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The Forgotten Face of “Our Federalism”

ABSTRACT. *Younger v. Harris* is canonical in the field of federal courts and exerts significant influence on federal civil-rights litigation. The decision's exposition of “Our Federalism” produced the *Younger* abstention doctrine, limiting federal courts' authority to address constitutional violations in state criminal prosecutions. Today, lower courts have expanded this doctrine in ways that substantially impede litigation challenging systemic illegalities in, for instance, pretrial detention systems and child-welfare programs. However, the origins of the case — a stark narrative of racialized surveillance, censorship, and police violence — remain largely unknown.

This Article recovers this story and reconstructs the case of John Harris, Jr., the forgotten face of “Our Federalism.” Harris was a Black civil-rights activist and onetime member of the Student Nonviolent Coordinating Committee who organized, protested, and agitated for racial and economic justice across Washington, D.C., Los Angeles, and the Deep South. His 1965 arrests in Mississippi were clearly legible as Jim Crow oppression, but his subsequent Los Angeles indictment in 1966 for similar activism became harder to recognize as racial persecution because it fell outside the Southern “Jim Crow paradigm.” This differential recognition helped courts maintain their image as champions against Southern injustice while limiting federal intervention elsewhere. Moreover, FBI files reveal extensive federal-state cooperation in suppressing Black political activism, contradicting *Younger*'s conception of federalism as “separate spheres.”

Examining a diverse array of sources — including original interviews, newly acquired FBI files, press coverage, court transcripts, legislative records, memoirs, protest materials, and four Supreme Court Justices' archival papers — this Article contributes to the democratization of constitutional memory by recovering the erased history of Black political resistance and state oppression underlying *Younger v. Harris*. It also introduces “legitimacy laundering,” a novel framework illustrating how subsequent narratives surrounding canonically influential decisions obscure their original context and implications and thereby confer legitimacy on otherwise questionable legal practices. Moreover, this Article reveals how some modern courts have expanded *Younger* abstention beyond its carefully negotiated scope, undermining the doctrine's original purpose in preserving federal courts' power to prevent irreparable harm.

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INTRODUCTION

*Picket lines
School boycotts
They try to say it's a communist plot
All I want is equality
For my sister, my brother, my people, and me
– Nina Simone¹*

*L.A.'s changed a lot over the years
Since those brave gold rush pioneers
Came in those creaky covered wagons
Far as they could go end of the line
Their dreams were yours, their dreams were mine
But in those dreams were hidden dragons
– Andrew Lloyd Webber²*

In 1965, Leonard Deadwyler, Jr. and John Harris, Jr. independently left the American South and headed west, a trek that many other Black Americans made during the Great Migration.³ These two separate journeys would soon tragically intersect. By mid-1966, Deadwyler was dead, shot at point-blank range by a white police officer in Los Angeles while he was driving his pregnant wife to the hospital.⁴ “She’s having a baby,” the unarmed, twenty-five-year-old father pled with what would be his last words.⁵ As for Harris, he was indicted on two counts of criminal syndicalism—each carrying a potential twenty-seven-year prison sentence—for distributing literature at a protest of Deadwyler’s death conveying themes of police abolition, anticapitalism, and the disparate racial impact of an ongoing war.

Harris’s criminal prosecution gave rise to a highly consequential, landmark federal-courts case that continues to shape federal civil-rights litigation today:

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1. NINA SIMONE, *Mississippi Goddam*, on Nina Simone in Concert (Philips Recs. 1964).
 2. ANDREW LLOYD WEBBER, *Sunset Boulevard*, on Sunset Boulevard (1993).
 3. GERALD HORNE, FIRE THIS TIME: THE WATTS UPRISING AND THE 1960S, at 36 (1995) (observing California’s popularity with Black Americans leaving the South during the latter end of the Great Migration).
 4. Larry Lynch, *Pistol Was Up Against Deadwyler*, INDEPENDENT (Long Beach, Cal.), May 27, 1966, at 1, 8.
 5. *Trip to Hospital Is Fatal*, MANHATTAN MERCURY, May 9, 1966, at 2; see also JOHNNIE COCHRAN & DAVID FISHER, A LAWYER’S LIFE 25 (2002) (quoting Deadwyler as saying, “But she’s having a baby”).

Younger v. Harris.⁶ This case, argued three times before the Supreme Court as coalitions shattered in the wake of the Court’s shifting composition,⁷ ultimately resulted in the doctrine known as *Younger* abstention. Under that doctrine, federal courts are not to halt an ongoing state criminal prosecution unless (1) the underlying state criminal forum is an inadequate site to raise federal constitutional claims, (2) “great” irreparable harm would follow in the absence of equitable intervention, or (3) other exceptional circumstances, such as a prosecution rooted in bad faith, are present.⁸ Relying on this doctrine, the Supreme Court reversed a lower federal court’s injunction that had been issued in Harris’s favor. Five decades later, the Supreme Court’s invocation of “Our Federalism” in *Younger* has spawned an ever-expanding abstention doctrine that some federal courts now wield to dismiss constitutional challenges across wide-ranging areas of state governance – from criminal justice to family law to public health – fundamentally altering the promise of federal civil-rights litigation.

This anticlimactic conclusion to Harris’s civil-rights battle in federal court was consistent with his own predictions in the years before. The flyers that led to his indictment pointedly compared Black Americans seeking justice in the American judiciary to George Washington seeking redress in King George’s

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6. 401 U.S. 37 (1971). For evidence of the decision’s impact, see John Harland Giammatteo, *The New Comity Abstention*, 111 CALIF. L. REV. 1705, 1721–23 (2023), which argues that *Younger* has been expanded beyond its own terms, and that this “new comity abstention is remarkably transubstantive.” See also *id.* (“Consider, for instance, the range of cases where this new comity abstention has been invoked, particularly in challenges to court systems like housing court, family court, and even parking court, that affect millions of individuals every year. The emerging doctrine has also justified federal courts’ dismissals of lawsuits challenging COVID-era safety protocols and litigation over foster care placements that do not address court proceedings at all.”); Peter R. O’Neill, Note, *Younger and the Youth: The Younger Abstention Doctrine in the Child-Welfare Context*, 76 STAN. L. REV. 1323, 1326 (2024) (critiquing the role of *Younger* abstention in child-welfare and foster-care proceedings); Alezeh Rauf, Comment, *Abstaining from Abstention: Why Younger Abstention Does Not Apply in 42 U.S.C. § 1983 Bail Litigation*, 171 U. PA. L. REV. 535, 536 (2023) (describing some of the most recent expansions); Kellen Funk, *Equity’s Federalism*, 97 NOTRE DAME L. REV. 2057, 2092 (2022) (“In January 2022, the en banc Fifth Circuit invited a district court to extend *Younger* abstention to pretrial bail proceedings found to be in violation of the Constitution by every other court that has evaluated similar bail regimes on the merits.”); Fred O. Smith, Jr., *Abstaining Equitably*, 97 NOTRE DAME L. REV. 2095, 2097 (2022) (describing “lower court developments that have the potential to undermine the Supreme Court’s careful balance”); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2305–17 (2018) [hereinafter Smith, *Abstention*] (describing the then-potential impact of *Younger* abstention in federal cases challenging local regimes that criminalize poverty). For an important critique of the latter article, see generally Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1 (2018).
 7. See *infra* Section III.C.
 8. See ERWIN CHERMERINSKY, SETH DAVIS, FRED O. SMITH, JR. & NORMAN W. SPAULDING, *FEDERAL COURTS IN CONTEXT* 1304 (2023).

colonial courts.⁹ Harris “warned against putting any faith in the federal courts,” flatly telling a leftist newsletter at the time that “no justice should be expected from the courts.”¹⁰ The conclusion of Harris’s legal battle was, in the words of another plaintiff in the suit, a “disappointment” and an “irony.”¹¹ A case seeking to expand civil liberties had actually created a basis for using “jurisdiction as a means of undercutting the very foundations of . . . protections for civil liberties and civil rights.”¹²

In the legal literature about *Younger* abstention, there is virtually no mention, let alone comprehensive discussion, of the racialized context of Harris’s arrest. The case has undergone a kind of laundering, in which the field of federal courts has come to divorce the case from its factual context altogether — omitting police brutality and race from our collective recollection. An article by one distinguished professor and former Massachusetts Supreme Judicial Court justice once wrongly described *Younger* (rather than Harris) as the party having been arrested.¹³ While other descriptions do not suffer from this inaccuracy, they are similarly incomplete. Some academic references to *Younger* simply note that Harris was arrested for criminal syndicalism,¹⁴ exercising his free-speech rights,¹⁵ or handing out literature.¹⁶ When additional information is given, academics have

9. See Harris Flyer 2, *infra* p.64, Figure 7.

10. ‘Cop Still Wanted for Murder,’ *Harris Case to Federal Court*, 3 SPARK, no. 2, Apr. 1967, at 3.

11. Telephone Interview with Farrel Broslawsky, Former Professor, L.A. Valley Coll. (June 21, 2024) (on file with authors).

12. *Id.*

13. Benjamin Kaplan, *The Great Civil Rights Case of Hague v. CIO: Notes of a Survivor*, 25 SUFFOLK U. L. REV. 913, 934–35 (1991) (wrongly calling *Younger*, rather than John Harris, the plaintiff who had been arrested).

14. 17B WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 4251 (3d ed. 2008); Dustin E. Buehler, *Jurisdiction, Abstention, and Finality: Articulating a Unique Role for the Rooker-Feldman Doctrine*, 42 SETON HALL L. REV. 553, 569 (2012); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1236 (1988) (“The facts of *Younger v. Harris* provide a useful point of entry. *Younger* arose when Harris was charged with violation of a California antisyndicalism statute of dubious constitutional validity.”).

15. Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us — Get over It!!*, 36 CREIGHTON L. REV. 375, 381–82 (2003); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 55 (1992); Anne Rachel Traum, *Distributed Federalism: The Transformation of Younger*, 106 CORN. L. REV. 1759, 1768 (2021).

16. Bryce M. Baird, *Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention*, 42 BUFF. L. REV. 501, 518 (1994); Kaplan, *supra* note 13, at 934–35; Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1144 (1977); see also Smith, *Abstention*, *supra* note 6, at 2294 (“In *Younger* itself, John Harris faced criminal prosecution under California’s Criminal Syndicalism

sometimes emphasized the workers’ rights dimension to the protest but notably omitted any reference to race.¹⁷ A prominent legal historian, for example, recently described the case as “involv[ing] the criminal prosecution of several California professors for teaching ‘the doctrines of Karl Marx.’”¹⁸ While a college instructor was among the plaintiffs in that case, the lead plaintiff, John Harris, was not a professor. Harris was a grassroots advocate who, in his own words, was “fighting police brutality” and “fighting for Black Liberation”¹⁹—first in D.C. and the Deep South, and then in Los Angeles in the aftermath of the 1965 Watts racial uprisings.

For Harris and some other members of the Progressive Labor Party, labor rights were inextricably tied to racial justice. In a leaflet he was arrested for distributing, Harris criticized a “system that kills people for being Black and poor.”²⁰ The leaflet continued, charging that “[m]urder by cops and death by unemployment are methods of systemic extermination.”²¹ The literature called for

Act for handing out far-left political pamphlets.”). The most notable exception we identified is CURTIS A. BRADLEY, TARA L. GROVE, JOHN C. JEFFRIES, JR. & PETER W. LOW, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 734 (8th ed. 2014) (“Harris had been distributing leaflets in response to the shooting by a white police officer of an African-American resident of Los Angeles. The leaflets referred to the shooting as a ‘murder,’ described south Los Angeles as a ‘concentration camp,’ and stated that the members of the police department ‘must all be wiped out before there is complete freedom.’”). In addition, another recent textbook briefly mentions the racialized context. CHEMERINSKY ET AL., *supra* note 8, at 1291 (“John Harris filed federal suit because the state was wielding a potentially unconstitutional law to prosecute him. Harris was arrested for the crime of ‘criminal syndicalism’ while passing out Progressive Party leaflets about local police brutality and racial discrimination.”); see also PAUL FINKELMAN, *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 1809 (2006) (“The case arose in 1966, when John Harris Jr. was passing out Progressive Party leaflets suggesting that a Los Angeles police officer had murdered a Watts resident, that local factories failed to employ Watts residents, and that people should take action.”). In a recent podcast, attorney Alec Karakatsanis described that Harris was handing out flyers following the shooting of a Black man by a white police officer. See FIVE FOUR POD: *Younger v. Harris*, at 06:24 (Oct. 26, 2021), <https://www.fivefourpod.com/episodes/younger-v-harris> [<https://perma.cc/T8X9-8RU2>].

17. Giammatteo, *supra* note 6, at 1712 (“*Younger* grew out of a First Amendment overbreadth challenge to state criminal proceedings. John Harris, Jr., a member of the socialist Progressive Labor Party, had been prosecuted under the California Criminal Syndicalism Act.”).
18. Funk, *supra* note 6, at 2084 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)); cf. Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 1009-10 (1994) (“Farrel[] Broslawsky, the Los Angeles Valley College history instructor who felt ‘inhibited’ in ‘teaching about the doctrines of Karl Marx or reading from the Communist Manifesto’ is a memorable character who sticks with us as a symbol of the sort of person a restraint-bound Court will not tolerate.” (quoting *Younger*, 401 U.S. at 39-40)).
19. ‘*Cop Still Wanted for Murder, Harris Case to Federal Court*, *supra* note 10, at 3.
20. See Harris Flyer 3, *infra* p.65, Figure 8.
21. See Harris Flyer 2, *infra* p.64, Figure 7.

abolishing the police and argued that “[t]he cops and the system they served must be replaced.”²²

This ideological linkage between racial justice and economic transformation was not lost on government officials, who viewed such connections through the lens of Cold War anxieties. Federal, state, and local officials alike feared that, given their relative economic and social standing, Black Americans would be attracted to far-left economic ideologies.²³ These officials warned that highly publicized instances of police brutality opened the door for Black-Communist coalitions.²⁴ Accordingly, the FBI dedicated significant attention to surveilling and disrupting movements that promoted Black liberation.²⁵ The FBI often worked in tandem with local “red squads” — police units that had proliferated during the first Red Scare and the Cold War.²⁶ In Los Angeles specifically, the local apparatus had significant support from Police Chief William Parker (who militarized the department and infamously spewed racist rhetoric);²⁷ Mayor Sam Yorty (a former federal intelligence official with statewide political ambitions);²⁸ and District Attorney Evelle Younger (also a former federal intelligence official who later ran for California Attorney General, successfully, and for governor, unsuccessfully).²⁹

During the summer and fall of 1966, the year Harris was arrested, ambitious government officials capitalized on the public’s fear of advocates for racial justice and communism.³⁰ That summer, Mayor Yorty sought the Democratic nomination for governor as a conservative, advocating for a version of an antiriot bill that would have criminalized speech promoting lawbreaking as a means of

22. See Harris Flyer 3, *infra* p.65, Figure 8.

23. See *infra* Sections II.A, II.B.

24. See *infra* Sections II.A, II.B.

25. Indeed, FBI files we obtained through open-records requests reveal that the agency surveilled John Harris. See John Harris FBI File (on file with authors). The file provided by the FBI is heavily redacted; some documents were not provided to the authors on the ground that their release would violate FBI policies.

26. See generally FRANK DONNER, *PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA* (1990) (discussing the origins of “red squads” and their cooperation with the FBI and other federal agencies).

27. ERWIN CHERMERINSKY, *PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS* 14 (2021).

28. Don Terry, *Sam Yorty, Maverick Mayor of Los Angeles, Dies at 88*, N.Y. TIMES, June 6, 1998, at B8.

29. John Balzar, *Ex-Atty. Gen. Evelle Younger Is Dead at 70*, L.A. TIMES (May 5, 1989), <https://www.latimes.com/archives/la-xpm-1989-05-05-mn-2225-story.html> [<https://perma.cc/U7MH-UGM4>]; see also *infra* Section II.B.

30. See *infra* Section II.D.

political change.³¹ On the campaign trail, he condemned the pamphlets handed out at the protest of Deadwyler’s death.³² He vocally opposed the philosophy of civil disobedience, warning that it would facilitate communism.³³ And he harshly, regularly, criticized incumbent governor Edmund “Pat” Brown for permitting protests on a public college campus to persist without a strong punitive response from the state.³⁴ When Yorty lost the nomination to Governor Brown, Ronald Reagan, then the Republican nominee for governor, picked up the mantle, running an ad condemning Brown’s record on riots the very week that Harris was arrested.³⁵ (In November, Reagan was elected governor on the strength of the white vote.³⁶) In this charged atmosphere, where politicians won elections by promising to silence voices like Harris’s, his prosecution became emblematic of a larger struggle: whether advocating for systemic change could be criminalized as incitement to lawlessness.

This Article centers John Harris, Jr.’s struggle for racial justice and free speech in the understanding of *Younger v. Harris*. To do so, the Article draws on contemporaneous newspaper articles, interviews, letters, protest literature, congressional-hearing transcripts, a plaintiff’s memoir, archival records from civil-rights organizations, and the papers of four Supreme Court Justices. These documents reveal Harris’s leadership in a movement for racial and economic justice in the Jim Crow South and further evince the racially charged environment that Harris encountered upon moving to Los Angeles, marked by high-profile instances of police brutality and the aftermath of a race riot. These sources also reveal the way that Harris’s felony indictment – the first for criminal syndicalism in several decades – fell within law-enforcement officials’ broader efforts to surveil, control, and eradicate movements for Black racial and economic justice in the 1960s.³⁷

This Article’s primary contribution is one of remembrance – that is, recovering forgotten history. This work of remembrance, what Elie Wiesel called “a noble and necessary act,”³⁸ does more than preserve historical knowledge – it actively challenges our constitutional memory. As Reva Siegel has explained,

31. See *infra* Section II.D.

32. See *infra* Section II.D.

33. See *infra* Section II.D.

34. Richard Bergholz, *Yorty Blames Brown for UC Campus Strife: Students Should Accept Discipline or Be Thrown Out, Mayor Tells Forum Gathering*, L.A. TIMES, May 26, 1966, at 28.

35. See *infra* Section II.D.

36. Richard Bergholz, *Reagan Elected by Landslide; Finch Defeats Anderson*, L.A. TIMES, Nov. 9, 1966, at 3.

37. See CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 444 (1991).

38. Elie Wiesel, Nobel Prize Lecture (Dec. 11, 1986), <https://www.nobelprize.org/prizes/peace/1986/wiesel/lecture> [<https://perma.cc/UPW6-GNJS>].

history and constitutional memory regularly diverge.³⁹ Constitutional memory “often excludes history, sometimes intentionally,”⁴⁰ constructing narratives from selective facts or even falsehoods. Remembrance provides the raw materials from which constitutional memory can be (re)constructed, while also expanding the terrain on which the politics of constitutional memory are fought.⁴¹

In service of this broader project of constitutional remembrance, this Article recovers the story of John Harris. It honors him as an individual. It remembers him as one of the “we” who have laid claim to “Our Federalism,” and as one who, more than most, helped mold these foundational ideals in the organizing halls of Sunflower County, in the civic arenas of Los Angeles, and in the marble halls of One First Street. This Article restores John Harris’s historical context—the struggle for racial and economic justice along with the state surveillance, repression, and violence that he and others faced for their activism—to our constitutional discourse. This Article also traces how Harris’s case progressed through the courts and examines the process by which his story came to be erased from our constitutional memory.

Three additional implications follow from the remembrance of Harris’s story. First, this Article introduces a novel theoretical concept: legitimacy laundering. Legitimacy laundering refers to circumstances in which the substantive content and ramifications of a case are veiled in ways that contribute to a doctrine or institution’s acceptance. Culpability for this kind of laundering can rest with courts, commentators, or both, and it can occur intentionally or negligently.

Younger is illustrative of this phenomenon. A close examination of this case’s facts raises questions about the Supreme Court’s legitimating posture of reflexive deference to the state’s criminal-legal system. Scholars have written of a Jim Crow constitutional paradigm and a related constitutional narrative in which federal courts heroically intervened to break a caste system in the American South during the civil-rights movement.⁴² Some of the Court’s sociological legitimacy—especially with respect to its aggressive use of judicial review—is traceable to the moral capital it earned through that intervention.

39. Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL’Y 19, 21 (2022).

40. *Id.*

41. Consider, by way of comparison, Toni Morrison’s posthumously published reflections on the writing of *Beloved*: “History versus memory, and memory versus memorylessness. Rememory as in recollecting and remembering as in reassembling the members of the body, the family, the population of the past. And it was the struggle, the pitched battle between remembering and forgetting, that became the device of the narrative.” Toni Morrison, ‘I Wanted to Carve Out a World Both Culture Specific and Race-Free’: An Essay by Toni Morrison, *GUARDIAN* (Aug. 8, 2019, 3:00 AM ET), <https://www.theguardian.com/books/2019/aug/08/toni-morrison-rememory-essay> [<https://perma.cc/22BE-FJSA>].

42. See *infra* note 552 and accompanying text.

Concomitantly, judge-made barriers to judicial review have gained legitimacy in part through promoting the ways that those barriers gave way to access during the civil-rights era.⁴³

But this Jim Crow constitutional paradigm can facilitate considerable myopia. For one, as scholars have written, the paradigm can exclude past (and present) horrors against groups like Native Americans and Chicanos.⁴⁴ And John Harris’s story shows how this narrative can erase systemic racialized injustices against Black Americans to the extent those injustices took place outside specific times (slavery and the Jim Crow era) and specific places (the South).⁴⁵ If we celebrate the Court’s intervention in racially biased prosecutions in the Jim Crow South while neglecting the Court’s failure to intervene in Harris’s case in Los Angeles, we are left in false comfort with the safeguards that have come to define American federalism. Harris’s arrests in 1965 Mississippi and his arrest in 1966 Los Angeles have more in common than the Jim Crow paradigm allows one to see.

Second, this Article highlights the stakes of internal battles at the Supreme Court, as dueling drafts of *Younger* traded hands over the case’s three separate arguments. Justice Black’s initial draft was, in the views of some who had expected to join it, insufficiently protective of federal rights. The final draft, together with Justice Brennan’s decision to concur in a pithy, stripped-down opinion, was the result of hard-earned concessions aiming to ensure that the majority’s rhetoric of “Our Federalism” was matched by its explicit affirmance of the role of federal courts in abating irreparable harm.

Today, despite those concessions, some federal courts push the logic of *Younger* beyond its carefully constructed bounds, stretching the doctrine in ways that facilitate the very irreparable harm it was designed to remediate.⁴⁶ These expansions have sometimes left economically disadvantaged pretrial detainees

43. See *infra* Section IV.A (describing the manner in which intervention in the civil-rights-era case *Dombrowski v. Pfister*, 380 U.S. 479 (1965), is invoked as distinguishable from Harris’s case).

44. See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1791–93 (2019). Further, Juan F. Perea has observed that this paradigm excludes Chicanos from our constitutional development and understanding. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213, 1214–15 (1997); see also Richard Delgado, *Derrick Bell’s Toolkit – Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283, 297 (2000) (“Binary thinking can easily allow one to believe that America made only one historical mistake—for example, slavery.”).

45. Cf. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 374 (1992) (“Despite our successful effort to strip the law’s endorsement from the hated ‘Jim Crow’ signs, contemporary color barriers are less visible but neither less real nor less oppressive.”).

46. See Fred O. Smith, Jr., *Younger and Older Abstention*, 123 MICH. L. REV. 1449, 1453 (2025); Giammatteo, *supra* note 6, at 1708.

without ability-to-pay hearings,⁴⁷ children languishing in broken foster-care systems,⁴⁸ and impoverished people facing incarceration for unpaid debts with no realistic access to federal-court protection.⁴⁹ In terms of both subject matter and the irreparable harms these plaintiffs suffer, their cases fall well outside *Younger*'s intended scope.

These roving expansions undermine the role of federal courts in our constitutional system. Federal recourse is an indispensable channel for vindicating federal rights for at least two reasons. First, when individuals challenge systemic flaws in state legal systems, it is fundamentally contradictory to suggest these same systems can adequately remedy their own defects. Structural bias cannot be its own solution.⁵⁰ Second, the Reconstruction Congress adopted 42 U.S.C. § 1983 based in part on the fear that state actors could become acclimated to, and complicit in, routinized harm.⁵¹ As Congressman Aaron F. Perry observed during legislative debates, state officials “having eyes to see, see not; judges, having ears to hear, hear not” when confronted with rights violations.⁵² It is in part for that reason that Congress deliberately protected a role for federal courts through § 1983 and related legislation,⁵³ a principle the Supreme Court affirmed a few decades later in holding that litigants “cannot be deprived” of their right to federal jurisdiction merely because state remedies exist.⁵⁴ By closing federal courthouse doors, modern expansions of *Younger* abstention undermine this foundational congressional guarantee of forum choice for constitutional claims and frustrate the protections that the Reconstruction Congress created and that the Justices in *Younger* actively worked to preserve.

Third, material omissions from American history in the field of federal courts can distort our collective memory, misleading judges, commentators, and

47. *Daves v. Dallas County*, 64 F.4th 616, 631 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 548 (2024).

48. Smith, *supra* note 46, at 1468–69.

49. See Smith, *Abstention*, *supra* note 6, at 2320–21 (first citing *Dade v. City of Sherwood*, No. 16-cv-00602, 2017 WL 2486078 (E.D. Ark. June 8, 2017); and then citing *Pompey v. Broward County*, 95 F.3d 1543 (11th Cir. 1996)).

50. *Id.* at 2285, 2288.

51. See *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2249–52 (2025) (Jackson, J., dissenting).

52. *Mitchum v. Foster*, 407 U.S. 225, 241 (1971) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 480 (1871) (statement of Rep. Aaron F. Perry)).

53. See Funk, *supra* note 6, at 2093–94; see also Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 963 (1987) (arguing that § 1983 was enacted “to provide a federal cause of action to remedy miscarriages of justice at the hands of state jurists”).

54. *Smyth v. Ames*, 169 U.S. 466, 516 (1898), *overruled by*, *Fed. Power Comm’n v. Nat. Gas Pipeline Co.*, 315 U.S. 575 (1942) (overturning *Smyth*'s narrow holding on rate regulation for utilities but not its broader holding on federal jurisdiction).

students about the consequences of the high-minded constitutional values placed before them. For example, Harris’s experience invites us to reevaluate what it means for federal courts to safeguard a “separate” state criminal-legal system in settings marked by significant federal-local collaboration on criminal prosecutions.

This Article proceeds as follows. Part I offers a window into Harris’s upbringing in Birmingham, Alabama, during a time of massive, violent resistance to civil rights by government officials, police, and terrorists. Part I then provides a detailed account of the long arc of Harris’s work on behalf of racial and economic justice. Part II turns to Harris’s September 1965 move to Los Angeles, just a month after the Watts riots. Harris quickly emerged as a leader of the Progressive Labor Party there. A close ally in that work was a young white Marxist named Jim Dann, with whom Harris had worked closely in Sunflower County, Mississippi. Part II illustrates the tense atmosphere that Harris and Dann encountered upon arriving in Los Angeles and documents the surveillance of Black liberation movements—and of Harris in particular—during that era. Next, Part II describes the shooting of Leonard Deadwyler, Jr. and the following inquest to investigate, led by District Attorney Evelle Younger. At the inquest, Harris led large groups of community members in protest, distributing flyers criticizing police, anti-Blackness, economic exploitation, and war. Four months later, Harris was indicted and then arrested in his home. Based on the pamphlets he had distributed, a grand jury voted to indict.

Part III then documents Harris and his interlocutors’ efforts to stop the prosecution in state and federal court. This narrative also describes Harris’s co-plaintiffs, including Jim Dann,⁵⁵ Farrel Broslawsky,⁵⁶ and Diane Hirsch. As the legal battle unfolded, the case’s racial context featured prominently. In a key moment during the legal journey, a three-judge federal panel enjoined the syndicalism law before the Supreme Court reversed it on direct appeal, citing principles of equitable restraint and federalism. Notably, the case was argued three times over the course of three successive Supreme Court terms. This Part, for the first time, details the internal dynamics of the Court during those delays, including a moment in which a more civil-rights-protective opinion by Justice Brennan achieved five votes—until the coalition shattered in a dramatic, chaotic exchange. Ultimately, Justice Black authored a majority opinion with soaring federalist

55. This co-plaintiff’s name is incorrectly spelled in the complaint and in the opinions as “Jim Dan” rather than Jim Dann. Email correspondence with Dann’s daughter confirmed, however, that Jim Dann was a co-plaintiff in the suit. Email from Rachel Dann to Fred O. Smith, Jr. (June 26, 2024, 1:17 PM EST) (on file with authors).

