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THE RACIAL ORIGINS OF MODERN CRIMINAL PROCEDURE

*Michael J. Klarman**

The constitutional law of state criminal procedure was born between the First and Second World Wars. Prior to 1920, the Supreme Court had upset the results of the state criminal justice system in just a handful of cases, all involving race discrimination in jury selection.[1] By 1940, however, the Court had interpreted the Due Process Clause of the Fourteenth Amendment to invalidate state criminal convictions in a wide variety of settings: mob-dominated trials, violation of the right to counsel, coerced confessions, financially-biased judges, and knowingly perjured testimony by prosecution witnesses.[2] In addition, the Court had broadened its earlier decisions forbidding race discrimination in jury selection in ways that made it practically as well as theoretically possible to establish equal protection violations in that context.[3]

Altogether, the Supreme Court decided six landmark state criminal procedure cases during the interwar period. Four of these cases involved black defendants from southern states. This Article contends that the linkage between the birth of modern criminal procedure and southern black defendants is no fortuity. For the Court to assume the function of superintending the state criminal process required a departure from a century and a half of tradition and legal precedent, both grounded in federalism concerns. The Justices were not prepared to embark on such a novel enterprise in cases of marginal unfairness — where the police had interrogated a suspect a bit too vigorously or permitted defense counsel a little less time than optimal for preparing a case. On the contrary, the Court was willing to take this leap only when confronted with cases in which defendants were brutally tortured into confessing or the appointment of defense counsel in a capi-

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1. *See* Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1900); Neal v. Delaware, 103 U.S. 370 (1880); Strauder v. West Virginia, 100 U.S. 303 (1879).

2. *See* Brown v. Mississippi, 297 U.S. 278 (1936) (coerced confessions); Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam) (perjury); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (financially biased judge); Moore v. Dempsey, 261 U.S. 86 (1923) (mob-dominated trial).

3. *See* Norris v. Alabama, 294 U.S. 587 (1935).

tal case was a complete sham. Such flagrant injustices were not frequent occurrences in the United States during the 1920s and 1930s — except in the South, in cases involving black defendants charged with serious interracial crimes, usually rape or murder.

Part I of this Article makes three related points about these egregious exemplars of Jim Crow justice, which provided the occasion for the birth of modern criminal procedure. First, the southern state appellate courts and the United States Supreme Court were operating on the basis of different paradigms when they evaluated the fairness of these criminal trials. For the southern courts, the simple fact that these defendants enjoyed the formalities of a criminal trial, rather than being lynched, represented a significant advance over what likely would have transpired in the pre-World War I era. For the United States Supreme Court, on the other hand, criminal trials were supposed to be about adjudicating guilt or innocence, not simply avoiding a lynching. Second, because these southern criminal trials were so egregiously unfair, public opinion in the nation generally supported the Supreme Court's interventions. Thus, these early criminal procedure cases hardly represent the sort of countermajoritarian judicial decisionmaking one often associates with landmark criminal procedure decisions such as *Mapp* or *Miranda*.[4] Third and finally, it is possible that the southern state courts themselves would have intervened to rectify the obvious injustices involved in these cases had the circumstances been a little different. Southern courts in the post-World War I period were becoming more committed to norms of procedural fairness, even in cases involving black defendants charged with serious interracial crimes. Yet, in cases that aroused outside criticism of the South or that posed broader challenges to the system of white supremacy, the southern state courts regressed. Cases that might never have reached the United States Supreme Court a decade or two earlier slipped through the state system uncorrected, thus providing the occasion for landmark criminal procedure rulings.

Part II evaluates the impact of these Supreme Court decisions, in terms of both the precise issues involved (e.g., black service on juries) and the general treatment of blacks in the southern criminal justice system. It turns out that none of these rulings had a very significant direct impact on Jim Crow justice. For example, few blacks sat on southern juries as a result of *Norris v. Alabama*, and black defendants continued to be tortured into confessing, notwithstanding *Brown v. Mississippi*. This Part explores some of the factors that explain the general failure of these Supreme Court decisions to affect the actual treatment of black criminal defendants in the South. Yet, Court decisions also can have more intangible consequences. This Part suggests

4. Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

that these criminal procedure rulings may have indirectly contributed to the modern civil rights movement by educating blacks about their rights, mobilizing protest in the black community, and rallying support among sympathetic whites who were horrified by revelations of Jim Crow practices at their worst.

Part III connects these criminal procedure decisions to broader themes in constitutional and civil rights history, identifying some tentative lessons regarding the nature and consequences of Supreme Court constitutional decisionmaking and the dynamics through which American race relations have changed over time.

I. FOUR LANDMARK CRIMINAL PROCEDURE CASES

Four of the landmark criminal procedure cases of the interwar period involved southern black criminal defendants convicted and sentenced to death after egregiously unfair trials. In *Moore v. Dempsey*,[5] the Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to forbid criminal convictions obtained through mob-dominated trials. In *Powell v. Alabama*,[6] the Court ruled that the Due Process Clause requires state appointment of counsel in capital cases and overturned convictions where defense counsel had been appointed the morning of trial. In *Norris v. Alabama*,[7] the Court reversed a conviction under the Equal Protection Clause where blacks had been intentionally excluded from juries. To reach that result, the Court had to revise the critical "subconstitutional"[8] rules that previously had made such claims nearly impossible to prove. In *Brown v. Mississippi*,[9] the Court construed the Due Process Clause to forbid criminal convictions based on confessions extracted through torture.

These four decisions arose from three distinct episodes. In *Moore*, six black defendants appealed death sentences imposed for a murder allegedly committed in connection with the infamous race riot in Phillips County, Arkansas in the fall of 1919.[10] Phillips was a typical deep South cotton county with a black majority of approximately three-to-one. According to the local black community, the cause of the

5. 261 U.S. 86 (1923).

6. 287 U.S. 45 (1932).

7. 294 U.S. 587 (1935).

8. By "subconstitutional" rules, I mean not the substantive liability standards, but rather the all-important rules bearing on standards of proof, standards of appellate review, and access to federal court. For a fuller discussion, see Michael J. Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303, 376-78 [hereinafter Klarman, *Plessy*].

9. 297 U.S. 278 (1936).

10. The most detailed treatment of *Moore* is RICHARD C. CORTNER, A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES (1988) [hereinafter CORTNER, MOB]. A briefer description appears in O.A. Rogers, Jr., *The Elaine Race Riots of 1919*, 19 ARK. HIST. Q. 142 (1960).

racial altercation that culminated in the *Moore* litigation was the brutal suppression by whites of an effort by black sharecroppers after World War I to form a tenant farmers' union and to seek legal redress for their landlords' peonage practices. The white community, on the contrary, charged that the cause of the conflagration was a black conspiracy to murder white planters throughout the county. An initial altercation in which whites shot into a black union meeting at a church and blacks returned the gunfire, killing a white man, quickly escalated into mayhem. Marauding whites, some of whom flocked to Phillips County from adjoining states and enjoyed the assistance of federal troops ostensibly employed to quell the disturbance, went on a rampage against blacks, tracking them down through the rural county, and killing (on one estimate) as many as 250 of them. Seventy-nine blacks (and no whites) were prosecuted as a result of the riot; twelve received the death penalty for murder; and six were involved in the appeal to the United States Supreme Court in *Moore v. Dempsey*. The Court reversed their convictions on the ground that mob-dominated trial proceedings violated the Due Process Clause.

The second and third race-based criminal procedure cases of the interwar period, *Powell v. Alabama* and *Norris v. Alabama*, both arose out of the famous Scottsboro Boys episode.[11] Nine black youths, ranging in age from thirteen to twenty, impoverished, illiterate, and transient, were charged with raping two young white women, alleged to be prostitutes, on a freight train in northern Alabama in the spring of 1931. They were tried in a mob-dominated atmosphere, and eight of the defendants received the death penalty. The state supreme court reversed one of these death sentences on the ground that the defendant was too young to be executed under state law and affirmed the other seven. The United States Supreme Court twice reversed the Scottsboro Boys' convictions — the first time on the ground that they had been denied the right to counsel, and the second time on the ground that blacks had been intentionally excluded from the grand jury that indicted them and the trial jury that convicted them.

Fourth and finally, in *Brown v. Mississippi* the Supreme Court reversed the death sentences of three black sharecroppers convicted of murdering their white landlord.[12] The principal evidence against the defendants was their own confessions, extracted through torture. The Supreme Court ruled that convictions so obtained violated the Due Process Clause of the Fourteenth Amendment.

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11. For extensive treatment of the Scottsboro Boys episode, see DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 1979), and JAMES GOODMAN, STORIES OF SCOTTSBORO (1994).

12. The most complete treatment is RICHARD C. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND *BROWN V. MISSISSIPPI* (1986) [hereinafter CORTNER, *BROWN*].

These four cases arose out of three quite similar episodes. Southern black defendants were charged with serious crimes against whites — either rape or murder. All three sets of defendants nearly were lynched before their cases could be brought to trial. In all three episodes, mobs comprised of hundreds or even thousands of whites surrounded the courthouse during the trial, demanding that the defendants be turned over for a swift execution. No change of venue was granted in these cases (except in the retrial of the Scottsboro Boys). Lynchings were avoided only through the presence of state militiamen armed with machine guns surrounding the courthouse. There was a serious doubt — not just with the aid of historical hindsight, but at the time of the trial — as to whether any of the defendants was in fact guilty of the crime charged. The defendants in *Moore* and *Brown* were tortured into confessing. In all three cases, defense lawyers were appointed either the day of or the day preceding trial, with no adequate opportunity to consult with their clients, to interview witnesses, or to prepare a defense strategy. Trials took place quickly after the alleged crimes in order to avoid a lynching — less than a week afterward in *Brown*, twelve days in *Powell*, and a month in *Moore*. The trials were completed within a matter of hours (forty-five minutes in *Moore*), and the juries, from which blacks were intentionally excluded in all three cases, deliberated for only a matter of minutes before imposing death sentences.[13]

Prior to *Moore v. Dempsey*, the Supreme Court had reversed state criminal convictions on federal constitutional grounds in only a handful of cases involving race discrimination in jury selection.[14] In a series of prior cases, the Court had denied that the Fourteenth Amendment converted the criminal procedure protections of the federal Bill of

13. On Scottsboro, see CARTER, *supra* note 11, chs.1-2; GOODMAN, *supra* note 11, chs.1-2. On *Moore*, see CORTNER, MOB, *supra* note 10, ch.1. On *Brown*, see CORTNER, *BROWN*, *supra* note 12, chs.1-2. The Scottsboro Boys certainly were innocent of the crimes charged, as revealed in a subsequent recantation by one of the alleged victims. Their innocence should have been reasonably clear at the trial both from the medical evidence and from the conflicting testimony of the prosecution's witnesses. *See* Brief for Petitioners at 28-30, Powell v. Alabama, 287 U.S. 45 (1932) (Nos. 98-100) [hereinafter *Powell* Petitioners' Brief], *reprinted in* 27 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 291, 324-26 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS]; CARTER, *supra* note 11, at 27-30, 227-28, 232. The *Brown* defendants possibly were innocent, and the State surely lacked sufficient evidence to convict them apart from their tortured convictions. *See* Brown v. State, 161 So. 465, 471 (Miss. 1935) (Griffith, J., dissenting). The *Moore* defendants at most were guilty of being present when the lethal shots were fired, and not even clearly of this. *See* CORTNER, MOB, *supra* note 10, at 124-25. For a very similar case that never reached the Supreme Court, see Downer v. Dunaway, 53 F.2d 586 (5th Cir. 1931). For fascinating background on *Downer*, see Anne S. Emanuel, *Lynching and the Law in Georgia Circa 1931: A Chapter in the Legal Career of Judge Elbert Tuttle*, 5 WM. & MARY BILL RTS. J. 215 (1996).

14. *See* cases cited *supra* note 1.

Rights into safeguards against *state* governments.[15] Likewise, in prior state criminal cases, the Court had narrowly construed the Due Process Clause of the Fourteenth Amendment, which does explicitly constrain the states. That the Supreme Court would select cases like *Moore*, *Powell*, *Norris*, and *Brown* as the occasion for announcing novel interpretations of the Fourteenth Amendment is hardly surprising. The identification of novel constitutional rights often takes place in cases that are appealing on their facts. Thus, for example, the constitutional right to privacy was first articulated in *Griswold v. Connecticut*,[16] involving the right of married couples to use contraceptives in the privacy of their own homes, rather than in *Roe v. Wade*,[17] where the issue was a woman's right to abortion. *Griswold* required the Court to invalidate the laws of only two states and almost certainly was consistent with dominant national opinion. *Roe*, on the other hand, had the effect of invalidating the abortion laws of forty-six states and has been intensely controversial ever since.[18] The race-related criminal procedure cases of the 1920s and 1930s were easy by almost any standard. Just as lynching was a convenient issue around which to mobilize national opinion politically, so was lynch law an easy issue around which to mobilize the Justices legally. Even a Court that evinced little sensitivity to the plight of blacks generally would be appalled by these farcical trials of southern black defendants. It was one thing to segregate or disfranchise southern blacks.[19] It was quite another to railroad possibly innocent black defendants to the death penalty through tortured confessions and mob-dominated trials. This was just one step removed from lynching; it was legal lynching.

As already noted, none of these defendants was clearly guilty, and it is possible that none of them was in fact guilty. Yet, in southern criminal cases involving allegations of black-on-white murder or sexual assault, factual guilt frequently was beside the point.[20] In the South

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15. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78 (1908) (privilege against self-incrimination); Maxwell v. Dow, 176 U.S. 581 (1900) (right to a grand jury proceeding); Hurtado v. California, 110 U.S. 516 (1884) (same).

16. 381 U.S. 479 (1965).

17. 410 U.S. 113 (1973).

18. On *Griswold* and *Roe* and the general propensity of constitutional law to suppress outliers, see Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16-17 (1996) [hereinafter Klarman, *Civil Rights*], and Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 172-73 (1998).

19. *See* Grovey v. Townsend, 295 U.S. 45 (1935) (unanimously sustaining the constitutionality of the white primary); Gong Lum v. Rice, 275 U.S. 78 (1927) (unanimously (albeit indirectly) sustaining the constitutionality of public school segregation).

20. On mob-dominated trials not being concerned with determining factual guilt, see NEIL MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 206-07 (1989); George C. Wright, *By the Book: The Legal Executions of Kentucky Blacks*, *in* UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH 250, 251 (W. Fitzhugh Brundage ed., 1997) [hereinafter Wright, *Legal Executions*]; Emanuel, *supra* note 13, at 246.

during this period, the mere allegation by a white woman that she had been raped by a black man generally was the equivalent of conviction.[21] As a southern letter-writer candidly informed *The Nation* in defending Alabama's performance with regard to Scottsboro, "[i]f a white woman is prepared to swear that a Negro either raped or attempted to rape her, we see to it that the Negro is executed."[22] The norms of white supremacy did not permit a jury of white men to believe a black man's word over a white woman's. The gender norms of the time and place did not allow defense counsel to closely interrogate a white woman about allegations involving sex. One southern newspaper observed in the context of a rape case around the time of Scottsboro that the honor of one white woman was more important than the life of a black man.[23] Southern whites often defended lynchings in response to allegations of rape on the ground that southern white women should not be forced to endure intolerable cross-examination in a rape prosecution. Moreover, because most southern white men believed that black males secretly lusted after "their" women, rape allegations generally were credible to them. Similarly, in black-on-white murder cases that inflamed the passions of the community, such as *Moore v. Dempsey* or *Brown v. Mississippi*, "accusation [was] equivalent to condemnation."[24] In such cases, the function of the trial was less to establish factual guilt or innocence than to preempt a mob lynching.

Indeed, the defendants in the four cases that reached the Supreme Court likely would have been lynched prior to World War I.[25] The zenith of lynchings in the American South came in the late 1880s and

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21. On rape cases, see RAY STANNARD BAKER, FOLLOWING THE COLOR LINE: AMERICAN NEGRO CITIZENSHIP IN THE PROGRESSIVE ERA 198-99 (Harper Torchbooks 1964) (1908); CARTER, *supra* note 11, at 133-35, 241; ARTHUR RAPER, THE TRAGEDY OF LYNCHING 50 (1933); Kathleen Atkinson Miller, *The Ladies and the Lynchers: A Look at the Association of Southern Women for the Prevention of Lynching*, 17 S. STUD. 221, 230 (1978); Wright, *Legal Executions*, *supra* note 20, at 257.

22. John Gould Fletcher, Correspondence, *Is This the Voice of the South?*, 137 THE NATION 734 (1933).

23. *See* CARTER, *supra* note 11, at 134 (citing BIRMINGHAM REP., Apr. 1, 1933).

