at 2 (another investigation into jury bribing). The problem was not unique to Chicago. See *Notes*, 18 AM. L. REV. 451, 455 (1884) (reporting that a riot in Cincinnati followed a verdict from a jury that was allegedly bribed).

253. *The Indicted Jury-Fixers*, CHI. TRIB., Dec. 24, 1889, at 8 (noting the superseding indictments); *Indicted for Conspiracy*, N.Y. TIMES, Dec. 25, 1889, at 1 (the same).

254. *Kavanaugh Goes Free*, CHI. TRIB., Feb. 20, 1890, at 9; *The Alleged Jury Bribers*, N.Y. TIMES, Feb. 20, 1890, at 3.

255. *Cronin's Murder Unsolved*, N.Y. TIMES, Mar. 11, 1894, at 17.

256. *Id.*

257. *Our Jury System*, N.Y. TIMES, Dec. 21, 1889, at 2.

258. *Id.*

was approached by a friend and told that if the jury did not hang the defendants, all the members of the jury would suffer.<sup>259</sup>

## VII. APPEAL

The record on appeal in the case takes up 2926 pages and fills five microfilm rolls.<sup>260</sup> The appellant's briefs totaled 623 pages,<sup>261</sup> the State's brief added another 233 pages to the mix.<sup>262</sup> There were 46 issues on appeal.<sup>263</sup>

Notwithstanding the accounts that praised the State for its strong case, the Illinois Supreme Court was deeply skeptical about the evidence against the defendants, and it characterized the entire case against the defendants as "purely circumstantial."<sup>264</sup> It noted that the State offered a detailed statement of its claims against the defendants in opening statement, but that "very little, if any, evidence was given at the trial to support [the claims in that statement]."<sup>265</sup>

Yet when it reversed the verdict of the trial court, the Illinois Supreme Court relied on only one of the 46 issues raised by the defendants on appeal, the question of whether the trial judge erred when he refused to excuse some of the jurors for cause.<sup>266</sup> The court concluded that examination of two of the jurors—Bontecou and Clarke—had revealed a view of the defendants' guilt that was too firmly fixed.<sup>267</sup> Neither man was subject to a peremptory challenge, because both were among the last jurors chosen and were picked at a moment when all but one defendant had exhausted his peremptory challenges.<sup>268</sup> Defendants had, however, tried to challenge both for cause, but those efforts were rebuffed by Judge McConnell, who subjected both men to his own voir dire and declared himself satisfied when they each, ultimately indicated that they would try to set their prejudices against the defendants aside.<sup>269</sup> The Illinois Supreme Court ruled that the grudging admissions by the two men were not enough to establish that either juror could be impartial,<sup>270</sup> and added that impartiality had to be estab-

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259. *Id.*

260. Record on Appeal, *supra* note 85.

261. Brief and Argument of the Plaintiff on Appeal, Record on Appeal, *supra* note 85, at 30-5514; Reply Brief, *supra* note 85, at 30-5514 (there are 494 pages in the brief, and 124 pages in the reply brief).

262. Brief of the Defendant in Error, Record on Appeal, *supra* note 85, at 30-5514.

263. Assignment of Errors, Record on Appeal, *supra* note 85, at 30-5515.

264. *Coughlin v. Illinois*, 33 N.E. 1, 2 (1893).

265. *Id.*

266. *Id.* at 4.

267. *Id.* at 15.

268. *Id.* at 4.

269. *Coughlin*, 33 N.E. at 15.

270. *Id.*

lished “before [a juror] is permitted to take the oath,”<sup>271</sup> that is, before a juror could be impaneled.<sup>272</sup> In effect, the court held that the “impartial jury” requirement of the Illinois Constitution<sup>273</sup> established a presumption of innocence and found that neither Clark nor Bontecou respected that constitutional right. In dissent, Justice Magruder condemned the majority opinion for changing the law, noting that the rule set out just six years earlier in *Spies v. Illinois* and affirmed on appeal by the United States Supreme Court,<sup>274</sup> was that the decision to excuse a juror for cause was left to the discretion of the trial judge and would not be reversed on appeal.<sup>275</sup>

### VIII. FAILURES OF REFORM

If the Illinois Supreme Court was inconsistent and uncertain in its treatment of criminal juries, the Illinois General Assembly was not quick to pick up the slack. The objections raised at the various stages of the Cronin Trial were hardly the first calls for jury reform in Illinois: the indefatigable *Chicago Tribune* had been agitating for jury reform since the 1870s, when it called for an end to the requirement of unanimous verdicts<sup>276</sup> and the abolition of the rule that jurors were judges of law.<sup>277</sup> Illinois Governors had been recommending jury reform since the 1860s.<sup>278</sup> The General Assembly considered proposals for jury reform in the early 1880s,<sup>279</sup> and the Illinois State Bar Association debated the issue at the beginning and the end of the decade.<sup>280</sup>

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271. *Id.* at 11 (quoting *Collins v. Illinois*, 48 Ill. 145 (1868)).