56. While Broslawsky’s name is occasionally misspelled in documents, the correct spelling is “Farrel Broslawsky.” See *Attorney Profile: Farrel Broslawsky*, STATE BAR CAL., <https://apps.calbar.ca.gov/attorney/Licensee/Detail/59178> [<https://perma.cc/6R52-9XPD>].

rhetoric, as Justice Brennan faltered in his final attempts to match that rhetorical fire with an ode to the history of constitutional adjudication. As a result, even though the Court ruled in June 1969 that an Ohio syndicalism statute much like the one at issue in *Younger* was unconstitutional, Harris did not benefit from that ruling until two years later, when a state court finally granted him a writ of habeas corpus.

Part IV explores the implications of failing to share Harris's story. These implications range from *Younger* abstention's enhanced legitimacy through selective historical memory to its problematic expansion beyond its original bounds. In restoring the racial context to *Younger v. Harris*, this Article demonstrates that what we forget about our constitutional past shapes—and constrains—our constitutional future.

I. HARRIS IN CAMPAIGNS FOR CIVIL RIGHTS

*"Ain't going to let no jailing turn me around."*⁵⁷

In a Mississippi jail cell on July 14, 1964, civil-rights workers arrested for distributing voting-rights flyers lifted their voices in protest through song. Songs of solidarity battled the summer heat and mosquito-filled air. That night, when fourteen FBI agents arrived seeking interviews, this solidarity took a different form. John Harris and his fellow arrestees collectively refused to speak without counsel present. One person explained, "The problem is that in the past they have sometimes turned statements over to the local officials."⁵⁸ This collision between civil-rights protest and governmental repression was not merely a cautionary tale about federal-local law-enforcement cooperation—it was emblematic of the world Harris had grown up in and would become a defining pattern of his life's work.

This Part provides an account of Harris as a son of the American South; an organizer fighting for racial equality in Washington, D.C.; and a civil-rights leader working to weaken Jim Crow's grip on Mississippi. Harris's earlier civil-rights work was once central to public portrayals of *Younger v. Harris*. For instance, as the case made its way through the courts, the Associated Press described him as a "former Mississippi civil rights worker."⁵⁹ Similarly, the *Evening Vanguard* referred to him as "a Negro" and a "civil-rights worker" who "was a

57. Letter from Mike Yarrow 2 (July 18, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/lets/640718_yarrow.pdf [<https://perma.cc/R55L-5HND>].

58. *Id.* at 3.

59. *Secret Indictment Jails Antipolice Pamphleteer*, INDEPENDENT (Long Beach, Cal.), Sep. 22, 1966, at 4.

member of the Student Nonviolent Coordinating Committee (SNCC) at Indianola, Miss., from 1964–65.”⁶⁰ This depiction is consistent with that of the *Los Angeles Times*, which also called him “a former Mississippi civil rights worker.”⁶¹

During this civil-rights work in Mississippi, Harris endured arrests and other forms of violence—incidents that would later be used against him by an anti-communist investigator in portraying Harris as a danger before Congress.⁶² Yet, despite its importance to the public framing of his arrest and lawsuit, this advocacy has largely been overlooked in the writings on federal jurisdiction. This Part reawakens that memory. By detailing Harris’s civil-rights work as well as the arrests and violence he encountered along the way, this Part explores how and why John Harris of Birmingham, Alabama, found himself in Los Angeles, California, in September 1965.

A. Early Life

John Wesley Harris, Jr. was born to John W. Harris and Iona Harris in Birmingham, Alabama, on October 30, 1943.⁶³ John, Sr. hailed from the small town of Pelham, Georgia.⁶⁴ He attended school through the third grade,⁶⁵ moved to Birmingham sometime during his youth, and found work at local paper and iron

60. ‘Syndicalist’ Tries to Cut Bail Today, *EVENING VANGUARD* (Venice, Cal.), Sep. 22, 1966, at 1.

61. *Syndicalism Act*, *L.A. TIMES*, Mar. 17, 1968, at G5.

62. *Subversive Influences in Riots, Looting, and Burning: Hearing Before the H. Comm. on Un-American Activities*, 90th Cong. 1299, 1303 (1967) [hereinafter *Subversive Influences*] (statement of William Wheeler) (“In 1964 and part of 1965 Harris served as project director for the Student Nonviolent Coordinating Committee (SNCC) in Indianola, Mississippi. During this time, he was arrested in October 1964 and twice in February 1965 on charges of disobeying police and disturbing the peace.”). Wheeler said nothing of the blatantly racist, terrorism-dominated contexts in which those arrests took place. See *id.*

63. *John Harris*, *AL.COM* (May 2012), <https://obits.al.com/us/obituaries/birmingham/name/john-harris-obituary?n=john-harris&pid=157560724> [<https://perma.cc/G3L6-T6SB>]; U.S. DEP’T OF COM., *CENSUS OF POPULATION AND HOUSING, BIRMINGHAM, ALABAMA* 29 (1950); Ron Einstoss & Art Berman, *Negro Arraigned as ‘Revolutionist’: Rarely Used Law Invoked to Hold Deadwyler Inquest Leaflet Passer*, *L.A. TIMES*, Sep. 22, 1966, at 3.

64. U.S. DEP’T OF COM., *supra* note 63, at 29; John Harris Draft Registration Card (n.d.) (on file with Nat’l Archives at St. Louis, Record Group 147: Records of the Selective Service System, Box 115, WWII Draft Registration Cards for Alabama, Oct. 16, 1940 – Mar. 31, 1947). In 1910, Pelham’s population was 1,880. BUREAU OF THE CENSUS, U.S. DEP’T OF COM. & LAB., *THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910: STATISTICS FOR GEORGIA* 594 (1913), <https://www2.census.gov/library/publications/decennial/1910/abstract/supplement-georgia.pdf> [<https://perma.cc/43Q5-QCBX>].

65. TRACY SUGARMAN, *WE HAD SNEAKERS, THEY HAD GUNS: THE KIDS WHO FOUGHT FOR CIVIL RIGHTS IN MISSISSIPPI* 294 (2009).

mills.⁶⁶ Iona, John's mother, was born in Evergreen, Alabama, a small town about 150 miles south of Birmingham.⁶⁷ Sometime before her seventh birthday, she was adopted by Alma and Gilbert House and moved to Birmingham to live with them.⁶⁸ Iona and John, Sr. married in May 1943; the younger John Harris was born five months later.⁶⁹

The Birmingham of Harris's youth was a dangerous place, a place where racial apartheid was enforced by the courts, the police, and the Klan (though the lines between those institutions were not always clear). When, in the late 1940s and early 1950s, Black families began moving to the fringes of white neighborhoods to escape cramped conditions, their homes were bombed relentlessly.⁷⁰ When, in 1955, a federal court ordered the University of Alabama to drop its informal "whites only" admissions policy, violence followed.⁷¹ When, in 1957, Reverend Fred Shuttlesworth, a Baptist minister and civil-rights leader, tried to enroll his daughters in a white school, he was beaten by a mob armed with bats and chains.⁷² And when, in June 1958, the antagonism between Shuttlesworth and Police Commissioner Bull Connor boiled over, Klansmen—reportedly with the help of detectives from the Birmingham Police Department—bombed Shuttlesworth's church.⁷³

66. U.S. DEP'T OF COM., *supra* note 63, at 29; Jefferson County, Alabama, Marriage License Records 273 (1943), <https://www.ancestry.com/discoveryui-content/view/328673:61365> [<https://perma.cc/G5Y4-NY8T>].

67. Jefferson County, Alabama, Marriage License Records, *supra* note 66, at 273.

68. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., FIFTEENTH CENSUS OF THE UNITED STATES: 1930 POPULATION SCHEDULE, BIRMINGHAM CITY, JEFFERSON COUNTY, ALABAMA (Apr. 4, 1930), <https://www.ancestry.com/discoveryui-content/view/119444761:6224> [<https://perma.cc/2DVM-JFAR>].

69. Jefferson County, Alabama, Marriage License Records, *supra* note 66, at 273.

70. Around fifty Black homes were bombed between 1947 and 1963. ANDREW M. MANIS, A FIRE YOU CAN'T PUT OUT: THE CIVIL RIGHTS LIFE OF BIRMINGHAM'S REVEREND FRED SHUTTLESWORTH 80 (1999).

71. The campus rioted after Autherine Lucy, a Black woman, attended classes. Rather than punish rioters, the state suspended Lucy and ultimately expelled her. *Lucy v. Adams*, 134 F. Supp. 235, 237 (N.D. Ala. 1955) (noting that, when Lucy and friend Polly Ann Myers arrived to campus, the president "tendered to each of the plaintiffs her room deposit and advised them the courses which they sought were available at Alabama State College in Montgomery"); Murray Kempton, *When the Riots Came*, in 1 REPORTING CIVIL RIGHTS: AMERICAN JOURNALISM 1941-1963, at 241, 241-48 (Clayborne Carson, David Garrow, Bill Kovach & Carol Polsgrove eds., 2003); Richard Goldstein, *Autherine Lucy Foster, First Black Student at U. of Alabama, Dies at 92*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/02/us/autherine-lucy-foster-dead.html> [<https://perma.cc/RM9U-L2Y2>].

72. MANIS, *supra* note 70, at 205.

73. *Id.* at 168-73.

But the near-constant onslaught of violence did not destroy civil-rights activities in Birmingham. Throughout the 1950s, a homegrown civil-rights movement fought against Black exclusion from the city’s civil service and for integration of the city’s schools and buses.⁷⁴ In 1960, when tens of thousands of students sat-in to integrate lunch counters across the South, they sat-in in Birmingham, too.⁷⁵ And in May 1961, when Freedom Riders boarded buses to challenge the continued illegal segregation of buses and bus terminals, Birmingham was a key stop,⁷⁶ one where they were met with extreme violence.⁷⁷ This was the place where John Harris came to know the world.

B. To Howard University

In the fall of 1961, Harris left Birmingham for Washington, D.C., to attend Howard University.⁷⁸ At Howard, Harris became involved with the Nonviolent Action Group (NAG), an organization formed soon after the first sit-ins in Greensboro.⁷⁹ Members staged sit-ins against segregated lunch counters and amusement parks; picketed the White House, the Capitol, and the Department of Justice; and participated in the Freedom Rides.⁸⁰ By the time Harris arrived,

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- 74. See generally DIANE MCWHORTER, *CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMATIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* (2001) (recounting civil-rights advocacy efforts and the resulting segregationist resistance in Birmingham, Alabama, during the 1960s).
 - 75. ANDREW B. LEWIS, *THE SHADOWS OF YOUTH: THE REMARKABLE JOURNEY OF THE CIVIL RIGHTS GENERATION 64-65* (2009) (“The sit-ins leaped across the South like wildfire. . . . By the end of the month, African-American students in more than thirty communities had staged sit-ins. In March, they did so in another forty communities, including Atlanta, Miami, Houston, Little Rock, and Birmingham. By mid-April . . . more than fifty thousand people had participated.”).
 - 76. See MANIS, *supra* note 70, at 262-63.
 - 77. See RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 16-17* (2006).
 - 78. SUGARMAN, *supra* note 65, at 294.
 - 79. Student Nonviolent Coordinating Committee Files on Nonviolent Action Group 8 (c. 1964) [hereinafter NAG Papers] (on file with Martin Luther King, Jr. Ctr. for Nonviolent Soc. Change, Student Nonviolent Coordinating Committee Papers, 1959-1972 [hereinafter SNCC Papers], Subgroup C, Series III, Nonviolent Action Group); CLEVELAND SELLERS & ROBERT TERRELL, *THE RIVER OF NO RETURN 59* (Univ. Miss. Press 1990) (1973).
 - 80. SELLERS & TERRELL, *supra* note 79, at 59-60; Jan Leighton Triggs & John Paul Dietrich, *Freedom Movement in Washington DC: 1960-61 Based on Actions of the Nonviolent Action Group (NAG)*, C.R. MOVEMENT ARCHIVE (1961, rev. 2011), <https://www.crmvet.org/info/dc60.htm> [<https://perma.cc/S88L-C7W8>].

NAG was already a group of civil-rights veterans, many of whom would go on to assume prominent positions in the national civil-rights movement.⁸¹

Through NAG, Harris would be exposed to ideas and action. In Harris's first semester, NAG members launched "Project Awareness," a debate series that would use university funds to bring some of the time's most controversial speakers to campus.⁸² A sign of what was to come, Project Awareness's first debate was between Malcolm X and Bayard Rustin on the issue "Integration or Separation."⁸³ The event drew a crowd of around two thousand, filling the auditorium to capacity and forcing some five hundred students to listen via loudspeaker.⁸⁴ In the weeks following the X-Rustin debate, NAG organized a caravan of Howard students to participate in sit-ins at scores of Baltimore restaurants.⁸⁵

In February 1963, during the spring of Harris's sophomore year, NAG brought itself to the center of campus debate when NAG members Melvin Schnapper and Mike Thelwell reported in *The Hilltop* that Howard's new gymnasium was being built by segregated labor.⁸⁶ NAG member Stokely Carmichael testified before the Equal Employment Opportunity Subcommittee of the President's Commission on Civil Rights, catching the attention of the Kennedy Administration and prompting the Secretary of Labor to announce that his Department would strictly enforce the ban on discrimination in federal projects.⁸⁷ At the same time, NAG collected clothing and funds for Black folks in Mississippi.⁸⁸

81. See, e.g., PENIEL E. JOSEPH, *STOKELY: A LIFE* 27 (2014); LEWIS, *supra* note 75, at 101 (noting the involvement of Stokely Carmichael, Hubert Rap Brown, Cleveland Sellers, and Charles Cobb).

82. See STOKELY CARMICHAEL, *READY FOR REVOLUTION: THE LIFE AND STRUGGLES OF STOKELY CARMICHAEL* 250-52 (2005); JOSEPH, *supra* note 81, at 41; Tom Kahn, *Malcolm X v. Rustin Here Monday*, HILLTOP (D.C.), Oct. 7, 1961, at 2; *University OKs Communist Speaker Aptheke, Mendelson Debate on Wed.*, HILLTOP (D.C.), Mar. 16, 1963, at 2.

83. Kahn, *supra* note 82, at 2; *Afro Editorial Lauds Project Awareness Idea*, HILLTOP (D.C.), Nov. 10, 1961, at 2.

84. JOSEPH, *supra* note 81, at 41-42.

85. *Id.* at 43; Tom Kahn, *Balt. Sit-Ins Again Tomorrow Following Last Week's Drive*, HILLTOP (D.C.), Nov. 17, 1961, at 4.

86. JOSEPH, *supra* note 81, at 50-53; Mike Thelwell, *Protests Sent to Federal Government Paper Demands Investigation of Locals*, HILLTOP (D.C.), Feb. 22, 1963, at 1; Melvin Schnapper, *Reporter Tells Story of Mysterious Vanishing List*, HILLTOP (D.C.), Feb. 22, 1963, at 1; NAG Papers, *supra* note 79, at 11 (confirming Schnapper's membership in NAG); CARMICHAEL, *supra* note 82, at 134 (confirming Thelwell's membership in NAG).

87. JOSEPH, *supra* note 81, at 50-51; *Labor Secy. Wirtz Takes Strong Action to End Building Bias*, HILLTOP (D.C.), Mar. 22, 1963, at 1, 5.

88. Fred Johnson, *NAG Attempts to Aid Miss. Negroes[s], Snags on Red Tape*, HILLTOP (D.C.), Mar. 8, 1963, at 4.

and put on a concert by the “Freedom Singers of Atlanta” to raise money for voter-registration efforts in the South.⁸⁹

Harris was elected as NAG’s Chairman for the 1963-1964 school year.⁹⁰ Over the course of that year, Howard’s “deepening relationship with the civil rights movement” would become apparent, as would NAG’s more radical orientation with Harris at the helm.⁹¹ In early November, Howard hosted a two-day conference on “Youth, Nonviolence, and Social Change.”⁹² Civil-rights leaders like Gloria Richardson, James Farmer, John Lewis, and Martin Luther King, Jr. came to campus to discuss and debate – alongside NAG members – the morality, efficacy, and future of nonviolent direct action.⁹³ Later that month, Howard hosted SNCC’s fourth annual conference, titled “On Food and Jobs.”⁹⁴ The conference’s stated focus was “acquaint[ing] [SNCC] field workers with existing programs in the areas of man-power re-training, job re-location, and economic relief to rural communities.”⁹⁵ But the vision of its organizers and participants was much broader. Using language that foreshadowed Harris’s “syndicalist” leaflets, the conference’s program announced: “[T]he entire social and economic structure of the South must be changed”⁹⁶ The conference’s resolutions committee urged SNCC to “establish lines of communication with labor”; to propose “that the present military budget . . . be spent for health, education and welfare projects”; and to promote “economic equality programs to bring full employment, economic security, a dignified and vital future for all Americans.”⁹⁷ All of this should be done “with the purpose of complete change of the power structure, toward a planned economy, and toward political organization.”⁹⁸

89. *Notice*, HILLTOP (D.C.), Mar. 22, 1963, at 5.

90. NAG Papers, *supra* note 79, at 8; JIM DANN & HARI DILLON, *THE FIVE RETREATS: A HISTORY OF THE FAILURE OF THE PROGRESSIVE LABOR PARTY* 23 (1977).

91. JOSEPH, *supra* note 81, at 64. Historian Clayborne Carson has noted that by 1964, “many NAG members had adopted socialistic views.” CLAYBORNE CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S*, at 104 (1995).

92. JOSEPH, *supra* note 81, at 64-65.

93. *Id.* at 64; *Howard U. Conference*, 8 NEGRO DIG., Mar. 1964, at 78-93.

94. JOSEPH, *supra* note 81, at 65.

95. Student Nonviolent Coordinating Comm., Program for Fourth Annual Conference: “On Food and Jobs” 2 (1963) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/631129_sncc_food_conf.pdf [<https://perma.cc/MWU7-NL8M>].

96. *Id.*

97. Resols. Comm., Student Nonviolent Coordinating Comm., Fourth Annual Leadership Conference: “Jobs and Food” Report 2-3 (Nov. 1963) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/631202_sncc_food_resolutions.pdf [<https://perma.cc/6DCX-7M6E>].

98. *Id.*

For Harris, campus activism was only the beginning. In the spring of 1964, toward the end of Harris's time as chairman, NAG's attention – and his – turned to Mississippi.⁹⁹ The nation's eyes would soon follow.

C. To Mississippi

In early 1964, the Council of Federated Organizations (COFO) – an amalgamation of civil-rights organizations operating in Mississippi – approved a plan for the Summer Project. The Summer Project, or “Freedom Summer” as it came to be known, promised to be nothing short of an “invasion,”¹⁰⁰ flooding states across the South with hundreds of civil-rights workers and volunteers.¹⁰¹ By design or by default, the vast majority of these volunteers were white.¹⁰² But looking for Black volunteers with more movement experience, COFO turned to NAG, and NAG members answered the call.¹⁰³ Stokely Carmichael was tasked with leading project activities in Mississippi's second congressional district,¹⁰⁴ and other NAG members – including Harris – were recruited for voter-registration work and political organizing.¹⁰⁵

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99. CARMICHAEL, *supra* note 82, at 356. In May 1964, NAG members also participated in a volatile rally in Cambridge, Maryland. JOSEPH R. FITZGERALD, *THE STRUGGLE IS ETERNAL: GLORIA RICHARDSON AND BLACK LIBERATION* 153 (2018). After qualifying for the Democratic primary in Maryland, Alabama Governor George Wallace organized a rally in Cambridge. *Id.* at 151. The Cambridge Nonviolent Action Committee organized a counter-rally and march, which ended after violent confrontation with the National Guard. *Id.* at 152–53. For more on this event, see *id.* at 151–54; SELLERS & TERRELL, *supra* note 79, at 67–76; and JOSEPH, *supra* note 81, at 67.
100. Council of Federated Orgs., Mississippi: Handbook for Political Programs 3 (1964) [hereinafter COFO, Mississippi: Handbook for Political Programs] (on file with C.R. Movement Archive), https://www.crmvet.org/docs/64_cofa_handbook.pdf [<https://perma.cc/GJN2-ZHTG>]. For its part, white Mississippi acted as if it were about to be invaded. In the spring of 1964, the state passed a number of statutes aimed at cracking down on civil-rights work. Council of Federated Orgs., *The Mississippi Legislature – 1964*, at 1–4 (June 2, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/6406_cofa_ms_leg-rpt.pdf [<https://perma.cc/49WQ-2GRP>] (listing thirty-seven such statutes and proposed statutes).
101. CARSON, *supra* note 91, at 110.
102. *Id.* at 98–100, 110; SUGARMAN, *supra* note 65, at 296. According to Cleveland Seller's account, only around 135 of the approximately 900 volunteers were Black. SELLERS & TERRELL, *supra* note 79, at 82.
103. NAG Papers, *supra* note 79, at 1–2; CARMICHAEL, *supra* note 82, at 358.
104. CARMICHAEL, *supra* note 82, at 357.
105. NAG Papers, *supra* note 79, at 2; CARMICHAEL, *supra* note 82, at 358.

1. *Freedom Summer*

Harris's Freedom Summer began with a week-long orientation in Oxford, Ohio. At the orientation, volunteers and staff¹⁰⁶ became acquainted with what was to become their reality. As one attendee later described, "The terror and violence of Mississippi was detailed and dissected. The extent of police brutality was cataloged, and the unreal world of the barbarous newsreel and the tabloid spread was suddenly becoming our world."¹⁰⁷

Harris was assigned to Sunflower County.¹⁰⁸ Thirty miles east of the Mississippi River, Sunflower County lies at the heart of "Mississippi Delta cotton country."¹⁰⁹ In the almost hundred years since the Civil War, the economy of Sunflower County had changed little. The county boasted little by way of industrial development.¹¹⁰ Cotton remained the county's primary industry, and much of this cotton was still grown by forced labor: the county's largest cotton producer was the Parchman State Penitentiary.¹¹¹

Though almost seventy percent of the county was Black, those residents were completely shut out of the local political process and power structure.¹¹² Surveying the situation in Ruleville, a city in Sunflower County, one SNCC report wrote: "No Negroes work in the city government. No Negroes work for the telephone company or for the utilities which service Ruleville. No Negroes serve as justices of the peace or on the juries. The one Negro policeman is not permitted to arrest white people."¹¹³ Countywide, only 1.2% of the nonwhite voting-age population was registered to vote in 1960.¹¹⁴

106. Harris was on SNCC staff during the Freedom Summer. Council of Federated Orgs., Tentative Project Assignments 2 (n.d.) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/6406_cofa_projlist.pdf [<https://perma.cc/GB8G-BPVF>].

107. SUGARMAN, *supra* note 65, at 11.

108. Tentative Project Assignments, *supra* note 106, at 2.

109. Student Nonviolent Coordinating Comm., This Is Sunflower County, Mississippi (n.d.) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/620000_sncc_sunflower-rpt.pdf [<https://perma.cc/85E6-C4XR>].

110. *Id.*

111. *Id.*

112. U.S. COMM'N ON C.R., REPORT BOOK 1: VOTING 337 (1961).

113. Student Nonviolent Coordinating Comm., Ruleville, Mississippi: A Background Report 4 (1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/640600_sncc_ruleville.pdf [<https://perma.cc/62H2-XUBA>].

114. U.S. COMM'N ON C.R., *supra* note 112, at 347.

As with elsewhere in the Mississippi Delta, white domination in Sunflower County was reinforced by economic coercion and terror.¹¹⁵ So, when Harris and the other COFO volunteers arrived in Ruleville on June 21, they entered turbulent terrain.¹¹⁶ The night of their arrival, Charles McLaurin and Fannie Lou Hamer called a community meeting to introduce these newcomers to the community.¹¹⁷ After introductions, McLaurin—the director of the Sunflower County Project¹¹⁸—led newcomers and residents in freedom songs. As one volunteer would recall, “That night the singing was so loud and exuberant that it shook the wooden walls and could be heard on the highway at the gas station, where the racists and their pickups gathered.”¹¹⁹

This exuberance was soon tempered. As the group arrived, word was spreading about the disappearance of three civil-rights workers: James Chaney, Michael Schwerner, and Andrew Goodman. The three had gone out to investigate the burning of a Black church some days before and never returned.¹²⁰ The morning after their arrival, McLaurin gave his cold assessment of the situation: “The cars you’ll hear moving through the quarter at night are vigilante cars. . . . Three of our people are missing, probably they’re dead. We’ve got to be careful, and we’ve got to keep in touch.”¹²¹ But as McLaurin explained, this would not stop their work: “Startin’ at five o’clock we’re gonna start working on

115. See COFO, *Mississippi: Handbook for Political Programs*, *supra* note 100, at 17; Jerry Tecklin, Report #1: Sunflower-Bolivar Cos. 2 (June 28, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/lets/64o628_sncc_rulev_rpt12.pdf [<https://perma.cc/NPQ7-HFQ3>] (“The people here have been through the mill as regards economic pressure, and physical violence is no stranger to their streets.”). The experience of Fannie Lou Hamer serves as one example. When, in 1962, Hamer attempted to register to vote, she was arrested. Released on bail, she returned home only to be ordered to remove her name from the voter rolls or to leave the plantation where she lived. She left the plantation. CARSON, *supra* note 91, at 73. After leaving, Hamer continued her civil-rights work, and was continually threatened, shot at, and in one instance, beaten nearly to death. CARMICHAEL, *supra* note 82, at 317.

116. JIM DANN, *CHALLENGING THE MISSISSIPPI FIREBOMBERS: MEMORIES OF MISSISSIPPI 1964-65*, at 50, 68 (2013).

117. *Id.* at 49-50.

118. Press Release, Council of Federated Orgs., Molotov Cocktail Hits Negro Church (June 25, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/pr/64o625_cofa_pr_sunflower.pdf [<https://perma.cc/EDN2-GBZ9>].

119. DANN, *supra* note 116, at 56-57.

120. As Harris and others would learn later that summer, the three were lynched in Philadelphia, Mississippi. See *Philadelphians React but Slightly to News*, ENTER-J. (McComb, Miss.), Aug. 5, 1964, at 1. The killers included a deputy sheriff who was acquitted by an all-white jury and completed his term. WILLIAM BRADFORD HUIE, *THREE LIVES FOR MISSISSIPPI* 5, 9 (2000).

121. SUGARMAN, *supra* note 65, at 32.

getting these people in Ruleville to sign up to go to Indianola on Wednesday to try and register.”¹²²

So they did. The next morning, Harris and others went door to door seeking to register people to vote,¹²³ though hardly anyone signed up.¹²⁴ That night, Black homes were hit by bottles thrown from a passing car.¹²⁵ The next day, a group of volunteers and workers holding a voter-registration event was confronted by white folks who brandished weapons.¹²⁶ And the day after that, only four days after the group’s arrival in Sunflower County, Williams Chapel, a Black church in Ruleville that served as a center for civil-rights activities, was fire-bombed.¹²⁷

But COFO workers and their local counterparts continued to work. Within weeks, they had set up a Freedom School and community center in Ruleville.¹²⁸ Scores of students attended the Freedom School sessions each day.¹²⁹ In the mornings, adults – mainly women – attended classes on reading, writing, citizenship, and health, while their children were watched at the daycare. And in the afternoon, children ten and up attended classes on reading, writing, math, Black history, art, and citizenship.¹³⁰ Volunteers had collected three thousand volumes

122. *Id.* at 71.

123. *Id.* at 78.

124. *Id.*

125. Student Nonviolent Coordinating Comm., A Brief Summary of Incidents in Sunflower County, Mississippi 1 (c. 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/6505_sncc_sunflower_incidents-c.pdf [<https://perma.cc/5Y2Q-H8KS>]. The date was June 23. When Harris brought this and other incidents to the attention of Ruleville’s mayor, the mayor blamed civil-rights workers, saying that they did these things “to get money.” Press Release, Council of Federated Orgs., Negro Community Hit by Coke Bottles (June 24, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/pr/640624_cofa_pr_sunflower.pdf [<https://perma.cc/7CM3-CUS9>].