24. KELLY MILLER, RACE ADJUSTMENT: ESSAYS ON THE NEGRO IN AMERICA 79 (1908).

25. For the claim that the Scottsboro Boys would have been lynched in an earlier era, see CARTER, *supra* note 11, at 105, 189. The rest of this paragraph is based on EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH 238-55 (1984); BAKER, *supra* note 21, ch.9; Brundage, *supra* note 20; W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930 (1993) [hereinafter BRUNDAGE, LYNCHING]; MCMILLEN, *supra* note 20, ch.7; 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY ch.27 (1944); RAPER, *supra* note 21, chs.1-3; GEORGE BROWN TINDALL, SOUTH CAROLINA NEGROES 1877-1900 ch.12 (1952); GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865-1940: LYNCHINGS, MOB RULE AND "LEGAL LYNCHINGS" (1990) [hereinafter WRIGHT, RACIAL VIOLENCE].

early 1890s, when well over a hundred were reported annually, and in some years over two hundred. Lynchings were primarily, though not exclusively, a southern phenomenon, and primarily, though not exclusively, a racial phenomenon. Over time, lynchings outside of the South and lynchings of persons who were not black became increasingly rare. Lynchings were much more common in sparsely populated counties, and especially in those experiencing rapid population growth and a transient black population. Many more blacks were lynched in the deep South than in the upper South or the border states. Most lynchings were linked to allegations of crime, though, contrary to popular mythology, the crime was rape in only a fairly small percentage of cases (roughly 20%). More often, the alleged crime was murder (nearly 40% of lynchings), though occasionally the offense was something much less serious, such as breach of racial etiquette or general uppityness. Some lynchings are best understood as the administration of populist justice, while others can only be interpreted as efforts to ensure black subordination. Prior to World War I, lynchings typically enjoyed the support of the local community. Efforts to prosecute even known lynchers were rare, and convictions were virtually nonexistent. Mass public lynchings in which hundreds or thousands of spectators attended, brought their children, and took home souvenirs from the victim's body were not uncommon during the peak period of lynchings.

By the 1920s, however, the annual number of reported lynchings had declined dramatically — from 187.5 in the 1890s, to 92.5 in the 1900s, to 61.9 in the 1910s, to 46.2 in the first half of the 1920s, and to 16.8 in the second half of that decade.[26] Many factors may explain this decline: the threat of federal anti-lynching legislation; the risk of state prosecution resulting from growing public repugnance toward lynchings; the diminishing insularity of the South attributable to better transportation and communication facilities; more professional law enforcement; better education; and perhaps the more settled nature of southern race relations, which rendered lynchings as a method of social control increasingly obsolete.[27] Most importantly for present purposes, the decline in lynchings probably also was dependent on their being replaced by quick trials that reliably produced guilty verdicts,

26. *See* RAPER, *supra* note 21, at 26-27; *see also* 1 CHARLES FLINT KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, 1909-1920, at 210 (1967).

27. On various explanations for the decline in lynchings, see BRUNDAGE, LYNCHING, *supra* note 25, at 209, 238; MYRDAL, *supra* note 25, at 565; GEORGE B. TINDALL, THE EMERGENCE OF THE NEW SOUTH 1913-1945, at 174, 554 (1967); Miller, *supra* note 21, at 237; Todd E. Lewis, *Mob Justice in the 'American Congo': 'Judge Lynch' in Arkansas During the Decade After World War I*, 52 ARK. HIST. Q. 156 (1993).

death sentences, and rapid executions.[28] Arkansas actually enacted a law designed to prevent lynchings by providing for a special term of court in cases of rape or other crimes likely to arouse the passions of the people; trial was to take place within ten days of the alleged crime.[29] Defense counsel in cases like *Moore*, *Brown*, or Scottsboro generally refrained from requesting a continuance, since delaying trial only enhanced the chances of their clients being lynched.[30] In all of these Supreme Court cases, and in many others that did not reach the Court, law enforcement officers gave explicit promises to prospective lynch mobs that black defendants would be quickly tried and executed if the mob desisted from its lynching efforts.[31] Prosecutors sometimes appealed to juries on similar grounds, urging them to convict in order to reward the mob for its good behavior and thus to encourage similar restraint in the future.[32] Opponents of leniency urged governors in such cases not to commute death sentences if they expected mobs to desist from lynching in future cases; some governors used this argument to justify allowing death sentences to stand.[33] Incredibly, similar arguments were made even to appellate courts reviewing convictions from mob-dominated trials.[34]

If all of this seems extraordinary to modern eyes, one must remember that for white southerners defending mob-dominated trials, the relevant comparison was to lynchings rather than to elaborate court proceedings accompanied by all the trappings of due process. Thus, a local newspaper warned in connection with a mob-dominated trial conducted contemporaneously with Scottsboro that challenging the conviction was "playing with fire," since a hasty trial was preferable to a lynching and indeed was "a first step, and a very important one."[35] Local newspapers frequently crowed with pride after a lynch-

28. On the replacement of lynchings with mob-dominated trials, see AYERS, *supra* note 25, at 246; CARTER, *supra* note 11, at 115; MCMILLEN, *supra* note 20, at 206-17; Wright, *Legal Executions*, *supra* note 20.

29. For examples of "special sessions" to avoid lynchings, see Bettis v. State, 261 S.W. 46 (Ark. 1924); CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 298 (1940); LAWRENCE D. RICE, THE NEGRO IN TEXAS 1874-1900, at 253 (1971); TINDALL, *supra* note 25, at 252.

30. *See* RAPER, *supra* note 21, at 46-47; Emanuel, *supra* note 13, at 229.

31. *See* Moore v. Dempsey, 261 U.S. 86, 88-89 (1923); Graham v. State, 82 S.E. 282, 285 (Ga. 1914); CORTNER, MOB, *supra* note 10, at 3-4, 8; WRIGHT, RACIAL VIOLENCE, *supra* note 25, at 251, 255; *Powell* Petitioners' Brief, *supra* note 13, at 36-37, *reprinted in* 27 LANDMARK BRIEFS, *supra* note 13, at 332-33.

32. *See, e.g.*, Cleveland v. State, 94 S.W.2d 746 (Tex. Crim. App. 1936); Williams v. State, 84 So. 8 (Miss. 1919); Harris v. State, 50 So. 626 (Miss. 1909); Thompson v. State, 26 S.W. 987 (Tex. Crim. App. 1894).

33. *See, e.g.*, *Moore*, 261 U.S. at 90; CORTNER, MOB, *supra* note 10, at 101.

34. *See, e.g.*, Downer v. Dunaway, 1 F. Supp. 1001, 1003 (M.D. Ga. 1932).

35. Editorial, Playing with Fire, FORUM (Washington, Ga.), June 25, 1931, *quoted in* Emanuel, *supra* note 13, at 246 n.161.

ing was averted and congratulated local citizens on the admirable self-restraint they had demonstrated.[36] White Alabamians seemed genuinely puzzled at outside criticism of their handling of the Scottsboro cases. Avoiding a lynching was "a genuine step forward,"[37] and thus was deserving of commendation, not condemnation. The state supreme court lauded the speed of the Scottsboro Boys' trials as likely to instill greater respect for the law.[38] A state member of the Commission on Interracial Cooperation ("CIC") thought it odd that Alabama should be criticized for delivering exactly what the CIC had been fighting so hard to accomplish — replacement of lynchings with trials. Several southern newspapers warned in connection with Scottsboro that if outsiders continued to assail Alabama after juries had returned guilty verdicts, then there would be little incentive to resist a lynching on future occasions.[39]

In sum, the state-imposed death penalty in these cases was little more than a formalization of the lynching process. As a dissenting justice on the state supreme court in *Brown v. Mississippi* put it, the legal proceedings were simply a "fictitious continuation of the mob which originally instituted and engaged in the admitted tortures."[40] The purpose of a mob-dominated trial was simply to avoid a lynching, and the purpose of a lynching usually was to ensure black subordination rather than to punish guilt. Thus, the result of these trials was pretty much foreordained, since their purpose had little to do with establishing factual guilt or innocence. In the slim handful of cases where defendants in mob-dominated trials were acquitted, they often were shot dead by the mob before they could leave the courthouse.[41]

Because these mob-dominated trials were more about preventing lynchings than reaching just verdicts, they presented appealing cases for the intervention of a legal tribunal that thought the purpose of criminal trials should be to determine factual guilt or innocence. The Supreme Court during the interwar period might have been reluctant to intervene in state criminal proceedings had the injustice been less manifest. A long, unbroken tradition, grounded in federalism con-

36. *See* CARTER, *supra* note 11, at 105-06; CORTNER, *BROWN*, *supra* note 12, at 11.

37. CARTER, *supra* note 11, at 113.

38. *See* Powell v. State, 141 So. 201, 211 (Ala. 1932).

39. *See* CARTER, *supra* note 11, at 107, 111-13; GOODMAN, *supra* note 11, at 55-57; Frank L. Owsley, *Scottsboro: The Third Crusade*, 1 AM. REV. 257, 285 (1933).

40. 161 So. 465, 472 (Miss. 1935) (Griffith, J., dissenting).

41. *See* MCMILLEN, *supra* note 20, at 208; *see also* ADAM FAIRCLOUGH, RACE AND DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA 1915-1972, at 26-29 (1995). On rare occasions, lynch mobs actually constituted themselves into extralegal adjudicative bodies, taking evidence and occasionally freeing a wrongly accused suspect. Thus, at the extremes, lynchings and legal lynchings converged into one another. On lynch mobs dispensing populist justice, see MCMILLEN, *supra* note 20, at 226-27, 239-44; Wright, *Legal Executions*, *supra* note 20, at 252.

cerns, restrained the federal courts from superintending state criminal trials.

Indeed, just eight years prior to *Moore* the Court had declined to intervene in state criminal proceedings even on egregious facts.[42] Leo Frank, the superintendent of an Atlanta pencil factory, was charged in 1913 with the murder of a thirteen-year-old girl, Mary Phagan, who worked in the plant. The evidence presented against Frank at trial was suspect, and the leading modern authority on the case plausibly has concluded that Frank was innocent. Yet as a transplanted northerner, a Jew, and an industrialist, Frank represented everything that was alien to the South's still predominantly rural, agricultural, and Protestant culture. Frank's arrest and charging unleashed a torrent of anti-Semitism. Every day of his trial, a mob surrounding the courthouse could be heard screaming, "Hang the Jew!," through the ground floor courtroom's open windows. In the presence of the jury, the trial judge consulted with the chief of police and the colonel of the state militia on security measures. At the judge's initiative, neither Frank nor his lawyers were present when the jury returned its verdict, so as to avoid a lynching in the unlikely event of an acquittal or a mistrial. After Frank exhausted his state court appeals, he sought a writ of habeas corpus from the federal courts. The United States Supreme Court rejected his appeal in 1915, ruling that the Due Process Clause of the Fourteenth Amendment required only that the state criminal justice system afford him an opportunity to raise his claim of mob domination in some forum other than the court that allegedly was under mob influence. Since the state supreme court had considered and rejected Frank's claim, the Federal Constitution was satisfied. Invoking federalism concerns, the Supreme Court declined to second guess the state appellate court's determination that the trial outcome had not been influenced by the mob surrounding the courthouse.[43] Georgia's governor, after reviewing the evidence and concluding that Frank probably was innocent, commuted his sentence to life imprisonment. Frank was then seized by a mob from the state prison farm at Milledgeville and taken back to Marietta, where he was lynched.

Eight years later, in *Moore v. Dempsey*, the Supreme Court ordered a federal district judge to conduct a hearing on whether the convictions of the Phillips County blacks were products of a mob-dominated trial and thus were in violation of the Due Process Clause. *Frank* and *Moore* are not necessarily inconsistent. Justice Holmes's

42. Frank v. Mangum, 237 U.S. 309 (1915). The fullest account of the Frank case is LEONARD DINNERSTEIN, THE LEO FRANK CASE (1968); *see also* Nancy MacLean, *Gender, Sexuality, and the Politics of Lynching: The Leo Frank Case Revisited*, 78 J. AM. HIST. 917 (1991); Appellant's Argument at 3-8, Frank v. Mangum, 237 U.S. 309 (1915) (No. 775) *reprinted in* 17 LANDMARK BRIEFS, *supra* note 13, at 476-81.

43. *Frank*, 237 U.S. at 334-38.

majority opinion in *Moore* can be read in either of two ways; one is consistent with *Frank*, and the other is not. At one point, Holmes deems it irrelevant whether the state system provided adequate corrective process if the federal court determines for itself that mob domination converted the trial into a farce.[44] This is what Holmes had said in his dissent in *Frank*, and obviously is inconsistent with the majority opinion in that case. Yet at another point in his *Moore* opinion, Holmes states that the corrective process afforded these defendants by the Arkansas Supreme Court was flawed — a determination that would permit reversal even within the bounds set by *Frank*.[45] The state supreme court in *Moore* apparently refused to make its own findings with regard to mob domination, noting that "no attempt is made [by appellants] to show that a fair and impartial trial was not had" and refusing to conclude "that this must necessarily have been the case."[46]

While the decisions may be technically consistent, it seems more likely that the Justices in *Moore* simply were more solicitous of the defendants' rights. This apparent shift in disposition probably cannot be attributed to changes in the composition of the Court. If anything, personnel changes appeared disadvantageous to litigants seeking the Court's intervention against mob-dominated trials.[47] One of the two dissenters in *Frank*, Charles Evan Hughes, had resigned from the Court in 1916 to run for president as the Republican Party's nominee. Moreover, prior to *Moore*, President Warren G. Harding had made several conservative appointments to the Court — William Howard Taft, George Sutherland, and Pierce Butler. One would not have pre-

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44. Moore v. Dempsey, 261 U.S. 86, 91-92 (1923).

45. *Id.* at 91-92.

46. Hicks v. State, 220 S.W. 308, 309-10 (Ark. 1920). Whether *Moore* is consistent with *Frank* has occasioned much historical debate. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 420-21 (1962); *id.* at 457-58 (Harlan, J., dissenting); CORTNER, MOB, *supra* note 10, at 185-88; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 488-91 (1963); Eric M. Freedman, *Milestones in Habeas Corpus: Part II. Leo Frank Lives: Untangling the Historical Roots of Meaningful Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1530-35 (2000). Justice McReynolds, who dissented in *Moore*, certainly saw the two decisions as inconsistent. *See Moore*, 261 U.S. at 93-96 (McReynolds, J., dissenting). For contemporary commentators viewing the decisions as inconsistent, see Note, *Mob-Domination of State Courts and Federal Review by Habeas Corpus*, 33 YALE L.J. 82 (1923); Note, *Mob Domination of a Trial as a Violation of the Fourteenth Amendment*, 37 HARV. L. REV. 247 (1924) [hereinafter Harvard Note]. Naturally, appellants in *Moore* adhered to the contrary view. *See* Brief for the Appellants at 35-37, 40, *Moore v. Dempsey*, 261 U.S. 86 (No. 199), *reprinted in* 21 LANDMARK BRIEFS, *supra* note 13, at 230-32, 235.

The different outcomes also could be attributable to the more egregious facts of *Moore*. While Frank's trial was indeed mob dominated, he at least received a genuine defense in a trial lasting an entire month. In *Moore*, by way of contrast, defense lawyers were appointed the day before a trial that lasted just forty-five minutes. On the comparison between the quality of the defense in *Frank* and *Moore*, see Appellants' Brief at 35-37, *Moore* (No. 199), at 230-32.

47. On personnel changes, see CORTNER, MOB, *supra* note 10, at 144-46.

dicted that these Justices would jettison federalism restrictions on the Court's supervision of state criminal proceedings.