272. *Id.*

273. ILL. CONST. OF 1870 art. II, § 9 (1874).

274. *Coughlin*, 33 N.E. at 18 (citing *Spies v. Illinois*, 123 U.S. 131, 179-80 (1887)).

275. *Id.* 33 N.E. at 18-19.

276. *Editorial*, CHI. TRIB., Nov. 24, 1871, at 4 (arguing that the requirement of unanimous verdicts in civil cases was improper); *The Jury System*, CHI. TRIB., Aug. 26, 1875, at 4 (noting that the New York legislature was considering abolishing the requirement of unanimous verdicts in civil and criminal cases, and urging the same for Illinois).

277. *The Law and the Facts*, CHI. TRIB., Dec. 7, 1874, at 4 (calling for the legislature to alter the rule that allows jurors to judge the law and the facts); *Jurors Judging the Law*, CHI. TRIB., Aug. 16, 1882, at 4 (denouncing the practice, calling for reform); *Criminal Law Reform*, CHI. TRIB., Apr. 17, 1882, at 8 (calling for abolition of the law that declares jurors judges of the law and the facts).

278. *See, e.g., Gov. Cullain's Message*, CHI. TRIB., Jan. 6, 1883, at 4 (calling for reform of jury selection process); *see also* Zeisler, *Jury Verdicts*, *supra* note 214, at 309, 312, 316 (quoting Illinois Governor Koerner's call for jury reform in 1869).

279. *Progress of Law Reform*, CHI. TRIB., Mar. 30, 1883, at 4 (reporting on legislators' debate on jury reform); *Criminal Code*, CHI. TRIB., Apr. 13, 1883, at 6 (also reporting on legislative debate on jury reform).

280. *The State Bar*, CHI. TRIB., Jan. 5, 1883, at 12 (Bar Association Annual Meeting featured discussion of the role of the criminal jury); *Illinois Bar*, CHI. TRIB., Jan. 6, 1883, at 6 (more on the same debate); *The Illinois Bar*, CHI. TRIB., Jan. 14, 1885, at 7 (another debate



But notwithstanding that history or the loud calls for reform after the Cronin verdict, little was actually done to change the jury's role in criminal trials in Illinois.<sup>281</sup> Sigmund Zeisler suggested one reason for that failure when he lamented that the pressure of history seemed to thwart reform— Illinois lacked the political will to turn its back on the traditions of the Anglo-American common law.<sup>282</sup> At the same time, reforms were stymied because leaders of the Illinois bar—lawyers and judges alike—believed that the common sense of jurors provided a valuable antidote to excessive legalism.<sup>283</sup> As Judge Hawes, of the Circuit Court of Chicago, put it in 1884:

What the law asked the jury to do was simply to consider the evidence brought before them in a common-sense way and not take for granted either the guilt or innocence of the accused, but to arrive at one of the other conclusions by an impartial weighing of the opposing evidence brought before them. Jurors were not advocates either of the State or of the accused, but of justice. *They were not to be guided by the technicalities* of the law; not to mistake justice as a piece of intricate machinery, devised for the escape of criminals, but to follow their own good judgment and be guided by those instincts of right which guided them in the every-day affairs of life. Their province was to discover guilt, not to furnish it a loop-hole for escape. They were not meant as the almoners of mercy, but as the administrators of justice.<sup>284</sup>

It was that sort of attitude that led prominent members of the bar to endorse the idea that jurors should retain the power to judge the law,<sup>285</sup> thus helping prevent jury reform.

Reform did happen, but not quickly. Just before the retrial of Coughlin in September 1893, the General Assembly passed a law that abolished the

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by the ISBA on criminal law reform that touches on the role of the jury); *To Amend the Present Jury System*, CHI. TRIB., Jan. 15, 1890, at 12 (ISBA again discusses jury reform).