126. Student Nonviolent Coordinating Comm., *supra* note 125, at 1.

127. *Id.*; see also Press Release, Council of Federated Orgs., *supra* note 118 (recounting the ordeal). Ruleville’s mayor accused civil-rights workers of staging this attack, too. *Id.*

128. Press Release, Student Nonviolent Coordinating Comm., Ruleville Freedom School Opens (July 4, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/pr/640704_cofa_pr_sunflower.pdf [<https://perma.cc/2LE8-CKTR>]; Jerry Tecklin, Report #2: Sunflower-Bolivar Cos. 3 (July 7, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/lets/640707_sncc_rulev_rpt13.pdf [<https://perma.cc/PFD5-XVAF>].

129. Tecklin, *supra* note 128, at 3.

130. See Kirsty Powell, *A Report, Mainly on Ruleville Freedom School, Summer Project, 1964*, reprinted in *FREEDOM SCHOOL CURRICULUM: MISSISSIPPI FREEDOM SUMMER, 1964*, at 83, 84-92 (Kathy Emery, Sylvia Braselmann & Linda Gold eds., 2004), http://www.educationanddemocracy.org/FSCpdf/FreedomSchoolCurrW_Photo.pdf [<https://perma.cc/9UGQ-ADKL>]; Schedule – Ruleville Freedom School (n.d.) (on file with C.R. Movement Archive), <https://>

for the community center's library,¹³¹ and despite police interference, had distributed truckloads of clothing.¹³² Political organizing continued, too. In Ruleville, Indianola, and the city of Sunflower, mass meetings drew crowds of over a hundred.¹³³ Volunteers and staff canvassed Black neighborhoods and escorted those who wanted to register to the courthouse.¹³⁴

Throughout the summer, activists had regular encounters with the police, and Harris in particular seemed to have attracted their attention.¹³⁵ On July 14, civil-rights workers Jim Dann and Fred Miller were in Drew, Mississippi, distributing leaflets advertising a rally later that day.¹³⁶ Police picked up the pair and told them to leave town and never return.¹³⁷ Though Dann and Miller's efforts had been interrupted, their leaflets had raced through Drew.¹³⁸ When the rally began around six o'clock that night, about a dozen youth joined the organizers, and scores of adults watched from across the street.¹³⁹ Police positioned themselves between the rally and the onlookers.¹⁴⁰ Miller and another volunteer, Mike Yarrow, attempted to hand out song sheets and were arrested for unlawful

www.crmvet.org/docs/640000_sncc_rulev_school.pdf [https://perma.cc/G786-8PYM]. Tracy Sugarman provides a heartwarming account of the Freedom School's first day. SUGARMAN, *supra* note 65, at 72-77.

131. Tecklin, *supra* note 128, at 3.

132. Press Release, Student Nonviolent Coordinating Comm., SNCC Workers Call Police Bluff (July 7, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/pr/640707_cof_pr_sunflower.pdf [https://perma.cc/4XEA-CQFL]; Tecklin, *supra* note 128, at 3.

133. David Halberstam, *Negroes Meet Nightly Despite Tension in Delta*, N.Y. TIMES, June 29, 1964, at 18; Press Release, Student Nonviolent Coordinating Comm., Four Congressmen Join Civil Rights Rally (July 3, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/pr/640703_cof_pr_sunflower.pdf [https://perma.cc/GDD3-XPCS]; Press Release, Student Nonviolent Coordinating Comm., SNCC Invades Citizen Council Birthplace (July 9, 1964) [hereinafter SNCC Invades Citizen Council Birthplace] (on file with C.R. Movement Archive), https://www.crmvet.org/docs/pr/640709_cof_pr_sunflower.pdf [https://perma.cc/S49S-AVLQ].

134. SUGARMAN, *supra* note 65, at 88-91.

135. Freedom Info. Serv., WATS Report (July 8, 1964) (on file with Wis. Hist. Soc'y, 1964 Freedom Summer Project Collection). WATS herein stands for Wide Area Telephone Service.

136. DANN, *supra* note 116, at 79-82; Report of Leonard Edwards 6 (1964) (on file with C.R. Movement Archive), https://www.crmvet.org/lets/640800_sncc_rulev_rpt10.pdf [https://perma.cc/CF6R-XCTR].

137. DANN, *supra* note 116, at 80.

138. SUGARMAN, *supra* note 65, at 60.

139. DANN, *supra* note 116, at 80-82.

140. SUGARMAN, *supra* note 65, at 60.

distribution of literature.¹⁴¹ When Harris stepped onto the sidewalk, he and four others were arrested, too. Ever defiant, Harris shouted out as he was led off by police: “If you register and vote, you won’t have to elect stupid public servants like this one!”¹⁴² For this, he was charged with using abusive language toward a policeman, and his bail was doubled.¹⁴³

Once in jail, Harris took charge. He explained to the group that they would be arraigned early the next morning; that they were to plead “not guilty”; and that they were not to sign anything without their lawyers present.¹⁴⁴ To pass the time, the group sang freedom songs and read from a battered copy of Michael Harrington’s *The Other America*.¹⁴⁵ Around ten o’clock that night, a dozen FBI agents came to interview the arrestees, but at Harris’s urging, they refused to speak with the FBI without seeing their lawyers first.¹⁴⁶ The group was bailed out the following morning.¹⁴⁷

Harris spent a good deal of his time that summer in Indianola.¹⁴⁸ Harris and a few volunteers had begun canvassing in Indianola in early July and were greeted enthusiastically by the community.¹⁴⁹ Indianola’s first mass meeting drew a crowd of over one hundred despite a brewing storm. As SNCC’s press release recounted:

Against a background of a churning thunderstorm and a fiery display of lightning, the Student Non-Violent Coordinating Committee (SNCC) held its first mass meetin[g] in Indianola, the birthplace and spiritual home of the White Citizens’ Council. Approximately 150 attended the voter registration rally on the steps of Bryant Chapel at 6 PM; 75-100 stayed and sang freedom songs when the rain began a half hour later.¹⁵⁰

141. Letter from Mike Yarrow, *supra* note 57, at 2-3; Report of Leonard Edwards, *supra* note 136, at 6; *Investigation Hints of Communistic Activities in Sunflower County*, ENTER.-TOCSIN (Indianola, Miss.), July 23, 1964, at 1.

142. SUGARMAN, *supra* note 65, at 62.

143. Report of Leonard Edwards, *supra* note 136, at 6; Petition for Removal and for Other Relief at A-2, *City of Drew v. Harris*, No. GCR6431 (N.D. Miss. July 21, 1964) (on file with authors).

144. SUGARMAN, *supra* note 65, at 64.

145. Letter from Mike Yarrow, *supra* note 57, at 2-3.

146. *Id.* at 3.

147. SUGARMAN, *supra* note 65, at 66. Harris and others would remove their criminal cases to federal court. TRACY SUGARMAN, *STRANGER AT THE GATES: A SUMMER IN MISSISSIPPI* 167 (1966); see Petition for Removal and for Other Relief, *supra* note 143, at A-1.

148. DANN, *supra* note 116, at 91-119.

149. SUGARMAN, *supra* note 147, at 173; see SNCC Invades Citizen Council Birthplace, *supra* note 133.

150. SNCC Invades Citizen Council Birthplace, *supra* note 133.

Harris's activities in Indianola continued throughout the month. When a local woman, Irene Magruder, offered to house freedom workers, Harris and two others, Charles Scattergood and Gretchen Schwartz, moved in.¹⁵¹ Harris was placed in charge of the Indianola project, and Jim Dann was responsible for ferrying additional volunteers between Ruleville and Indianola.¹⁵²

After securing a place to meet, Harris and the rest of COFO's Indianola contingent got to work setting up a Freedom School and running off flyers for Indianola's first indoor mass meeting.¹⁵³ By 7:30 on the evening of the meeting, around 250 people had packed into the Baptist school.¹⁵⁴ When Charles McLaurin arrived from Ruleville the night of the meeting, he could not believe his eyes: "Man! This is *Indianola*! Do you realize that? *Indianola*! . . . I thought there'd be ten people here! Look at them! In *Indianola*!"¹⁵⁵

That night, Harris warmed up the crowd with freedom songs and chants: "Black and white together, / We shall not be moved. / Just like a tree that's planted by the waters, / We shall not be moved."¹⁵⁶ Harris stood at the front of the room and started to introduce McLaurin, but his introduction was cut off by a disturbance in the back of the room.¹⁵⁷ Despite assurances that the police would remain outside, Nathaniel "Slim" Jack, Indianola's first Black policeman,¹⁵⁸ entered the meeting.¹⁵⁹ Harris asked Jack to leave, but he refused. Things escalated from there. After McLaurin suggested that Jack would be forcibly removed, Jack pulled his pistol, aimed it at a rabbi, and threatened to shoot.¹⁶⁰ After white police officers escorted Jack out, the meeting continued as

151. DANN, *supra* note 116, at 94.

152. *Id.*

153. *Id.* at 100-02.

154. Sugarman estimates that the crowd was around 250, SUGARMAN, *supra* note 65, at 93, as does Mike Yarrow, Letter from Mike Yarrow, *supra* note 57, at 2. But *The Freedom Fighter*, a "paper for and by the Black folk of Sunflower," estimated the crowd was anywhere from three to five hundred. *The Freedom Movements Grows in Indianola*, FREEDOM FIGHTER, July 1964, at 1 (on file with Wis. Hist. Soc'y, 1964 Freedom Summer Project Collection).

155. SUGARMAN, *supra* note 65, at 93 (second and fourth emphasis added).

156. *Id.* at 93-94.

157. *Id.* at 94.

158. Cameron Abel, *Nathaniel Jack Monument Unveiled*, ENTER.-TOCSIN (Indianola, Miss.), Nov. 4, 1993, at 6.

159. SUGARMAN, *supra* note 65, at 94.

160. Statement of Allan Levine 1 (1964) (on file with C.R. Movement Archive), https://www.crmvet.org/nars/aff/640723_sncc_rulev_stm4.pdf [<https://perma.cc/QSR7-ZHFF>]; Affidavit of Jerry Tecklin (July 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/nars/aff/640000_sncc_rulev_aff1.pdf [<https://perma.cc/Y58C-W4EQ>].

planned.¹⁶¹ McLaurin spoke about the “need to have a black electorate, to have real police protection, economic benefits and full and meaningful equality.”¹⁶² Harris announced that Indianola’s Freedom School would open the next day.¹⁶³ The project in Indianola continued to flourish, and mass meetings continued to draw a crowd. At the next mass meeting in Indianola, five hundred gathered in the schoolhouse to hear from Fannie Lou Hamer.¹⁶⁴ And the week after that, over a thousand gathered to hear James Forman, SNCC’s executive director.¹⁶⁵

By summer’s end 1964, “the Movement in Sunflower County could look back on two years of solid accomplishment.”¹⁶⁶ Though only ten to fifteen Black folks had become registered voters, many hundred had attempted to register,¹⁶⁷ and over two thousand filled out “freedom registration forms.”¹⁶⁸ Community centers and Freedom Schools were set up in Ruleville and Indianola, and these centers would continue to run after the summer’s end.¹⁶⁹ And three communities had formed local civil-rights organizations, with mass meetings regularly held in Ruleville, Indianola, and Sunflower.¹⁷⁰

2. *Leading the Sunflower County Project*

Although the summer was ending, Harris’s time in Mississippi was not. COFO had announced that the “Summer Program” would continue through the next year.¹⁷¹ Harris decided to stay on and was placed in charge of the Sunflower

161. DANN, *supra* note 116, at 117.

162. *Id.* at 118.

163. *Id.*

164. *Id.* at 119.

165. *Id.* at 120.

166. Miss. Freedom Democratic Party, *The Sunflower County Project Report, 1964-1965*, at 9 (1965) (on file with Wis. Hist. Soc’y, 1964 Freedom Summer Project Collection). For an internal assessment of the Summer Project’s impact statewide, see generally *The Mississippi Summer Project (1964)* (on file with C.R. Movement Archive), https://www.crmvet.org/docs/640900_sncc_mississippisummer-r.pdf [<https://perma.cc/Z3WJ-E34P>].

167. Miss. Freedom Democratic Party, *supra* note 166, at 9 (noting that eight hundred attempted to register and fifteen succeeded); John Harris, *Report on Sunflower County 14* (c. 1964) (on file with Wis. Hist. Soc’y, 1964 Freedom Summer Project Collection) (noting that four hundred people attempted to register and only ten succeeded).

168. See Miss. Freedom Democratic Party, *supra* note 166, at 10.

169. *Id.*

170. *Id.*

171. Press Release, Council of Federated Orgs. (Aug. 8, 1964), https://www.crmvet.org/docs/pr/640808_cofa_pr_project.pdf [<https://perma.cc/T5ER-XNG9>]; Miss. Freedom Democratic Party, *supra* note 166, at 9-11; Council on Federated Orgs., *COFO Program (Winter 1964-Spring 1965)*, at 1-2 (on file with Wis. Hist. Soc’y, 1964 Freedom Summer Project Collection).

County Project.¹⁷² He set ambitious goals for the year to come: “[W]hile the White Citizens’ Council is dreaming of a returning to conditions before 1962, the Sunflower County Project is . . . mapping plans and plunging ahead into a more intensified program designed to bring about fundamental social, political and economic change in Sunflower County.”¹⁷³

In September, local civil-rights groups formed the Sunflower County Civic League to coordinate the county’s civil-rights program.¹⁷⁴ The League organized a boycott of all white-owned businesses in the city of Sunflower; limited boycotts were being planned in Ruleville, Indianola, and Moorhead, too.¹⁷⁵ Meanwhile, SNCC, COFO, and the Mississippi Freedom Democratic Party prepared for a “Freedom Vote” drive that would be held from the last week of October to the first week of November.¹⁷⁶ As part of this effort, the Sunflower County Project redoubled its voter-registration efforts across the county.¹⁷⁷

During this time, Harris’s attention was trained on testing public accommodations. The first week of September, Harris led a group of students to integrate Indianola’s movie theater.¹⁷⁸ The group was turned away by police, and a number of protestors, including Harris, were arrested.¹⁷⁹ Over the next several months, Harris, Dann, and other volunteers drove across the county attempting to integrate restaurants, motels, and the public library.¹⁸⁰

172. Miss. Freedom Democratic Party, *supra* note 166, at 11.

173. *Id.* at 13.

174. John Harris, Sunflower County Report (Oct. 17, 1964) (on file with authors).

175. *Id.* at 3.

176. Press Release, Miss. Freedom Democratic Party, Fact Sheet: 1964 Vote Campaign 1 (1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/6410_mfdp_freedomvote-press.pdf [<https://perma.cc/66QD-MQED>]; Press Release, Student Nonviolent Coordinating Comm., “Freedom Vote” Volunteers Arrive in Mississippi (Oct. 27, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/pr/641027_sncc_pr-fvvol.pdf [<https://perma.cc/8WDB-Y5PD>].

177. DANN, *supra* note 116, at 147-49, 166-67. In Indianola and Sunflower, more votes were cast in the Freedom Election than in the official one. Miss. Freedom Democratic Party, *supra* note 166, at 12.

178. *Id.* at 127-28; Freedom Info. Serv., WATS Reports 24 (Sep. 1964) (on file with Wis. Hist. Soc’y, 1964 Freedom Summer Project Collection).

179. Freedom Info. Serv., *supra* note 178, at 24.

180. DANN, *supra* note 116, at 129-38. Dann seems to date the library picket to sometime in September to October 1964, but contemporaneous records seem to indicate that the incidents Dann recounts occurred in February 1965. See WATS Line Reports, 1964-65, at 38, 43-44 (on file with Wis. Hist. Soc’y, 1964 Freedom Summer Project Collection); WATS Reports [166] (Feb. 20, 1965) (on file with SNCC Papers, *supra* note 79, Subgroup C, Series I, WATS List, Revised, Nov. 1965 WATS Reports, July 2, 1964-Sep. 4, 1966); WATS Reports [170] (Feb.

Contemporaneously, cracks within SNCC—doubtlessly present before the summer—rose to the surface. Numerous questions arose regarding SNCC’s decision-making structure and composition¹⁸¹: should SNCC become “a strong, centralized organization expanding its power and moving toward becoming a mass organization,” or should it remain “a limited cadre of organizers?”¹⁸² Did the college background of SNCC’s staff prevent the organization from operating effectively?¹⁸³ What should be the role of women within SNCC?¹⁸⁴ And, perhaps most divisively, what should be the role of white organizers within SNCC?¹⁸⁵ At the same time, there were complaints that SNCC’s effectiveness was being undermined by “irresponsible behavior that resulted from the staff’s declining morale, lack of direction, and opposition to authority.”¹⁸⁶

The Sunflower County Project and Harris himself were not immune to these divisions. In late 1964, Harris and another staffer authored dueling reports about the state of the Sunflower County Project and who should be blamed for any shortcomings.¹⁸⁷ Harris, for his part, blamed others. He complained about the Jackson office’s inability to answer basic questions about programming, the late and inadequate provision of funds, and—mirroring larger divides within SNCC regarding centralization, race, and gender—he complained about Liz Fusco, a white woman who was the coordinator of Freedom Schools in Mississippi.¹⁸⁸

22, 1965) (on file with SNCC Papers, *supra* note 79, Subgroup C, Series I, WATS List, Revised, Nov. 1965 WATS Reports, July 2, 1964-Sep. 4, 1966); WATS Reports [171] (Feb. 23, 1965) (on file with SNCC Papers, *supra* note 79, Subgroup C, Series I, WATS List, Revised, Nov. 1965 WATS Reports, July 2, 1964-Sep. 4, 1966).

181. CARSON, *supra* note 91, at 137-39.

182. *Id.* at 139.

183. *Id.* at 142.

184. *Id.* at 147-48. In response, Stokely Carmichael crudely joked, “prone.” *Id.* at 148.

185. *Id.* at 144-45; *see also* R. Hunter Morey, Cross Roads in COFO 1 (Dec. 3, 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/641203_cofa_xroads.pdf [<https://perma.cc/7HMA-SK5H>] (noting racial abuse toward and patronization by white workers).

186. CARSON, *supra* note 91, at 149.

187. *See* Letter from Theodis Hewitt, Project Dir., Leake Cnty. Project (n.d.) (on file with Wis. Hist. Soc’y, 1964 Freedom Summer Project Collection); Harris, *supra* note 167, at 15. The report appears to have been drafted in November 1964 because the Freedom Vote has already taken place, and Harris discusses the plan for a mock election in January 1965. *Id.* at 14. Moreover, it appears that Harris’s report, and the staff member’s complaints about Harris discussed below, were the topic of discussion at a staff meeting held on November 30. *See* Council of Federated Orgs., Memoranda and Reports, 1964-1965, Second Congressional Staff Meeting 79, 80 (c. 1965) (on file with Wis. Hist. Soc’y, 1964 Freedom Summer Project Collection) (noting complaints about project directors).

188. Harris, *supra* note 167, at 15 (“Undue interference and personal harassment from Miss. Freedom School coordinator. Persons with incomplete knowledge of the situation cannot give

Harris summed it up this way: “Insufficient funds, lack of cooperation, and incompetence have led the Sunflower County Project to the point of almost complete disregard and loss of respect for the Jackson office.”¹⁸⁹

The other staff member had a different view. According to him, Harris—the director of the Sunflower County Project—deserved some of the blame for the Sunflower County Project’s shortcomings:

Despite the other report, there are problems on our project aside from non-cooperation with Jackson. These can be summed up under self-complacency. The key people on the project, in terms of power, feel that we have the best project in the state, and sit back on their laurels Since the Freedom Election, not one thing has been done on v[oting] r[ights]. NOT ONE THING [The project director] is lazy. Typical day: rise at noon, eat, get the mail, drive around, eat, play cards, watch TV and spend the rest of the evening and night drinking at the local cafe.¹⁹⁰

These complaints notwithstanding, the Sunflower County Project carried on. In December, COFO’s attention shifted to preventing the seating of the congressmen elected in Mississippi’s second, fourth, and fifth congressional districts,¹⁹¹ and the Sunflower County Project—no doubt with Harris’s involvement—busied itself holding precinct meetings, circulating petitions, and collecting affidavits in support of these challenges.¹⁹² At the beginning of January, as part of another statewide effort, Harris organized a “Freedom Day” in

advice.”); COFO News, Mississippi Student Union Convention 1 (Dec. 1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/6412_cofa_msu.pdf [<https://perma.cc/FP49-VRKE>] (identifying Liz Fusco as the Freedom School Coordinator).

189. Harris, *supra* note 167, at 16.

190. Letter from Theodis Hewitt, *supra* note 187. While the letter does not mention Harris by name, it is clear from its contents that the complaints are being leveled, at least in part, against him. The letter complains about the “project director” and recounts incidents that occurred in Sunflower County. *Id.* Specifically, it recounts that the Freedom School was burnt, *id.*, and Indianola’s Freedom school was burnt in October 1964, *see* Student Nonviolent Coordinating Comm., *supra* note 125. Harris was the director of the Sunflower County Project, so it appears that the author’s complaints about the project director were complaints about Harris. *See* Miss. Freedom Democratic Party, *supra* note 166, at 11.

191. Miss. Freedom Democratic Party, Freedom Primer No. 3: The Right to Vote and the Congressional Challenge 3 (1965) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/ms_primer3_64.pdf [<https://perma.cc/AM7D-UDQH>].

192. Student Nonviolent Coordinating Comm., WATS Report (Dec. 13, 1964) (on file with SNCC Papers, *supra* note 79, Subgroup A, Series VII, Internal Communications, 1962-1966); DANN, *supra* note 116, at 158-59, 169-72; Linda Davis, Ruleville Report—Sunflower County (c. Jan. 1965) (on file with authors).

Indianola.¹⁹³ Fifty tried to register to vote, but they were thwarted when the registrar closed the courthouse, and over 350 picketed outside.¹⁹⁴ The day was considered a success, even though it, like earlier registration efforts, yielded few registered voters.¹⁹⁵

FIGURE 1. JOHN HARRIS AT RALLY IN INDIANOLA ON JANUARY 4, 1965¹⁹⁶



In February, efforts to integrate the library, which had been brewing since September, finally came to a head when over one hundred people picketed outside.¹⁹⁷ After being ordered to leave, the protesters refused and were met with

193. Press Release, Student Nonviolent Coordinating Comm., Eight Mississippi Freedom Days Held 2 (Jan. 9, 1965) (on file with SNCC Papers, *supra* note 79, Subgroup A, Series VII, Internal Communications, 1962-1966).

194. *Id.*; WATS Reports, Freedom Days in Mississippi (Jan. 4, 1965) (on file with SNCC Papers, *supra* note 79, Subgroup A, Series VII, Internal Communications, 1962-1966).

195. Davis, *supra* note 192.

196. This photo first appeared in DANN, *supra* note 116, at 14. Reprinted with permission of Baraka Books and Arley Dann.

197. WATS Line Reports, *supra* note 180, at 38.

police violence and arrest.¹⁹⁸ Officers hit Harris in the face with a billy club, left a fifteen-year-old with a broken arm, and beat one white volunteer limp.¹⁹⁹ The library was integrated a few weeks later.²⁰⁰

The real breakthrough in Sunflower County would not come until early April. On April 8, over two years after the Justice Department first filed suit, a federal judge declared that the registrar of Sunflower County had, for years, deprived Black citizens of the right to vote.²⁰¹ The judge enjoined the use of racially discriminatory practices and ordered the registrar to process the applications of at least fifty-six voters each day.²⁰² The injunction kicked off a flurry of voter-registration activity. The Sunflower County Freedom Democratic Party, led by Hamer, launched a “crash voter registration” program, aimed at registering as many Black residents as possible in advance of the municipal elections scheduled for June.²⁰³ Organizers put out a call for volunteers to come to Ruleville to help register voters.²⁰⁴ Despite increased intimidation and harassment from police and white vigilantes,²⁰⁵ over three hundred Black voters registered in the first three weeks after the injunction was issued.²⁰⁶

198. *Id.*; Firsthand Account of John Harris, Segregation and Brutality in the Mississippi Delta—Sunflower County 2 (n.d.) (on file with Wis. Hist. Soc’y, Alicia Kaplow Papers, 1964–1968, Archives Main Stacks, MSS 507, Box 1, Folder 6).

199. WATS Line Reports, *supra* note 180, at 38; Firsthand Account of John Harris, *supra* note 198, at 2–3.

200. John Harris, Report from Indianola, Miss. (1964) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/64_cofu_indianola-rpt.pdf [<https://perma.cc/Z3YB-C3V5>]. In apparent retaliation, the Freedom School in Indianola was burned to the ground. *Id.*; Student Nonviolent Coordinating Comm., *supra* note 125, at 4; *Indianola CR Building Is Destroyed by Blaze*, DELTA DEMOCRAT TIMES (Greenville, Miss.), Mar. 5, 1965, at 1.

201. United States v. Campbell, No. GC633 (N.D. Miss. 1963–1973) (docket sheet) (on file with authors); *see also* Hamer v. Campbell, 358 F.2d 215, 217 (5th Cir. 1966) (describing the injunction).

202. Order and Decree on Injunction at 1, United States v. Campbell, No. GC633 (N.D. Miss. Apr. 8, 1965) (on file with authors); Freedom Info. Serv., WATS Report #34, at 1 (Apr. 11, 1965) (on file with Wis. Hist. Soc’y, 1964 Freedom Summer Project Collection).

203. Press Release, COFO News, Crash Voter Registration Drive Continues for Third Day; City Clerk Offers Obstacles [42] (Apr. 21, 1965) (on file with SNCC Papers, *supra* note 79, Subgroup A, Series VII, Internal Communication, 1962–1966, WATS Reports, April–May 1965).

204. Freedom Info. Serv., WATS Report: Thursday, Apr. 15, 1965, at 1–2 (1965) (on file with Wis. Hist. Soc’y, 1964 Freedom Summer Project Collection).

205. Letter from Margaret Lauren to Friends of SNCC (May 7, 1965) (on file with C.R. Movement Archive), https://www.crmvet.org/docs/650507_sncc_injunction-ltr.pdf [<https://perma.cc/6S8X-MTDV>]; S. Reporting Serv., Sunflower County: A Southern Preview 3–4 (May 24, 1965) (on file with authors).

206. *Hamer*, 358 F.2d at 217.

Around the time the injunction came down, Harris was out of town. Harris and Dann had gone to Washington, D.C., to attend Students for a Democratic Society’s National March on Washington to protest the Vietnam War.²⁰⁷ Harris’s extended absence exacerbated existing tensions within the Sunflower County Project,²⁰⁸ and sometime in late spring, Harris and Dann announced they would be leaving the Project to work for the Child Development Group of Mississippi, the state’s first statewide Head Start program.²⁰⁹ Harris and Dann stayed with the Child Development Group through the end of the summer.²¹⁰ Then, in September 1965, Harris and Dann left Mississippi, driving together to Los Angeles.

When Harris left for Los Angeles, he brought with him the lessons he had learned in Birmingham, Washington, and Sunflower County. He brought with him what he had learned about racial separation, political disfranchisement, and economic exclusion. He brought with him what he had learned about how these systems were maintained: through surveillance, and through formal and informal violence. And he brought with him ideas about how these systems could be changed: as Jim Dann later explained, “After the Watts Rebellion of that summer Los Angeles seemed to be the place for the upcoming imagined revolution.”²¹¹

II. HARRIS IN CALIFORNIA

When John Harris arrived in Watts, Los Angeles, in September 1965, the city was grappling with the aftermath of a fiery civil uprising.²¹² This Part explores the factors that converged to make Harris a target of heightened government surveillance and control within that environment. First, the underlying tensions that sparked the Watts riots remained unresolved, fueling anxieties about another potential outbreak. Second, Harris’s decision in December 1965 to join the Progressive Labor Party, a Marxist-Leninist organization, coincided with a

207. DANN, *supra* note 116, at 180–81.

208. *Id.* at 182.