Changes in the extralegal context constitute the most plausible explanation for the seemingly inconsistent results in *Frank* and *Moore*. The nation, and the Court, likely would have taken a very different view of lynching (and, relatedly, lynch law) before and after World War I. Prior to the war, the NAACP had been largely unsuccessful at focusing national attention on lynching. President Theodore Roosevelt criticized lynchings but blamed them mainly on black criminals.[48] President Taft refused to comment on lynchings because he thought them beyond the jurisdiction of the federal government.[49] President Woodrow Wilson repulsed repeated efforts to secure his condemnation of lynchings until after an alarming increase in their number during and after the war — from 36 in 1917 to 60 in 1918 to 76 in 1919.[50] This resurgence in lynchings paved the way for the NAACP's massive publicity campaign against lynching and in support of a federal anti-lynching statute. The widespread race riots during and after the war also helped focus national attention on problems of interracial violence and lawlessness.[51] President Wilson finally was impelled to condemn lynching in the summer of 1918.[52] The NAACP printed and circulated fifty thousand copies of the president's statement and in the spring of 1919 convened an anti-lynching conference that was endorsed by prominent political figures such as Charles Evans Hughes, Attorney General A. Mitchell Palmer, and former Secretary of State Elihu Root.[53] From that conference issued an NAACP address to the nation on lynching, signed by 130 prominent citizens, including former President Taft, who would become Chief Justice by the time of *Moore*. In a special message to Congress in April 1921, President Harding endorsed a federal anti-lynching bill, which had first been introduced in Congress in 1918 by Representative Leonidas Dyer of St. Louis. Early in 1922, just a year before *Moore*, the House of Representatives passed that legislation. The NAACP then submitted memorials in support of the bill to the Senate; these had been en-

48. *See* Theodore Roosevelt, *Annual Message to Congress (1906), in* 17 THE WORKS OF THEODORE ROOSEVELT 412, 420-25 (1925) ("The greatest existing cause of lynching is the perpetration, especially by black men, of the hideous crime of rape. . . .").

49. *See* RICHARD B. SHERMAN, THE REPUBLICAN PARTY AND BLACK AMERICA: FROM MCKINLEY TO HOOVER, 1896-1933, at 97-98 (1973); ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950, at 26 (1980).

50. On the number of lynchings, see ZANGRANDO, *supra* note 49, at 35.

51. *See* KELLOGG, *supra* note 26, at 246; ZANGRANDO, *supra* note 49, at 38.

52. *See* KELLOGG, *supra* note 26, at 227; SHERMAN, *supra* note 49, at 123-24.

53. For the remainder of this paragraph on the NAACP's anti-lynching campaign, see KELLOGG, *supra* note 26, ch. 10; SHERMAN, *supra* note 49, ch.7; ZANGRANDO, *supra* note 49, chs. 2-3.

dorsed by half of the nation's governors, mayors of many prominent cities, and leading church officials, state court judges, and college presidents. The Association also took out full-page ads in national newspapers that proclaimed lynching "The Shame of America." This extensive lobbying campaign came to naught, as the Dyer bill was filibustered to death in the Senate. Yet the vast majority of Republican congressmen had supported federal anti-lynching legislation in 1922, a sentiment likely shared in 1923 (the year of *Moore*) by the majority of Supreme Court Justices, who also were Republicans. Just as Republican congressmen were motivated by the recent epidemic of anti-black violence to condemn lynching, so may similarly-minded Supreme Court Justices have been prompted to take action against lynching's close cousin, mob-dominated trials.[54]

The Scottsboro cases that reached the Supreme Court, first in 1932 and then again in 1935, presented the Justices with a similarly appealing set of facts in which to make new constitutional law governing state criminal procedure.[55] Nine black youngsters were charged with the rape of two white women; eight of them received the death penalty. The trials were conducted in a mob atmosphere. Defense counsel was appointed the morning of the trials. The trial record raised substantial doubts as to the defendants' factual guilt. The lawyers for the Scottsboro Boys raised three distinct constitutional claims in their first appeal to the Supreme Court, *Powell v. Alabama*: mob domination of the trial, in violation of the Due Process Clause; intentional exclusion of blacks from the grand and petit juries, in violation of the Equal Protection Clause; and denial of the right to counsel under the Due Process Clause.[56] The Court reversed the defendants' convictions on the last of these proffered grounds, declining to reach the other two. It is impossible to know why the Justices chose this basis for their decision. Either of the other two grounds would have required the creation of less new law. *Moore* already had established a due process right to a criminal trial free of mob domination, and a consistent line of cases dating back to *Strauder v. West Virginia*[57] in 1879 had established that blacks could not be excluded from juries because of their race. (Around the turn of the century, however, the Court had evolved subconstitutional rules that made such discrimination virtually impossible to prove.)[58]

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54. On the connection between *Moore* and the federal anti-lynching bill, see Harvard Note, *supra* note 46, at 250.

55. *See* CARTER, *supra* note 11, at 50.

56. *See Powell* Petitioners' Brief, *supra* note 13, at 3-4, 34-62, *reprinted in* 27 LANDMARK BRIEFS, *supra* note 13, at 299-300, 330-58.

57. 100 U.S. 303 (1879).

58. *See, e.g.*, Franklin v. South Carolina, 218 U.S. 161 (1910); Thomas v. Texas, 212 U.S. 278 (1909); Martin v. Texas, 200 U.S. 316 (1906); Brownfeld v. South Carolina, 189 U.S. 426

Possibly the Justices in *Powell* chose the ground for decision that they thought would prove least controversial, even though it required the creation of the most new law.[59] Invalidating Ozie Powell's conviction on the basis of mob domination would have required an extension of *Moore*, since Powell's trial was not quite so farcical as that of the Phillips County defendants: Powell received a genuine defense; his trial lasted for several hours (not forty-five minutes); his jury deliberated more than the five minutes in *Moore*; his case did not raise the broader implications of the Phillips County race riot; and he had not been tortured into confessing.[60] Thus, for the Court in *Powell* to have reversed the convictions on the basis of *Moore* might have required some basic alterations in the administration of Jim Crow justice in high profile cases involving black-on-white crime. Moreover, the author of *Powell*, Justice Sutherland, had been one of the two dissenters in *Moore*, and thus was an unlikely candidate for extending that decision. Similarly, to invalidate Powell's conviction on the basis of race discrimination in jury selection would have been far more controversial among white southerners, because the perpetuation of white supremacy within the legal system depended substantially on the preservation of all-white juries. Overturning Powell's conviction on the ground that he had been denied the right to counsel, on the other hand, was unlikely to affect either the outcome of his retrial or, more generally, the nature of Jim Crow justice.[61]

While prior to *Powell* the Supreme Court never had ruled that the Due Process Clause of the Fourteenth Amendment required that states respect the right to counsel in criminal trials, neither had it ever rejected that position.[62] Moreover, every state court that had confronted the issue had, on its own initiative, guaranteed state-appointed

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(1903); Tarrance v. Florida, 188 U.S. 519 (1903). For discussion of the *Plessy*-era jury cases, see Klarman, *Plessy*, *supra* note 8, at 376-78; Benno C. Schmidt, Jr., *Juries, Jurisdiction and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1462-76 (1983).

59. On the oddity of the *Powell* Court's reaching out to decide a new legal issue, see BERNARD H. NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920, at 69 (1946).

60. For the argument that the mob-domination claim was stronger in *Moore*, see Brief for Respondent at 27-28, Powell v. Alabama, 287 U.S. 45 (1932) (Nos. 98-100), *reprinted in* 27 LANDMARK BRIEFS, *supra* note 13, at 399-400.

61. For contemporary criticism of the Court for ducking more significant issues and "instructing" Alabama on how to properly execute the Scottsboro Boys, see CARTER, *supra* note 11, at 163-64; 1 HARVARD SITKOFF, A NEW DEAL FOR BLACKS 224-25 (1978). For the claim that the right-to-counsel ground would incite the least southern resentment, see Alfred J. Cilella & Irwin J. Kaplan, Note, *Discrimination Against Negroes in Jury Service*, 29 ILL. L. REV. 498, 505-06 (1934).

62. As of 1932, the only Bill of Rights protections that had been held applicable to the states through the Fourteenth Amendment were the Fifth Amendment right to just compensation for takings of property and the First Amendment freedoms of speech and press. *See* Otto M. Bowman, Comment, 12 OR. L. REV. 227, 232 n.32 (1933).

counsel for indigent defendants in capital cases.[63] Powell, of course, had received a court-appointed lawyer. He made two arguments as to why this appointment failed to satisfy federal constitutional standards. First, the State had not permitted him adequate opportunity to hire counsel of his own choice. Second, the court appointment was inadequate because it had been made the morning of the trial, and thus defense counsel was denied an adequate opportunity to consult with clients, interview witnesses, and prepare a defense.[64]

The Alabama Supreme Court in *Powell* deemed this last minute appointment of counsel sufficient to satisfy the state constitutional requirement of a court-appointed lawyer in capital cases. The United States Supreme Court has no authority to review state court interpretations of state law. Thus the Court, if it was to reverse Powell's conviction, had to construe the Due Process Clause of the Fourteenth Amendment to protect the right to counsel in capital cases. As noted earlier,[65] the Justices seem least reluctant to expand constitutional rights when doing so involves simply holding a few outlier states to the norm already espoused by the vast majority. The right to state-appointed counsel for indigent defendants in capital cases had not been rejected in *any* state. Indeed, one reason why state courts had not yet considered whether the Federal Due Process Clause guaranteed such a right is that they all had interpreted their state constitutions to do so.

Once the Court had determined that the Due Process Clause prevented the states from denying capital defendants the right to counsel, reversing Powell's conviction was easy. First, Powell had been denied the opportunity to hire a lawyer of his own choice. Second, to any impartial observer, the trial judge's appointment of counsel for the Scottsboro Boys had been obviously inadequate. At a preliminary hearing, the judge had casually appointed the entirety of the Scottsboro bar, seven lawyers, to look after the defendants' interests prior to trial.[66] This diffusion of responsibility not only ensured that nobody genuinely represented them, but also violated state law, which limited the number of court-appointed lawyers to two.[67] On the day of trial, the judge appointed as their defense counsel a Tennessee lawyer, Stephen Roddy, who had been sent to Scottsboro by some of the de-

63. *See* Bowman, *supra* note 62, at 229.

64. *Powell* Petitioners' Brief, *supra* note 13, at 48-59, *reprinted in* 27 LANDMARK BRIEFS, *supra* note 13, at 344-55.

65. *See supra* notes 16-18 and accompanying text.

66. For appointment of defense counsel and their performance during trial, see CARTER, *supra* note 11, at 17-50.

67. For the diffusion of responsibility argument, see *Powell*, 287 U.S. at 56-57. For the state law violation, see *Powell* Petitioners' Brief, *supra* note 13, at 10, *reprinted in* 27 LANDMARK BRIEFS, *supra* note 13, at 306.

fendants' families to look after their interests. When Roddy objected that he was unfamiliar with Alabama criminal procedure and thus was disinclined to take the assignment, the judge appointed a local member of the bar to assist him with the defense. At the trial, while defense counsel did cross-examine prosecution witnesses, they made only a feeble effort to change the trial venue, presented neither opening nor closing arguments, and called none of their own witnesses other than the defendants, who implicated each other in a desperate attempt to avoid the death penalty.[68] While the Scottsboro trials were not quite the sham affair under review in *Moore*, most impartial jurists certainly would have deemed inadequate the legal representation afforded to the Scottsboro Boys. Indeed, southern state supreme courts frequently had reversed convictions on state law grounds when counsel had been granted only *a few days* to prepare a defense.[69]

Not only were the Scottsboro defendants plainly denied the right to counsel, but the trial record revealed a substantial probability that they were factually innocent — a circumstance likely to be of some significance to Supreme Court Justices reviewing their convictions, even if technically irrelevant to the merits of their appeal. Constitutional criminal procedure safeguards often shield the guilty from punishment and for that reason frequently arouse public opposition. It seems only natural that the Justices would be more inclined to create novel criminal procedure rights in cases where defendants were plausibly innocent. The medical evidence introduced at trial in the Scottsboro cases raised a serious doubt as to whether the two women had been raped at all. The accounts they provided on the witness stand also contradicted one another's. Moreover, they possessed a clear motive for fabrication — the wish to avoid a possible Mann Act prosecution for traveling across state lines for immoral purposes (prostitution). By the time *Powell* reached the Supreme Court in 1932, a substantial segment of national opinion had concluded that the Scottsboro Boys were innocent. Many newspapers, both in the North and the upper South, approved of the Court's reversal of the Scottsboro defendants' convictions, expressly noting the substantial doubts existing as to their guilt.[70]

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68. The inadequacies of defense counsel are enumerated in *Powell* Petitioners' Brief, *supra* note 13, at 9-14, 51-59, *reprinted in* 27 LANDMARK BRIEFS, *supra* note 13, at 305-10, 347-55.

69. *See, e.g.*, Stroud v. Commonwealth, 169 S.W. 1021 (Ky. 1914); *see also* McDaniel v. Commonwealth, 205 S.W. 915 (Ky. 1918); State v. Collins, 29 So. 180 (La. 1900) (discussing numerous additional Louisiana cases).

70. *See, e.g.*, Editorial, *The Scottsboro Case*, N.Y. HERALD-TRIB., Nov. 8, 1932, at 20; Editorial, *The Scottsboro Cases*, BALT. SUN, Nov. 9, 1932, at 10; Editorial, *Righteously Remanded*, RICHMOND NEWS LEADER, Nov. 8, 1932, at 8; Editorial, *The Scottsboro Case*, RICHMOND TIMES-DISPATCH, Nov. 9, 1932, at 10.

The Scottsboro Boys were retried by Alabama, beginning in 1933. Clarence Norris appealed his second conviction to the Supreme Court on the ground that blacks had been intentionally excluded from the juries that indicted and convicted him. Supreme Court precedents from the *Plessy* era made it exceedingly difficult for black defendants to prove race discrimination in jury selection.[71] The Alabama Supreme Court rejected Norris's jury discrimination claim on the basis of these precedents.[72] The state court refused to presume discrimination on the part of jury commissioners, denied the existence of an affirmative duty to place blacks on juries, and deferred to the commissioners' denials of racial motivation. In the Supreme Court, Alabama invoked *Thomas v. Texas*[73] for the proposition that federal courts must defer to state court findings of fact on the issue of race discrimination in jury selection.

The Supreme Court overturned Norris's conviction, implicitly repudiating some of its *Plessy*-era precedents and reversing its first state criminal conviction on jury discrimination grounds since 1904.[74] *Norris* did not create any new substantive constitutional law; since *Strauder* in 1879, the Court consistently had construed the Equal Protection Clause to bar race discrimination in jury selection. However, *Norris* did require the Court to alter the critical subconstitutional rules, which for decades had doomed to failure virtually all jury discrimination claims. The Justices now reinvigorated the long dormant dicta of *Neal v. Delaware*,[75] which had approved inferring intentional discrimination from the lengthy absence of blacks from jury service.[76] The *Norris* Court declared that when no blacks had served on juries for a lengthy period of time in a county where many blacks satisfied the statutory qualifications for service, the state was obliged to provide some explanation beyond a simple denial of race discrimination. Otherwise, the constitutional safeguard "would be but a vain and illusory requirement."[77] Further, *Norris* held that where the alleged constitutional violation turned on disputed facts, the federal courts must find those facts for themselves, rather than simply deferring to state findings —

71. *See supra* note 58.

72. Norris v. State, 156 So. 556 (Ala. 1934).

73. 212 U.S. 278 (1909). For Alabama's invocation of *Thomas*, see Brief in Opposition to Petition for Writ of Certiorari, Norris v. Alabama, at 7.

74. Rogers v. Alabama, 192 U.S. 226 (1904). On the inconsistency between *Norris* and *Thomas*, see Willard L. Eckhardt, Comment, 24 ILL. B.J. 233 (1936).

75. 103 U.S. 370, 397 (1880). Most state courts had long ignored the *Neal* dicta. *See* Bernard S. Jefferson, *Race Discrimination in Jury Service*, 19 B.U. L. REV. 413, 424-25 (1939).

76. *Norris*, 294 U.S. at 591 (invoking *Neal*).

77. *Id.* at 598.

"[t]hat the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied."[78]

Norris was an attractive case for the Court to reconsider its *Plessy*-era precedents on jury discrimination. Not only had blacks been absent from juries for decades in these Alabama counties with substantial black populations — this was true in the *Plessy*-era precedents as well — but also local public officials had been trapped in an embarrassing lie. Seeking to deflect charges of race discrimination in jury selection, local court officers had forged black names on the jury rolls prior to Norris's retrial. Uncontradicted testimony at trial by the defense handwriting expert had exposed this fraud.[79] The only plausible explanation for it was the desire of these officers to cover up the intentional exclusion of blacks from jury lists. In an unprecedented moment of high drama, Supreme Court Justices at oral argument examined the Jackson County jury rolls through magnifying glasses.[80]

Norris was an appealing case in which to reconsider the subconstitutional rules that had largely nullified the *Strauder* right for another reason as well. By 1935, the belief had spread that the Scottsboro Boys were innocent.[81] At the first of the defendants' retrials in 1933, one of the young women who had charged rape, Ruby Bates, recanted her testimony, admitting that the two women had concocted the rape allegation.[82] Yet the Morgan County trial jury doggedly ignored her recantation, apparently accepting the prosecution's contention that she had been bribed to perjure herself, and imposed a new death sentence on Haywood Patterson. Leading southern white journalists such as Douglas Southall Freeman of the *Richmond New Leader* and Josephus Daniels of the *Raleigh News and Observer* expressed outrage over the second round of convictions in light of the Scottsboro Boys' probable innocence.[83] The *Chattanooga News* declared that "we cannot conceive of a civilized community taking human lives on the strength of the miserable affair."[84] The leading modern authority describes a "general national indignation over the Scottsboro Case,"[85] while a contemporary legal commentator noted the "widespread sym-

78. *Id.* at 589-90. *Norris* is usefully discussed in Schmidt, *supra* note 58, at 1476-83.