281. See *infra* notes 284-294.

282. Zeisler, *Jury Verdicts*, *supra* note 214, at 314-15.

283. DALE, *RULE OF JUSTICE*, *supra* note 69, at 105-06. Cf. Anon., *Trial by Jury*, 3 S. L. REV. (new series) 903, 914 (1877-1878) (making the same point).

284. *Notes*, 18 AM. L. REV. 451, 487 (1884) (italics in original). See also [Judge] Joseph Gary, *The Chicago Anarchists of 1886: The Crime, the Trial, and the Punishment*, 45 THE CENTURY MAG. 803 (1893) (arguing for the importance of the common-sense view of justice jurors brought to cases).

285. DALE, *RULE OF JUSTICE*, *supra* note 69, at 64.

practice of calling special venires.<sup>286</sup> But that was the last reform for many years. The statutory provision that allowed jurors to nullify the law, substituting their judgment for that of the judge, remained in effect until the Illinois Supreme Court determined it was unconstitutional in *People v. Bruner*,<sup>287</sup> decided in 1931. The law was subsequently changed to reflect that decision, and now states that jurors are judges of the facts.<sup>288</sup> The principle that judges, not lawyers, should control voir dire was endorsed by Judge Sample of the Appellate Court in 1894,<sup>289</sup> but was not codified until the Illinois Supreme Court established Supreme Court Rule 24-1<sup>290</sup> in the late 1950s,<sup>291</sup> and then declared that rule constitutional in 1959.<sup>292</sup> Jurors in Illinois continued to impose sentence, in addition to determining guilt or innocence, until the 1980s,<sup>293</sup> when the law changed to limit the jury's role to entering a verdict.<sup>294</sup> And even though the Illinois Association for Criminal Justice suggested that the unanimity requirement be abolished in criminal cases in 1926,<sup>295</sup> the rule that verdicts in criminal trials be unanimous remains on the books to this day.<sup>296</sup>

Notwithstanding the calls for jury reform, as the nineteenth century turned into the twentieth, Chicago, and the Illinois court system more gen-

286. *Economy Results from Jury Reform*, CHI. TRIB., Sept. 26, 1893, at 14 (reporting that the new law was on the books and that the Sheriff of Cook County, Mattson, who had assembled the special venires in the first Coughlin trial, was pleased with the reform).

287. *People v. Butler*, 343 Ill. 146, 155 (1931) (citing *Massachusetts v. Anthes*, 71 Mass. 185 (1835)).

288. 725 ILCS 5/115-4(a) (2002).

289. *Amending Criminal Procedure*, CHI. TRIB., Dec. 22, 1894, at 12.

290. This is now Illinois Supreme Court Rule 234.

291. The current rule provides:

The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching upon their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature and extent of the damages. Questions shall not directly or indirectly concern matters of law or instructions. The court shall acquaint prospective jurors with the general duties and responsibilities of jurors.

292. *People v. Lobb*, 161 N.E.2d 325, 331-32 (Ill. 1959).

293. Jenia Iontchava, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 330 n. 97. See also Adriann Lanni, *Note: Jury Sentencing*, 108 YALE L.J. 1775 (1999).

294. 725 ILCS 5/115-4(j) (2002).

295. *Illinois Association for Criminal Justice Completes Crime Survey*, 15 A.B.A. J. 426, 426-27 (1929).

296. 725 ILCS 5/115-4(o) (2002). See also *People v. Hudson*, 526 N.E.2d 164 (1st Dist. 1987). The law does, however, now permit a defendant to waive a twelve person jury. See *People v. Barrier*, 834 N.E.2d 616 (3d Dist. 2005).

erally, just was not ready for it. That helped make plea agreements an attractive option.

#### IX. CONCLUSION

As reaction and response to the outcome in the Cronin Trial suggests, the late nineteenth century was a period of great ambivalence about the criminal jury in Chicago and Illinois. On one hand, people of all political persuasions, from the conservative pro-business *Chicago Tribune* to the socialist Sigmund Zeisler, who helped defend the Haymarket anarchists, agreed the jury reform was sorely needed. On the other, lawyers and judges and other leaders of the bar resisted those reforms. The result was a volatile mix in a criminal justice system dominated by the idea that jurors could take the law into their own hands. That made criminal jury trials a gamble for both the State and the defense. That factor seems to have influenced the rise of plea agreements in the city's felony courts.