209. *Id.* Harris must have stayed with the project at least until May 1965. In 1965, Harris wrote a solicitation that began: “Your financial help is needed to keep the freedom movement alive in this Mississippi delta county, a decision was handed down from the northern district federal court a month ago . . .” Letter from John Harris to Friends and Supporters of the Sunflower County Freedom Movement 1 (c. 1965) (on file with C.R. Movement Archive), https://www.crmvet.org/lets/650500_sunflower_harris.pdf [<https://perma.cc/C9L9-TUHE>].

210. DANN, *supra* note 116, at 200–01.

211. *Id.* at 201.

212. For a detailed discussion of the Watts riots, see generally HORNE, *supra* note 3; and RICK PERLSTEIN, NIXONLAND 3–19 (2008), which locates the Watts riots within the historical context of the 1960s.

national and local focus on controlling communist activity.²¹³ Harris's advocacy for racial equality and police abolition likely solidified him as a target.²¹⁴ Finally, and most directly, the shooting of an unarmed Black man named Leonard Deadwyler in May 1966 reignited fears of another riot,²¹⁵ and Harris's participation in the subsequent protests drew further attention to his advocacy.²¹⁶ While his act of distributing revolutionary pamphlets outside of Deadwyler's inquest was not unique, it nonetheless resulted in his indictment.²¹⁷ This Part ends by describing Harris's grand-jury proceedings – in which race was a major theme – and the details surrounding his arrest.

These converging factors – Harris's arrival in a community still smoldering from racial uprising, his membership in a Marxist-Leninist organization during the height of Cold War paranoia, his race, and his direct confrontation with police violence through the Deadwyler protests – created a perfect storm. Yet this context has been largely erased from how legal scholars and students understand *Younger v. Harris*.²¹⁸ The doctrine is taught in a manner divorced from the reality that Harris was a Black communist activist whose “crime” was distributing revolutionary literature while protesting police violence. This sanitized understanding obscures how *Younger* abstention is a doctrine born from the surveillance and prosecution of civil-rights activists and, as in Harris's case, continues to insulate state authorities from federal oversight. Harris's identity as both a civil-rights advocate and a communist organizer was not incidental to his case; it is central to understanding why the state pursued him. By recovering this forgotten history, we can more fully grasp the stakes of the legal precedent that bears his name.

213. *Subversive Influences*, *supra* note 62, at 1303–04 (statement of Rep. William M. Tuck); *see also* Roberto A. Mónico, Los Angeles and William H. Parker: Race, Vice and Police During the Red Scare 120–22 (2022) (Ph.D. dissertation, University of Colorado Boulder) (ProQuest) (describing Chief of Police William H. Parker's anticommunist views); R. HARRIS SMITH, OSS: THE SECRET HISTORY OF AMERICA'S FIRST CENTRAL INTELLIGENCE AGENCY 20 (1972) (describing the role of Evelle Younger, who served as district attorney in Los Angeles at the time of Harris's arrest, in the CIA's predecessor organization).

214. HORNE, *supra* note 3, at 9 (“There was a particular fear that blacks, given the atrocious racism they faced, would turn Red . . .”).

215. COCHRAN & FISHER, *supra* note 5, at 25.

216. *See Subversive Influences*, *supra* note 62, at 1247–51 (testimony of Clayton R. Anderson).

217. *See id.* at 1251.

218. *See supra* notes 13–34 and accompanying text.

A. *The Watts Riots*

In August 1965, Los Angeles experienced a city-defining uprising spurred by systemic racism, police brutality, and years of economic neglect. Violent acts perpetrated by police against a young man named Marquette Frye and his mother, Rena Frye, acted as the immediate catalysts for the Watts riots.²¹⁹ Reports of this brutality ignited a growing crowd of residents.²²⁰ Their simmering anger erupted into disorder, which in turn was met with massive violent force from police. An official government report described the immediate aftermath of the uprisings as “staggering.”²²¹ It documented 34 fatalities and 1,032 reported injuries alongside extensive property damage, with over 600 buildings burned or looted.²²² Notably, media coverage often characterized the event as an “insurrection” or “revolt,” suggesting a distinction in nature or scale compared to typical outbreaks of violence in other American cities.²²³

After the dust settled, two major governmental reports assessed the contributing causes of the riot. At the state level, Governor Edmund Brown assembled a commission led by John A. McCone, a longtime Republican who had served as CIA director under Presidents Kennedy and Johnson.²²⁴ The McCone Commission formally interviewed over five hundred witnesses and surveyed thousands of others. Locally, the Los Angeles City Council also issued a report.²²⁵ According to the authors of that report, the results were based on interviews from “73 persons in 40 separate meetings . . . over a 22-week period.”²²⁶ In these reports, leaders attributed the uprising to a range of causes.

The first was the dearth of job opportunities. The McCone Commission described “the overwhelming hopelessness that comes when a man’s efforts to find a job come to naught. Inevitably, there is despair and a deep resentment of a

219. HORNE, *supra* note 3, at 54-55; Lonnie T. Brown, Jr., *Different Lyrics, Same Song: Watts, Ferguson, and the Stagnating Effect of the Politics of Law and Order*, 52 HARV. C.R.-C.L. L. REV. 305, 313-15 (2017); GOVERNOR’S COMM’N ON THE L.A. RIOTS, VIOLENCE IN THE CITY—AN END OR A BEGINNING? 10-14 (1965) [hereinafter MCCONE COMMISSION REPORT].

220. See HORNE, *supra* note 3, at 55, 313-14.

221. MCCONE COMMISSION REPORT, *supra* note 219, at 23.

222. *Id.*

223. See HORNE, *supra* note 3, at 36-39.

224. *Long Awaited Watts Riots Report Released*, ENTER.-REC. (Chico, Cal.), Dec. 7, 1965, at 13; see Glenn Fowler, *John A. McCone, Head of C.I.A. in Cuban Missile Crisis, Dies at 89*, N.Y. TIMES (Feb. 16, 1991), <https://www.nytimes.com/1991/02/16/obituaries/john-a-mccone-head-of-cia-in-cuban-missile-crisis-dies-at-89.html> [<https://perma.cc/JEE7-2EAY>].

225. POLICE, FIRE & CIV. DEF. COMM. OF THE COUNCIL OF THE CITY OF L.A., REPORT ON LOS ANGELES RIOT 1-3 (1965) [hereinafter CITY COUNCIL REPORT].

226. *Id.* at 3.

society which he feels has turned its back upon him.”²²⁷ The city-issued report similarly concluded: “A considerable amount of the testimony presented to the Committee by residents of the South Central community related to the lack of jobs for people in the area and the social problems associated with unemployment.”²²⁸ Beyond mere scarcity, however, racial discrimination deepened the crisis of unemployment.²²⁹ The Commission concluded that “both willful and unwitting discrimination in employment have existed and continue to exist within [the] community.”²³⁰ Specifically, private employers and labor unions often discriminated against Black residents.²³¹ And these bleak economic conditions were worsened by the longstanding exclusion of Black workers from lucrative opportunities in Hollywood, the city’s signature industry.²³² Moreover, the Commission heard evidence that even when Black Americans were employed, they earned much less than whites. One twenty-three-year-old Black resident, Willey Shorty, testified to making \$55 a week at a car wash, compared to the \$100 a week that white men earned doing the same job.²³³

A second attributed cause was the relationship between law enforcement and residents. The Commission’s report concluded, “The bitter criticism we have heard evidences a deep and longstanding schism between a substantial portion of the Negro community and the Police Department. ‘Police brutality’ has been the recurring charge.”²³⁴ The Commission added that “[o]ne witness after another has recounted instances in which, in their opinion, the police have used excessive force or have been disrespectful and abusive in their language or manner.”²³⁵ An example of this abusive language was reported by Shorty, who recounted an officer’s chilling words: “I haven’t shot a n*gger since yesterday.”²³⁶ Similarly, a nineteen-year-old resident told the Commission that he was “consistently” stopped by law enforcement and asked invasive questions about his whereabouts.²³⁷ During one encounter, an officer told him, “If you make a move I’ll blow your head off.”²³⁸

227. MCCONE COMMISSION REPORT, *supra* note 219, at 38.

228. CITY COUNCIL REPORT, *supra* note 225, at 12.

229. See MCCONE COMMISSION REPORT, *supra* note 219, at 46.

230. *Id.*

231. *Id.*

232. See HORNE, *supra* note 3, at 29.

233. *Id.* at 208–09.

234. MCCONE COMMISSION REPORT, *supra* note 219, at 27.

235. *Id.*

236. HORNE, *supra* note 3, at 209.

237. *Id.*

238. *Id.*

In addition to unemployment and policing abuses, others cited income inequality in a city with conspicuous wealth. District Attorney Evelle Younger told a congressional committee in 1967, “People in Harlem don’t compare themselves to people in the Congo. People in Watts don’t compare themselves with people in Harlem. The people in Watts compare themselves with people in Bel Air. That is where the dissatisfaction comes.”²³⁹ He also testified that a sense of deprivation can, ironically, be especially gnawing in places where African Americans have made some progress, as opposed to places where they have been more fully subjugated: “A little bit of freedom is a heady wine. When a Negro has a taste of a better life, he understandably wants more.”²⁴⁰ He surmised, “The perfect rioter is one who has experienced excitement, who has tasted a bit of success and is hungry for much of it, who has achieved minor gains and now demands massive rewards as his due.”²⁴¹

While Los Angeles’s leaders provided a diagnosis, they did not offer a cure. Unemployment, discrimination, police brutality, and income inequality persisted beyond August 1965. If Watts could erupt once, it might—with the right provocation—do so again. And so, when Harris arrived in Los Angeles in September 1965 looking for revolution, government leaders feared that he just might find it.

B. “*Because He’s a Communist. Because He’s Black.*”²⁴²

In December 1965, Harris joined the Progressive Labor Party and became an organizer.²⁴³ In this capacity, Harris found himself at the center of two areas heavily monitored by local governmental officials: communist activity and Black radicalism. Indeed, leftist supporters of Harris later bluntly charged in the Progressive Labor Party newsletter *Spark* that he was targeted “[b]ecause he’s a Communist” and “[b]ecause he’s Black.”²⁴⁴

While Harris was ensnared in anticommunist fervor in the 1960s, California’s history of cracking down on communism began long before, predating his arrival by decades. During the first Red Scare in 1919, the California legislature

²³⁹. *Subversive Influences*, *supra* note 62, at 783 (statement of Evelle Younger).

²⁴⁰. *Id.* at 777.

²⁴¹. *Id.*

²⁴². This quotation is taken from a November–December 1966 edition of a newsletter called *Spark*, published by the Progressive Labor Party. See Progressive Lab. Party, *L.A. Arrest of John Harris: Because He’s a Communist, Because He’s Black*, SPARK: W. VOICE FOR REVOLUTION, Nov.–Dec. 1966, at 5.

²⁴³. See *supra* note 213 and accompanying text.

²⁴⁴. See Progressive Lab. Party, *supra* note 242, at 5.

passed the Criminal Syndicalism Act, which would ultimately be used to prosecute Harris.²⁴⁵ This law criminalized advocating for political or economic change through violence or other unlawful methods, even if there was no imminent threat of violence.²⁴⁶ During the 1920s and 1930s, prosecutors used the law frequently, bringing charges against “531 individuals of whom 504 were apprehended, 204 actually tried, and 128 convicted and sentenced to prison for a term of one to fourteen years” in the five years following the passage of the law.²⁴⁷ The Communist Labor Party and a labor union were the primary targets of these efforts.²⁴⁸ In 1933, Attorney A.L. Wirin, who would later represent Harris, called this period a “reign of terror.”²⁴⁹ Others shared this assessment. The Los Angeles Bar Association and the Los Angeles Ministers’ Association both condemned aggressive enforcement of the Criminal Syndicalism Act.²⁵⁰ Efforts to repeal the law, however, proved unsuccessful.²⁵¹

The second Red Scare, which began around the time of Harris’s birth, reignited anticommunist anxieties. California once again became a focal point for these fears and subsequent crackdowns. The California Senate established the Fact-Finding Subcommittee on Un-American Activities, which operated from the Cold War’s Red Scare period until 1971.²⁵² Throughout its existence, the subcommittee issued reports on a wide range of topics, including communism, the Black Panthers, Chicano workers’ rights advocates, and student protests.²⁵³ Additionally, at the federal level, the House Un-American Activities Committee held hearings in 1947 that specifically targeted Hollywood.²⁵⁴ These hearings

245. A.L. WIRIN, WHY REPEAL THE CALIFORNIA SYNDICALISM LAW? 2 (1933); Progressive Lab. Party, *supra* note 242, at 5.

246. Act of Apr. 30, 1919, ch. 188, § 2, 1919 Cal. Stat. 281, 281 (“Any person who . . . advocates, teaches or aids and abets criminal syndicalism . . . [i]s guilty of a felony.”). To use slightly anachronistic terms, the statute prohibited “mere advocacy” of violence as well as “incitement to imminent lawless action.” *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam).

247. WIRIN, *supra* note 245, at 4.

248. *Id.*

249. *Id.* at 1; Progressive Lab. Party, *supra* note 242, at 5.

250. WIRIN, *supra* note 245, at 10.

251. See Charles K. Ferguson & E. Foster Dowell, *Control: Freedom and Censorship*, 4 PUB. OP. Q. 297, 304 (1940) (discussing the “[o]bstacles to [r]epeal” and the “unsuccessful campaigns” in nine states, including California, to “eliminate or moderate their syndicalism acts”).

252. See *California Un-American Activities Committees Records, 1931-1971*, ONLINE ARCHIVE CAL. (2025), <https://oac.cdlib.org/findaid/static/ark:%2F13030%2Fft9p3007qg> [https://perma.cc/G8MM-QLA8]. Reports produced by the Committee during that period are on file with the authors.

253. *Id.*

254. See Arthur Eckstein, *The Hollywood Ten in History and Memory*, 16 FILM HIST. 424, 424-25 (2004).

aimed not only to uncover communist influence but also to discourage individuals from collaborating for fear of being labeled un-American.²⁵⁵

As historian Frank Donner has documented, throughout both “scares,” local police units known as “red squads” played a central role in operationalizing this anticommunist panic.²⁵⁶ The New York Radical Bureau, for example, maintained a cadre of undercover officers tasked during the first Red Scare with “the compilation of dossiers on Communist Party leaders, members, and supporters.”²⁵⁷ The squad was highly active during the 1930s and seemed to be waning in the 1950s.²⁵⁸ However, renewed fears of far-left movements led the city to ramp up its activities in the 1960s.²⁵⁹ Los Angeles’s apparatus followed a similar trajectory, initially focusing heavily on labor movements and then gaining new steam by the 1960s.²⁶⁰ By 1963, an estimated 300,000 officers staffed these red squads across the nation.²⁶¹ These individuals focused mainly on repressing far-left political movements.

In Los Angeles and elsewhere, these government officials came to see communism and Black liberation movements as insidious in synergistic ways.²⁶² A report published by the Subcommittee on Un-American Activities in California expressed concern that “since the 30’s in California, the Communist Party has persistently been striving to organize the unemployed, alienate the racial minority groups from the rest of the country, foment as much trouble as possible, and then to step back and manipulate the resulting disturbances from positions of remote control.”²⁶³ An earlier report from the Subcommittee warned that the Progressive Labor Party, in particular, was “finding enthusiastic support from the more irresponsible and violent elements in various Negro organizations.”²⁶⁴ The Subcommittee also lamented that communists had used “the Peace Movement, the war in Vietnam, civil rights, courses in Black studies at our educational institutions, and a long series of non-negotiable demands, for the purpose of arousing the most susceptible elements of the Negro minority to violent action

255. *See id.*

256. *See* DONNER, *supra* note 26, at 44-64.

257. *Id.* at 47.

258. *Id.* at 48-49.

259. *Id.*

260. *Id.* at 246-53.

261. *Id.* at 1.

262. HORNE, *supra* note 3, at 9.

263. CAL. LEGISLATURE, FIFTEENTH REPORT OF THE SENATE FACT-FINDING SUBCOMMITTEE ON UN-AMERICAN ACTIVITIES 145 (1970).

264. CAL. LEGISLATURE, THIRTEENTH REPORT OF THE SENATE FACT-FINDING SUBCOMMITTEE ON UN-AMERICAN ACTIVITIES 168 (1965).

against the government.”²⁶⁵ One leader of the John Birch Society even claimed that the Watts riots were “planned, engineered and instigated” by “some forty to fifty Negroes sent by the Communists” into Los Angeles.²⁶⁶ Sounding a similar, if less conspiratorial, theme, FBI Director J. Edgar Hoover testified on February 16, 1967, before the House Subcommittee on Appropriations:

[F]or years it has been Communist policy to charge “police brutality” in a calculated campaign to discredit law enforcement and to accentuate racial issues. The riots and disorders of the past 3 years clearly highlight the success of this Communist smear campaign in popularizing the cry of “police brutality” to the point where it has been accepted by many individuals having no affiliation with or sympathy for the Communist movement.²⁶⁷

Hoover’s sentiments about police brutality were also amplified by Los Angeles Mayor Sam Yorty, a former military-intelligence official.²⁶⁸ Yorty had, in the mid-1960s, called charges of racist police brutality a “big lie,” perpetuated by communists and the Black community to discredit law enforcement and the government.²⁶⁹

Acting on such concerns, two other prominent figures within the Los Angeles government apparatus — Chief of Police William H. Parker and District Attorney Evelle Younger — significantly escalated surveillance efforts aimed at communism and Black liberation. Parker, who joined the police department in 1927, rose to the position of police chief in 1950.²⁷⁰ He served in that role until his

265. CAL. LEGISLATURE, *supra* note 263, at 230.

266. Joseph Boskin, *Violence in the Ghettos: A Consensus of Attitudes*, 37 N.M. Q. 317, 326 (1967); Gene Blake, *Reddin Disputes Article: Watts Riots as Rehearsal for Red Coup Discounted*, L.A. TIMES, Apr. 28, 1967, at A6; Harold Kinsch, *Vocal but Local Says Commie Plot Behind City Racial Turmoil*, CAMARILLO STAR, Aug. 9, 1967, at 12. The John Birch Society — still active today — is a far-right political organization. Founded in 1958, within a few years of its founding, the Birch Society had become one of the country’s “most notorious far-right movement[s]” and had become known for “its brutal tactics and extremist ideas concerning hidden communist conspiracies within the United States.” MATTHEW DALLEK, *BIRCHERS: HOW THE JOHN BIRCH SOCIETY RADICALIZED THE AMERICAN RIGHT* 1 (2022).

267. *Subversive Influences*, *supra* note 62, at 883. Hoover had also warned, in testimony two years prior: “The ever-increasing evidences of racial unrest in the country during the past year have witnessed a parallel in the increased emphasis being placed by the Communist Party, U.S.A. on the Negro question and the racial movement generally.” *Id.* at 880.

268. Terry, *supra* note 28, at B8 (noting that Yorty served as captain in the United States Army Air Corps’s intelligence unit).

269. *Subversive Influences*, *supra* note 62, at 835.

270. *Chief of Police in Los Angeles, William H. Parker, Dies at 64*, N.Y. TIMES (July 17, 1966), <https://www.nytimes.com/1966/07/17/archives/chief-of-police-in-los-angeles-william-h-parker-dies-at-64.html> [<https://perma.cc/D8Z3-NVZ4>].

death in the summer of 1966.²⁷¹ Under his leadership, the Los Angeles Police Department (LAPD) became highly militarized, prioritizing intelligence gathering and strict social control.²⁷² He expanded the LAPD’s Intelligence Department and, according to one scholar, brought a wartime mentality to policing Black neighborhoods in Los Angeles.²⁷³ Among other tactics, Parker implemented an aggressive wiretapping program that was challenged in the 1950s by A.L. Wirin, the attorney who would later represent John Harris after his arrest.²⁷⁴ Parker was staunchly anticommunist and feared the prospect of the United States becoming a socialist nation “under the domination of Russian rule.”²⁷⁵ At the time of the wiretapping suit, for example, Parker criticized Wirin for his “defense of Communists.”²⁷⁶ Parker’s anticommunism was blended with racism.²⁷⁷ For example, Parker attributed unlawful acts by Black Americans and Chicanos to their genes and infamously compared Black residents to “monkeys in a zoo.”²⁷⁸

Contemporaneously, District Attorney Younger brought to local government his prior experience as an intelligence official in the Office of Strategic Services²⁷⁹ (the forerunner to the CIA²⁸⁰) and as an FBI agent under Director J. Edgar Hoover.²⁸¹ As district attorney, he continued to coordinate with the FBI.²⁸² While the

271. *Id.*

272. CHEMERINSKY, *supra* note 27, at 14 (observing that Parker “authoriz[ed] the use of force to ensure control,” “was notoriously racist,” and “imbued the LAPD with his militaristic, racist approach to policing”).

273. HORNE, *supra* note 3, at 137.

274. See *Wirin v. Parker*, 313 P.2d 844, 884 (Cal. 1957).

275. DONNER, *supra* note 26, at 252.

276. *Id.* at 249.

277. See IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* 138 (2003).

278. Mónico, *supra* note 213, at 49 (quoting Parker’s statements on racial genes); MIKE DAVIS & JON WIENER, *SET THE NIGHT ON FIRE: L.A. IN THE SIXTIES* 39 (2020) (same); CHEMERINSKY, *supra* note 27, at 14 (quoting the “monkeys in a zoo” remark); JILL A. EDY, *TROUBLED PASTS: NEWS AND THE COLLECTIVE MEMORY OF SOCIAL UNREST* 30 (2006) (same).

279. JOHN WHITECLAY CHAMBERS II, *OSS TRAINING IN THE NATIONAL PARKS AND SERVICE ABROAD IN WORLD WAR II* 536 (2008).

280. See generally BRADLEY F. SMITH, *THE SHADOW WARRIORS: O.S.S. AND THE ORIGINS OF THE C.I.A.* (1983) (providing an overview of the Office of Strategic Services).

281. See Balzar, *supra* note 29; Interview by Steven D. Edgington with Evelle J. Younger, in L.A., Cal. 3-6 (1982), <https://archive.org/details/lifetimeinlawenfooyoun/page/n67/mode/2up> [<https://perma.cc/BW5G-RJAF>].

282. See JOSÉ ANGEL GUTIÉRREZ, *FBI SURVEILLANCE OF MEXICANS AND CHICANOS, 1920-1980*, at 194, 202 (2020); ERNESTO B. VIGIL, *THE CRUSADE FOR JUSTICE: CHICANO MILITANCY AND THE GOVERNMENT’S WAR ON DISSENT* 136 (2020).

full extent of that coordination may never be known, Younger's cooperation contributed to the arrest of Chicano workers' rights protestors later in the decade.²⁸³ Moreover, local officials' testimony before Congress in 1967 confirms that his office kept files on far-left organizations.²⁸⁴ At a hearing on October 25, 1967, Younger testified to "information in our files" about Marxist-Leninists in Los Angeles.²⁸⁵

C. The Deadwyler Shooting, Inquest, and Protest

In 1966, governmental fears of unrest instigated by communists and Black liberation activists like Harris escalated sharply when a young Black man named Leonard Deadwyler was shot and killed by a police officer.²⁸⁶ Deadwyler, born in 1941 and raised in Georgia, had moved to Los Angeles with his wife Barbara in 1965.²⁸⁷ On May 7, 1966, believing his pained wife was in labor, he rushed her to the hospital at high speed.²⁸⁸ Two LAPD officers pulled him over.²⁸⁹ During the encounter, one of the officers, Jerold M. Bova, shot and killed Deadwyler.²⁹⁰ Bova later claimed the gun discharged accidentally when the car lurched.²⁹¹

283. GUTIÉRREZ, *supra* note 282, at 202.

284. *Subversive Influences*, *supra* note 62, at 784 (referencing the testimony of Evelle Younger).

285. *Id.*

286. COCHRAN & FISHER, *supra* note 5, at 24-30. One headline read, "Police Keep Watchful Eye on LA Negroes." See *Police Keep Watchful Eye on LA Negroes*, REGISTER (Santa Ana, Cal.), May 29, 1966, at 3.

287. L.C. Fortenberry, *Deadwyler Widow Recalls Husband's Death*, L.A. SENTINEL, Dec. 8, 1977, at A2, A15.

288. *Id.* at A2.

289. Jerry McLain, *Officer Supports Bova's Testimony in Inquest*, NEWS-PILOT (San Pedro, Cal.), May 26, 1966, at 1.

290. *Policeman Testifies Slaying Was an Accident*, DAILY ADVANCE (Lynchburg, Va.), May 26, 1966, at 12.

291. *Id.*

FIGURES 2 & 3. LEONARD DEADWYLER (LEFT)²⁹² & TESTIMONY OF JEROLD BOVA (RIGHT)²⁹³



Deadwyler's killing outraged Los Angeles's Black community.²⁹⁴ A local minister, who headed the United Civil Rights Council, observed at the time: "In a tense atmosphere like you have here . . . a death like that of Leonard Deadwyler is almost exactly the worst kind of thing that could have happened. You couldn't ask for a more inflammatory set of circumstances."²⁹⁵ In an effort to address these concerns and quell potential unrest, the Los Angeles Coroner's Office quickly convened an inquest to determine the circumstances surrounding the shooting.²⁹⁶ The eight-day inquest became a highly publicized event, drawing

292. *Leonard Deadwyler (1941-1966)*, WE REMEMBER BY ANCESTRY, <https://www.weremember.com/leonard-deadwyler/6y9l/memories> [<https://perma.cc/7F67-Z76C>].

293. *Auto's Lurch Caused Fatal Shot, Cop Says*, PRESS & SUN-BULL. (Binghamton, N.Y.), May 26, 1966, at 1 (citing the Associated Press Wirephoto).

294. *Unruly Crowd Delays Start of Hearing in Negro's Death*, HERALD-SUN (Durham, N.C.), May 20, 1966, at 47 (describing the Black community as "incensed").

295. *Watts Boils After Negro Shot in Car*, IDAHO DAILY STATESMAN, May 19, 1966, at 3.

296. Don Brackenbury, *Negro Leaders Urged to Back Law, Order*, INDEPENDENT (Long Beach, Cal.), May 24, 1966, at 4. One cynical commentator said of the inquest at the time: "They are trying to avert a riot that will happen anyway, if someone decides to start one." George Robeson, *The Great Inquest Won't Stop a Riot*, INDEP. PRESS-TELEGRAM (Long Beach, Cal.), May 30, 1966, at C-7.

significant public interest.²⁹⁷ Underscoring the importance of the case, the inquest marked the first time such a proceeding was televised live in California.²⁹⁸ Six hundred individuals, primarily from the Black community, arrived on the first day to witness the hearing in person.²⁹⁹ Indeed, the courtroom initially selected proved inadequate for the large crowd, necessitating relocation to a larger venue.³⁰⁰ Some skepticism about the process was evident. One Black attendee predicted in an interview with *CBS News*, “We’re not getting any justice . . . It’s going to be a justifiable homicide just like the rest.”³⁰¹

The inquest featured testimony from forty-nine witnesses.³⁰² Among the most crucial was the senior white officer who, alongside Officer Bova, initiated the traffic stop. This officer testified that his partner “shouted” or “yelled” at Mr. Deadwyler prior to the shooting, but he also corroborated Bova’s contention that the shooting itself was accidental.³⁰³ Following this testimony, Barbara Deadwyler, roughly nine months pregnant, delivered a composed and poignant account of her husband’s final moments.³⁰⁴ Finally, perhaps the most critical testimony came from Officer Bova himself. He maintained his stance that the shooting was accidental, claiming the gun discharged as he leaned into the vehicle to turn off the ignition.³⁰⁵

297. *Jury Rules Fatal Shooting of Deadwyler Was Accident*, VALLEY NEWS (Van Nuys, Cal.), June 2, 1966, at 18A.

298. Ronald Einstoss, *Younger Keeps Eye on TV Set During Inquest*, L.A. TIMES, May 21, 1966, at 15.

299. CBS NEWS: *Leonard Deadwyler Inquest*, at 00:01 (CBS television broadcast, 1966), <https://www.youtube.com/watch?v=mnzxF-kAlQU> [<https://perma.cc/H3XC-YVVN>].