79. *See* CARTER, *supra* note 11, at 282-83.

80. *See Norris*, 294 U.S. at 593 n.1; CARTER, *supra* note 11, at 319-20; *Hits Alabama Jury Book: Scottsboro Defense Charges Forgery of Names List*, N.Y. TIMES, Feb. 16, 1935, at 2.

81. *See* GOODMAN, *supra* note 11, at 148-49.

82. *See* CARTER, *supra* note 11, at 232; GOODMAN, *supra* note 11, at 132.

83. *See* CARTER, *supra* note 11, at 252-53, 270.

84. CHATTANOOGA NEWS, *quoted in The South Split Over the Scottsboro Verdict*, LITERARY DIG., Apr. 22, 1933, at 4 (reporting other southern newspaper reaction as well).

85. CARTER, *supra* note 11, at 322.

pathy and indignation aroused by the[ir] plight."[86] This national sense of outrage was manifested in mass petitions and northern protest rallies in which thousands of demonstrators assailed the second round of convictions.[87] In New York City, such protests attracted the support of the mayor and leading Democratic Party politicians. Small wonder that newspapers throughout much of the country applauded the Supreme Court's reversal of Clarence Norris's conviction on jury discrimination grounds.[88] Outside of Alabama, most observers apparently had become convinced of the Scottsboro defendants' innocence.

Brown v. Mississippi, the fourth of the Supreme Court's race-related criminal procedure cases of the interwar period, also required the Justices to manufacture new constitutional law. Prior to *Brown*, the Supreme Court had not confronted a state criminal conviction grounded on a confession extracted through torture. In 1908, however, *Twining v. New Jersey*[89] had denied that the Fifth Amendment privilege against self-incrimination was incorporated against the states through the Fourteenth Amendment. The Mississippi Supreme Court relied on *Twining* in rejecting the federal constitutional claim in *Brown*.[90] Moreover, even had the Supreme Court acknowledged the existence of such a federal constitutional right, precedent in analogous contexts would have suggested that deference be extended to state court findings of fact regarding the voluntariness of confessions. In *Brown*, the trial court found that the defendants' confessions to the sheriff (which took place after the tortured confessions extracted by the deputy sheriff) were voluntary.

Still, if the Court was going to create novel constitutional law, *Brown* was about as appealing a case as one could find in which to do so. First, the new federal constitutional right identified by the Court — a due process right not to be convicted on the basis of a confession extracted through torture — already was recognized by the law of *every* state. All state constitutions but two contained explicit rights against self-incrimination, and those two had adopted such a right through ju-

86. Recent Decision, 35 COLUM. L. REV. 776, 777 (1935).

87. *See* CARTER, *supra* note 11, at 243-45; GOODMAN, *supra* note 11, at 149, 152-53.

88. *See* Recent Decision, *supra* note 86, at 777 & n.2 (reproducing opinions from other newspapers); *see, e.g.*, Editorial, *Justice for Negroes*, N.Y. TIMES, Apr. 2, 1935, at 20; Editorial, *New Scottsboro Opinion*, BALT. SUN, Apr. 3, 1935, at 12; Editorial, *The Scottsboro Decision*, N.Y. HERALD-TRIB., Apr. 2, 1935, at 18; Editorial, *The Scottsboro Decision*, WASH. POST, Apr. 3, 1935, at 8.

89. 211 U.S. 78 (1908).

90. Brown v. State, 161 So. 465, 468 (Miss. 1935). For the reliance on *Twining*, see Brief for Respondent at 6-7, Brown v. Mississippi, 297 U.S. 278 (1936) (No. 301), *reprinted in* 31 LANDMARK BRIEFS, *supra* note 13, at 93, 104-05.

dicial construction.[91] Moreover, every state court to consider the issue had agreed that confessions extracted through force or threats thereof must be excluded from evidence. The Mississippi Supreme Court had so held on numerous occasions during the 1920s.[92] The state court refused to reverse Brown's conviction because his state self-incrimination claim had not been properly raised at trial and because the federal constitution had been construed not to protect against self-incrimination in state courts.[93]

Not only did *Brown* simply hold states to their own constitutional standards, but it also involved an especially appealing set of facts in which to create a new federal constitutional right. Incredibly, the deputy sheriff admitted at trial the torture by which the defendants' confessions had been obtained. He defended his actions on the candid though repulsive ground that the beatings were "[n]ot too much for a Negro."[94] The sheriff, who received the defendants' subsequent "voluntary" confessions, admitted that one of the men still bore the marks of the whippings to which he had been subjected. Not only was the physical torture admitted by the State's witnesses, but the defendants' convictions rested almost entirely on these confessions. Without them, the prosecution's case would have been insufficient to go to the jury.[95] In short, *Brown* created a new constitutional right in a case involving possibly innocent defendants and undisputed facts regarding denial of the right.

Finally, it seems doubtful that in 1936 any significant segment of public opinion would have opposed the *Brown* decision. The Wickersham Commission Report on Law Enforcement in 1931 had found increasing agreement among police chiefs that third degree practices were uncivilized and unacceptable. While the commission found that various forms of psychological coercion, such as holding prisoners incommunicado, were still quite common, physical torture seemed clearly on the decline.[96] By 1936, moreover, public revulsion against Nazi and Stalinist law enforcement abuses would have inclined most Americans to distance themselves from the physical torture per-

91. For the state constitutions and judicial interpretations thereof, see Report on Lawlessness in Law Enforcement, 11 U.S. Comm'n on Law Observance and Enforcement 3-4, 25, 28 (1931) [hereinafter Report on Lawlessness].

92. *See infra* note 128.

93. Brown v. State, 158 So. 339, 341-42 (Miss. 1935), 161 So. at 466-68.

94. Brown v. Mississippi, 297 U.S. 278, 284 (1936); 161 So. at 471 (Griffith, J., dissenting).

95. *Brown*, 297 U.S. at 279; 161 So. at 471.

96. Report on Lawlessness, *supra* note 91, at 43-46, 91. On that report's influence, see CORTNER, *BROWN*, *supra* note 12, at 120-21.

petrated upon the *Brown* defendants.[97] Southern liberals were deeply disturbed by such practices, as evidenced by the participation in Brown's appeal of the Commission on Interracial Cooperation and the Association of Southern Women for the Prevention of Lynching (ASWPL).[98] Both of the newspapers in Jackson, Mississippi, approved of the *Brown* decision.[99] A scathing dissent in the state supreme court by Justice Griffiths noted that the transcript "reads more like pages torn from some mediaeval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government."[100] *Brown* was an easy case for Supreme Court Justices, who had little trouble distinguishing between a prosecutor commenting on the defendant's refusal to take the stand in his own defense (*Twining*) and "[t]he rack and torture chamber" (*Brown*).[101] Even Justice McReynolds, who had little sympathy either for blacks specifically or criminal defendants generally and had dissented in both *Moore* and *Powell*, was unprepared to defend Mississippi's practices in *Brown*.[102] Indeed, it is hard to believe that the Court would not have reached the same result earlier had an appropriate case presented itself. But many defendants like Brown would have been lynched in an earlier period, and those who were not, generally lacked the funds necessary for an appeal to the Supreme Court. *Brown* got there only because of the financial support provided by the NAACP, the CIC, and the ASWPL.[103]

Thus far, I have suggested that the race-related criminal procedure cases of the interwar period were attractive candidates for Supreme Court intervention because southern state courts operated under a different paradigm of legal justice from that of the High Court. The state courts viewed any trial, no matter how defective its procedures, as an improvement over a lynching. Supreme Court Justices, however, believed that criminal trials should seek to determine factual guilt or innocence, not simply avoid a lynching. Yet it is also important to recognize that southern state supreme courts, especially after World War

97. *See* CORTNER, *BROWN*, *supra* note 12, at 121; Francis A. Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 219 (1959); Klarman, *Civil Rights*, *supra* note 18, at 65-66.

98. *See infra* note 103.

99. CORTNER, *BROWN*, *supra* note 12, at 145-46.

100. *Brown*, 161 So. at 470.

101. *Brown*, 297 U.S. at 285-86.

102. On McReynolds's notorious racism, see, e.g., A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 158-59 (1996); Robert L. Carter, *Tribute (to Charles Hamilton Houston)*, 111 HARV. L. REV. 2149, 2153-54 (1998).

103. On the CIC and ASWPL's involvement, see CORTNER, *BROWN*, *supra* note 12, at 90-102. On the difficulty of getting such cases to the Supreme Court, see *infra* notes 174-196 and accompanying text.

I, generally were becoming more committed to securing procedural fairness for black defendants in criminal cases. Indeed, it is plausible to believe that the state supreme courts themselves might have reversed the criminal convictions in each of the four cases that reached the Supreme Court during the interwar period had the time and circumstances been slightly different. Yet in high profile cases that were perceived to pose more general challenges to the Jim Crow system and that incited outside criticism of the southern way of life, southern state courts regressed in their treatment of the procedural rights of black defendants.

Southern state courts in criminal cases involving black defendants frequently bragged about the colorblind nature of southern justice. For example, in 1906 the Mississippi Supreme Court, reversing the murder conviction of a nonwhite defendant on the basis of the prosecutor's improper racial appeal to the jury, boasted that everyone — black, white, and mulatto — is "on precisely the same exactly equal footing."[104] The same court in a similar case fifteen years later observed that "the humblest human being, be he white or black, red or yellow, is entitled to a fair and impartial trial on the sole issue of guilt or innocence under the law and evidence of the case."[105] In one sense, these proud pretensions to colorblind justice were absurd. Everyone knew that blacks could not serve on southern juries, that black lawyers could not command a fair hearing in southern courts, that black witnesses were treated as less credible than whites, that the death penalty never was imposed for the rape of black women, and so forth. Still, southern white judges may well have convinced themselves of the veracity of their own colorblind rhetoric. As one prominent liberal southerner explained in 1933, "it is entirely possible for a southern white man to be uncompromisingly in favor of justice to the Negro and uncompromisingly against intermarriage."[106] Indeed, by the 1920s, southern state supreme courts regularly reversed convictions of black defendants charged with serious crimes against whites, occasionally even murder or rape, on a wide variety of procedural grounds — prejudicial racial appeals by prosecutors to juries, improper denial by the trial judge of a motion for change of venue, inadequate opportunity for defense counsel to prepare a case, and coerced confessions.[107]

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104. Hampton v. State, 40 So. 545, 546 (Miss. 1906).

105. Funches v. State, 87 So. 487, 488 (Miss. 1921). For similar examples of colorblind rhetoric, see Jones v. State, 109 So. 189, 190-91 (Ala. Ct. App. 1926); Clark v. State, 59 So. 887, 888 (Miss. 1912); Morehead v. State, 151 P. 1183, 1190 (Okla. Crim. App. 1915).

106. JOHN T. KNEEBONE, SOUTHERN LIBERAL JOURNALISTS AND THE ISSUE OF RACE, 1920-1944, at 91 (1985) (quoting Virginius Dabney).

107. Many such cases are cited and discussed in MANGUM, *supra* note 29, chs.14, 16; MCMILLEN, *supra* note 20, ch.6. For a few of these cases, see Williams v. State, 146 So. 422 (Ala. 1933); Byrd v. State, 123 So. 867 (Miss. 1929); Story v. State, 97 So. 806 (Miss. 1923); Graham v. State, 82 S.E. 282 (Ga. 1914); State v. Jones, 53 So. 959 (La. 1911); Tannehill v.

However, this apparent willingness of southern appellate courts to extend procedural justice to black criminal defendants seemed to dissipate in cases that were perceived to implicate broader challenges to white supremacy or that generated national criticism of the white South's treatment of black criminal defendants. It is, perhaps, a natural human tendency to react defensively toward criticism by outsiders. White southerners may have been especially sensitive to such criticism owing to their historical memories of the Civil War and Reconstruction.[108]

The Scottsboro cases are the clearest illustration of this phenomenon, though *Moore* and *Brown* plausibly are exemplars as well. The Alabama Supreme Court previously had reversed convictions in cases similar to Scottsboro on the ground that a change of venue should have been granted owing to mob domination.[109] Other southern state supreme courts, in less publicized cases, had reversed convictions on the ground that defense counsel had been given inadequate opportunity to prepare, even when appointment of counsel had taken place a couple of days before trial, rather than the morning thereof.[110] Yet in *Powell*, the Alabama Supreme Court implausibly ruled that a fair trial was possible notwithstanding the presence of a mob surrounding the courthouse and that the right to counsel had been satisfied notwithstanding the farcical appointment of counsel the morning of the trial.[111]

The Alabama court's refusal to reverse convictions stemming from obviously unfair trials was plausibly attributable, at least in part, to the judges' defensive reaction to national criticism leveled against Alabama for its treatment of the Scottsboro defendants.[112] The Com-

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State, 48 So. 662 (Ala. 1909); Sykes v. State, 42 So. 875 (Miss. 1907) (mem.); cases cited *supra* note 69; *see also* cases cited *infra* note 128. For the suggestion that southern state appellate courts were less likely to discriminate against blacks because the judges were more professionalized and were relatively independent of local opinion, see 1 MYRDAL, *supra* note 25, at 552, 555.

108. On southern sensitivity to outside interference, see generally CARTER, *supra* note 11, at 109-10; Michael J. Klarman, Brown, *Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7, 109-11 (1994); Owsley, *supra* note 39.

Obviously there were exceptions, such as the dissenting state appellate judges in *Powell* and *Brown*, and the trial judge in one of the Scottsboro cases who heroically ordered a new trial after the jury had returned a guilty verdict, thereby costing himself his job in the following year's election. *See* Powell v. State, 141 So. 201, 214 (Ala. 1932) (Anderson, C.J., dissenting); Brown v. State, 158 So. 339, 343 (Miss. 1935) (Anderson, J., dissenting); 161 So. 465, 471 (Miss. 1935) (Griffith, J., dissenting); CARTER, *supra* note 11, at 223-34, 266, 273. My point is one about tendencies, not universal laws.

109. *See, e.g.*, Seay v. State, 93 So. 403, 405 (Ala. 1922); Thompson v. State, 23 So. 676 (Ala. 1898) (mem.).

110. *See* cases cited *supra* note 69.

111. Powell v. State, 141 So. 201 (Ala.), *rev'd* 287 U.S. 45 (1932).

112. On the circling-the-wagons effect of Scottsboro, see CARTER, *supra* note 11, at 109-10, 180-81; GOODMAN, *supra* note 11, at 47-50; Owsley, *supra* note 39; Fletcher, *supra* note

munist International Labor Defense ("ILD"), which provided the Scottsboro Boys with defense counsel on their initial appeals and retrials, immediately converted Scottsboro into a national and international cause célèbre, conducting mass protest meetings in northern cities as well as orchestrating demonstrations at United States consulates overseas in the spring and summer of 1931.[113] The ILD consistently portrayed white Alabamians as "lynchers" for their treatment of the Scottsboro defendants. Sensitive to Yankee criticism in any context, Alabama whites were particularly enraged at Communists pillorying their state, especially at a time when the Communist Party was achieving some success at organizing rural Alabama farm workers in the midst of depression.[114] Thousands of abusive and threatening protest letters from around the world were directed toward Alabama's governor and state supreme court justices.[115] Those jurists were said to be "seething with anger at an avalanche of protests, demands, and threats."[116] When Chief Justice Anderson opened the state court's session early in 1932, he expressly criticized these inflammatory messages, which had been made with "the evident intent to bulldoze th[e] court."[117] After the state court rejected the appeal in *Powell*, Anderson, the sole dissenter, explained in a letter to Walter White of the NAACP that his brethren had been swayed into denying a new trial by the ILD tactics, to which they did not wish to appear to be capitulating.[118]

The United States Supreme Court decision in *Powell*, reversing the first round of Scottsboro convictions, only exacerbated the already defensive tendencies of white Alabamians. After the initial trials, some division of opinion continued to exist in Alabama as to whether the defendants had received a fair hearing.[119] After the Supreme Court's "stinging rebuke" of the state supreme court, however, public doubts regarding the defendants' guilt or the fairness of their trials could no

22; John Temple Graves, *Alabama Resents Outside Agitation*, N.Y. TIMES, June 21, 1931, § 3, at 5. For a similar effect in *Frank*, see DINNERSTEIN, *supra* note 42, at 105-06, 116-17.