300. Art Berman, *Spectators Flare as Watts Inquest Begins*, BOS. GLOBE, May 20, 1966, at 10.

301. See CBS NEWS: *Leonard Deadwyler Inquest*, *supra* note 299, at 01:30; see also *Watts Boils After Negro Shot in Car*, *supra* note 295, at 3 (“The Rev. H. H. Brookins, a Negro and head of Los Angeles’ United Civil Rights Council, agreed that Deadwyler’s death had stirred deep resentment in the Negro community . . . The Negroes expect the verdict to be justifiable homicide. They’re prejudging it.”).

302. *Deadwyler Shooting Found to Be ‘Accidental,’* REDLANDS DAILY FACTS, June 1, 1966, at 10.

303. See McLain, *supra* note 289, at 1.

304. See Jerry McLain, *Mrs. Deadwyler Gives Version of Shooting*, NEWS-PILOT (San Pedro, Cal.), May 24, 1966, at 1; Don Hastings, *Conflict, Threats, Highlight Inquest*, INDEP. PRESS-TELEGRAM (Long Beach, Cal.), May 29, 1966, at C-18.

305. *Policeman Testifies Slaying Was an Accident*, *supra* note 290, at 12.

FIGURE 4. BARBARA DEADWYLER WITH ATTORNEY JOHNNIE COCHRAN³⁰⁶



While the inquest itself took place within the courthouse, protests unfolded outside. Flyers distributed by at least three individuals, including John Harris, addressed concerns about police conduct, economic disparities, and racial bias, all issues noted by the official reports as causes of the August uprising.³⁰⁷ These flyers contain strong, radical language accusing Bova of murder and calling for revolution.³⁰⁸

On May 31, 1966, following three hours of deliberation, the inquest jury ruled the shooting of Leonard Deadwyler an accident. District Attorney Evelle Younger quickly concurred with this verdict, announcing the case closed unless new evidence emerged.³⁰⁹ The verdict was met with relative calm in Watts.³¹⁰ To be sure, some expressed disappointment in both the outcome and the inquest

³⁰⁶. Reproduction permission obtained from *The Associated Press*.

³⁰⁷. The content of these flyers is included in the following pages for reference. See *Subversive Influences*, *supra* note 62, at 1243-53.

³⁰⁸. See Harris Flyer 2, *infra* p.64, Figure 7.

³⁰⁹. Art Berman, *Inquest Jury Rules Shooting of Deadwyler Was Accident: Younger Says He Considers Case ‘Closed,’* L.A. TIMES, June 1, 1966, at 1.

³¹⁰. See *id.*

process.³¹¹ City Councilman Billy G. Mills lamented, “The Deadwyler inquest demonstrated how far law enforcement will go to protect the police officer, whether he be right or wrong.”³¹² And young attorney Johnnie Cochran, representing the Deadwyler family, voiced dissatisfaction over his inability to cross-examine witnesses.³¹³ Despite these concerns, fears of a renewed outbreak of violence similar to the Watts riots did not materialize.³¹⁴

FIGURE 5. JOHN HARRIS SURVEILLANCE PHOTO³¹⁵



311. See *Deadwyler Death Ruled Accidental*, INDEPENDENT (Long Beach, Cal.), June 1, 1966, at A-1.

312. *Id.*

313. *Jury Rules Fatal Shooting of Deadwyler Was Accident*, *supra* note 297, at 18A.

314. COCHRAN & FISHER, *supra* note 5, at 28 (“The outbreak of riots that was feared never happened.”).

315. Photograph of John Harris, in *Subversive Influences*, *supra* note 62, at 1249.

FIGURE 6. HARRIS FLYER 1³¹⁶

THE NEED FOR REVOLUTION

"... Shall the millions forever submit to robbery, to murder, to ignorance, and every unnamed evil which an irresponsible tyranny can devise, because the overthrow of that tyranny would be productive of horrors? We say not. The recoil, when it comes, will be in exact proportion to the wrongs inflicted; terrible as it will be, we accept and hope for it . . ."

Frederick Douglass

—1856

There are 50,000 unemployed black workers in the South Los Angeles Area. Eighty percent of the South L.A. area is black yet black people make up only some 5% of the jobs in factories right in the neighborhood like General Motors on Alameda and Goodyear on Central. Contrary to the lies preached by the capitalists and their apologists, 90% of the jobs in these factories can be done by illiterates. How much training does it take to put a wheel on a car in an assembly line or turn a bolt. The retraining program IS A FRAUD!!!

Between 1960 and 1965 the average white family income in Los Angeles rose 14%—but the black family's income fell 8%.

Every killing that happened at the hands of the cops during the August rebellion was ruled "justifiable homicide." Was it justifiable to shoot people in their apartments or anywhere?

Why?—The cops, Yorty, Parker, Brown, and the whole lot are paid to protect the interests of the rich white imperialists. Those who own factories like GM and Goodyear. South L.A. is a big industrial complex with enough jobs for everyone in the area. The national guard was really sent in to protect the big industries, not the small corner stores, liquor stores, and pawn shops.

It is these big industrialists and their spokesmen like Yorty and Brown who must be defeated.

They can't be defeated by pleading and begging. Any nation has the right to revolution and self-determination. *REVOLUTION IS NECESSARY*. They must be totally replaced. Revolution means a complete *overthrow* of the system. *NO ACCOMMODATION!! NO COMPROMISE*. The community must be organized block by block. There must be a block leader for each 20 houses who organizes for defensive and offensive actions. Maps must be constructed of the whole neighborhood.

We must not fear revolution but we must welcome it.

"... Revolution is bloody, revolution is hostile, revolution knows no compromise, revolution overturns and destroys everything that gets in its way. And you, sitting around here like a knot on the wall, saying, I'm going to love these folks no matter how much they hate me. No, you need a revolution. . ."

MALCOLM X

—1964

Welcome revolution—Organize for Revolution.

Progressive Labor Party

399-6819 or WE 3-0463

316. Progressive Lab. Party, The Need for Revolution Flyer (1966), in *Subversive Influences*, *supra* note 62, at 1246-47.

FIGURE 7. HARRIS FLYER 2³¹⁷

WANTED for the
MURDER of
Leonard Deadwyler:-
(a member of the concentration camp)
"BOVA—the—COP"
(a guard in the concentration camp)

Bova is just one cop in the police department. They must be all wiped out before there is complete freedom. South Los Angeles-Watts is one big concentration camp in which its citizens are subject to systematic extermination.

+++WE MUST LEARN TO DEFEAT THE ENEMY BEFORE WE ARE ALL EXTERMINATED.

+++THE MEMBERS OF THE CONCENTRATION CAMP CAN BE WIPED OUT BY HUNGER ALSO. THAT'S WHY UNEMPLOYMENT IS HIGH.

South Los Angeles is a big industrial complex. There are factories that employ thousands right in the backyards— (General Motors on Alameda and Goodyear on Central just to name two large ones)— of our homes.

Black people make up 80% of the South L.A. area. Black people should make up 80% of the work force in the South L.A. Area.

+++WE SHOULD BE ABLE TO WORK WHERE WE LIVE.

The slogan should be raised:
+++“IF 80% OF US DON'T WORK HERE, YOU DON'T PRODUCE.”
Production can be stopped.

Murder by cops and death by unemployment are methods of systematic extermination.

+++THIS EXTERMINATION ISN'T GOING TO BE STOPPED BY GOING TO THE COURT OF THE EXTERMINATOR AS ADVISED BY SOME “NEGRO” POLITICIANS AND PREACHERS.

+++GEORGE WASHINGTON AND THE AMERICAN REVOLUTIONARIES NEVER WENT TO KING GEORGE'S COURT FOR JUSTICE. THEY CHARGED KING GEORGE'S COURT. THE JEWS NEVER ASKED TO GO TO HITLER'S COURT.

+++THE CONCENTRATION CAMP MUST DEVELOP ITS OWN COURT AND ITS OWN METHOD OF TRIAL.....

These slogans must be raised:
“BRING PARKER, YORTY, AND BOVA TO TRIAL FOR MURDER —IN A COURT OF THE PEOPLE.”

“DISARM THE GUARDS IN THE CONCENTRATION CAMP”.

“IF 80% OF US DON'T WORK IN THE FACTORIES, YOU DON'T PRODUCE!!!”

Progressive Labor Party
399-6819

317. Progressive Lab. Party, Wanted for the Murder of Leonard Deadwyler Flyer (1966), *Subversive Influences*, *supra* note 62, at 1245-46.

FIGURE 8. HARRIS FLYER 3³¹⁸

The cops and the system they serve must be replaced...the system that kills people for being Black and poor. This racist system that uses Black men as cannon fodder in a war against our colored brothers in Vietnam. Millions of dollars for war; millions for racist cops- but nothing but oppression for the black people in America: Harlem, Watts, Birmingham! WE MUST ORGANIZE TO DEFEAT THE ENEMY BEFORE WE ARE ALL EXTERMINATED! In the South Los Angeles area there is an enormous industrial complex. There are factories that employ thousands. Black people make up 80% of the South L.A. area. Black people should make up 80% of the work force in the area. WE SHOULD BE ABLE TO WORK WHERE WE LIVE! Murder by cops and death by unemployment are methods of systemic extermination. THIS EXTERMINATION ISN'T GOING TO BE STOPPED BY GOING TO THE COURT OF THE EXTERMINATOR—as advised by some "Negro" politicians and preachers. Black people must develop their own court and their own method of trial.

D. Political Reverberations

The inquest and leftist protests became topics in a political tug-of-war during a heated campaign season. Some white Angelenos made clear their view that the inquest had been a "spectacle" to appease "rabble rousers,"³¹⁹ or even an "absurd display of exaggerated appeasement of Negro bitterness."³²⁰ But perhaps no rivalry made the political stakes clearer than that between Mayor Sam Yorty and Governor Pat Brown as they ran against each other for the Democratic Party's gubernatorial nomination in summer 1966. Yorty's campaign challenged Brown from the right. He strongly criticized Brown's approach to the Deadwyler inquest, especially the governor's comment that "the guilty will be punished";³²¹ he received applause from a nine-hundred-person audience when he criticized the distribution of provocative material at the inquest,³²² likening the flyers to

318. Unlike the previous two flyers, which are direct facsimiles, this is created using exact, reproduced text from a *Spark* newsletter. See Progressive Lab. Party, SPARK: W. VOICE FOR REVOLUTION, Nov.-Dec. 1966, at 5.

319. *Pitchess Decries Spectacle Amid Deadwyler Inquest*, PASADENA INDEP., June 3, 1966, at 2.

320. See Robeson, *supra* note 296, at C-7 (attributing this sentiment to others).

321. *Yorty Asks Retraction by Brown*, INDEPENDENT (Long Beach, Cal.), May 23, 1966, at A-2.

322. Bergholz, *supra* note 34, at 28.

shouting “fire” in a crowded theater and suggesting they could incite a riot.³²³ Yorty further charged that Brown had not been harsh enough toward antiwar student protesters on college campuses.³²⁴ Governor Brown took heed of the threat: the two candidates proposed dueling pieces of antiriot legislation, despite warnings from the American Civil Liberties Union (ACLU) that such legislation would likely be “used to harass and arrest Negroes, making the prospect of racial riots far more likely.”³²⁵

Even after Yorty lost the primary, he supported the Republican nominee — Ronald Reagan — by never endorsing Brown and by continuing to hammer him from the right.³²⁶ When antiriot legislation passed that fall, Yorty called the bill “fraudulent and impotent.”³²⁷ Yorty had favored an earlier draft of the legislation that would have penalized not only the act of rioting but also the distribution of literature deemed to pose a “clear and present” danger of inciting a riot.³²⁸ Yorty informed the public that he had submitted communist pamphlets circulated in Los Angeles to the city attorney to assess their compliance with the enacted law.³²⁹ He expressed disappointment when that official determined that the pamphlets did not violate the legislation.³³⁰

The Yorty-Brown rivalry offers a window into a broader political dynamic in the summer and fall of 1966 in California. Race and order were important themes. While Brown prevailed in the primary, he did poorly among working-class white voters, making evident the appeal of the law-and-order posture.³³¹ Yorty had made clear his belief that doctrines of civil disobedience and direct action “opened the doors to social chaos and a possible Communist advantage as well.”³³² Reagan leaned into this dynamic. “Reagan Raps Democrats on State

323. *Id.*

324. *Id.*

325. *Anti-Riot Measure on Assembly Floor*, DAILY INDEP. J. (San Rafael, Cal.), July 1, 1966, at 3.

326. DREW PEARSON, WASHINGTON MERRY-GO-ROUND: THE DREW PEARSON DIARIES, 1960-1969, at 546 (Peter Hannaford ed., 2015); *The Nation—Sam Pan*, TIME, May 5, 1967, at 23; *Yorty Raps Brown as a Compromiser*, SAN LUIS OBISPO TELEGRAM-TRIB., Aug. 17, 1966, at 3 (reporting that Yorty accused Brown of “sacrific[ing] his ability to lead the party” to appease “left wing forces” within the Democratic Party).

327. Erwin Baker, *Yorty Denounces New Anti-Riot Law: Statute ‘Fraudulent and Impotent,’ Strips Officials of Power, He Says*, L.A. TIMES, Oct. 27, 1966, at 3.

328. *Id.*

329. *Id.*

330. *Id.*

331. Roland Evans & Robert Novak, *Watts Crisis ‘In Cement’ Until the Voting Is Over*, BERKSHIRE EAGLE (Pittsfield, Mass.), July 19, 1966, at 15.

332. Bruce Michael Tyler, *Black Radicalism in Southern California, 1950-1988*, at 86 (1983) (Ph.D. dissertation, University of California, Los Angeles) (on file with authors).

Crime,” a *Los Angeles Times* headline blared on September 21, which, coincidentally, was the day after Harris’s indictment. That article cited a new campaign ad which, among other things, criticized Governor Brown for his “late and reluctant” support of antiriot legislation.³³³ Reagan defeated Brown in the November election, trouncing him among white voters in Southern California.³³⁴

E. Grand-Jury Proceeding and Indictment

As this political battle unfolded, the legal aftermath of the Deadwyler shooting extended beyond the inquest. Approximately four months after the inquest, on September 20, 1966, the Los Angeles District Attorney’s Office, led by Patrick McCormick, initiated grand-jury proceedings.³³⁵ Strikingly, the proceedings commenced the morning after Leonard Deadwyler’s widow filed a wrongful-death claim against the city.³³⁶ The office sought an indictment against John Harris for “criminal syndicalism” based on the flyers he distributed at the Deadwyler inquest.

During the single-day grand-jury hearing, eight witnesses testified.³³⁷ Four primary themes emerged. The first was the photographic evidence. Current and former LAPD photographers – Carleton Sullivan and Earl Thorsen – testified as to photos that depicted Harris distributing flyers outside the inquest.³³⁸ Detective James Harris of the district attorney’s intelligence detail confirmed John Harris was the individual depicted and corroborated that he was distributing flyers.³³⁹ He further attested to receiving a flyer with potentially revolutionary content from Harris at the inquest.³⁴⁰

Second, witnesses testified to several riots that took place in the months leading up to the inquest. Pierce Brooks, a lieutenant in the LAPD, informed the jury

333. Richard Bergholz, *Reagan Raps Democrats on State Crime*, L.A. TIMES, Sep. 21, 1966, at 30.

334. Richard Bergholz, *Reagan Triumphs: GOP Scores Heavily in Nation: Finch Beats Anderson; Other Democrats in Tough Battles*, L.A. TIMES, Nov. 9, 1966, at 1, 3 (“Computer analysts reported that white backlash voters – those motivated by Negro demonstrations and demands – played an important part in the Brown defeat. Early computations showed that white voters were giving Brown only 36% of their ballots, compared to the 48% he got in 1962 . . .”); MARK BRILLIANT, *THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA, 1941-1978*, at 9-10 (2010).

335. Appendix to Appellees’ Supplemental Brief for Argument at 10, *Younger v. Harris*, 401 U.S. 37 (1971) (No. 70-2).

336. *Deadwyler Widow Files New Claim*, INDEPENDENT (Long Beach, Cal.), Sep. 21, 1966, at 29.

337. See Appendix to Appellees’ Supplemental Brief for Argument, *supra* note 335, at 8-9.

338. *Id.* at 11-15.

339. *Id.* at 18-20.

340. *Id.* at 18-20; see Harris Flyer 1, *supra* p.63, Figure 6.

of the human toll of the August 1965 riot nine months prior.³⁴¹ Allen Archbald, also a lieutenant in the LAPD, testified about a two-day riot in Watts on March 15-16, 1966, which resulted in two deaths and property damage.³⁴²

Third, witnesses described the crowd at the inquest as agitated and, at times, hostile toward law enforcement. S.I. Holmes and Oliver Taylor, both captains in the Los Angeles County Sheriff's Office, testified that many of the individuals who entered the courthouse to watch the inquest became vocally upset when they learned there was no room for them and initially refused to clear the hall when asked to do so.³⁴³

Fourth, race was a recurring subtext throughout the hearing. Witnesses referred to John Harris as a "Negro man,"³⁴⁴ a "male negro,"³⁴⁵ and a "male Negro person."³⁴⁶ The racial composition of the inquest's spectators was also expressly described on two occasions during the relatively short hearing.³⁴⁷ Holmes and Taylor were both asked about the "ethnic makeup of the spectators" and both shared the assessment that the crowd was approximately "ninety percent Negro."³⁴⁸

After the witnesses testified, the grand jury deliberated and voted to indict Harris for criminal syndicalism.³⁴⁹ The presiding judge then issued a bench warrant for his arrest.³⁵⁰ At 5:30 p.m. on the same day, "six plain clothes" officers entered Harris's home and arrested him.³⁵¹ During the course of the arrest, "after handcuffing Harris," the officers purportedly "ransacked the apartment."³⁵² The officers also "stole a large quantity of Progressive Labor Party literature, films and a mimeograph machine."³⁵³ Notably, among Harris's roommates at the time

341. Appendix to Appellees' Supplemental Brief for Argument, *supra* note 335, at 25-29.

342. *Id.* at 30-35.

343. *Id.* at 35-45.

344. *Id.* at 14.

345. *Id.* at 12.

346. *Id.*

347. *Id.* at 40-42.

348. *Id.* at 40, 42.

349. *Id.* at 3, 46.

350. *Id.* at 46.

351. Progressive Lab. Party, *Defend John Harris Arrested for 'Criminal Syndicalism,'* SPARK: W. VOICE FOR REVOLUTION 1 (recounting Harris's story in a "Special Edition to Defend John Harris" in *Spark*). The archived copy of this special edition of *Spark* is undated but appears to have been published between the Nov.-Dec. 1966 and Jan.-Feb. 1967 regular issues.

352. *Id.*

353. *Id.*

was Jim Dann, who would eventually sue the district attorney alongside Harris in federal court.

With his arrest, Harris became the first person charged with criminal syndicalism in California since 1937.³⁵⁴ When the district attorney charged him, it set the stage for one of the most important cases in the field of federal jurisdiction.

III. HARRIS IN THE COURTS

After his arrest in 1966, the charges against Harris would remain unresolved until their dismissal in 1971. This Part details Harris’s legal battle during that five-year period. At each step of his legal journey, racial context was material both to how the arguments were made and how the press described the proceedings. This Part also explores the experiences of other plaintiffs who, alongside Harris, challenged the California Criminal Syndicalism Act. Through original interviews, readers will gain insight into the chilling effect Harris’s arrest had on these individuals. This Part also describes the inner workings of the Court during the three years that the case lingered there. In a manner typical of the Court’s longstanding practice of deciding issues instead of disputes,³⁵⁵ Harris and the racial context of his case faded from view as *Younger* became consolidated with other cases and oral argument was set, reset, and reset again. By the time the Justices settled on what would become the *Younger* abstention doctrine, Harris’s case, which had begun with headlines blaring “Negro Arraigned as Revolutionist,”³⁵⁶ had mellowed into an exposition of the “basic doctrine of equity” and “Our Federalism.”³⁵⁷ All the while, the Justices paid little attention to the effect of these protracted proceedings on Harris and the other parties.

A. State Court

1. Legal Advocates

In his state criminal proceeding, Harris was represented by lawyers from the ACLU and the National Lawyers Guild, neither of which was a stranger to

354. Reporter’s Transcript of Proceedings at 19–20, *Harris v. Younger*, 281 F. Supp. 507 (C.D. Cal. 1968) (No. 67–1041). While the arrest had no recent parallel in California history, it drew comparisons to the 1964 conviction of a Harlem Progressive Labor Party leader named Bill Epton for the crime of “criminal anarchy.” See Paul Harris, Comment, *Black Power Advocacy: Criminal Anarchy or Free Speech*, 56 CALIF. L. REV. 702, 706, 708, 711 (1968).

355. Jason Iuliano & Ya Sheng Lin, *Supreme Court Repeaters*, 69 VAND. L. REV. 1349, 1371 (2016) (citing Justices Breyer and Scalia for this proposition).

356. Einstoss & Berman, *supra* note 63, at 3.

357. *Younger v. Harris*, 401 U.S. 37, 43–44 (1971).

defending communists (and suspected communists) from government overreach. One notable member of Harris's legal team was A.L. Wirin, a highly respected, "legendary"³⁵⁸ lawyer who came to the proceeding with decades of experience advocating for civil liberties and racial equality in California. In the 1930s, Wirin represented leftist organizers charged under the California Criminal Syndicalism Act and authored a book documenting abuses and government excesses caused by that law.³⁵⁹ A decade later, Wirin represented Japanese American draft resisters,³⁶⁰ and ten years after that, Wirin successfully challenged the LAPD's illegal wiretapping practices.³⁶¹ Wirin also represented Native Americans challenging the criminalization of peyote,³⁶² sued South Pasadena for a policy that prohibited Black Americans from using the municipal swimming pool,³⁶³ and sued a trade association that discriminated against Black brokers.³⁶⁴ Particularly relevant here, Wirin had also challenged a federal law that required individuals to declare whether they were, or ever had been, a communist as a condition of receiving Medicare benefits.³⁶⁵ It is therefore fitting that Wirin served as a lead attorney for Harris in 1966, challenging the constitutionality of the California Criminal Syndicalism Act in this high-profile case at the intersection of race, labor, and free speech.

Harris was also represented by Frank Pestana, Laurence Sperber, and Fred Okrand. Pestana was deeply involved with the Guild.³⁶⁶ Sperber was also a longtime member and part of the legal team that successfully overturned Paul Robert Cohen's disturbing-the-peace conviction for wearing a jacket bearing the words "Fuck the Draft" in a California courthouse.³⁶⁷ Okrand, another highly

358. Telephone Interview with Farrel Broslawsky, *supra* note 11.

359. See *supra* note 245 and accompanying text.

360. ELLEN M. EISENBERG, *THE FIRST TO CRY DOWN INJUSTICE? WESTERN JEWS AND JAPANESE REMOVAL DURING WWII* 77 (2008) (detailing the crucial role that Jewish advocates like Wirin played in battling that injustice); see also Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. FOR SOC. JUST. 1, 30 (2005) ("[T]he government attempted to address the wrongs committed against the Nisei draft resisters. A.L. Wirin, who had represented some of the resisters during their trials, submitted a petition for amnesty on their behalf." (footnotes omitted)).

361. *Wirin v. Parker*, 313 P.2d 844, 844-48 (Cal. 1957).

362. Howard Kennedy, *Ban on Peyote Fought on Basis of Religion*, L.A. TIMES, June 11, 1964, at A8.

363. *Court Weighs Swim Pool Racial Charge*, L.A. MIRROR, Sep. 19, 1957, at Part III, 8.

364. *Brokers Sue Realty Board, Charge Bias*, CAL. EAGLE, Mar. 5, 1964, at 5.

365. *ACLU Fights Medicare Question on Communism*, SACRAMENTO BEE, July 29, 1966, at 12.

366. See *Guild Dinner Huge Success!*, CONSPIRACY, Nov. 1974, at 5 (listing Pestana as a guest of honor at a Guild dinner).

367. *Cohen v. California*, 403 U.S. 15, 16 (1971).

experienced attorney, would go on to be co-counsel of record in the landmark case of *City of Los Angeles v. Lyons*.³⁶⁸

2. Arraignment and Bail Hearing

Harris was unable to afford the \$15,000 bail set by the grand jury, and the amount was initially ratified by Judge Arthur Alarcón at Harris’s arraignment.³⁶⁹ Harris spent two days in jail as a result. At a second appearance on September 22, however, Wirin successfully advocated for bail to be reduced from \$15,000 to \$1,500.³⁷⁰ The presiding judge, Richard Hayden, was not persuaded by the government’s representation that Harris was a flight risk: “It has been my experience that people charged with this kind of thing – you can’t keep them out of court.”³⁷¹ After the reduction, Harris was able to post bond and was released from jail.³⁷²

Roughly thirty of Harris’s supporters showed up at the hearing, some vowing to support his cause financially. These supporters were members of a range of student organizations: “the UCLA Vietnam Day Committee, Progressive Labor Party, friends of the Student Nonviolent Coordinating Committee, the Freedom Now Committee, the UCLA DuBois Club, and the UCLA Students for a Democratic Society.”³⁷³ Some of these protestors had picketed outside the jail on the evening of Harris’s arrest into the morning.³⁷⁴ For them, the gravity of the arrest, and its implications for freedom of speech, were palpable.³⁷⁵

368. 461 U.S. 95, 97 (1983).

369. *Syndicalist Tries to Cut Bail Today*, *supra* note 60, at 1; Einstoss & Berman, *supra* note 63, at 3.

370. ‘Criminal Syndicalism’ Case Defense Cites Constitution, VAN NUYS NEWS & VALLEY GREEN SHEET, Sep. 23, 1966, at 2B – Central.

371. *Id.*

372. *After Reduction ‘Syndicalist’ Freed on \$1,500 Bail*, EVENING VANGUARD (Venice, Cal.), Sep. 23, 1966, at 1.

373. *Id.*

374. *Id.*

375. Some supporters organized fundraising efforts on his behalf. See *infra* Appendix Figures 1-3.

FIGURE 9. NEWSPAPER HEADLINE³⁷⁶

3. *Demurrer and the Obstacle of Whitney v. California*

On October 7, 1966, after his release from pretrial detention, Harris filed a demurrer seeking to have the case dismissed on First Amendment grounds.³⁷⁷ But the motion was not heard by Judge Hayden, the liberal judge who had reduced Harris's bail.³⁷⁸ It was instead heard on December 1, 1966, before Judge Barnes, a former prosecutor and an outspoken critic of rulings that restricted police practices.³⁷⁹ "I think it is time that our courts gave some support to the enforcement of the law and the protection of the rights of citizens," Barnes had opined earlier that year.³⁸⁰ At the hearing, Wirin argued to Barnes that the California Criminal Syndicalism Act, as applied to Harris, violated the First Amendment. Barnes rejected the argument and instead ordered Harris to appear in

376. Einstoss & Berman, *supra* note 63, at 3.

377. 'Syndicalist' Says Old Law Is Illegal, *EVENING VANGUARD* (Venice, Cal.), Oct. 7, 1966, at 1.

378. Evidence of Judge Hayden's liberal orientation can be seen decades later, when he was removed from school-desegregation cases as a result of his dues-paying membership in both the NAACP and the ACLU. *U.S. Judge Bars Dismantling of L.A. Busing Plan*, *VENTURA CNTY. STAR*, Apr. 18, 1981, at A-2.

379. *Judge to Set Trial for Rights Worker*, *L.A. TIMES*, Dec. 2, 1966, at 28; *Superior Judge Barnes Assails Ruling in Dorado Case, Supports Police Acts*, *L.A. TIMES*, Mar. 15, 1966, at 27.

380. *Superior Judge Barnes Assails Ruling in Dorado Case*, *supra* note 379, at 27.

three weeks for trial on the “unusual charge” that had not been used against any Californian in twenty-nine years.³⁸¹

Harris’s First Amendment argument encountered a significant doctrinal difficulty in the 1927 case *Whitney v. California*.³⁸² In that case, Charlotte Anita Whitney, a wealthy woman whose leftist politics were influenced by her experiences working in philanthropy for the poor, was charged with criminal syndicalism.³⁸³ She had joined the Communist Labor Party, which had in turn endorsed a labor union alleged to have advocated violence.³⁸⁴ On November 28, 1919, Whitney delivered a speech on racial equality,³⁸⁵ telling audience members that Black Americans were not inferior but had been held back by oppressive conditions and a dearth of opportunity.³⁸⁶ She also implored action against lynchings, laying out sobering statistics.³⁸⁷ She concluded, “Let us then both work and fight . . . so that the flag that we love may truly wave.”³⁸⁸ Moments after exiting the stage, she was arrested for criminal syndicalism.³⁸⁹

Whitney’s arrest was controversial.³⁹⁰ Some supported it,³⁹¹ but some media outlets like *The Nation* condemned it as overreach.³⁹² The *San Francisco Call* wrote, “The colonists were wrong when they burned witches; the people were wrong when they spat upon the abolitionists. And the people of California may be equally wrong when they send Anita Whitney to prison.”³⁹³

381. *Judge to Set Trial for Rights Worker*, *supra* note 379, at 28.