113. *See* CARTER, *supra* note 11, at 141-44, 243-45, 250-51; GOODMAN, *supra* note 11, at 28-29.

114. *See* CARTER, *supra* note 11, at 119-36, 152-53, 174-78; GOODMAN, *supra* note 11, at 27-31.

115. CARTER, *supra* note 11, at 145; GOODMAN, *supra* note 11, at 47-48; *Scottsboro Ruling Evokes Praise Here*, N.Y. TIMES, Nov. 8, 1932, at 11.

116. CARTER, *supra* note 11, at 156.

117. *Quoted in id.*; *see* GOODMAN, *supra* note 11, at 49-50.

118. CARTER, *supra* note 11, at 159-60.

119. *See id.* at 113, 136; Editorial, *The Affirmation of the Scottsboro Cases*, BIRMINGHAM NEWS, Mar. 25, 1932, at 52.

longer be expressed publicly without repercussions.[120] The Commission on Interracial Cooperation, which often participated in the appeals of southern blacks convicted in obviously unfair trials, refused to become involved in the defense of the Scottsboro Boys because of hostile public opinion.[121] Lonely voices of liberal dissent raised in defense of the Scottsboro Boys in Alabama were forcefully squelched. A protesting Jewish rabbi was pressured by his congregation to resign and then was run out of the state, and a critical Birmingham college professor had his contract terminated.[122] The ILD-provided defense attorney, Samuel Leibowitz, only made matters worse by lambasting white Alabamians as "lantern jawed morons and lynchers"[123] in widely publicized speeches in New York City. The issue at the second and third round of trials was more one of loyalty to Alabama and its system of white supremacy than the defendants' guilt or innocence. The prosecutor at one of the defendants' retrials devoted more of his closing argument to attacking New York City than to discussing the defendant's guilt.[124] The jury foreman in Haywood Patterson's third trial, convinced of the defendant's innocence, explained that the jurors felt they simply could not vote for acquittal and return to live in their communities, and thus compromised instead on a seventy-five-year prison sentence.[125] ILD criticism of Alabama made it all but impossible politically for the governor to commute the Scottsboro Boys' sentences.[126]

The Arkansas Supreme Court's refusal to reverse the convictions in *Moore v. Dempsey* may be similarly explained. Here, the court's predicament was less the state's defensive reaction to outside criticism than the difficulty of taking the side of blacks in a legal dispute that had originated in a fundamental challenge to white supremacy — the effort of black workers to organize a tenant farmers' union — and had culminated in a race war. The real issue posed by the state litigation in *Moore* was not whether the defendants were guilty of murder but rather whether to vindicate the official story of the white community that the race riot had been instigated by a black conspiracy to murder white planters. Posed in such stark terms, the choice cannot have been

120. On the galvanizing effect of *Powell*, see CARTER, *supra* note 11, at 190 (quoting the BIRMINGHAM POST).

121. *See id.* at 118-19, 153; CORTNER, *BROWN*, *supra* note 12, at 37-39. On the CIC's involvement in similar cases, see *id.* at 90-102; Emanuel, *supra* note 13, at 238 & n.119.

122. *See* CARTER, *supra* note 11, at 253-61.

123. *Quoted in* Owsley, *supra* note 39, at 284; *see also* CARTER, *supra* note 11, at 244-46 (describing white Alabamian outrage at Leibowitz's remarks in New York City); GOODMAN, *supra* note 11, at 152 (same).

124. CARTER, *supra* note 11, at 372.

125. *Id.* at 348.

126. *See id.* at 100, 119-20, 389-97.

difficult for an all-white jury chosen from the local community. While Arkansas Supreme Court justices enjoyed both greater distance and independence from local public opinion, it is scarcely surprising that they would have chosen to side with Phillips County whites in their struggle to maintain white supremacy. In less celebrated cases that posed little threat to the Jim Crow system, state supreme courts throughout the South previously had reversed convictions on the basis of mob-dominated trial proceedings.[127]

The Mississippi Supreme Court's refusal to reverse the convictions in *Brown* is difficult to comprehend except on the basis of this backlash interpretation. On several occasions in the 1910s and 1920s, that court reversed criminal convictions of black defendants on the basis of coerced confessions that had been extracted with less brutality than was involved in *Brown*, where one of the defendants had been twice strung up from a tree in an effort to induce his confession.[128] Moreover, in at least one of these earlier cases, the state court ruled that whether or not the defendant had objected to the introduction of his coerced confession at the appropriate point of the trial, the appellate court must overturn his conviction, since "[t]he duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure."[129] Yet in *Brown*, the same court refused to consider the defendants' coerced confession claim under the state constitution because their lawyer had objected to it at the wrong point in the trial proceedings.[130]

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127. *See, e.g.*, Newman v. State, 84 S.E. 579 (Ga. 1915); Graham v. State, 82 S.E. 282 (Ga. 1914); State v. Weldon, 74 S.E. 43 (S.C. 1912), *overruled in part by* State v. Thompson, 115 S.E. 326 (S.C. 1922); Browder v. Commonwealth, 123 S.W. 328 (Ky. 1909); Brown v. State, 36 So. 73 (Miss. 1904); Collier v. State, 42 S.E. 226 (Ga. 1902); Thompson v. State, 23 So. 676 (Ala. 1898); Massey v. State, 20 S.W. 758 (Tex Crim. App. 1892); MANGUM, *supra* note 29, at 278, 282-85. That the Arkansas Supreme Court twice reversed the death sentences of another set of six Phillips County defendants may appear to undermine this interpretation. However, the state judges may have regarded these as compromise verdicts. So long as some of the Phillips County defendants were executed, the State's interest in vindicating white supremacy was satisfied. On the other state supreme court decisions arising from the Phillips County riot, see Ware v. State, 252 S.W. 934 (Ark. 1923) (*Ware II*); 225 S.W. 626 (Ark. 1920) (*Ware I*); CORTNER, MOB, *supra* note 10, ch.5; Walter F. White, *The Defeat of Arkansas Mob Law*, 25 THE CRISIS 259 (1923); *Victory in Arkansas*, 26 THE CRISIS 163 (1923); J.S. Waterman & E.E. Overton, *The Aftermath of* Moore v. Dempsey, 6 ARK. L. REV. & B. ASS'N J. 1 (1951-52).

128. *See, e.g.*, Fisher v. State, 110 So. 361 (Miss. 1926); Whip v. State, 109 So. 697 (Miss. 1926); White v. State, 91 So. 903 (Miss. 1922); Matthews v. State, 59 So. 842 (Miss. 1912); MCMILLEN, *supra* note 20, at 213. For similar decisions from other southern states, see, for example, *Bell v. State*, 9 S.W.2d 238 (Ark. 1928); *Enoch v. Commonwealth*, 126 S.E. 222 (Va. 1925).

129. *Fisher*, 110 So. at 365. For similar willingness by the Mississippi Supreme Court to overlook a procedural default by a black defendant, see *Butler v. State*, 112 So. 685 (Miss. 1927).

130. *See* Brown v. State, 158 So. 339, 342-43 (Miss. 1935), 161 So. 465, 466-67 (Miss. 1935).

Brown did not generate national publicity. The NAACP intentionally maintained a low profile so as not to prejudice the defendants' chances for a reversal of their convictions in the state supreme court or for a commutation of their sentences by the governor.[131] Mississippi was not vilified in the national press over *Brown* as Alabama had been over Scottsboro. Thus, the turnabout by the Mississippi Supreme Court on the issue of coerced confessions seems attributable not to a backlash against outside criticism in connection with *Brown* but rather to a general shift in regional judicial outlook flowing from Scottsboro. After watching a neighboring state being pilloried before the nation for its treatment of black criminal defendants, a majority of Mississippi Supreme Court justices apparently were convinced of the desirability, when possible, of insulating that court's judgments from federal scrutiny by invoking state procedural defaults. This shift in approach already was apparent in two decisions handed down by that court between Scottsboro in 1931 and *Brown* in 1935. In *Perkins v. State*[132] the Mississippi Supreme Court affirmed a murder conviction partly on the ground that defense counsel had failed to move for the exclusion of an allegedly coerced confession at the appropriate point in the trial. In *Carraway v. State*[133] that court refused to reverse a death sentence for rape even though defense counsel had declined to seek a continuance or a change of venue for fear that his client would be lynched. One cannot know for sure, but southern state judges may have concluded after Scottsboro that if northerners were intent on criticizing southern states for their treatment of black criminal defendants notwithstanding the recent progress they felt had been made toward achieving color-blind justice, they were not going to offer any assistance in that enterprise.[134]

In sum, the Supreme Court's race-related criminal procedure decisions of the interwar period almost certainly were consonant with dominant national opinion. Most of the country was appalled by these farcical proceedings in which southern black defendants, quite plausibly innocent of the offenses charged, were tortured into confessing and then rushed to the death penalty in mob-dominated trials without effective assistance of counsel. Black criminal defendants certainly were not treated this way in the North. While northern blacks were segregated in ghetto neighborhoods and discriminated against in employment and public accommodations, the administration of justice in northern courts was relatively nondiscriminatory.[135]

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131. *See* CORTNER, *BROWN*, *supra* note 12, at 95-96, 103.

132. 135 So. 357 (Miss. 1931).

133. 154 So. 306 (Miss. 1934).

134. For a similar example, see *Patterson v. State*, 156 So. 567 (Ala. 1934).

135. On northern discrimination against blacks, see, for example, KENNETH L. KUSMER, A GHETTO TAKES SHAPE: BLACK CLEVELAND, 1870-1930, at ch.8 (1976); 1

The difference between northern and southern treatment of blacks charged with serious crimes against whites is typified by the most celebrated NAACP case of the 1920s, the criminal defense of black doctor Ossian Sweet and his family.[136] Several members of the Sweet family were charged in a Detroit courtroom with murder for allegedly killing a member of a white mob that assaulted their home in an effort to drive them out of a white neighborhood. The trial before Judge (later Supreme Court Justice) Frank Murphy was strikingly fair, according to contemporary testimonials by NAACP leaders, especially in light of the extent of Klan influence in Detroit in the mid-1920s. After a first trial involving several Sweet family members ended with a deadlocked jury, Dr. Sweet's brother was acquitted in the only retrial that took place. It is difficult to imagine a similar result in a southern courtroom during this time period. Yet, even in the South, many whites did not condone the sort of treatment of black criminal defendants that the Supreme Court denounced in these interwar decisions.[137] As the Swedish social scientist Gunnar Myrdal observed in his classic study of American race relations, *An American Dilemma*, discrimination in the legal system was near the bottom of the white supremacist hierarchy of values.[138] That is, many white southerners who were intensely committed to racial segregation in education and to legal bans on interracial marriage did not endorse manifestly unfair trials for black criminal defendants. For this reason, it was possible to enlist eminent white counsel to represent black criminal defendants like Moore or Brown on appeal.[139] During this time period, securing such representation for black litigants challenging public school segregation or disfranchisement would have been virtually impossible.

Perhaps the Justices would have been unwilling to intervene in these cases had the facts been significantly less egregious than they were. The paradox of these criminal procedure cases is that while the facts made them easy, the law made them hard. Prior to *Moore*,

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MYRDAL, *supra* note 25, at 293-96, 304-06; ALLAN H. SPEAR, BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO 1890-1920, at ch.11 (1967); Hannibal Gerald Duncan, "The Changing Race Relationship in the Border and Northern States" chs.3-4 (Ph.D. dissertation, University of Pennsylvania, 1922). On regional differences in legal treatment of blacks, see 1 MYRDAL, *supra* note 25, at 526-29, 534.

136. On Sweet, see NAACP Papers (microfilm edition), pt. 5, reel 3, *passim*, especially frames 164, 230, 462-63.

137. *See, e.g.*, Henry J. McGuinn, *Equal Protection of the Law and Fair Trials in Maryland*, 24 J. NEGRO HIST. 143, 145 (1939).

138. 1 MYRDAL, *supra* note 25, at 60-61; *see also* SAMUEL N. PINCUS, THE VIRGINIA SUPREME COURT, BLACKS AND THE LAW 1870-1902, at 247-48 (1990).

139. *See, e.g.*, CORTNER, *BROWN*, *supra* note 12, at 64-69; CORTNER, MOB, *supra* note 10, at 43-44; AUGUST MEIER & ELLIOTT RUDWICK, ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE 134 (1976); 1 MYRDAL, *supra* note 25, at 555-56; Emanuel, *supra* note 13, at 234-36.

scarcely any precedent existed for federal court intervention in the state criminal process. *Moore* required a departure from *Frank*, and *Norris* implicitly repudiated *Plessy*-era precedents on race discrimination in jury selection. *Powell* and *Brown* involved no departure from precedent only because these decisions were truly unprecedented; the Court never before had broached the subject of reversing state criminal convictions on the ground that the right to counsel had been violated or confessions had been coerced. For the Court effectively to intervene in these cases, it had to do something that the Justices understandably would have been reluctant to do: accuse state courts or state officials of lying.[140] *Moore* required the Court to disbelieve a state appellate tribunal's determination that trial proceedings had not been corrupted by mob domination. *Norris* required the Justices to substitute their judgment for that of the state supreme court on the question of whether jury commissioners had lied when denying any racial motivation in jury selection. Finally, to render *Brown* effective, the Court would have to be willing to question denials by state law enforcement officials that they had beaten black defendants into confessing. The Court's willingness to blaze such trails may have depended on the confluence of two factors: appealing cases in which the injustice to black defendants and the dishonesty of the state appellate courts were manifest, and an incipient transformation of the extralegal context which rendered the Justices more sensitive to and less tolerant of the egregious mistreatment of blacks by the southern criminal justice system.[141]

II. CONSEQUENCES

A. *Direct Effects*

The Court's remand of the criminal convictions in *Moore* for a hearing on the question of mob domination may have had the effect of saving the lives of the black defendants. Given public opinion in Arkansas regarding the Phillips County race riot, the governor might have been disinclined to run the political risk of commuting their sentences had the Court not first intervened. On the other hand, since the governor did in fact commute their sentences after *Moore*, rather than forcing them to proceed with their habeas hearing in federal district court and possibly a new trial in state court, it is possible that their lives would have been spared regardless of the Court's decision. After

140. On the willingness to second-guess state court findings of fact, see NELSON, *supra* note 59, at 103-05; Recent Case, 1 GEO. WASH. L. REV. 116, 117 (1932).

141. I have sketched that extralegal context in some detail in Michael J. Klarman, Neither Hero, Nor Villain: The Supreme Court, Race, and the Constitution in the Twentieth Century ch.3 (1999) (unpublished manuscript).

all, nothing prevented the state from retrying the defendants after *Moore*. The Scottsboro Boys, for example, were retried, reconvicted, and resentenced to death on more than one occasion after the Court first reversed their convictions in *Powell v. Alabama*. By 1923, public furor over the Phillips County race riot may have dissipated sufficiently that the *Moore* defendants would not have been executed regardless of the Court's disposition of their case. Nobody can know for certain.[142]

Measuring the broader impact of *Moore* also is impossible. Obviously the decision did not end mob-dominated trials in the South or even induce state appellate courts consistently to reverse guilty verdicts in such cases. Scottsboro and many other similar cases in the late 1920s and 1930s make this clear.[143] Indeed some lower courts, both state and federal, construed *Moore* narrowly and refused to find mob domination on somewhat less egregious facts.[144] Moreover, even to the extent that fewer mob-dominated trials took place in the South after *Moore*, any reduction might have been attributable to changing social circumstances rather than to the Supreme Court. Urbanization, industrialization, better education, improvements in communication and transportation, more professionalized law enforcement, and the greater threat of federal government intervention all combined to erode the environment that had been conducive to southern lynchings.[145] Naturally, a reduction in lynchings eventually translated into fewer mob-dominated trials. The number of lynchings in the South declined steadily through the 1920s and 1930s, with the exception of a brief resurgence in the early years of the Depression.[146] Obviously this phenomenon was not attributable to the Supreme Court, since lynchings were beyond the Court's power to control. Any reduction in the number of mob-dominated trials similarly may not have been ascribable to the Court.

The Supreme Court probably saved the Scottsboro Boys from execution. Given public opinion in Alabama in the early 1930s, the governor almost certainly would not have commuted their death sentences. Yet the Court's reversal of the first round of convictions in *Powell* and the second in *Norris* did not prevent the State from initiating a third

142. On *Moore*'s aftermath, see CORTNER, MOB, *supra* note 10, ch.8; Waterman & Overton, *supra* note 127, at 6-7; *The Arkansas Cases Nearly Ended*, 27 THE CRISIS 124 (1924); *The End of the Arkansas Cases*, 29 THE CRISIS 272 (1925).

143. For post-*Moore* mob-dominated trials, see, for example, State v. Wilson, 158 So. 621 (La. 1935); Downer v. Dunaway, 1 F. Supp. 1001 (M.D. Ga. 1932); Powell v. State, 141 So. 201 (Ala.), *rev'd*, 287 U.S. 45 (1932); *Ex parte Hollins*, 14 P.2d 243 (Okla. Crim. App. 1932).

144. *See, e.g.*, Bard v. Chilton, 20 F. 2d 906 (6th Cir. 1927); *Powell*, 141 So. at 208-09.

145. *See supra* note 27.

146. *See, e.g.*, 1 SITKOFF, *supra* note 61, at 269; Miller, *supra* note 21, at 225.

series of prosecutions, which resulted in one more death sentence and several lengthy prison terms.[147] Indeed, the Supreme Court reversals seemed only to further inflame local opinion, ensuring that prosecutors would not drop the cases and that juries would continue to convict and to impose draconian sentences.[148] Eventually the Supreme Court ran out of plausible federal constitutional grounds for reversing the defendants' convictions. In 1937, the Justices refused to review Haywood Patterson's fourth conviction, which carried a seventy-five-year prison sentence.[149] The fact that the Justices likely believed the Scottsboro Boys to be innocent did not, unfortunately, amount to a sound constitutional basis for reversing their convictions. So the Scottsboro Boys, who certainly were innocent of the crimes charged, wound up spending from five to twenty years in prison apiece, notwithstanding the Court's two reversals of their convictions.[150] As the Justices again would discover following their school desegregation ruling in 1954, a state judiciary determined to have its way and willing to dissemble in doing so possessed a wide variety of means for frustrating federal court intervention.[151]

As to broader impact, we have no way of determining whether *Powell* led to better legal representation for black defendants in southern criminal cases. Even to the extent that legal assistance was improved over time, the cause might have been the increasing professionalization of the southern legal system as well as a growing conviction among more progressive white southerners that Jim Crow could be preserved without sacrificing the lives of innocent black defendants. Moreover, Justice Sutherland's *Powell* opinion was written as narrowly as was humanly possible. Not only did the ruling cover only capital cases, but it seemed to be limited to the precise facts of Scottsboro — "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces . . . ."[152]

Even if *Powell* did ensure better legal representation for southern black defendants, how much this affected actual case outcomes is un-

147. CARTER, *supra* note 11, chs. 10-11.

148. *Id.* at 181, 189-90, 329.

149. *Id.* at 379.

150. *See id.*, chs. 11-12.

151. On the Alabama judiciary's willingness to "cheat" to ensure convictions in retrials of the Scottsboro defendants, see *id.* at 341-46. On post-*Brown* evasions by state courts, see MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 283-89 (1994); Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority*: Williams v. Georgia *Revisited*, 103 YALE L.J. 1423 (1994); Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School:* Virgil Hawkins v. The Florida Board of Control, 12 FLA. ST. U. L. REV. 59 (1984).

152. *Powell*, 287 U.S. at 71.

certain. The ILD criticized *Powell* because the Justices apparently had selected the least significant ground for reversing the Scottsboro Boys' convictions. Indeed, the Communists accused the Court of simply providing Alabama with instructions on how properly to lynch the defendants.[153] Even if appointed days before trial and afforded adequate opportunity to prepare a defense, counsel generally could do little to assist clients like the Scottsboro Boys. Black lawyers, who might have been willing aggressively to pursue their clients' defense, were few and far between in the South, and in any event were distinct liabilities owing to the prejudice they aroused among white judges and juries. White lawyers, on the other hand, generally refrained from pressing defenses that raised broader challenges to the Jim Crow system, such as race-based exclusion from juries.[154] In any event, even the most earnest advocacy rarely could influence case outcomes when the system was so pervasively stacked against fair adjudication of the legal claims of black defendants. The Scottsboro Boys did enjoy outstanding legal representation in their retrials, yet it made absolutely no difference to the outcomes.

Getting blacks onto southern juries was of greater practical importance than having defense lawyers appointed with sufficient time to prepare their cases. This is why contemporary observers deemed the jury exclusion claim of the Scottsboro Boys to be more significant than the right-to-counsel argument. Yet, in practice, *Norris* had very little impact on black jury service in the South.

The southern press reaction to *Norris* generally was calm and collected.[155] Newspapers expressed confidence that the decision easily could be circumvented through lawful means. The *Jackson (Mississippi) Daily News* deemed the ruling a minor nuisance because lawyers would have to invest time in devising methods to evade it.[156] In states like Mississippi and South Carolina, where jury service was linked to voter registration, *Norris* made essentially no difference at all because blacks still were almost universally disfranchised in the 1930s.[157] As to other southern states, *Norris* still did not call into ques-

153. *See supra* note 61.

154. On the difficulty faced by southern black defendants in securing decent legal representation, see *infra* notes 177-187 and accompanying text.

155. *See* CARTER, *supra* note 11, at 326-27.

156. *See* CARTER, *supra* note 11, at 326 (discussing the reaction of the *Daily News* (Jackson, Miss.)). For other contemporary predictions that *Norris* would be evaded, see MANGUM, *supra* note 29, at 333; NELSON, *supra* note 59, at 82 (quoting view of NAACP's William Pickens); J.F. Barbour, Jr., Note, *The Exclusion of Negroes from Jury Service*, 8 MISS. L.J. 196, 200-01 (1935); Recent Decision, *supra* note 86.

157. *See* State v. Grant, 19 S.E.2d 638 (S.C. 1942); NELSON, *supra* note 59, at 82-83; Barbour, *supra* note 156, at 201-04; *Negroes and Jury Service in the Southern States*, BIRMINGHAM NEWS, Apr. 5, 1935, at 8; CHARLESTON NEWS & COURIER, Apr. 13, 1935, at 4; BIRMINGHAM NEWS, Apr. 30, 1935, at 1, *reproduced in* THE ATTITUDE OF THE

tion the constitutionality of the typical southern state jury selection scheme, which vested enormous discretion in the hands of (white) jury commissioners. Proving the existence of race discrimination in the administration of such a scheme remained a formidable task, *Norris* notwithstanding, especially since state courts continued to make the initial factual determinations.

Most white southerners correctly concluded that *Norris* could be circumvented by placing a few black names on the jury rolls. Blacks on the list rarely were called for actual service, and those who were called frequently could be intimidated out of serving. Moreover, the presence of an occasional black man on a grand jury could be nullified through the use of supermajority, rather than unanimity, voting rules for indictment. For example, the Jackson County grand jury that reindicted the Scottsboro Boys after *Norris* consisted of thirteen whites and one black and operated under a rule requiring only a two-thirds majority for indictment.[158] The even more occasional black man called for service on petit juries after *Norris* could be excluded through challenges for cause, over which trial judges exercised enormous discretion, or through peremptory challenges, the number of which some states increased in order to nullify *Norris*'s potential impact.[159] Thus, for example, in Haywood Patterson's retrial, 12 blacks appeared on the trial jury venire of 100, but 7 were excused upon request and the other five were struck with peremptories. In Clarence Norris's retrial, another all-white jury reconvicted and resentenced him to death.[160]

The most that *Norris* seems to have accomplished anywhere — and even then only in large cities in the peripheral South — was to place a single black person onto an occasional jury.[161] These were the same parts of the South where changing public opinion with regard to race might have induced acceptance of occasional black jury service regardless of Supreme Court intervention.[162] Even before *Norris*, blacks had begun to serve again sporadically on juries in parts of Maryland,

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SOUTHERN WHITE PRESS TOWARD NEGRO SUFFRAGE, 1932-1940, at 2 (Rayford W. Logan ed., 1940).

158. For the post-*Norris* proceedings, see CARTER, *supra* note 11, at 338-41.

159. On the use of jury challenges to circumvent *Norris*, see NELSON, *supra* note 59, at 82-83 & n.100; Eckhardt, *supra* note 74, at 233-35.

160. On the continued difficulty of proving race discrimination in jury selection, see Jefferson, *supra* note 75, at 433-34, 447, and Schmidt, *supra* note 58, at 1482. On Norris's third death sentence, see CARTER, *supra* note 11, at 369-70.

161. NELSON, *supra* note 59, at 82 n.96.

162. *See, e.g.*, Walter White, *George Crawford — Symbol*, 41 THE CRISIS 15 (1934); John Temple Graves, *Scottsboro Ruling Disturbs the South*, N.Y. TIMES, Apr. 7, 1935, § 3, at 6.

Virginia, and Tennessee.[163] In the deep South and in rural areas throughout the region, exclusion of blacks from juries remained the rule for another generation after *Norris*.[164] A study conducted by southern social scientist Arthur Raper in 1940 found that the vast majority of rural counties in the deep South "have made no pretense of putting Negroes on jury lists, much less calling or using them in trials."[165] In a Louisiana case that reached the Supreme Court in 1939, a rural parish with a black population of nearly fifty percent had "complied" with *Norris* by placing the names of three blacks, one of whom was dead, on a jury venire of 300.[166] A study of the *border state* of Kentucky found that all fifteen black men executed by the State from 1940 to 1962 were convicted by all-white juries for crimes committed against whites.[167] White judges and white prosecutors in Kentucky simply continued to exclude blacks from juries in racially sensitive cases.

As with Scottsboro, the Supreme Court's intervention in *Brown* almost certainly saved three southern blacks from the death penalty. Yet, also as with Scottsboro, defendants who quite possibly were factually innocent spent substantial periods (three to seven years) in jail, notwithstanding the Court's intervention on their behalf. Skeptical of their chances of securing an acquittal on retrial, the defendants in *Brown* deemed it prudent to accept a plea bargain with prison sentences rather than risk reimposition of the death penalty after a second trial.[168]

It is impossible to measure the amount of physical coercion employed by southern sheriffs to extract confessions from black suspects, and thus one cannot say for sure what effect *Brown v. Mississippi* had on this practice. Supreme Court cases from the 1940s, however, make it clear that beating blacks into confessing remained a common practice in the South after *Brown*.[169] For a variety of reasons, *Brown* had,

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163. *See, e.g.*, Harry H. Jones, *The Negro Before the Court During 1932*, 40 THE CRISIS 230 (1933); White, *supra* note 162; Editorial, *Negroes as Jurors*, N.Y. TIMES, July 12, 1932, at 16.

164. *See, e.g.*, FAIRCLOUGH, *supra* note 41, at 63-64; 1 SITKOFF, *supra* note 61, at 231 (noting U.S. Civil Rights Commission report from 1960s); PITTSBURGH COURIER, Jan. 29, 1943, at 3.

165. *Quoted in* 1 MYRDAL, *supra* note 25, at 549-50.

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

167. Wright, *Legal Executions*, *supra* note 20, at 266.

168. CORTNER, *BROWN*, *supra* note 12, at 153, 159.

169. *See, e.g.*, Ward v. Texas, 316 U.S. 547 (1942); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 309 U.S. 227 (1940); *Florida's Little Scottsboro: Groveland*, 56 THE CRISIS 266, 267 (1949) (describing beating of blacks accused of rape in Groveland, Fla.); *Along the N.A.A.C.P. Battlefront*, 55 THE CRISIS 123, 123 (1948) (detailing NAACP's efforts in late 1940s on behalf of rape suspect forced to "confess" through "force, violence, and fear"); *Along the N.A.A.C.P. Battlefront*, 50 THE CRISIS 371, 372-73 (1943) (discussing 1941 conviction of Oklahoman black whose confession had been obtained through violence); *see*

at most, a limited impact on southern police practices. First, it must be recalled that the deputy sheriff who had administered the beatings in *Brown* made no effort to hide his behavior. The likeliest effect of the Supreme Court's decision, then, was to reduce the candor of state law enforcement officials. If sheriffs denied coercion of black criminal defendants and state courts believed them, it was difficult for a reviewing federal court to find a constitutional violation. Second, *Brown* provided little direct incentive for southern sheriffs to discontinue their traditional methods of handling black suspects. Tortured confessions, if detected, might eventually be reversed by the Supreme Court or even by a state appellate court, but the vast majority of criminal cases never made it that far in the system.[170] Thus, most convictions based on coerced confessions were unlikely ever to be overturned. Moreover, the narrow construction provided to federal civil rights statutes at this time made it very difficult to prosecute law enforcement officials who used physical violence against black suspects.[171] Even in those unusual cases where a federal violation could be established, convincing all-white southern juries to indict and convict law enforcement officials who had mistreated black defendants proved virtually impossible.[172]

Finally, even assuming that the number of coerced confessions declined after 1940, it is impossible to say how much *Brown* was responsible for this development. The sort of law enforcement behavior condemned by the Court's ruling appears to have been on the decline anyway by the 1930s. The Wickersham Commission Report in 1931 had noted a decline in the use of extreme physical coercion against criminal defendants. Popular revulsion against Nazi and Stalinist law enforcement methods further contributed to the demise of such practices by the mid-1930s, as did the work of the Commission on Interracial Cooperation and other southern liberal organizations that challenged the most egregious aspects of Jim Crow criminal justice. Law enforcement officials continued regularly to employ less extreme forms of coercion, such as sleep deprivation, physical isolation, and continuous interrogation. Physical torture, however, seems to have

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also Editorial, *Rebuke to Torture*, 47 THE CRISIS 81 (1940) (calling the torturing of black criminal suspects a "routine police procedure" in the South).

170. *See, e.g.*, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMISSION ON CIVIL RIGHTS 25 (1947).

171. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945); ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 24, 30-31, 105-15 (photo. reprint 1959) (1947); TO SECURE THESE RIGHTS, *supra* note 170, at 114-19.

172. *See, e.g.*, CARR, *supra* note 171, at 114, 133-42, 161-62; TO SECURE THESE RIGHTS, *supra* note 170, at 126.

been losing favor, independently of the Supreme Court's intervention.[173]

Brown thus intervened against a practice that apparently was declining in frequency anyway. It clearly did not eradicate that practice. At most, it provided incentives to drive the practice underground. And those incentives were relatively weak, since law enforcement officials engaging in the practice could not be held directly responsible for violations, and most cases built upon coerced confessions never advanced far enough in the legal system for courts inclined to follow *Brown*'s mandate to register their disapproval. For all these reasons, *Brown* was not a decision of dramatic consequence.

One general reason the criminal procedure cases of the interwar period did not have much direct impact was that southern black defendants ordinarily could not get their cases to the Supreme Court. Their fate lay in the hands of less sympathetic state courts, which may or may not have respected the constitutional rights articulated by the Justices.

Most southern black criminal defendants were impecunious. They could not afford the cost of hiring a lawyer for trial, much less the several thousand dollars required to finance extensive appellate litigation.[174] The criminal procedure cases that reached the Supreme Court were atypical in this regard. The NAACP financed the appellate litigation in *Moore*; the ILD in *Powell* and *Norris*; and the NAACP, the CIC, and the ASWPL in *Brown*. None of these cases could have gotten to the Supreme Court without outside financial assistance. The Phillips County race riot and the alleged rapes and ensuing trials at Scottsboro captured national attention. Because these criminal cases revealed southern Jim Crow at its worst, they provided outstanding fundraising opportunities.[175] The NAACP and the ILD, respectively, became involved at the early stages of litigation and raised large sums of money to finance appeals. *Brown v. Mississippi* was more of a garden variety murder case. Only the extraordinary efforts of local appointed counsel, who covered some of the legal costs from his own

173. For the points in this paragraph, see *supra* notes 96-98 and accompanying text. The Court began challenging less extreme forms of coercion in *Chambers*, 309 U.S. 227 (repeated interrogation of isolated prisoner).

174. One contemporary commentator attributed the relative dearth of Supreme Court criminal procedure cases to the expense, which he estimated to exceed $3,500. *See* NELSON, *supra* note 59, at 45. The NAACP spent roughly $15,000 over three-and-a-half years defending the Phillips County defendants at various levels of the criminal justice system. *See* Walter White, *The Defeat of Arkansas Mob Law*, 25 THE CRISIS 259 (1923); NAACP, Press Release 2 (Sept. 12, 1924), *microformed on* NAACP Papers, pt. 5, reel 4, frames 335-36. The Supreme Court appeal alone in *Brown v. Mississippi* cost $1,261. *See* AFRO-AMERICAN (Balt., Md.), Feb. 22, 1936, at 1.