382. 274 U.S. 357 (1927), *overruled by*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

383. Ahmed White, *Law, Labor, and the Hard Edge of Progressivism: The Legal Repression of Radical Unionism and the American Labor Movement’s Long Decline*, 42 *BERKELEY J. EMP. & LAB. L.* 165, 211 (2021); Lisa Rubens, *The Patrician Radical: Charlotte Anita Whitney*, 65 *CAL. HIST.* 158, 160–61, 164 (1986).

384. Rubens, *supra* note 383, at 158.

385. White, *supra* note 383, at 211.

386. See Ronald K.L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis’s Vote in Whitney v. California*, 2005 *SUP. CT. REV.* 333, 344–45 (noting that Whitney’s speech involved “recounting the shameful history of slavery, deconstructing the theory of black inferiority, and comparing current disparities in the economic and political power of the races”).

387. *Id.* at 345.

388. *Id.*

389. *Id.*

390. Rubens, *supra* note 383, at 164.

391. *Id.*

392. Clare Shipman, *The Conviction of Anita Whitney*, 110 *NATION* 365, 365–67 (1920).

393. Rubens, *supra* note 383, at 164.

Whitney was convicted, and her state-court appeal was unsuccessful.³⁹⁴ The U.S. Supreme Court affirmed.³⁹⁵ Without parsing the content of any of Whitney's words, the lead opinion reasoned that the First Amendment did not bar her conviction. "The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods," the Court wrote.³⁹⁶ "That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear."³⁹⁷

In California's defense of the criminal-syndicalism law, *Whitney* featured prominently, given that it upheld the act that Harris was charged under.³⁹⁸ Harris's team, by contrast, expressed doubts about the continued viability of *Whitney*.³⁹⁹

4. State Appellate Court

After the trial court denied his demurrer, Harris sought a writ of prohibition from the California Court of Appeals. If granted, the writ would have stopped Harris's prosecution from commencing. But the petition was denied on December 19, 1966.⁴⁰⁰ Harris then petitioned the California Supreme Court, a request again denied on January 18, 1967.⁴⁰¹ Both denials occurred without a hearing and without a written opinion.⁴⁰² In seeking these remedies, Harris appears to have employed the state pretrial remedies available to prevent the prosecution.

While § 1983 contains no general exhaustion requirement—as the Supreme Court later clarified in *Patsy v. Board of Regents*⁴⁰³—Harris's pursuit of state remedies would ultimately feature in the federal litigation's atmosphere. As the federal district court would later observe, "[I]t cannot be said that the plaintiffs

394. *People v. Whitney*, 207 P. 698, 698-99 (Cal. Dist. Ct. App. 1922).

395. *Whitney v. California*, 274 U.S. 357, 372 (1927), *overruled by*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

396. *Id.* at 371-72.

397. *Id.*

398. See Brief for the People of California at 2, *Younger v. Harris*, 401 U.S. 37 (1971) (No. 68-163).

399. Reporter's Transcript of Proceedings, *supra* note 354, at 52 ("I think it would be blinking reality to say that the constitutional doctrine has not changed since *Whitney v. California*.").

400. *In re Harris*, 97 Cal. Rptr. 844, 845 (Ct. App. 1971) (describing these facts).

401. *Id.*

402. *Id.*

403. 457 U.S. 496, 504 (1982) (observing that "Congress intended section [1983] to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights" (quoting CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871) (statement of Rep. David P. Lowe))).

ignored the state courts in seeking to assert their constitutional claims, although they presumably would have had a right to do so and come directly here.”⁴⁰⁴ Indeed, Harris would later emphasize to the Supreme Court that “there was every effort” to exhaust state remedies.⁴⁰⁵ This voluntary pursuit of state remedies—unnecessary under federal law but strategically helpful—would subtly shape how both courts and litigants approached the federal lawsuit that followed.

B. Federal Court

1. Three-Judge District-Court Panel

Harris’s next stop was federal district court. On July 21, 1967, Harris, Jim Dann, Diane Hirsch, and Farrel Broslawsky filed a complaint in the Central District of California.⁴⁰⁶ Dann was Harris’s close friend, fellow Progressive Labor Party organizer, and roommate. Diane Hirsch was a Progressive Labor Party member who felt inhibited from speaking out about her leftist political views for fear that she would be prosecuted.⁴⁰⁷ Notably, though not mentioned in the complaint, Hirsch (or someone sharing her name) had faced criminal prosecution less than a month before the filing in defense of the protests against police brutality.⁴⁰⁸ As for Broslawsky, he was a politically active advocate for causes on the left who worked as an attorney and as a political-science professor at Los Angeles Valley College. According to the complaint, he feared prosecution for teaching about Karl Marx.⁴⁰⁹

In an interview for this Article, Broslawsky recalled why, even though he was not afraid of being prosecuted, he believed he had “a rational basis for fear of prosecution,”⁴¹⁰ and that the other co-plaintiffs in the Progressive Labor Party were likely more fearful than he was.⁴¹¹ According to Broslawsky, many Californians at the time were simply afraid to speak. To some degree, these fears were rooted in California history, as many in the 1960s would have borne memories of the first Red Scare and fresh memories of the second Red Scare. Broslawsky

404. *Harris v. Younger*, 281 F. Supp. 507, 510 (C.D. Cal. 1968), *rev’d*, 401 U.S. 37 (1971).

405. Reply to Appellant’s Supplemental Brief on Reargument at 11, *Younger v. Harris*, 401 U.S. 37 (1971) (No. 69-4).

406. Civil Docket, *Harris*, 281 F. Supp. 507 (No. 67-1041).

407. Complaint for Injunction at 5, *Harris*, 281 F. Supp. 507 (No. 67-1041).

408. See *id.*; *Courts Picketed in War Protest*, VALLEY TIMES (San Fernando Valley, Cal.), June 29, 1967, at 1.

409. Complaint for Injunction, *supra* note 407, at 5.

410. Telephone Interview with Farrel Broslawsky, *supra* note 11.

411. *Id.*

shared, for example, that his mother was a teacher who was, in his words, “somewhat blacklisted” as a communist and subsequently left California for Alaska.⁴¹² The experience of Broslawsky’s mother was not unique: he had classmates whose parents were also blacklisted and locked out of Hollywood jobs. Broslawsky and his peers were also subjected to police surveillance; he recounted that the LAPD was “always taking pictures of us” and “making lists.”⁴¹³

Broslawsky’s recollection of the surveillance of Los Angeles activists comports with the experiences of Clayborne Carson, who worked as a journalist for the *Los Angeles Free Press* in the 1960s and knew Harris personally. In an interview for this Article, Carson reported that Harris’s arrest caused “concern for a lot of people,” as many were “surprise[d] that there’s even a [criminal-syndicalism] law on the books.”⁴¹⁴ Carson described frequent tracking by government officials and being photographed doing things as mundane as walking on a beach—photographs that he later learned became part of his FBI files.⁴¹⁵

Because Broslawsky, Dann, Harris, and Hirsch were seeking to enjoin a state law on federal constitutional grounds, the request for injunctive relief was heard before a three-judge panel. They pressed their First Amendment claims⁴¹⁶ while also arguing that the suit should not be barred by the principle of criminal abstention.⁴¹⁷ In making this argument, they relied heavily on *Dombrowski v. Pfister*, the 1965 case in which the Supreme Court stopped a state criminal prosecution against civil-rights workers who had been harassed by Louisiana officials.⁴¹⁸ In *Dombrowski*, the Court concluded that “the abstention doctrine is inappropriate for cases . . . [in which] statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.”⁴¹⁹

Moreover, Harris’s lawyers identified other, post-*Dombrowski* civil-rights cases in which federal courts enjoined criminal prosecutions. For example, in *Ware v. Nichols*, a Mississippi federal court had granted relief to eight “Negro citizens . . . affiliated with the Council of Federated Organizations as voter

^{412.} *Id.*

^{413.} *Id.*

^{414.} Interview with Clayborne Carson, Martin Luther King, Jr. Centennial Professor, Emeritus, Stan. Univ. (June 21, 2024).

^{415.} *Id.*

^{416.} Memorandum of Points and Authorities in Support of Application for Injunction and for Appointment of Three Judge Court at 1, *Harris v. Younger*, 281 F. Supp. 507 (C.D. Cal. 1968) (No. 67-1041) (on file with authors). Authors are grateful to the National Archives at Riverside, California, for their assistance in locating and transmitting this brief.

^{417.} *Id.* at 9.

^{418.} 380 U.S. 479, 489-90 (1965).

^{419.} *Id.*

registration workers” who had been charged with criminal syndicalism.⁴²⁰ Likewise, in *Baker v. Bindner*, a group of civil-rights demonstrators successfully challenged Kentucky’s criminal-syndicalism statute.⁴²¹ In both *Ware* and *Baker*, courts had rejected abstention as a result of *Dombrowski*.⁴²²

The district court agreed with Harris and his co-plaintiffs, temporarily restraining enforcement of the law on August 8, 1967.⁴²³ In that order, Johnson-appointed Judge Ferguson concluded that federalism-based abstention principles did not bar the suit, citing *Dombrowski*.⁴²⁴ The panel then heard argument on the government’s motion to dismiss on October 27, 1967,⁴²⁵ ultimately rejected that motion on March 11, 1968, and preliminarily enjoined District Attorney Evelle Younger from prosecuting Harris or otherwise wielding the syndicalism statute.⁴²⁶

As the court issued the order, it again concluded that abstention principles should not stand in the way of relief. As an initial matter, the court noted that while it is preferable for state courts to rule on the constitutionality of state laws, Harris had diligently pursued state-court remedies.⁴²⁷ The court further concluded that even if he had not, federal relief was still warranted. Under *Dombrowski*, it reasoned, federal courts should issue injunctive relief when significant irreparable harm would otherwise follow.⁴²⁸ Here, among other harms, the plaintiffs were chilled from engaging in constitutionally protected conduct, given the credible threat of prosecution. Moreover, in the court’s view, facing a criminal prosecution based on a facially unconstitutional statute was itself irreparable harm.⁴²⁹

On the merits, the court concluded that relief was supportable under prevailing Supreme Court precedent. While the panel acknowledged that in *Whitney v. California*, the Supreme Court had upheld the California Criminal Syndicalism Act,⁴³⁰ the panel observed that later precedents counseled the opposite result in

420. 266 F. Supp. 564, 565, 569 (N.D. Miss. 1967).

421. 274 F. Supp. 658, 661 (W.D. Ky. 1967).

422. *Ware*, 266 F. Supp. at 566; *Baker*, 274 F. Supp. at 661.

423. Temporary Restraining Order, Joint Appendix at 10–12, *Younger v. Harris*, 401 U.S. 37 (1971) (No. 70–2).

424. *Id.* at 11.

425. Civil Docket, *supra* note 406. The transcript from that hearing is not available in the federal judicial archival records.

426. *Harris v. Younger*, 281 F. Supp. 507, 517 (C.D. Cal. 1968), *rev’d*, 401 U.S. 37 (1971).

427. *Id.* at 510.

428. *See id.* at 510–11.

429. *See id.* at 511.

430. *Id.* (citing *Whitney v. California*, 274 U.S. 357 (1927)).

this case. Specifically, the district court relied on *Baggett v. Bullitt*,⁴³¹ where the Court reviewed the constitutionality of a statute that required public-school teachers to swear to affirm “reverence for law and order” and to “promote respect for the flag and institutions of the United States of America.”⁴³² The *Baggett* Court found that the statute was unconstitutionally vague in ways that would inhibit constitutionally protected speech.⁴³³ According to the district court in *Harris*, the same principles applied with respect to communist political speech.⁴³⁴

Moreover, relying on Justice Brandeis’s influential concurring opinion in *Whitney*, the panel concluded that any harm arising from Harris’s actions was too remote to be proscribed. “Even if the Act were to be construed as including only the type of teaching that involves advocacy,” Judge Ferguson wrote, “it still is overbroad in its prohibition, because the advocacy condemned is not limited to the ‘Action now!!’ variety.”⁴³⁵ Because the injunction was granted by a three-judge panel, Younger’s appeal proceeded directly to the Supreme Court.⁴³⁶

2. United States Supreme Court

a. Three Oral Arguments

Discussing oral argument in this case requires identifying precisely *which* oral argument. Remarkably, the case was argued before the Court three different times: April 1, 1969, April 29, 1970, and November 16, 1970. In May 1969, roughly a month after the case was first argued, *Life* magazine ran a story revealing Justice Abe Fortas’s receipt of honoraria from a wealthy Wall Street financier for service on a charitable board.⁴³⁷ Justice Fortas resigned five days later, insisting that, while he had done nothing wrong, remaining in the face of the revelations of an unseemly gift from a wealthy man would damage the integrity of the

431. 377 U.S. 360 (1964).

432. *Id.* at 361-62 (citing Oath of Allegiance by School Teachers, ch. 103, 1931 Wash. Sess. Laws 295, 295-96).

433. *Id.* at 372.

434. *Harris*, 281 F. Supp. at 511-13.

435. *Id.* at 513 (citing *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring)).

436. 28 U.S.C. § 1253 (2024).

437. BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 499-500 (1988); William Lambert, *Fortas of the Supreme Court: A Question of Ethics*, LIFE, May 9, 1969, at 33-34.

Court.⁴³⁸ Soon after, Chief Justice Warren made good on a 1968 promise to retire when his successor was confirmed.⁴³⁹ In the face of changing membership and the internal disputes documented in Section III.C, *Younger* was pushed to the next term.

The Court that reheard *Younger*’s appeal on April 29, 1970, remained short-handed. The seat that Justice Fortas had left open remained vacant for the entire year.⁴⁴⁰ President Nixon’s attempts to nominate two others—Clement Haynsworth in September 1969 and G. Harrold Carswell in February 1970—both faltered.⁴⁴¹ As the *Harvard Law Review* explained, “At the end of the Court’s 1969 Term . . . the Court also avoided deciding a number of major issues by re-scheduling an inordinate number of cases for reargument.”⁴⁴² Seventeen cases fell within that category, including *Younger*.⁴⁴³ Indeed, the question presented in *Younger* proved particularly divisive.⁴⁴⁴ The case was heard a remarkable third time on November 16, 1970,⁴⁴⁵ with a full complement of nine justices in tow.⁴⁴⁶

In ways that unsettle the traditional narrative about *Younger*, the government’s argument in the first Supreme Court hearing focused on race far more than communism or labor rights. The fact that Harris was a communist was

438. Laura Kalman, *Does Character Affect Judicial Performance?*, 71 U. COLO. L. REV. 1385, 1396 (2000); Letter from Justice Abe Fortas to Chief Justice Earl Warren (May 14, 1969) (on file with Libr. of Cong., William J. Brennan Papers [hereinafter Brennan Papers], Part II, Box 110, Folder 5).

439. DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* 138 (1999); BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 755-57 (1983); PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, *THE FEDERAL COURTS: AN ESSENTIAL HISTORY* 396-97 (2016).

440. Justice Fortas’s replacement, Justice Harry Blackmun, was confirmed by the Senate on May 12, 1970. *Blackmun Approved*, 94-0; *Nixon Hails Vote by the Senate*, N.Y. TIMES, May 13, 1970, at 1.

441. Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 420-30 (2000). In a memorable moment, a senator supporting G. Harrold Carswell’s nomination offered this unsuccessful argument: “Even if he is mediocre, there are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation, aren’t they?” HOFFER ET AL., *supra* note 439, at 397.

442. *The Supreme Court, 1970 Term—The Statistics*, 85 HARV. L. REV. 344, 344 (1971).

443. *Id.*

444. See *infra* Section III.C.2.

445. *Younger v. Harris*, 401 U.S. 37, 37 (1971).

446. Transcript of Oral Argument at 2, *Younger*, 401 U.S. 37 (No. 70-2) [hereinafter *Younger* Third Oral Argument Transcript], https://www.supremecourt.gov/pdfs/transcripts/1970/70-2_11-16-1970.pdf [<https://perma.cc/S6LT-ZNS9>]. The same Term, Justice Fortas authored the per curiam opinion in *Brandenburg v. Ohio*, which adopted the imminency standard. See Martha A. Field, *Brandenburg v. Ohio and Its Relationship to Masses Publishing Co. v. Patten*, 50 ARIZ. ST. L.J. 791, 791 (2018).

never mentioned during oral argument, and the word “communist” was only used three times—twice in relation to Professor Broslawsky’s desire to teach about Karl Marx,⁴⁴⁷ and a third time in describing the facts of another case.⁴⁴⁸ By contrast, the racial subtext was clear: even if a riot did not materialize, Harris intolerably risked stoking a new round of antipolice violence from Black Angelenos who were outraged about the shooting of an unarmed Black man. The government’s attorney⁴⁴⁹ explained to the Court that the “incident occurred in April, 1966, about six months after the great Watts riots.”⁴⁵⁰ He then informed the Court that the protest Harris participated in “grew out of the shooting and killing” of Deadwyler, “a black man [who] was taking a pregnant wife to a hospital.”⁴⁵¹ In light of “great furor about that in the Los Angeles community,” the city held a coroner’s inquest.⁴⁵² The lawyer observed that at the inquest, “[t]he audience was about 90 percent black,” and the “unruly” crowd sometimes booed during witnesses’ testimony.⁴⁵³ “Mr. Harris was out there handing these leaflets out in this setting and the leaflet—I am not going to read the whole thing—says, ‘Wanted for the murder of Leonard Deadwyler, Bobo the cop.’”⁴⁵⁴

Harris’s attorney, Sam Rosenwein, clarified during his argument that Harris was handing out flyers outside of a government building, not in the heart of a Black neighborhood. “I am not going into the facts any more than counsel . . . but I simply would like to say that all that is involved in this case is a young man distributing in [a] civic center, not in the black area . . .”⁴⁵⁵ The subtext of Rosenwein’s statement appears to be the mirror image of the government’s: Harris was engaged in a common expressive activity in a public place where the risk of an uprising was relatively mild compared to a “Black area” of Los Angeles. In an interview a decade later, recounting these racialized facts,

447. Transcript of Oral Argument at 5, *Younger*, 401 U.S. 37 (No. 68-163) [hereinafter *Younger* First Oral Argument Transcript], https://www.supremecourt.gov/pdfs/transcripts/1968/68-163_04-01-1969.pdf [<https://perma.cc/8KPH-TYVX>].

448. *Id.* at 30.

449. The government attorney’s name was Albert W. Harris, Jr. Because he shares the last name as John Harris, we will refer to him here as the “government’s attorney” to avoid confusion.

450. *Younger* First Oral Argument Transcript, *supra* note 447, at 14. Though, to be clear, the protest occurred eight months after the Watts riots. See HORNE, *supra* note 3, at 141 (describing the Watts riots of August 1965). Harris’s indictment occurred over a year after the riots in September 1966. See Jurisdictional Statement at 4, *Younger*, 401 U.S. 37 (No. 68-163).

451. *Younger* First Oral Argument Transcript, *supra* note 447, at 14.

452. *Id.* at 14-15.

453. *Id.* at 15.

454. *Id.*

455. *Id.* at 21.

Rosenwein referred to Harris’s leaflets as “tough” and “incendiary,” but to a reasonable observer with the benefit of hindsight, “harmless.”⁴⁵⁶

In the second argument, the racial context of the case was far less explicit. The government’s attorney first noted that the flyers were handed out “six months after the Watts riots in Los Angeles County.”⁴⁵⁷ He also described Deadwyler’s death and characterized Harris’s flyers as arguing that “the Police Department must all be wiped out before there is complete freedom.”⁴⁵⁸ Still, he never explicitly mentioned the race of Harris, Deadwyler, or the protestors. Instead, it was Harris’s attorney A.L. Wirin who introduced the case’s racial context. The flyers were distributed “at a proper place and a proper time on a proper occasion” after “[a] Negro had been shot and killed by a white officer.”⁴⁵⁹ He acknowledged the flyers’ “very strong language.”⁴⁶⁰ But strong language, Wirin argued, falls far short of constitutionally unprotected speech.⁴⁶¹

By the third argument, race’s place in the attorneys’ arguments had faded even further. The words “Black,” “Watts,” and “Negro” did not appear in the transcript at all.⁴⁶² It is difficult to determine with precision the reason for this shift. Perhaps as memories of the Watts riots faded, the government deemed explicit racial appeals less persuasive.

b. Briefing

Were Harris’s flyers part of a dangerous statewide matrix of militarism? Or did they reflect a virtuous voice for racial justice? Apart from the merits, these dueling visions pervaded the briefing.

The government broadly emphasized California’s social context in the 1960s. Before any substantive legal discussion, the brief opened with several pages describing militant California organizations—the Black Panthers, Students for a Democratic Society, and the American Nazi Party. The brief reproduced extreme literature those organizations distributed over the course of the 1960s across the

456. Interview by Michael S. Baiter with Sam Rosenwein 181 (Dec. 19, 1985), <https://static.library.ucla.edu/oralhistory/pdf/submasters/21198-zz0008zhjq-1-submaster.pdf> [<https://perma.cc/3AZW-R4DS>].

457. Transcript of Oral Argument at 9, *Younger v. Harris*, 401 U.S. 37 (1971) (No. 69-4), https://www.supremecourt.gov/pdfs/transcripts/1969/69-4_04-29-1970.pdf [<https://perma.cc/FWC4-NWRU>].

458. *Id.*

459. *Id.* at 23.

460. *Id.*

461. *Id.*

462. See *Younger* Third Oral Argument Transcript, *supra* note 446.

state of California—including bomb-making instructions. The government did not claim that Harris had any responsibility for those extreme materials distributed by others across the state. Instead, the government chided the district court for failing to view Harris’s prosecution within “the social context or matrix of his action.”⁴⁶³ “[H]ate literature,” the government surmised, “necessarily lends an aura of legitimacy to violence and reinforces the distorted perceptions of sick minds.”⁴⁶⁴

In response, Harris’s brief criticized the government’s “appeal to political expediency” based on “immaterial and incompetent documents and unsubstantiated statements.”⁴⁶⁵ In a subsequent brief, Harris characterized his flyers as a legitimate—even righteous—protest against police brutality and unemployment affecting Black residents in South Los Angeles.⁴⁶⁶ In this framing, Harris’s literature “call[ed] for this dire situation to be remedied.”⁴⁶⁷ And by contrast to the government’s brief, Harris quoted his own flyers heavily. He highlighted, for example, that one of his flyers opened with an 1856 Frederick Douglass quotation encouraging the “overthrow” of “irresponsible tyranny.”⁴⁶⁸ This, Harris told the court, was a “sound American doctrine” expressed not only by Douglass, “one of the great leaders of the Negro people,” but also by “the Founding Fathers of the Nation.”⁴⁶⁹

The remaining arguments in the briefing took place on more traditional legal ground. For example, the government argued that the district court erred by enjoining the criminal-syndicalism law on its face. It contended that the law had been narrowed by California precedent in ways that comported with leading precedents of that day.⁴⁷⁰ In its view, the statute only applied to settings of “clear and present” danger.⁴⁷¹ And as such, enjoining all enforcement of the law was unwarranted. Harris, by contrast, argued that the facts of his case revealed that the reach of the law was not as narrow as the government suggested. He observed that at no point did his flyers call for any immediate unlawful action.⁴⁷²

463. Brief for the Appellant at 8, *Younger*, 401 U.S. 37 (No. 68-163).

464. *Id.* at 14.

465. Brief for Appellees at 8-9, *Younger*, 401 U.S. 37 (No. 68-163).

466. Appellees’ Supplemental Brief on Reargument at 10-12, *Younger*, 401 U.S. 37 (No. 70-2).

467. *Id.* at 11.

468. *Id.*

469. *Id.*

470. Brief for the Appellant, *supra* note 463, at 16-17 (discussing *Dennis v. United States*, 341 U.S. 494 (1951)).

471. *Id.* at 21.

472. Appellees’ Supplemental Brief on Reargument, *supra* note 466, at 11-12.

The parties also disputed the legal issues for which the case is most known: jurisdiction and comity.

In the way of Article III jurisdiction, the government argued that plaintiffs Dann, Hirsch, and Broslawsky lacked standing given that only Harris faced prosecution.⁴⁷³ Harris’s team countered that all plaintiffs had adequately alleged injury from the Act’s chilling effect – Dann and Hirsch felt “inhibited in attempting through peaceful, non-violent means to advocate the program of the Progressive Labor Party,” while Professor Broslawsky felt “inhibited and uncertain as to what he might say and teach” about Marx and the Communist Manifesto.⁴⁷⁴

In the way of comity, the government invoked the Anti-Injunction Act’s “positive congressional mandate” prohibiting federal interference with state proceedings, warning that “the prohibition is not to be whittled away by judicial improvisation.”⁴⁷⁵ Harris’s response reframed the primary underlying principle as one of constitutional supremacy rather than comity, arguing that § 1983 expressly authorized the injunctive relief as an explicit qualification of § 2283’s prohibition. To accept the government’s position, Harris contended, would frustrate Congress’s “expressed desire to place the national government between the state and its citizens.”⁴⁷⁶

C. *Deliberations and Opinions*

In *Younger v. Harris* and related cases such as *Samuels v. Mackell*, the key question was whether federal courts could issue prospective relief that would have the practical effect of interrupting an ongoing prosecution. *Samuels* focused specifically on declaratory relief.⁴⁷⁷ Those two cases, along with a few others, became known internally at the Court as “the *Dombrowski* cases,” and draft opinions often contained captions that bore the names of both *Younger* and *Samuels*. The cases were the basis of a three-year tug-of-war between Justices Brennan and Black in back-and-forth drafts. During that period, Brennan sought to preserve access to federal courts for individuals who, despite criminal charges in state court, needed federal judicial intervention for their rights to be protected.

473. Brief for the Appellant, *supra* note 463, at 3–4.

474. Brief for Appellees, *supra* note 465, at 5. At the same time, in what may have been a missed opportunity, Harris’s brief did not mention that Dann was Harris’s roommate and that Harris’s roommates’ belongings were carted off with Harris’s. See Progressive Lab. Party, *supra* note 351, at 1.

475. Brief for the Appellant, *supra* note at 463, at 34 (quoting *Amalgamated Clothing Workers of Am. v. Richman Bros.*, 348 U.S. 511, 514 (1955)).

476. Brief for Appellees, *supra* note 465, at 35.

477. *Samuels v. Mackell*, 401 U.S. 66, 72–73 (1971).

Black sought to protect state courts' autonomy on criminal matters, contending that failure to do so was anathema to important American traditions.

1. *October 1968 Term (Fall 1968 to Summer 1969)*

After the first oral argument in April 1968, the Court voted 5-3 to reverse the district court's injunction in *Younger v. Harris*.⁴⁷⁸ Voting in Younger's favor were Justices Black, Fortas, Harlan, Marshall, and Stewart. Voting in Harris's favor were Justices Brennan, Warren, and White.⁴⁷⁹ Because Justice Douglas did not attend oral argument, he did not initially vote.⁴⁸⁰ As the most senior Justice in the apparent majority, Black assigned himself the opinion.⁴⁸¹ Chief Justice Warren assigned Brennan the dissent.⁴⁸²

When Justice Black circulated his draft opinion, however, several Justices expressed serious concerns. In an April 1969 memo, Justice Fortas informed Justice Black, "I am sorry to say that I cannot join your opinion,"⁴⁸³ explaining that he could not "join a general attack on *Dombrowski*."⁴⁸⁴ Justices Marshall and Harlan also preferred a narrower opinion. As a result, Justice Brennan, for a moment, thought he might be able to assemble a majority for his own view by persuading the liberal Justices Marshall and Fortas to join him.