175. On the fundraising opportunities created by Scottsboro, see CARTER, *supra* note 11, at 143-44, 170 n.98; CORTNER, *BROWN*, *supra* note 12, at 40. On *Moore*, see KELLOGG, *supra* note 26, at 242-43.

pocket, kept the case alive long enough for outside organizations to become involved and finance an appeal to the Supreme Court.[176]

In the run-of-the-mill criminal case, indigent black defendants were represented not by elite legal talent hired by the NAACP or the ILD, but rather by court-appointed lawyers. Generally these lawyers were white, and they could not always be counted upon to defend aggressively the rights of their black clients, since doing so could be injurious to their careers as well as potentially hazardous to their health.[177] For example, a tacit agreement existed among prosecutors and defense counsel in many southern counties not to raise the issue of black exclusion from juries.[178] When a white ILD lawyer challenged that tacit agreement in a Maryland murder case in 1931, he had to endure death threats and subsequent retaliatory disbarment proceedings.[179] The ILD lawyer representing the Scottsboro Boys in their first round of retrials, Samuel Leibowitz, was besieged with death threats after he questioned in court the honesty of county jury commissioners and of the white women who had alleged rape.[180] The court-appointed white defense attorney in *Brown v. Mississippi* ruined a promising political career by pursuing the case so aggressively.[181] In the wake of Scottsboro, two white ILD lawyers lost their lives for defending three blacks charged with raping and killing a white woman in Tuscaloosa, Alabama.[182]

Black lawyers, who possibly would have been more aggressive in defending the rights of their clients, were few and far between in the South during the interwar period.[183] The number of black lawyers in Mississippi declined from twenty-one in 1910 to three in 1940, and the

176. *See* CORTNER, *BROWN*, *supra* note 12, at 45-49.

177. *See, e.g.*, Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49 (1935); Letter from William Pickens to NAACP (Apr. 11, 1926) (describing how white attorneys had "double-crossed" blacks), *microformed on* NAACP Papers, pt. 5, reel 2, frame 753; Letter from G.W. Lucas, President, New Orleans Branch of the NAACP, to James Welson Johnson, Secretary, NAACP (Apr. 24, 1926) (describing "apprehension" over southern white attorney in residential segregation case), *microformed on* NAACP Papers, pt. 5, reel 2, frame 755. On the pressure felt by white lawyers not to represent blacks in controversial cases involving interracial crime, see Browder v. Commonwealth, 123 S.W. 328, 330 (Ky. 1909); CARTER, *supra* note 11, at 179; MCMILLEN, *supra* note 20, at 214-17; Emanuel, *supra* note 13, at 237 n.115.

178. Cilella & Kaplan, *supra* note 61, at 503 n.17; *see also* CARTER, *supra* note 11, at 75.

179. McGuinn, *supra* note 137, at 156-57. The Maryland case was *Lee v. State*, 161 A. 284 (Md. 1932).

180. CARTER, *supra* note 11, at 199-202, 205-10; *see also id.* at 79-80 (describing threats against two other attorneys who questioned the character of the alleged rape victims).

181. CORTNER, *BROWN*, *supra* note 12, at 46, 59-60, 105-06, 155-56.

182. CARTER, *supra* note 11, at 276 & n.7.

183. 1 MYRDAL, *supra* note 25, at 550; Houston, *Negro Lawyers*, *supra* note 177, at 49, 50 tbl. 1.

number in South Carolina fell from seventeen to five.[184] Outside of major cities, essentially no black lawyers practiced in the South. Furthermore, the few black lawyers who could be found were a distinct liability in most Jim Crow courtrooms, both because of the racial prejudice of white judges and jurors and because of the inferior legal training most of them had received.[185]

The NAACP, to preserve its credibility, was unwilling to become involved in criminal cases unless convinced of a high probability of the defendant's innocence.[186] Moreover, the absence of NAACP branches from most of the rural South at this time obstructed the Association's participation in cases where the abuses were likely to be greatest at a point in the litigation where it could have done the most good — when the trial record was being created.[187] In any event, NAACP involvement was something of a mixed blessing from the perspective of southern black criminal defendants. On the one hand, the organization could provide essential financial resources and skilled lawyering. On the other hand, its involvement, if publicly known, risked alienating local opinion, and thus reduced the chances of a favorable jury verdict, appellate reversal, or gubernatorial commutation.

Frequently, enlistment of competent counsel on appeal came too late to do much good, as inept or careless lawyering at trial produced procedural defaults that insulated constitutional violations from appellate review. In *Brown v. Mississippi*, the coerced confession issue nearly failed to gain a hearing in the Supreme Court because defense counsel had challenged the voluntariness of the confessions at the wrong point of the trial.[188] The issue of race discrimination in jury selection was procedurally defaulted in both *Moore* and *Powell* and very nearly so in *Patterson v. Alabama*, a companion case to *Norris*.[189] In *Frank v. Mangum*, a procedural default cost the defendant any appellate review on the question of whether his absence from the court-

184. MEIER & RUDWICK, *supra* note 139, at 130.

185. On racial bias against black lawyers, see *id.*, and MCMILLEN, *supra* note 20, at 215. On inferior legal training, see KELLOGG, *supra* note 26, at 293; 1 SITKOFF, *supra* note 61, at 217-18; and Editorial, 9 CRISIS 133-34 (Jan. 1915).

186. On the NAACP's rule requiring likely innocence, which was not relaxed until World War II, see CARTER, *supra* note 11, at 52-53; TUSHNET, *supra* note 151, at 28-29.

187. On the absence of NAACP branches from the rural South, see, for example, JOHN DITTMER, BLACK GEORGIA IN THE PROGRESSIVE ERA, 1900-1920, at 206 (1977); MCMILLEN, *supra* note 20, at 314-16.

188. The Mississippi Supreme Court in *Brown* initially refused to consider the federal coerced confession claim because of defense counsel's failure to object at the appropriate point of the trial. Only because that court addressed (in passing) the merits of the claim at a rehearing was the United States Supreme Court empowered to consider the issue. *See Brown*, 161 So. 465, 467-68 (Miss. 1935).

189. Patterson v. State, 156 So. 567 (Ala. 1934), *vacated*, 294 U.S. 600 (1935); Powell v. State, 141 So. 201, 210 (Ala.), *rev'd*, 287 U.S. 45 (1932); Hicks v. State, 220 S.W. 308, 309 (Ark. 1920).

room when the jury verdict was returned violated his due process rights.[190] Even highly skilled defense counsel, as in *Frank*, could slip on the hazardous terrain of state criminal procedure. Until the Supreme Court in the civil rights era changed the rules regarding federal court deference to state procedural defaults, many valid federal constitutional claims were denied a hearing in any appellate court.[191]

Finally, the Jim Crow system was so broadly and deeply rooted that compiling the sort of trial record necessary for effective appellate review could be difficult. For example, in *Moore v. Dempsey*, fear of economic and physical retaliation deterred all but a handful of local blacks from signing affidavits supporting a change in trial venue. When Walter White of the NAACP traveled to Phillips County to investigate the facts of the case for purposes of litigation, he was nearly lynched.[192] Similarly, in cases raising the issue of race discrimination in jury selection, local blacks who testified regarding their qualifications to serve risked retaliation.[193] Rigorous cross-examination of white witnesses, especially women in rape cases, not only alienated white jurors but also put defense counsel at physical risk.[194] The pervasive violence of the Jim Crow South could intimidate white witnesses as well as black. One of the physicians who testified in the second round of Scottsboro trials privately confessed to the judge that he never had believed the alleged victims had been raped, but he rejected the judge's exhortation to testify publicly to this effect, for fear that he would no longer be able to live in that county.[195] Ruby Bates, one of the two alleged victims in Scottsboro, who recanted her rape allegation in one of the defendants' retrials, refused to return to Alabama for subsequent proceedings because of death threats. In all of these ways, it was difficult to develop a trial record that would have enabled even a sympathetic appellate court to reverse criminal convictions of southern black defendants.

For these various reasons — the inability of most southern black defendants to afford counsel, the relative absence of alternative forms of legal assistance such as the NAACP, the difficulty of maneuvering around state procedural default rules, and the obstacles to compiling a favorable trial record — cases such as *Moore*, *Powell*, *Norris*, and *Brown* were the exception rather than the rule. The Supreme Court

190. 237 U.S. 309, 343 (1915).

191. For the later change in the rules regarding procedural defaults, see Fay v. Noia, 372 U.S. 391 (1963), and Williams v. Georgia, 349 U.S. 375 (1955).

192. On *Moore* and Walter White, see CORTNER, MOB, *supra* note 10, at 26, 91-92. For a similar scenario, see *Browder v. Commonwealth*, 123 S.W. 328, 330 (Ky. 1909).

193. *See* Emanuel, *supra* note 13, at 240.

194. On Leibowitz's brutal cross-examination of Victoria Price, see CARTER, *supra* note 11, at 205-10, 223-24.

195. For the rest of this paragraph, see *id.* at 214-15, 291.

probably failed to review other similar cases during this period not because equally egregious injustices did not exist, but rather because those other cases failed to advance sufficiently far in the legal system. Many southern black criminal defendants surely were denied their constitutional rights without ever receiving a fair opportunity for appellate review.[196]

B. *Indirect Effects*

It is possible, however, that these Supreme Court decisions and the litigation that produced them were more important for their intangible effects: convincing blacks that the racial status quo was not impervious to change; educating them about their rights; providing a rallying point around which to organize a protest movement; and perhaps even instructing oblivious whites as to the egregious nature of Jim Crow conditions. These sorts of intangible consequences of litigation are impossible to measure, but may nonetheless be quite real and possibly even substantial.

A social movement for civil rights faced intimidating obstacles in the interwar South. One of the most formidable challenges was simply convincing blacks that the status quo of racial subordination and oppression was not natural and inevitable, but rather contingent and malleable.[197] A black correspondent of NAACP Secretary Walter White wrote from Louisa County, Virginia, in 1935 that our "worse [sic] enemy is ourselves."[198] A southern NAACP branch official similarly confided to the national office in 1924 in connection with the fight against residential segregation that "it is a very hard matter to convince the mass of our people that Segregation is not the best thing for us."[199] As Walter White explained in a 1937 letter, the greatest difficulty faced by the NAACP was "getting over to the masses of our folks the significance of these fights."[200] Not only did the civil rights

196. For example, the Supreme Court heard eight coerced confession cases involving southern black defendants between 1936 and 1943. *See* NELSON, *supra* note 59, at 135-36. There cannot possibly have been more coercion during these years than previously. The increase in the number of cases must be attributable to more favorable conditions for obtaining appellate review — a more active NAACP, an increase in the number of black lawyers, a more professionalized southern legal system, and less oppressive social conditions.

197. On the importance of maintaining hope, see DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT chs.5-6 (1991); DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970, at 105-06 (1982).

198. Letter from J. Rice Perkins to Walter White (May 7, 1935), *microformed on* NAACP Papers, pt. 3, ser. A, reel 4, frame 367.

199. Letter from Jasper E. Gayle, Chairman, New Orleans Branch of the NAACP, to Robert W. Bagnall, Director of Branches, NAACP (Nov. 27, 1924), *microformed on* NAACP Papers, pt. 5, reel 2, frame 645.

200. Letter from Walter White to Edward S. Lewis, Baltimore Urban League 1 (Sept. 8, 1937), *microformed on* NAACP Papers, pt. 3, ser. A, reel 2, frames 818-19.

movement have to overcome black hopelessness and fearfulness, but sometimes it was necessary as well to undo the psychological damage that the ideology of white supremacy had inflicted on those blacks who had internalized its lessons.[201]

Litigation, even if it could not "bring on a social revolution,"[202] may have laid the groundwork for future civil rights protest by furthering several distinct objectives. First, litigation taught blacks suffering under the oppressive weight of Jim Crow that they had rights, though they must fight for their enforcement. This also was probably the main objective of the NAACP's principal political campaign of the interwar period — the fight for a federal anti-lynching bill.[203] Such legislation was unlikely ever to survive a southern Democratic filibuster in the Senate, and in any event probably would have been effectively nullified by recalcitrant southern juries. Still, the fight to secure such legislation may have had important motivational and educational effects on blacks throughout the United States. An effectively organized litigation campaign offered similar possibilities.[204] The NAACP's national office wrote letters to southern blacks informing them of their constitutional rights and of the obligation of whites to respect them.[205] Southern black communities sometimes felt so hopeless and friendless that for the national office merely to make inquiries on their behalf would "do a lot of good."[206] The Margold Report, which in 1930 formulated an overall NAACP litigation strategy, stressed that lawsuits would "stir . . . the spirit of revolt among blacks" and cause whites to view them with greater respect.[207] A 1934 memorandum by Charles Houston, then the NAACP's chief lawyer, declared that a principal

201. On these "internal" obstacles to change, see JOHN W. CELL, THE HIGHEST STAGE OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH 240-41 (1982); FAIRCLOUGH, *supra* note 41, at 47-48; KELLOGG, *supra* note 26, at 131; RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN VS. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 157 (1976); 2 MYRDAL, *supra* note 25, at 758-59, 824-25.

202. RALPH J. BUNCHE, THE POLITICAL STATUS OF THE NEGRO IN THE AGE OF FDR 108 (Dewey W. Grantham ed., 1973) (questioning the capacity of litigation to produce racial reform).

203. For this view of the anti-lynching campaign, see SHERMAN, *supra* note 49, at 198, and ZANGRANDO, *supra* note 49, at 38-39, 214.

204. On this general view of civil rights litigation, see 1 SITKOFF, *supra* note 61, at 242-43; McGuinn, *supra* note 137, at 163-65.

205. An example of an educational letter is Letter From Thurgood Marshall, Assistant Special Counsel, NAACP, to Roy L. Ferguson, Principal (of a black school), Hollow Rock, Tenn. (Aug. 19, 1937), *microformed on* NAACP Papers, pt. 3, series A, reel 2, frames 789-90.

206. Letter from J. Rice Perkins to Walter White, *supra* note 198, at 1.

207. *Quoted in* JACK GREENBERG, CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 59, 212 (1994) (ellipsis in original).

objective of the litigation campaign should be "to arouse and strengthen the will of the local communities to demand and fight for their rights."[208]

Many NAACP leaders believed that a litigation campaign was as important for its role in organizing local black communities as for the victories it produced in court. Lawsuits taught blacks the importance of banding together in defense of their rights. What happened to Ossian Sweet in Detroit in 1925 or to the Scottsboro Boys in Alabama in 1931 could happen to almost any black American at almost any time.[209] NAACP lawyers such as Charles Houston and Thurgood Marshall saw an important part of their job as organizing local communities in support of litigation campaigns. A recent biographer describes how Marshall frequently was conscripted into making public speeches at mass rallies after journeying to southern cities and towns for a court appearance. "On occasion," Mark Tushnet writes, Marshall "appears to have been brought to town nominally to work on pending litigation but actually to rally the troops."[210] Houston, in a letter to Marshall, referred to himself as "not only lawyer but evangelist and stump speaker," and he emphasized the need "to back up our legal efforts with the required public support and social force."[211] Marshall and Houston generally took advantage of such speaking opportunities to connect a particular legal battle with broader community concerns such as voter registration or general political organization.[212]

Because these criminal cases demonstrated to blacks the importance of collective action in defense of their rights, they provided unparalleled fundraising and branch-building opportunities for the NAACP. The association raised over $70,000 in connection with the Sweet case in the 1920s — a small fortune for the NAACP at the time.[213] Scottsboro provided a similar fundraising bonanza for the ILD, as the defendants' mothers undertook northern speaking tours

208. Memorandum for the Joint Committee of the NAACP and the American Fund for Public Service from Charles H. Houston (Oct. 26, 1934), *microformed on* NAACP PAPERS, pt. 3, ser. A, reel 1, frames 859-60.

209. On Sweet, see Press Release, NAACP, The Sweets with Robert W. Bagnall Tour 5 Cities (Jan. 15, 1926), *microformed on* NAACP Papers, pt. 5, reel 3, frame 415; *Dr. Sweet*, FLA. SENTINEL (Jacksonville), Nov. 14, 1925, *microformed on* NAACP Papers, pt. 5, reel 4, frame 34; *A Hopeful Sign*, ST. LOUIS ARGUS, Jan. 1, 1926, *microformed on* NAACP Papers, pt. 5, reel 4, frame 210; *Sweet Case*, Unidentified press clipping, May 29, 1926, *microformed on* NAACP Papers, pt. 5, reel 4, frame 291. On Scottsboro, see CARTER, *supra* note 11, at 143-44.

210. TUSHNET, *supra* note 151, at 30.

211. Letter from Charles Hamilton Houston to Thurgood Marshall (Sept. 17, 1936), *quoted in* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 145 (1983).

212. *See* PATRICIA SULLIVAN, DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA 83-84, 91-92 (1996).

213. *See Sweet Case*, *supra* note 209.

which drew large crowds and raised substantial sums of money. Often the initiation of litigation in some southern city or town provided the occasion for organizing a new NAACP affiliate. For example, the NAACP branch in Meridian, Mississippi, was organized in connection with the *Brown* litigation.[214]

Litigation not only taught blacks about their rights and inspired them to organize in defense thereof, but it also provided salutary examples to southern black communities of black accomplishment and courage. Observing a skilled black lawyer subjecting a white county sheriff to a grueling cross-examination was an important educational lesson to southern blacks, who had endured so long the oppressive weight of Jim Crow. The bold and capable performance of black lawyers in southern courtrooms seemed to contravene the very premises of white supremacy. Mark Tushnet observes that Thurgood Marshall's most important audience on such occasions was neither judge nor jury, but rather "the African-American community observing the trial."[215] The NAACP was well aware of the "moral effect" of using black lawyers.[216] For example, Walter White observed in a 1933 letter that the use of a black lawyer in the Texas white primary litigation would "have an excellent psychological effect upon colored people."[217]

Litigation not only energized and educated blacks, but it also may have raised the salience of the race issue for whites. Charles Houston observed in the mid-1930s that "[t]he truth is there are millions of white people who have no real knowledge of the Negro's problems and who never give the Negro a serious thought."[218] A major challenge

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214. On Meridian, see CORTNER, *BROWN*, *supra* note 12, at 72-73. Litigation challenging residential segregation ordinances proved especially conducive to building new branches and raising large sums of money. *See, e.g.*, KELLOGG, *supra* note 26, at 184-86; GEORGE C. WRIGHT, LIFE BEHIND A VEIL: BLACKS IN LOUISVILLE, KENTUCKY 1865-1940, at 201, 208 (1990); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and 'Race in the Progressive Era. Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 503, 514 (1982); NAACP 1926 Legal Defense Report on Residential Segregation, *microformed on* NAACP Papers, pt. 5, reel 1, frame 955; Letter from Robert W. Bagnall, Director of Branches, NAACP, to James Weldon Johnson, Secretary, NAACP (Sept. 24, 1924), *microformed on* NAACP Papers, pt. 5, reel 2, frames 629-30; Letter from G. W. Lucas, President, New Orleans Branch of NAACP, to Bagnall (Nov. 19, 1924), *microformed on* NAACP Papers, pt. 5, reel 2, frame 644; Letter from Lucas to Bagnall (Mar. 9, 1925), *microformed on* NAACP Papers, pt. 5, reel 2, frame 716; Letter from A.V. Dunn, Secretary, New Orleans Branch of NAACP, to Bagnall (Nov. 9, 1924), *microformed on* NAACP Papers, pt.5, reel 4, frames 820-21. On other branches founded in connection with litigation, see KLUGER, *supra* note 201, at 195, 199.

215. TUSHNET, *supra* note 151, at 66.

216. Letter from Oscar W. Baker to Walter White (Mar. 8, 1926), *microformed on* NAACP PAPERS, pt. 5, reel 3, frames 462-63 (in connection with the Sweet case).

217. MEIER & RUDWICK, *supra* note 139, at 149-52 (quoting letter from Walter White). For particular examples of black lawyers fulfilling this function, see KLUGER, *supra* note 201, at 150-53; TUSHNET, *supra* note 151, at 62-63; Robert Wendell Hainsworth, *The Negro and the Texas Primaries*, 18 J. NEGRO HIST. 426, 435-36 (1933).

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

for the civil rights movement was simply teaching white Americans how egregious black living conditions were under Jim Crow.[219] Litigation helped further that educational process. As Ralph Bunche pointed out contemporaneously, "[c]ourt decisions, favorable or unfavorable, serve to dramatize the plight of the race more effectively than any other recourse; their propaganda and educative value is great."[220] Walter White went so far as to observe in connection with the Sweet trial in 1925 that the NAACP might prefer not to have an early verdict directed in the defendants' favor, since finishing the trial would enable the Association to complete the job of education, "which gives the trial its greatest ultimate value."[221] The educational opportunities afforded by litigation may have been greatest in these criminal procedure cases, since they revealed Jim Crow at its worst — southern blacks, possibly or certainly innocent of any crime, being railroaded to the death penalty through farcical trials.[222] By publicizing the worst excesses of Jim Crow, such litigation may have inspired something of a backlash against the system as a whole, in the same way that millions of white Americans turned against segregation and disfranchisement in the 1960s after witnessing the barbarities of the white supremacy system on display at Birmingham and Selma.[223] If nothing else, Supreme Court Justices, confronted with the appalling facts of cases like *Moore*, *Powell*, *Norris*, and *Brown*, may have begun to rethink their previously tolerant attitudes toward Jim Crow practices.

Finally, litigation, when successful, provided blacks with one of the few reasons they had before the late 1930s to be optimistic about the future. As already noted, one of the most formidable obstacles to the creation of a social protest movement under oppressive conditions is convincing potential participants that change is possible. As black leader Kelly Miller observed in 1935, even if court victories produced little concrete change, they at least "keep open the door of hope to the Negro."[224]

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219. On northern white ignorance of southern black living conditions, see 1 MYRDAL, *supra* note 25, at 48.

220. BUNCHE, *supra* note 202, at 108; *see also* 1 SITKOFF, *supra* note 61, at 243.

221. Letter from Walter White to James Weldon Johnson, Secretary, NAACP (Nov. 15, 1925), *microformed on* NAACP PAPERS, pt. 5, reel 3, frame 92.

222. The NAACP during the interwar period made anti-lynching legislation its principal political priority for similar reasons. *See* 1 SITKOFF, *supra* note 61, at 278, 296-97; ZANGRANDO, *supra* note 49, at 18.

223. *See, e.g.*, Klarman, *Brown*, *supra* note 108, at 141-49 (citing numerous studies).

224. *Quoted in* NELSON, *supra* note 59, at 106 n.177. On the importance of maintaining hope, see *supra* notes 197-201 and accompanying text.

III. LESSONS

By situating these interwar criminal procedure decisions in the broader context of American constitutional and civil rights history, it is possible to draw some tentative lessons regarding the nature and consequences of judicial review and the dynamics of racial change in American history. For starters, these rulings support the claim made by several recent commentators that the Supreme Court's constitutional interventions tend to be less countermajoritarian than is commonly supposed.[225] The decisions in *Moore*, *Powell*, *Norris* and *Brown* almost certainly were consonant with dominant national opinion at the time. Even within the South, significant support existed for the results in these cases. As noted earlier, these rulings only bound the southern states to abstract norms of behavior that they generally had embraced on their own. In the North, meanwhile, although blacks suffered oppressive discrimination in housing, employment, and public accommodations, the criminal justice system approached somewhat nearer to the ideal of colorblindness. Thus, it is erroneous to conceive of these landmark criminal procedure cases as instances of judicial protection of minority rights from majoritarian oppression. Rather, they better exemplify the paradigm of judicial imposition of a national consensus on resistant state outliers (with the qualification that even the southern states generally accepted these norms in the abstract).

Relatedly, these criminal procedure decisions raise the interesting possibility that during the interwar period the Supreme Court reflected national opinion on racial issues better than did Congress. These rulings imposed constitutional constraints on southern lynch law at almost precisely the same time that the national legislature was debating the imposition of statutory constraints on lynching. The House of Representatives approved anti-lynching bills three times, in 1922, 1937, and 1940.[226] But these measures never survived in the Senate, mainly because that institution's antimajoritarian filibuster rules enabled intensely committed southern Senators (with the aid of some largely indifferent westerners) to block passage. Similarly, the House approved anti-poll tax bills five times in the 1940s, but they never passed the Senate, while the Supreme Court that same decade struck a momentous blow for black suffrage by invalidating the white pri-

225. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586-616 (1993); Klarman, *Civil Rights*, *supra* note 18; Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEXAS L. REV. 1881, 1889-90 (1991); *see generally* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (Sanford Levinson ed., 2d ed. 1994).

226. ZANGRANDO, *supra* note 49, at 19, 64, 143, 162.

mary.[227] Likewise, three years after the Court decided *Brown v. Board of Education*,[228] which according to opinion polls enjoyed the approval of roughly half the nation,[229] the best Congress could do was to enact a civil rights law dealing with the less contentious issue of voting rights that was so obviously inefficacious that many black leaders urged President Eisenhower to veto it.[230] In sum, from the 1920s through the 1950s, the Supreme Court probably was a better gauge of national opinion on race than was a United States Congress in which white supremacist southern Democrats enjoyed disproportionate power because of Senate seniority and filibuster rules.[231]

Another important lesson to be derived from considering the interwar criminal procedure decisions against the backdrop of the Court's other race-related rulings is that not all Jim Crow measures were of a piece. In the 1920s, the Supreme Court unanimously (if indirectly) reaffirmed the constitutionality of public school segregation.[232] In the 1930s, the Court unanimously dismissed constitutional challenges to the white primary and the poll tax.[233] Yet, at the same time the Court was legitimizing segregation and black disfranchisement, it struck several blows against Jim Crow criminal justice. Apparently the Justices thought it was one thing to segregate and disfranchise blacks, and quite another to execute possibly innocent black defendants after farcical trials. These rulings thus revealed a judicial hierarchy of racial values similar to that embraced by most white Americans of the era. During the interwar period, very few white southerners (or, for that matter, white northerners) evinced disapproval of the segregation and disfranchisement of southern blacks.[234] Yet many whites, both in the North and in the South, were genuinely appalled by the sort of lynch

227. Smith v. Allwright, 321 U.S. 649 (1944). On the federal anti-poll tax measures, see STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH 1944-1969, ch.3 (1976).

228. 347 U.S. 483 (1954).

229. *See, e.g.*, Hazel Gaudet Erskine, *The Polls: Race Relations*, 26 PUB. OPINION Q. 137, 139 (1962) (reporting 1956 opinion poll); Herbert H. Hyman & Paul B. Sheatsley, *Attitudes Toward Desegregation*, SCI. AM., Dec. 1956, at 35, 36.

230. On the 1957 Civil Rights Act, see J.W. ANDERSON, EISENHOWER, BROWNELL, AND THE CONGRESS: THE TANGLED ORIGINS OF THE CIVIL RIGHTS BILL OF 1956-1957 (1964); ROBERT FREDERICK BURK, THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS ch.10 (1984).

231. *Cf.* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 788-819 (1991) (arguing that had blacks been fully enfranchised and southern legislatures equitably apportioned, judicial intervention might not have been necessary to achieve desegregation of public schools in the South).

232. Gong Lum v. Rice, 275 U.S. 78 (1927).

233. Breedlove v. Suttles, 302 U.S. 277 (1937) (poll tax); Grovey v. Townsend, 295 U.S. 5 (1935) (white primary).

234. *See* Klarman, *supra* note 141.

law procedures that the Court's rulings countermanded. These decisions, in short, confirm the hierarchy of racial values famously described by Gunnar Myrdal in his *American Dilemma*. Most whites of the period were far more opposed to interracial marriage, school desegregation, and black voting than they were committed to executing innocent blacks without a fair trial.

These criminal procedure decisions also lend some support to the view of those commentators who have questioned the Court's capacity to effectuate significant social change.[235] In the face of deeply rooted southern mores, these Supreme Court decisions made little practical difference to southern blacks enmeshed in the Jim Crow legal system. The many mob-dominated trials of the 1930s confirm the limited impact of *Moore*, and the many tortured confessions of the 1940s confirm the limited impact of *Brown v. Mississippi*. The decision whose effects are easiest to measure, and whose potential impact on southern criminal justice was greatest, was *Norris*. In those parts of the South most intensely resistant to black service on juries, that ruling was defied without repercussion for an entire generation. Thus, the criminal procedure decisions of the interwar period foreshadowed the southern white response to *Brown v. Board of Education*. For an entire decade, essentially no school desegregation took place in the South, notwithstanding that most famous of all Supreme Court interventions against Jim Crow.[236]

Still, Supreme Court victories can have important indirect effects, even if intense resistance frustrates their direct implementation. The abominable treatment of black criminal defendants vividly symbolized the precarious lives African Americans led in the Jim Crow South. For this reason, criminal defense litigation provided outstanding fundraising and branch-building opportunities for the NAACP. When innocent men were sentenced to death after farcical trials, no southern black man could feel safe. The need for collective action to resist such injustice was apparent. Meanwhile, northerners, both white and black, frequently were aghast at the sort of egregious injustices that received the stamp of state approval in mid-century America. Measuring the intangible effects of Supreme Court decisions is virtually impossible. Yet, it is plausible to believe that during an era in which black Americans had little reason to be optimistic about the possibility of change in race relations, a handful of Supreme Court victories may have provided a slim ray of hope in an otherwise barren landscape.

Yet the Court's criminal procedure decisions also had an effect on white southerners. Reared on hostile memories of federal intervention

235. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Klarman, *Civil Rights*, *supra* note 18.

236. *See* ROSENBERG, *supra* note 235, at 50 tbl. 2.1; HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY, 1954-1980, at 36 (rev. ed. 1993).

during the Civil War and Reconstruction, most white southerners were viscerally resistant to any federal imperatives regarding race relations, whether legislative or judicial. Thus, decisions such as *Powell v. Alabama* produced notable backlashes in southern white opinion. The more the Supreme Court intervened on behalf of the Scottsboro Boys, the more determined white Alabamians seemed to execute them. Similarly, the Mississippi Supreme Court clearly retrogressed in *Brown v. Mississippi*, refusing to reverse a conviction based on a coerced confession that it almost certainly would have excluded from evidence a decade earlier. A later and more famous Supreme Court ruling named *Brown* is the most dramatic exemplar of this backlash potential inherent in High Court decisions. As I have argued elsewhere,[237] the most significant effect of *Brown v. Board of Education* may have been neither its educational influence on white northerners nor its motivational impact on African Americans, but rather its crystallization of southern white resistance to changes in the racial status quo. *Brown* encouraged a racial extremism that rendered it profitable for southern politicians to support, or at least to tolerate, violence against peaceful civil rights demonstrators.

The southern white backlash produced by *Brown v. Board of Education* ultimately generated its own northern counterbacklash. The landmark criminal procedure cases discussed in this Article help us to understand this dynamic. From the Civil War through the civil rights movement, it has been easiest to mobilize northern white opinion in support of the rights of southern blacks in response to brutality, violence, and lynching. When southern whites have quietly segregated or disfranchised blacks, northern whites often have remained relatively indifferent. Brutality and violence, though, they sometimes have refused to countenance. Thus, during Reconstruction it was the Ku Klux Klan violence of the late 1860s that induced a Republican Congress to stretch constitutional boundaries by enacting landmark civil rights legislation in 1870 and 1871.[238] The NAACP, appreciating the force of this dynamic, made the battle for federal anti-lynching legislation its first political priority during the period between the world wars. The Association recognized that lynching was the easiest issue around which to mobilize national opinion in support of federal intervention in southern race relations. Likewise, the criminal procedure decisions of this same era confirm that southern lynch law was the most appealing racial issue around which to mobilize national *judicial* opinion. After World War II, a resurgence in lynchings, maimings, and

237. Klarman, *Brown*, *supra* note 108, at 75-150; Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

238. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 425-44, 454-59 (1988); ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION ch.24 (1971).

race riots prompted President Truman in 1946 to appoint his famous civil rights committee, which inaugurated a chain of events culminating in 1948 in the Democratic Party's adoption of a landmark civil rights platform and in President Truman's issuance of executive orders desegregating the military and the federal civil service.[239] Finally, and perhaps most importantly, this same dynamic, by which southern white violence against blacks induces a sympathetic northern response, accounts for the enactment of landmark civil rights legislation in 1964 and 1965, in reaction to televised scenes of brutality inflicted on peaceful black demonstrators at Birmingham and Selma.[240] Thus, the backlash *Brown v. Board of Education* produced in southern politics ultimately generated its own counterbacklash, which rendered possible the enactment of revolutionary civil rights legislation. Supreme Court decisions, it would appear, sometimes have the most unpredictable of consequences.

239. *See* DONALD R. MCCOY & RICHARD T. RUETTEN, QUEST AND RESPONSE: MINORITY RIGHTS AND THE TRUMAN ADMINISTRATION 42-54 (1973); TO SECURE THESE RIGHTS, *supra* note 170, at 20-27; Kari Frederickson, *"The Slowest State" and "Most Backward Community": Racial Violence in South Carolina and Federal Civil-Rights Legislation, 1946-1948*, 98 S.C. HIST. MAG. 177 (1997).

240. *See, e.g.*, Klarman, *Brown*, *supra* note 108, at 141-49 (citing numerous studies).