Those hopes dwindled when Justice Fortas unexpectedly resigned in May 1969.⁴⁸⁵ With that departure, it was not clear how Justice Brennan could attract five votes to reverse. Brennan needed to consider other strategies to preserve a robust reading of *Dombrowski*, even if Harris did not benefit.

478. Notes from Joseph Onek and Robert Weinberg, Law Clerks, U.S. Sup. Ct., October Term 1968 Notes, at VI (1968) [hereinafter Brennan Clerks' Notes OT 1968] (on file with Brennan Papers, *supra* note 438, Part II, Box 6, Folder 11).

479. *Id.*

480. *Id.* at VI-VII.

481. *Id.* at VII.

482. This assignment can be surmised because as a matter of Supreme Court custom, the most senior Justice in the dissent generally assigns the principal dissent. In this custom, the Chief Justice is always deemed the "most senior," regardless of years of service.

483. Memorandum from Justice Abe Fortas to Justice Hugo Black (Apr. 29, 1969) (on file with Brennan Papers, *supra* note 438, Part I, Box 190, Folder 9).

484. *Id.*

485. Letter from Justice Abe Fortas to Chief Justice Earl Warren (May 14, 1969) (on file with Brennan Papers, *supra* note 438, Part II, Box 110, Folder 5).

Justice Brennan indeed switched tactics. Instead of circulating a dissent, he circulated a concurring opinion on June 4, 1969.⁴⁸⁶ That concurrence agreed to reverse the district court but simultaneously attempted to read *Dombrowski* more broadly than did Justice Black’s opinion. Brennan’s draft preserved the ability of a federal court to enjoin a state prosecution when “a State brings or threatens to bring a criminal prosecution in bad faith or for the purpose of harassment.”⁴⁸⁷ Under those circumstances, Brennan explained, a federal court could intervene because “the opportunity to raise defenses at a criminal trial will not suffice to vindicate the constitutional rights at stake, since in such a case the bringing of the prosecution is itself a constitutional deprivation.”⁴⁸⁸ Moreover, he emphasized that

if an overbroad criminal statute inhibits persons from engaging in constitutionally protected conduct, the opportunity to raise defenses at a criminal trial will not be adequate to protect the underlying constitutional rights, since in that situation persons may choose to avoid the risk of criminal prosecution by abstaining from conduct thought to be proscribed by the statute.⁴⁸⁹

Either of these categories would justify intervention “in order to assure the full protection of federal constitutional rights.”⁴⁹⁰

Justice Brennan’s draft avoided all discussion of whether Harris’s co-plaintiffs—Broslawsky, Dann, and Hirsch—had standing. In other cases during the same period, there was some resistance to the view that one needed to be threatened with prosecution to obtain pre-enforcement review.⁴⁹¹ Brennan apparently made the judgment that it was better to say nothing of the topic in his draft.

Within a day of its circulation, Justice Brennan’s concurrence, written for both *Younger* and *Samuels*, commanded *five* votes: Justices Douglas, Marshall,

486. See Justice William J. Brennan, Jr., Draft Concurrence, *Samuels v. Mackell*, No. 580 (June 4, 1969) (on file with Libr. of Cong., Hugo LaFayette Black Papers [hereinafter Black Papers], Box 435, Folder 4).

487. *Id.* at 1.

488. *Id.* at 1–2.

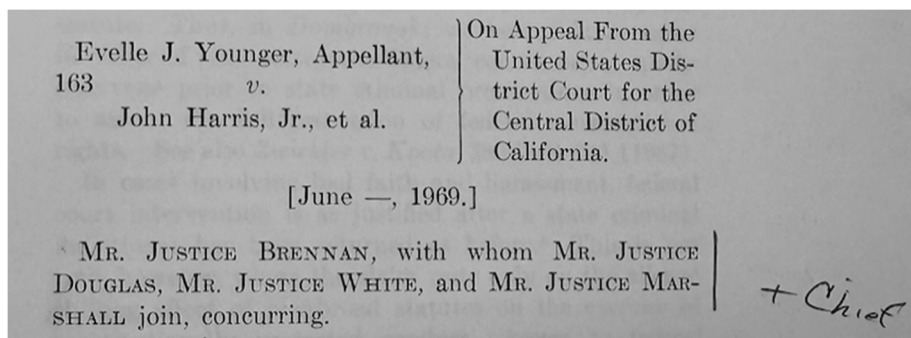
489. *Id.* at 2.

490. *Id.*

491. See Justice Abe Fortas, Draft Opinion 1, *Boyle v. Landry*, No. 244 (May 1, 1969) (on file with Brennan Papers, *supra* note 438, Part I, Box 190) (“I cannot agree with the apparent insistence upon threat of arrest or prosecution as a prerequisite to injunctive or declaratory relief.”).

Warren, White, and himself.⁴⁹² Justice Black garnered fewer votes for his “majority” opinions. For *Samuels*, holding that abstention principles applied to declaratory relief, Justice Black appeared to have as many as four votes: himself, along with Justices Harlan, Stewart, and Douglas.⁴⁹³ And for his opinion in *Younger*, he had only three: himself, Harlan, and Stewart.⁴⁹⁴ Douglas was the only justice to join (1) Brennan’s joint opinion for *Younger* and *Samuels* and (2) Black’s opinion in *Samuels*.⁴⁹⁵

FIGURE 10. JUSTICE BRENNAN’S DRAFT OF JUNE 5, 1969, WITH FIVE JUSTICES NOTED⁴⁹⁶



At the following conference, Justice Brennan victoriously noted that he now had five votes for his opinion. He contended that he was therefore empowered to craft a majority opinion that emphasized the Court’s *Dombrowski*-affirming

492. Memorandum from Justice Thurgood Marshall to Justice William J. Brennan, Jr. (June 4, 1969); Memorandum from Justice William O. Douglas to Justice William J. Brennan, Jr. (June 4, 1969); Memorandum from Justice Byron White to Justice Hugo Black (June 5, 1969); Memorandum from Justice Earl Warren to Justice William J. Brennan, Jr. (June 5, 1969). Each of these memoranda is archived in the Brennan Papers, *supra* note 438, Part I, Box 196, Folder 3.

493. See Brennan Clerks’ Notes OT 1968, *supra* note 478, at VII-VIII.

494. *Id.*

495. Memorandum from Justice William O. Douglas to Justice William J. Brennan, Jr., *supra* note 492 (“Mr. Justice Douglas, while joining the opinion of the Court in the *Samuels* and *Fernandez* cases, also joins this concurring opinion.”). The *Samuels* case was a companion to *Younger* but involved declaratory rather than injunctive relief. See *Samuels v. Mackell*, 401 U.S. 66, 69 (1971).

496. Justice William J. Brennan, Jr., Draft Concurrence 1, *Younger v. Harris*, Nos. 580, 813, 163 (June 5, 1969) (on file with Libr. of Cong., Thurgood Marshall Papers, Box 55, Folder 3).

commitment to protecting freedom of speech when that speech would be imperiled by a prosecution based on an unconstitutionally broad law.⁴⁹⁷

But Justice Stewart argued that it made no sense for Justice Douglas to be on the opinion of Justice Brennan in *Younger*, adopting a broad view of *Dombrowski*, and the opinion of Justice Black in *Samuels*, which cabined *Dombrowski*.⁴⁹⁸ And at some point during this discussion, Douglas became irritated at the suggestion that he had joined inconsistent opinions. Douglas stood, looked at Brennan, and commanded, “Take my name off of your opinion.”⁴⁹⁹ According to clerks from that Term, the result was “utter chaos,” and the Justices thought it best for the case to be argued the following Term.⁵⁰⁰

The following morning, one of Justice Douglas’s clerks urged him to rejoin Justice Brennan’s opinion.⁵⁰¹ Otherwise, that clerk argued, *Dombrowski* would be left at the mercy of what was almost certain to be a more conservative Supreme Court. Indeed, *Dombrowski* might even be “destroy[ed].”⁵⁰² This plea was successful. Douglas called Brennan and agreed to discuss a compromise.⁵⁰³ By that point, however, Justice White believed that important issues were at risk of being decided with insufficient care in the rush of the end of a Term, and he therefore favored reargument.⁵⁰⁴ Justice White’s cautious view prevailed.

2. October 1969 Term (Fall 1969 to Summer 1970)

Younger was reargued in April 1970. By then, the liberal Chief Justice Warren had been replaced by the conservative Chief Justice Burger. But Justice Fortas had not yet been replaced, as President Nixon’s first two nominees had faltered. The case was heard, then, by an eight-member Court.

Even after almost a year had passed, Justice Black’s opinion continued to give both Justice Harlan and Justice Stewart doubts as to whether it was sufficiently protective of constitutional rights. Their concerns were threefold. First, the language in Black’s draft could have been read to prevent relief even when a federal

497. Brennan Clerks’ Notes OT 1968, *supra* note 478, at VIII.

498. *Id.* Here, we mean Justice Black’s opinion in *Samuels*, requiring abstention in a case involving declaratory relief, and Justice Brennan’s opinion in *Younger*, allowing federal courts to intervene to stop irreparable harm.

499. *Id.* (emphasis added).

500. *Id.*

501. *Id.*

502. *Id.*

503. *Id.*

504. *Id.*

claim was brought before a state criminal prosecution had commenced.⁵⁰⁵ A second concern was that the opinion blurred the distinction between judge-made abstention doctrine and congressional commands under the Anti-Injunction Act.⁵⁰⁶ Third, Stewart was “shaken up” at the possibility that Black’s opinion could be read to apply to both criminal and civil proceedings.⁵⁰⁷

Also impeding Justice Black’s (and Justice Brennan’s) attempt to assemble a majority, Justice Douglas circulated a dissent that looked much like the one he would ultimately publish. The Douglas opinion extolled the importance of free speech, lamented attacks on that foundational principle, and opined that some government officials would rather crack down on people who complain of poor conditions than fix those deficient circumstances.⁵⁰⁸

Some evidence indicates that Chief Justice Burger hoped that Justices Black and Brennan could settle their impasse by way of a single opinion, or at least by way of two opinions not sharply at rhetorical odds with one another. A draft opinion circulated by Justice Black in May bore the handwritten words “Justice Black’s final offer” atop the first page.⁵⁰⁹

Justice Brennan did not accept. In June 1970, Brennan circulated a much more detailed opinion than he had a year earlier, an opinion concurring in part and dissenting in part.⁵¹⁰ The basis of the dissent was profound disagreement with Justice Black regarding the ability of abstention principles to block declaratory relief. The twenty-six-page opinion, which received advance input from

505. See Memorandum from Justice John Marshall Harlan II to Justice Hugo Black 1-2, *Younger v. Harris*, No. 4 (May 8, 1970) (on file with Black Papers, *supra* note 486, Box 438, Folder 7); see also Memorandum from Justice Potter Stewart to Justice Hugo Black 1, *Younger v. Harris*, No. 4 (May 12, 1970) (on file with Black Papers, *supra* note 486, Box 438, Folder 7) (expressing support for Justice Harlan’s suggestions).

506. Those two concerns were related: an aggressive reading of the Anti-Injunction Act could prevent all manner of injunctions against illegal prosecutions, regardless of when those prosecutions were initiated. Memorandum from Justice John Marshall Harlan II to Justice Hugo Black, *supra* note 505, at 1-2; see also Justice Hugo Black, Draft Opinion, *Younger v. Harris*, No. 70-2 (Nov. 30, 1970) (on file with Black Papers, *supra* note 486, Box 438, Folder 7) (eliding the distinction between the Anti-Injunction Act and prudential norms and neglecting to specify that the ruling applied to pending criminal cases).

507. Loftus Becker, Richard Cotton & Michael Moran, Law Clerks, U.S. Sup. Ct., Notes, at XX (1970) (on file with Brennan Papers, *supra* note 438, Part II, Box 6, Folder 13).

508. All of this could have been the law a year earlier, if he had not suddenly changed his vote.

509. Justice Hugo Black, Draft Opinion 1, *Younger v. Harris*, No. 70-2 (May 1970) (on file with Brennan Papers, *supra* note 438, Part I, Box 232, Folder 3).

510. Justice William Brennan, Draft Opinion 1-2, *Younger v. Harris*, Nos. 4, 11, 20 (June 1970) [hereinafter Draft of Justice Brennan, June 1970] (on file with Black Papers, *supra* note 486, Box 435, Folder 4); see also Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1096 n.19 (2014) (describing the unpublished opinion as “the fullest statement of Justice Brennan’s views on the declaratory judgment”).

Justice White before circulating,⁵¹¹ was scholarly. It reasoned that federal intervention to prevent grave, irreparable harm is a longstanding pillar of our constitutional tradition, dating back to the days of *Osborn v. Bank of United States*,⁵¹² a landmark 1824 case in which the Court enjoined enforcement of an unconstitutional state tax law with penal dimensions. Brennan’s draft opinion reasoned that Congress had endorsed this mode of enforcement on numerous occasions: in the Reconstruction Era; through the Declaratory Judgement Act of 1933;⁵¹³ and by way of expanding federal-question jurisdiction for civil-rights matters in 1948.⁵¹⁴ He contended that Justice Black’s draft would “disrupt” and “overturn” the “very foundations of federal constitutional adjudication which were laid by acts of Congress and decisions of this Court.”⁵¹⁵ Upon circulating, Justice White quickly joined,⁵¹⁶ as did Justice Marshall.⁵¹⁷

Five votes were not achieved, however, for either Justice Brennan’s or Justice Black’s opinions. As such, Black and Brennan wrote a joint memorandum to Chief Justice Burger on June 22, 1969, describing their inability to reach an agreement with respect to *Younger v. Harris*. “We have conferred in an effort to reach a conclusion,” they wrote.⁵¹⁸ But due to their inability to “make an agreement,” they regretfully “both recommend[ed] that” *Younger* and a related case “go over until next year.”⁵¹⁹ With that, once again, the case was moved to the following Term.

3. October 1970 Term (Fall 1970 to Summer 1971)

When the case was argued yet again in October 1970, the Court had a full complement of nine justices, as Justice Harry Blackmun had replaced Justice Fortas. During that Term, Justice Brennan’s quest to sustain a broad reading of *Dombrowski* did not end, but his tactics fundamentally changed. In December of that Term, Brennan attempted to import this vision of the law into a different

511. Justice Byron White, Justice White’s Comments (n.d.) (on file with Brennan Papers, *supra* note 438, Part I, Box 232, Folder 3).

512. Draft of Justice Brennan, June 1970, *supra* note 510, at 3-4 (citing and discussing *Osborn v. Bank of U.S.*, 22 U.S. 738 (1824)).

513. *Id.* at 9-12.

514. *Id.* at 6-8.

515. *Id.* at 12.

516. Memorandum from Justice Byron White to Justice William Brennan 1-2 (June 15, 1970) (on file with Black Papers, *supra* note 486, Box 438, Folder 7).

517. Draft of Justice Brennan, June 1970, *supra* note 510, at 1.

518. Memorandum from Justice Hugo Black and Justice William Brennan to Chief Justice Warren Burger (June 22, 1970) (on file with Black Papers, *supra* note 486, Box 438, Folder 7).

519. *Id.*

opinion as a means of offsetting Justice Black's language in *Younger*. In the now-obscure case *Perez v. Ledesma*,⁵²⁰ a majority of the Court had voted to apply abstention and block relief for the plaintiffs.⁵²¹ But when Brennan circulated the draft majority opinion, he included much of the language that had appeared the previous Term in his exaltation of the federal judicial role when a state criminal-legal system tramples upon federal rights.⁵²² If successful, the ode to "Our Federalism" in *Younger* would be matched in *Perez* with a deep exposition of America's tradition of constitutional enforcement.

Justice Brennan may have overplayed his hand. For one, the tactic infuriated Justice Black.⁵²³ Justice Black even told his clerks that he refused to retire until the "*Dombrowski* cases," as they had come to be known at the Court, had been decided.⁵²⁴ Likewise, multiple Justices wrote memoranda expressing confusion, observing that Justice Brennan's opinion in *Perez* was at odds with Black's opinions in *Younger* and *Samuels*.⁵²⁵ Worse for Brennan, Black circulated a concurring opinion in *Perez* that gained steam and ultimately became the majority opinion in that case. Brennan's vision of "*Perez-Younger* abstention," as it may have come to be known, was not to be.

In the end, Justice Black sufficiently moderated his opinion in *Younger* to achieve a majority and persuade Justice Brennan not to publish a vigorous concurrence.⁵²⁶ Brennan instead published a short, much milder concurrence, joined by Justices Marshall and White.⁵²⁷ Justice Douglas was the sole dissenter.⁵²⁸

Beyond the rhetoric, the substance of the majority opinion in *Younger* was not all that different from what Justice Brennan had advocated for in *Perez*. The opinion made clear that the case only controlled *pending* criminal

520. 401 U.S. 82 (1971); see Becker et al., *supra* note 507, at XX-XXII.

521. Becker et al., *supra* note 507, at XX-XXII.

522. Justice William J. Brennan, Jr., Draft Opinion 10-12, *Perez v. Ledesma*, No. 60 (Dec. 1970) (on file with Brennan Papers, *supra* note 438, Part I, Box 236, Folder 2).

523. Becker et al., *supra* note 507, at XXII.

524. *Id.*

525. See Memorandum from Chief Justice Warren Burger to Justice William Brennan (Dec. 28, 1970) (on file with Brennan Papers, *supra* note 438, Part I, Box 236, Folder 1); Memorandum from Justice Harry Blackmun to Justice William Brennan (Dec. 28, 1970) (on file with Brennan Papers, *supra* note 438, Part I, Box 236, Folder 1).

526. *Younger v. Harris*, 401 U.S. 37, 38 (1971). See also Funk, *supra* note 6, at 2085, in which Kellen Funk, who has carefully studied Justice Black's successive drafts, observes an important shift from the first draft to the last. The first draft relied on federalism logic, with very little attention to equity, while the final draft brought equity into the main frame.

527. *Younger*, 401 U.S. at 56 (Brennan, J., concurring in the result).

528. *Id.* at 58 (Douglas, J., dissenting).

prosecutions.⁵²⁹ It left no doubt that abstention is inappropriate when there is no adequate opportunity to raise the federal claim in the criminal prosecution.⁵³⁰ And “great,” “immediate,” “irreparable” harm still justified federal intervention in criminal prosecutions.⁵³¹ The majority opinion in *Younger v. Harris*, then, is a blend of Brennan’s substantive views in *Perez* and Justice Black’s rhetorical federalist fire.

Even so, many of Justice Brennan’s views took a serious hit in the Court’s published opinion. As readers will recall, Brennan had initially voted in April 1969 to affirm the district court and put an end to Harris’s criminal ordeal. By May 1969, Brennan was perhaps one unexpected resignation short of translating that legal view into American law. Not only did those arguments fall short, but Brennan’s views on declaratory relief also failed to become the law. Brennan’s draft opinions in 1970 had insisted that declaratory relief was milder than injunctive relief and should be available in a wider range of circumstances.⁵³² Such an outcome would have created a far different legal landscape than that in place today, where declaratory relief and injunctive relief are treated as similarly intruding on pending cases for abstention purposes.⁵³³

Further, in some corners of the federal judiciary, the broad rhetoric of *Younger* has come to displace its narrow holding. States have increasingly urged federal courts to abstain from deciding any issue that would address structural wrongs in important state systems. In a move that one scholar has called “the new comity abstention”⁵³⁴ and that one of us has argued is woefully

529. *Id.* at 41 (majority opinion) (“We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.”).

530. *Id.* at 43-44 (explaining that the doctrine applies “when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief”).

531. *Id.* at 45. In the view of the majority opinion, if the underlying state forum is adequate, then the harm is not generally irreparable. Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1167 (1974) (“The Court has recalled the traditional rule of equity that irreparable harm must be shown for an injunction to issue and reasoned that that prerequisite to injunctive relief is not satisfied if the state proceeding provides an adequate forum for litigating the constitutional issue.”).

532. See Bray, *supra* note 510, at 1096 n.19, 1097 & n.26.

533. *Samuels v. Mackell*, 401 U.S. 66, 69 (1971). In *Steffel v. Thompson*, 415 U.S. 452, 462-73 (1974), however, Justice Brennan’s opinion commanded a majority for the view that injunctive relief and declaratory relief should be treated differently outside the context of pending prosecutions. For a powerful critique, see Bray, *supra* note 510, at 1096-1104.

534. See generally Giammatteo, *supra* note 6 (arguing that federal courts’ recent abstention practices based on principles of comity and federalism constitute a “new comity abstention” doctrine divorced from precedent).

ahistorical,⁵³⁵ a few lower courts have been receptive to these broadsided attacks on a class of constitutional adjudication at least as old as *Osborn*.⁵³⁶

4. *The Forgetting of Harris*

As we have described the internal judicial affairs between 1969 and 1971, readers might have observed that the names of the actual parties have scarcely been mentioned. That is no accident. During the three years of battles between Justices Black and Brennan, there appears to have been very little focus on the collateral impact of these delays. Harris spent years facing felony charges that carried penalties that could have imprisoned him for decades, as Brennan attempted to rescue the legacy of his opinion in *Dombrowski*. Harris's unconstitutional ordeal would likely have ended much sooner if Justice Fortas hadn't resigned and if Justice Douglas hadn't suddenly changed his vote. Ironically, Harris's ordeal also would have ended sooner if Black's 1969 opinion had immediately become the law, given that the state courts would have needed to apply the newly decided *Brandenburg v. Ohio*.⁵³⁷

Most charitably, this tale reinforces the ways that the Court generally focuses on law more than facts. The Court decides issues, not disputes. Issues are necessarily larger than any single dispute, because what the Court announces will impact untold lives for the ages. Less charitably, this is also a tale of ego, wherein two colleagues were perhaps further apart in rhetoric than in substance. Under either of these two interpretations, Harris himself became a mere afterthought.

D. *State-Court Redux*

After the Supreme Court ruled, Harris filed a petition for habeas corpus. Though denied in the trial court without written opinion,⁵³⁸ the petition was

535. See generally Smith, *supra* note 46 (arguing that recent abstention decisions are inconsistent with historical practices in equity).

536. For a fuller discussion, see Giammatteo, *supra* note 46, at 1721-23, which cites ways that this broad approach to abstention "has been invoked, particularly in challenges to court systems like housing court, family court, and even parking court, that affect millions of individuals every year" and argues that "the emerging doctrine has also justified federal courts' dismissals of lawsuits challenging COVID-era safety protocols and litigation over foster care placements that do not address court proceedings at all." See also *infra* Section IV.B (discussing the impact of these practices in wealth-based detention and child-welfare cases).

537. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

538. *In re Harris*, 97 Cal. Rptr. 844, 845 (Ct. App. 1971).

granted on appeal.⁵³⁹ The California Court of Appeal explained that, while it was initially bound by *Whitney v. California* to preserve the Criminal Syndicalism Act,⁵⁴⁰ *Whitney* had been overruled by *Brandenburg v. Ohio*, which declared a similar Ohio statute unconstitutional under the First and Fourteenth Amendments.⁵⁴¹ Holding that the Criminal Syndicalism Act suffered the same constitutional infirmities as the Ohio law, the court granted Harris’s petition.⁵⁴² His legal nightmare finally met its end.

IV. HARRIS IN THE CANON

This Part explores a few implications of Harris’s story – or more aptly, the implications of *not* telling Harris’s story. First, overlooking the racialized surveillance and censorship that Harris faced obscures the true stakes of *Younger*, contributing to the doctrine’s unearned legitimacy through a process of selective memory that treats Jim Crow abuses as uniquely Southern phenomena. Second, this legitimacy laundering may help explain the doctrine’s subsequent expansion beyond its original bounds, as courts have increasingly deployed *Younger* to shield systemic constitutional violations from federal review. Third, the routine coordination between federal and state authorities in surveilling Harris and other activists exposes a stark irony in *Younger*’s celebration of “separate spheres” federalism, revealing how the abstention doctrine can shield intergovernmental cooperation from judicial review. Both individually and together, these implications reveal how the erasure of Harris’s story has enabled *Younger* to function as a doctrinal shield for the very patterns of state-sanctioned constitutional violations it purports to reject. We must therefore reassess not only the doctrine’s canonical status but also its continuing expansion into areas where federal judicial oversight remains essential both for protecting constitutional rights and preventing irreparable harm.

539. *Id.* at 846.

540. *Id.* at 845.

541. *Id.* In *Brandenburg*, the Supreme Court noted that *Whitney* had “been thoroughly discredited by later decisions.” 395 U.S. at 447. These later decisions made clear that the First Amendment prohibits states from forbidding “advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* Because the Ohio syndicalism law – both on its face and as applied – failed to distinguish between “mere advocacy,” which is protected, and “incitement,” which is not, the Ohio law ran afoul of the First and Fourteenth Amendments. *Id.* at 448–49.

542. *Harris*, 97 Cal. Rptr. at 846.

A. *Legitimacy Laundering*

In Federalist No. 78, Alexander Hamilton observed that the judiciary has “neither FORCE nor WILL” and “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”⁵⁴³ Hamilton’s recognition of courts’ inherent institutional weakness underscores a crucial form of capital: the degree to which the public and legal elites accept the judiciary’s decisions. Without direct enforcement powers, courts must rely on their accumulated legitimacy to secure compliance with their decisions. Like financial capital, this legitimacy can be “earned” through actions that enhance public confidence, “spent” when courts issue controversial rulings, and even “laundered” through moves that obscure troubling origins or implications.

As Richard H. Fallon, Jr. has influentially observed, legitimacy operates along multiple tracks.⁵⁴⁴ In the context of judicial power, legal legitimacy refers to the extent to which the informed legal community—judges, lawyers, and scholars—accepts and applies judicial doctrines and decisions as binding authority.⁵⁴⁵ Sociological legitimacy captures the broader public’s acceptance of and compliance with judicial authority, even when they disagree with specific outcomes.⁵⁴⁶ Fallon further distinguishes between discussions of “ideal” legitimacy—whether a doctrine or institution meets the nation’s core democratic values⁵⁴⁷—and “minimal” legitimacy—whether it clears a basic threshold of acceptance.⁵⁴⁸

Legitimacy does not fall along a simple binary.⁵⁴⁹ Rather, it operates on a spectrum between poles of ideal and minimal legitimacy, with doctrines and institutions moving closer to or further from the ideal based on various factors, including their perceived alignment with normative touchstones.⁵⁵⁰ Understanding where doctrines’ or institutions’ legitimacy lies along the spectrum offers a framework for analyzing how courts build and maintain their authority.

The accumulation of judicial legitimacy depends, in part, on constitutional narratives and paradigms that align with the republic’s prevailing moral

543. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

544. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789–94 (2005).

545. *Id.* at 1817–18.

546. *Id.* at 1828–29.

547. *Id.* at 1797.

548. *Id.* at 1798.

549. See Smith, *Abstention*, *supra* note 6, at 2355.

550. *Id.*

intuitions and mores.⁵⁵¹ For example, among the most powerful sources of this capital is the judiciary’s role in dismantling Jim Crow, particularly through *Brown v. Board of Education*.⁵⁵² As Pam Karlan has observed, *Brown* “has become the most revered opinion in the Court’s history,” and “[a] constitutional theory that cannot produce the result reached in *Brown*—the condemnation of de jure Jim Crow—is a constitutional theory without traction.”⁵⁵³ When doctrines can be shown to align with this heroic narrative, they gain enhanced legitimacy while simultaneously reinforcing the institution’s moral authority.

Absences in constitutional memory can also influence perceptions of the judiciary. As Shirin Sinnar has written in the context of procedural cases that omit abhorrent facts, such omissions “can affect broader understanding of the legitimacy of the state practices at issue.”⁵⁵⁴ Historian Mary Dudziak has similarly written that “the erasure of the person from the laws is more than a hole”; it also “aids in the forward-looking construction of ideas about the nature of American justice.”⁵⁵⁵ Absences can, for example, make commonplace injustices appear aberrant.

Lest one doubt these general propositions, consider the extremes: staggering human tragedy surely informs how people view anticanonical cases like *Korematsu* or *Dred Scott*.⁵⁵⁶ In the absence of its tragic context, one might unironically and uncritically cite *Korematsu* for the proposition that national security is a compelling governmental interest. One might cite *Dred Scott* for propositions on originalism, substantive due process, or diversity jurisdiction. But we do not and should not. What is more, consider how much respect the Court would

551. See generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing the relationship between legal norms and narratives about law and the Constitution).

552. See Blackhawk, *supra* note 44, at 1791 (“To better understand our constitutional framework both descriptively and normatively, our canon has long drawn on the paradigm case of slavery and Jim Crow segregation.”). For a collection of sources, see *id.* at 1792 n.7.

553. Pamela S. Karlan, *What Can Brown® Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009).

554. Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 384 (2017). While Sinnar’s insightful analysis focuses on how procedure legitimated the substantive practices challenged in *Ashcroft v. Iqbal*—namely, a policy of rounding up and detaining people in the United States on account of race—this Article’s theory highlights the inverse relationship: how procedural doctrines themselves are legitimized through the erasure of their troubling contexts and consequences.

555. See Mary L. Dudziak, *The Case of “Death for a Dollar Ninety-Five”: Miscarriages of Justice and Constructions of American Identity*, in WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 33, 33 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

556. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 475 (2011) (discussing the conception of cases that must be refuted in constitutional law as anticanon); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) (arguing that cases like *Lochner* represent an anticanon in constitutional law).

command if it were viewed as having produced more opinions akin to *Korematsu* than *Brown*. The Court derives legitimacy from a historical perspective that treats such sins as the extreme exception rather than a defining feature of American law.⁵⁵⁷ As Erwin Chemerinsky has observed, the institution takes on a less reverent aura upon recognizing that “[i]t has rarely lived up to . . . lofty expectations and far more often has upheld discrimination and even egregious violations of basic liberties.”⁵⁵⁸

Jurisdictional doctrines present a particularly complex case in this dynamic, given how casting a doctrine in jurisdictional terms transforms substantive value choices into seemingly neutral procedural rules. The machinery of jurisdiction simultaneously embeds substantive choices—as exemplified by *Younger* abstention’s explicit reliance on normative views about the importance of comity—while characterizing these choices as neutral and procedural. In the field of jurisdiction, substantive choices can be made under the veil of procedure, and substantive consequences can be obscured by their procedural presentation.

The interplay between legitimacy and constitutional memory comes into sharp focus when examining *Younger v. Harris*. The doctrine’s accumulation of enhanced legitimacy operates through a sophisticated process of selective memory: by remembering *Dombrowski* as a case in which federal intervention was necessary to combat Jim Crow’s systemic abuse of state criminal processes, the doctrine is aligned with the judiciary’s heroic civil-rights narrative. Then, by distinguishing *Younger* as distinctive from *Dombrowski*, the Court presents abstention as a neutral jurisdictional rule consistent with the federal judiciary’s protection of civil rights.⁵⁵⁹ This framing results in a dual effect: it casts Jim Crow’s abuses as aberrational rather than systemic, thereby positioning the judiciary as a legitimate guardian against exceptional injustice while simultaneously justifying a more general doctrine of federal-court restraint. This complex movement—invoking the moral authority of civil-rights intervention and

557. Kendall Thomas has critiqued the “ordered image that the historical narrative of constitutional progress imposes on an unruly past.” See Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2664 (1992).

558. See ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 5-6 (2014).

559. Justin Driver has offered an important critique of asymmetry with respect to racial recognition in judicial opinions. This includes what he calls “macro-asymmetry,” wherein race is mentioned in some cases and not mentioned in other like cases. See Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 430 (2012). To avoid creating this level of asymmetry, he argues that “if a judge recognizes race in a particular type of case, that judge should have a strong reason for adopting a different approach in subsequent opinions involving that particular type of case.” *Id.* *Dombrowski* and *Younger* offer an example of the Justices not following this advice. The asymmetry rests not in the failure to describe the parties’ race (*Dombrowski* was white). Rather, this asymmetry rests in the failure to describe the call for racial justice present in both cases.

treating racial subordination as exceptional rather than endemic—exemplifies how constitutional memory and jurisdictional framing can work together to enhance a doctrine’s legitimacy and the Court’s institutional authority.

To see this process of selective memory at work, consider how the *Younger* Court itself drew the distinction between the two cases. The Court explicitly contrasted Harris’s allegations with those of the plaintiffs in *Dombrowski*. The *Younger* Court explained that the *Dombrowski* plaintiffs had alleged that

the threats to enforce the statutes against [them were] not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass . . . and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.⁵⁶⁰

Dombrowski, then, was a case about the harassment of plaintiffs seeking to vindicate racial justice. *Younger*, this passage misleadingly implies, was not.

Academic commentary immediately after *Younger* similarly distinguished the two cases in sharp terms, noting that intervening in Harris’s case was not “as attractive as the cases of the *Dombrowski* era, which involved black civil rights struggles against Southern injustice.”⁵⁶¹ Here, the author’s references to “Southern injustice” and a previous “era” may be instructive, suggesting that *Younger* has been understood as different than *Dombrowski* for reasons related to time, place, manner, and matter.

In the way of time, while Harris was arrested in 1966, the case was decided a few years after the civil-rights movement, six years after the passage of the Voting Rights Act of 1965, and three years after Dr. King’s death.⁵⁶² Even Harris’s 1966 arrest took place after the passage of the Voting Rights Act, the civil-rights movement’s crowning achievement. Domestically, perceptions of Black struggles for equality shifted dramatically during that period.⁵⁶³ And internationally, the

560. *Younger v. Harris*, 401 U.S. 37, 48 (1971) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965)).

561. Note, *Federal Courts—Injunctions—The Civil Rights Act of 1871 Constitutes an Express Statutory Exception to the Anti-Injunction Statute*, 50 TEX. L. REV. 170, 182 (1971).

562. *Dr. King Slain by Sniper*, COM. APPEAL (Memphis, Tenn.), Apr. 5, 1968, at 1.

563. When asked in a Harris Survey in November 1964 whether “Negroes have tried to move too fast,” 34% said “too fast,” 32% said “too slow,” and 34% answered “about right.” By contrast, in mid-October 1966, 85% answered “too fast,” 3% answered “too slow,” and 12% answered, “about right.” See Louis Harris, *Republicans to Score on Two Domestic Issues*, IOWA CITY PRESS-CITIZEN, Oct. 26, 1966, at 10; see also Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1117 (1977) (observing that riots “no doubt affected the Justices’ perception of [civil-rights] protest activities”).

rising importance of the Vietnam War took precedence over race when it came to the United States's standing in the world, reducing pressure to respond to urban unrest in ways that resembled civil-rights-era legislative reforms.⁵⁶⁴

In the way of place, unlike Harris's earlier arrests in Mississippi, his 1966 arrest occurred outside of the Jim Crow South in an urbane coastal city.⁵⁶⁵ After all, it is one thing to say that the criminal-legal system in the South was marred by racists who undermined those systems' integrity. Reaching that same conclusion with respect to a city like Los Angeles was a different matter. If Los Angeles was to be deemed exceptional in the way of harassing Black civil-rights leaders, it is not clear where in the United States was not.⁵⁶⁶

As for subject matter and manner of protest, Harris was no longer advocating for legal access to public accommodations or the right to vote, as he was in Mississippi. He was fighting against racist policing and job discrimination facilitated by deep-seated custom, rather than facially racist laws. As Owen Fiss observed in his classic essay on *Dombrowski*, after 1965, "Protests were no longer confined to civil rights; the antiwar movement and student radicalism moved to the center of the First Amendment arena. The silent sit-in was overtaken by massive and often vituperative demonstrations, such as . . . the student takeovers at Columbia and Cornell."⁵⁶⁷ The "silent premises" of *Dombrowski*—that federal courts could intervene to protect speech in the face of harsh crackdowns on protests—could no longer "carry the day."⁵⁶⁸

Yet, for all of these differences, *Dombrowski* and *Younger* shared more similarities than the Court's contradistinction suggested. In *Dombrowski*, officials invoked and threatened further enforcement of Louisiana's Subversive Activities and Communist Control Law and Communist Propaganda Control Law as a way of retaliating against and chilling the speech of activists fighting for racial justice.⁵⁶⁹ Harris's case involved a similar syndicalism law born of anticommunist fervor being wielded against a Black activist protesting police brutality.

564. MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 17 (2000).

565. Beginning in 1965, the cases in which the Supreme Court has endorsed intervening in criminal and quasi-criminal matters all emerged from the South. See *Dombrowski*, 380 U.S. at 481-82, 489 (originating in Louisiana); *Gibson v. Berryhill*, 411 U.S. 564, 570-72, 581 (1973) (originating in Alabama); *Steffel v. Thompson*, 415 U.S. 452, 454, 472 (1974) (originating in Georgia); *Gerstein v. Pugh*, 420 U.S. 103, 105, 119-26 (1975) (originating in Florida).

566. Cf. Fiss, *supra* note 563, at 1117 ("[T]he civil rights movement had matured: it had lost its regional focus. If the rules were changed to benefit the movement, the changes would have a national scope.").

567. *Id.*

568. *Id.*

569. *Dombrowski*, 380 U.S. at 482.

And in both *Dombrowski* and *Younger*, the prosecution persisted with no reasonable chance that it would withstand constitutional scrutiny. After all, the Supreme Court ruled in *Brandenburg* that words are protected when they do not incite imminent harm.⁵⁷⁰ No imminent danger flowed from the pamphlets Harris distributed, but Harris’s prosecution persisted for years after *Brandenburg*.

Similarity also exists between the subject matter of the Southern civil-rights movement and the advocacy that later took place in Los Angeles. In some ways, Harris and Dann’s journey through the 1960s personifies the linkages between these movements, as they traveled from Mississippi to Los Angeles. SNCC’s calls in 1963 for a planned economy, a “complete change of the power structure,” and economic equality bore strong conceptual similarity to themes that filled the pamphlets that Harris was arrested for distributing in 1966.⁵⁷¹ In addition, much of the civil-rights work in Southern California focused on issues often associated with the traditional civil-rights movement, including school desegregation and housing discrimination.⁵⁷² Southern civil-rights leader Fannie Lou Hamer, whom Harris had worked alongside in the South, wrote a letter of support upon his arrest in Southern California.⁵⁷³

The *Younger-Dombrowski* distinction thus exemplifies how legitimacy laundering operates in practice. This process of selective memory and forgetting—remembering *Dombrowski* as a case about Southern injustice while forgetting the similar substantive stakes in *Younger*—demonstrates how jurisdictional doctrines can accumulate legitimacy-capital through the erasure of their troubling implications. Without caution and care in examining these doctrinal moves, we risk passing this myopia on to new generations of lawyers, perpetuating a cycle where procedural neutrality masks substantive choices about the scope of federal-court protection for civil rights.

570. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

571. Resols. Comm., *supra* note 97; see Harris Flyer 1, *supra* p.63, Figure 6; Harris Flyer 2, *supra* p.64, Figure 7; Harris Flyer 3, *supra* p.65, Figure 8.

572. See *Adoption of Firm Policy Delayed*, 44 OPEN F., no. 8, Aug. 1967, at 1, 2 (relaying that while the school boards of Berkeley, Sacramento, and Riverside had adopted policies to tackle de facto segregation, “Los Angeles has not”). In the interview for this Article, Broslawsky described working on those issues through marches and sit-ins. On one occasion, he marched in a protest led by Dr. Martin Luther King, Jr. He also describes how he and others protested in Los Angeles when horrific events took place many miles away in the Deep South, such as the bombing of a Birmingham church that killed four little girls. Telephone Interview with Farrel Broslawsky, *supra* note 11.

573. DANN, *supra* note 116, at 203.

B. Distortion Through Unearned Legitimacy

The process of legitimacy laundering described above helps explain *Younger*'s expansion beyond its original bounds.⁵⁷⁴ When courts mischaracterize a doctrine, they can create an unearned impression of alignment with normative ideals. This perceived alignment facilitates the doctrine's canonization,⁵⁷⁵ which in turn leads courts to treat the case as embodying broad principles rather than specific constraints. As Jack Balkin and Sanford Levinson have observed, certain canonical narratives tell "stories about a moment when the Constitution was properly understood, a benchmark from which later courts and politicians" are expected not to "debase[]" or stray.⁵⁷⁶ The sanitized version of *Younger* has become such a benchmark—with it, federal courts invoke an idealized vision of an era that affirmed federal-state comity. The result is that subsequent decisions invoke *Younger* for sweeping propositions while paying insufficient attention to the original case's distinguishing features. *Brown v. Board of Education* exemplifies this phenomenon at its extreme: its canonical status, achieved in part through careful curation of constitutional memory, has allowed it to be deployed variously as standing for colorblindness across all governmental spheres, wholly disconnected from the context of subordination and caste.⁵⁷⁷

A similar interpretive shift, albeit on a smaller scale, has occurred with *Younger*. The sanitization of the doctrine's origins—the erasure of racial surveillance and the reframing of Harris's case as routine rather than retaliatory—has facilitated the type of canonical narrative Balkin and Levinson describe. The Fifth Circuit, for example, has treated *Younger* as marking a moment when proper constitutional understanding was restored after an earlier era in which "[i]deas of deference to state governmental systems or state courts seemed to have been overshadowed by the Supreme Court's enthusiasm for effectuating novel notions of social justice and personal rights."⁵⁷⁸ This canonical framing may explain why courts have felt empowered to deploy what scholars have termed "free-floating federalism"⁵⁷⁹ or "the new comity abstention,"⁵⁸⁰ expressly disavowing the nuances of *Younger* doctrine in favor of broader notions of federal-state relations.

574. For a description of this expansion, see Smith, *supra* note 46, at 1470.

575. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1019 (1998).

576. *Id.* at 990.

577. See Ian F. Haney López, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1000–01 (2007).

578. *Daves v. Dallas County*, 64 F.4th 616, 624 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 548 (2024).

579. Smith, *supra* note 46, at 1474.

580. Giammatteo, *supra* note 6, at 1708.

This expansion is particularly troubling where individuals face immediate, irreparable harm from state systems – such as pretrial detention without ability-to-pay hearings or child removal without adequate process – yet are denied federal-court access despite their cases falling outside *Younger*’s express scope.

As documented in previous work, this expansion manifests in several concerning ways. First, at least one court has abandoned the established timeliness exception to criminal abstention. Under that important exception, if great and irreparable harm will befall the plaintiff before the state prosecution offers a forum to raise a federal constitutional objection, abstaining is improper.⁵⁸¹ Recently, the Fifth Circuit outright rejected the validity of this exception.⁵⁸² In *Daves v. Dallas County*, the refusal to recognize this exception facilitated the dismissal of the plaintiffs’ claims alleging that they were jailed before trial *for weeks or months* without hearings to determine their ability to pay bail.⁵⁸³ The dismissal of these federal claims undermined *Younger*’s recognition that state proceedings must offer an opportunity to address federal violations before irreparable harm occurs.⁵⁸⁴ Those plaintiffs experienced precisely the kind of “great and immediate” harm – beyond the cost and anxiety of a prosecution – for which the *Younger* Court expressly permitted intervention.

Second, other courts have suggested that plaintiffs must exhaust collateral state remedies before seeking federal relief, despite the Supreme Court’s clear guidance that § 1983 requires no such exhaustion.⁵⁸⁵ This new de facto exhaustion requirement has appeared in cases like *Oglala Sioux Tribe v. Fleming*, in which tribal plaintiffs challenged South Dakota’s emergency child-removal procedures.⁵⁸⁶ The Eighth Circuit vacated injunctive relief on abstention grounds, reasoning that South Dakota courts could address the plaintiffs’ legal objections through state high courts or courts of general jurisdiction.⁵⁸⁷ This functional exhaustion requirement contradicts the Supreme Court’s decisions in *Steffel v.*

581. See *Gibson v. Berryhill*, 411 U.S. 564, 577 & n.16 (1973); cf. *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975) (observing that pretrial custody “does not present the high probability of substantial harm”).

582. *Daves*, 64 F.4th at 632-33.

583. *Id.* at 621.

584. See Smith, *supra* note 46, at 1470-75.

585. *Id.* at 1473-74.

586. 904 F.3d 603, 610 (8th Cir. 2018).

587. *Id.*

*Thompson*⁵⁸⁸ and *Patsy v. Board of Regents*,⁵⁸⁹ which find that exhaustion requirements are incompatible with § 1983.

Third, and most broadly, courts have begun to apply abstention whenever litigants challenge systemic illegalities within state criminal systems, citing unbound federalism principles rather than respecting *Younger*'s careful limits. In *Dixon v. City of St. Louis*, for instance, the Eighth Circuit overturned a federal district-court decision that required additional procedural safeguards for arrestees, broadly citing the "principle of comity."⁵⁹⁰ Similarly, the Fifth Circuit in *Daves* relied on free-floating federalism, dismissing *Younger* doctrine's precise rules as "unrelated nuances" in favor of broad and undefined conceptions of state sovereignty.⁵⁹¹ At the heart of this expansion lies a willingness to countenance ongoing, unconstitutional, and irreparable harm. The consequences are profound. Wealth-based detention of the sort at issue in *Daves*, for example, affects hundreds of thousands of persons on any given day in the United States, and millions of Americans annually.⁵⁹²

588. 415 U.S. 452, 472–73 (1974) ("[W]e have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.").

589. 457 U.S. 496, 502 (1982) ("Although we recognize that the 1871 Congress did not expressly contemplate the exhaustion question, we believe that the tenor of the debates over § 1 supports our conclusion that exhaustion of administrative remedies in § 1983 actions should not be judicially imposed.").

590. 950 F.3d 1052, 1056 (8th Cir. 2020) (quoting *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1074 (7th Cir. 2018)).

591. *Daves v. Dallas County*, 64 F.4th 616, 626 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 548 (2024). One of us has observed elsewhere that while *Daves* also

purport[s] to rely on *O'Shea v. Littleton*, 414 U.S. 488 (1974),] to override the precise rules and exceptions governing *Younger* abstention, this deployment of free-floating federalism is actually an expansion of Supreme Court doctrine. The Court has struck a careful balance in applying *Younger* doctrine to ensure that abstention does not cross the line into abnegation of federal courts' duty to enforce the Constitution when a plaintiff faces, in the words of *Younger* itself, "great and immediate" harm. Waving one's hand and proclaiming "*O'Shea*" when someone challenges a systemic wrong in a criminal legal context does not suddenly hollow out [the limits that the Court has placed on the doctrine].

Smith, *supra* note 46, at 1476.

592. Smith, *Abstention*, *supra* note 6, at 2357; see also Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. JUST. 1 (2019), <https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention> [https://perma.cc/LWA4-JKG8] ("Approximately two-thirds of the more than 740,000 people held in locally run jails across the United States have not been convicted of a crime—they are presumed innocent and simply waiting for their day in court."); Zhen Zeng, *Jail Inmates in 2016*, BUREAU OF JUST. STAT. 1 (2018), <https://bjs.ojp.gov/content/pub/pdf/ji16.pdf> [https://perma.cc/DW45-66F4] (noting that over ten million people were admitted to jail in 2016).

The Court’s newly exposed internal struggle to craft *Younger*’s precise limitations provides a compelling reason to adhere to the Court’s actual words, rather than embracing an expansive divination of the opinion’s spirit. Indeed, given the Justices’ careful deliberations in an attempt to preserve a role for federal courts, it is nearly unthinkable that *Younger* would have come out the same way if John Harris had faced the kind of routine pretrial detention that has become commonplace today – if, instead of being released on bail, he had been incarcerated during the years his case was being debated. If prosecution under an unconstitutional law presented a close question of irreparable harm, the physical deprivation of liberty through pretrial detention surely does not. Understanding *Younger*’s origins helps reveal the manifestation of a reality the Court sought to prevent: the transformation of a limited doctrine of restraint into a broad shield for systemic constitutional violations.

C. *The Separate-Spheres Myth*

A final irony bears discussion. Despite the *Younger* Court’s repeated emphasis on “*separate state governments*” performing “*separate functions*” in “*separate ways*,” these supposedly separate spheres were thoroughly intertwined in the underlying case. Federal-local cooperation and coordination formed the backbone of efforts to surveil, disrupt, and control Black liberation movements and far-left organizations in the 1960s.⁵⁹³ This coordination operated at multiple levels: local “red squads” routinely shared intelligence with federal authorities;⁵⁹⁴ federal and state governments jointly developed strategies to criminalize activists;⁵⁹⁵ and Congress actively monitored local efforts to control Black and leftist movements in Los Angeles, even calling local officials to testify about their surveillance

593. See *supra* Section II.B.

594. See DONNER, *supra* note 26, at 85 (“A key FBI tactic in maintaining ties with the police community and at the same time preventing challenges to the bureau’s primacy was to cultivate and cooperate with factions in police structures favorable to its hegemonic claims. The riots of the sixties and the need for a cooperative approach to tactical problems also brought local and federal agencies closer together.”); cf. GREGG L. MICHEL, *SPYING ON STUDENTS: THE FBI, RED SQUADS, AND STUDENT ACTIVISTS IN THE 1960S SOUTH* 182 (2024) (describing federal-local cooperation in law enforcement); REGIN SCHMIDT, *RED SCARE: FBI AND THE ORIGINS OF ANTICOMMUNISM IN THE UNITED STATES, 1919-1943*, at 122 (2000) (“The Bureau files confirm that the Bureau in a number of instances used local police forces to collect information and execute raids against radicals.”).

595. DONNER, *supra* note 26, at 208 (describing the use of local traffic laws, for example, to ensnare activists in a joint effort with the FBI).

programs.⁵⁹⁶ The wall between federal and local authority that *Younger* celebrated was, in reality, more membrane than barrier, permitting constant exchange and mutual reinforcement between different levels of government. This pattern of federal-local cooperation, far from being a historical anomaly, has become a persistent feature of American law enforcement.⁵⁹⁷

This reality of intergovernmental coordination undermines a core premise of the abstention doctrine: that federal-court intervention would disrupt the separate functioning of state systems. When state and federal authorities are already working in concert to surveil and prosecute, abstention serves not to protect separate spheres but to shield collaborative enforcement efforts from federal judicial review. Moreover, *Younger*'s decontextualized canonical status in federal-courts doctrine has helped obscure the interactive nature of American federalism, promoting a vision of dual sovereignty that maps poorly onto historical and contemporary practice. Rather than separate systems operating in parallel, federal and state authorities have long engaged in complex patterns of cooperation, competition, and mutual reinforcement—patterns that abstention doctrine elides.

CONCLUSION

A growing body of scholarship has uncovered the previously unknown racialized origins of canonical federal-courts cases.⁵⁹⁸ These recoveries are

596. See *Subversive Influences*, *supra* note 62, at 718–20 (statement of Evelle J. Younger) (illustrating, through Younger's testimony, Congress's scrutiny of local riot-management practices); *id.* at 1123 (statement of James C. Harris, detective with the district attorney's intelligence detail); *id.* at 1222 (statement of Clayton R. Anderson, lieutenant in the district attorney's intelligence detail); see also *id.* at 1128 (statement of Rep. William M. Tuck) ("Whether or not Communists and black nationalist elements can be said to have played a major role in the initial Watts riot, it is clear that their desire and intent is to foment racial violence in this country and that they are doing everything possible to accomplish that end.").

597. For an illuminating discussion of the role that federal-state coordination has played in diminishing liberty in contemporary times, see generally Sheldon Evans, *Towards a Federalism(s) Framework of Punishment*, 115 J. CRIM. L. & CRIMINOLOGY 491 (2025), which discusses federalism and its impact on punishment; and Daniel C. Richman & Sarah Seo, *How Federalism Built the FBI, Sustained Local Police, and Left Out the States*, 17 STAN. J. C.R.-C.L. 421 (2022), which discusses collaborative federalism between the FBI and local police departments.

598. See, e.g., Charquia Wright Fegins, *The Untold History of Ex Parte McCordle and Ex Parte Yeger* 1–7 (2025) (unpublished manuscript), <https://ssrn.com/abstract=5272790> [<https://perma.cc/6TA7-LCH8>] (placing two Reconstruction era cases within their context of voter intimidation and lynching); Helen Hershkoff & Fred Smith, Jr., *Reconstructing Klein*, 90 U. CHI. L. REV. 2101, 2172 (2023); Sinnar, *supra* note 554, at 384. See generally CHEMERINSKY ET AL., *supra* note 8 (placing federal-courts cases in their historical, and sometimes racially

significant, in part because constitutional memory is a powerful legal force in legal argumentation,⁵⁹⁹ as are asymmetric absences in that memory.⁶⁰⁰ Recovering forgotten histories helps ensure that marginalized individuals’ democratic contributions to the nation’s constitutional order are included in our constitutional memory.⁶⁰¹ This is broadly true of American law,⁶⁰² and the field of federal courts is no exception.

The language of federal-courts doctrine itself—“passive virtue,”⁶⁰³ “discretion,”⁶⁰⁴ the pronoun “our”—reveals how deeply human perspectives are already implicitly woven into this supposedly “neutral,”⁶⁰⁵ “trans-substantive”⁶⁰⁶ field.

inflected, contexts). For earlier expositions of canonical cases that serve a similar function, see Laurel Robel, *Riding the Color Line: The Story of Railroad Commission of Texas v. Pullman Co.*, in *FEDERAL COURT STORIES* 163, 163–89 (Vicki C. Jackson & Judith Resnik eds., 2010); and Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and Federal Courts*, 81 N.C. L. REV. 1927, 2028–38 (2003).

599. For prominent scholarly accounts of constitutional memory, see generally Siegel, *supra* note 39; and JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* (2024).

600. See Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1200–04 (2023); Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 43 (2024); Driver, *supra* note 559, at 430.

601. See Fred O. Smith, Jr., *The Other Ordinary Persons*, 78 WASH. & LEE L. REV. 1071, 1078–79 (2021) (“If one generation subverts the memory, will, and reputation of a group, then members of that group will sometimes be denied an equal place in the nation’s collective memory.”). See generally Siegel, *supra* note 597 (highlighting the importance of women’s stories in the history and tradition of substantive-due-process rights).

602. For recent scholarship documenting important absences in other legal academic fields, see generally David A. Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering Queen v. Hepburn*, 2022 SUP. CT. REV. 413, 413–16; K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022); Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1119 (2022); Darren Lenard Hutchinson, “With All the Majesty of the Law”: Systemic Racism, Punitive Sentiment, and Equal Protection, 110 CALIF. L. REV. 371 (2022); Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. 674 (2022); and Blackhawk, *supra* note 44.

603. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40–42 (1961); see also William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 188 (2023) (observing that one common way of thinking about justiciability sounds in “judicial virtue”).

604. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985).

605. Consider the seminal article by one of the founders of the field, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The article’s critique of *Brown* has largely been forgotten in relation to the article’s routine citation. See Karlan, *supra* note 553, at 1049–50.

606. See generally David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371 (2010) (calling federal civil procedure “trans-substantive”).

These words embody human values, judgment, and belonging.⁶⁰⁷ What is “virtue” without any reference to humanity? What is meant by “discretion” without a recognition of the role of human judgment in constitutional adjudication? What is “our” without a reference to a shared group, a group that some are in and others (wittingly or unwittingly) are not? To be sure, for law to function, narratives must often be calcified into abstractions to some degree. But we must resist the temptation to transform jurisdictional principles into pristine marble axioms, stripped of their origins in human suffering, colonialism, and American apartheid, washed of their blood.

Harris’s own words offer a fitting conclusion to this human-centered exposition of *Younger v. Harris*. Late in his life, in an essay, Harris contemplated the civil-rights struggles of the 1960s, urging future generations to glean wisdom from that era’s quest for racial and economic equality.⁶⁰⁸ “Pass[] the lessons on,” he advised.⁶⁰⁹ The urgency of his call for historical reflection reverberates through time. The issues that defined his fight—systemic racism, economic inequality, and state violence—continue to mutate in form while persisting in substance.

607. For important expositions of the ways that “neutral” principles often embody substantive values, see Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1, 7–8 (2023); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 680 (1989); and Cover, *supra* note 551, at 4–11.

608. John Harris, *Preface* to DANN, *supra* note 116, at 13, 13–14.

609. *Id.* at 14.

APPENDIX

APPENDIX FIGURE 1: DEFEND JOHN HARRIS FLYER 1⁶¹⁰

SUPPORT JOHN HARRIS !

SCHEMIDT 29 WILL MARK the beginnings of the first use of the State of California's "Criminal Syndicalist" law since 1937. This law, which was passed in 1919, states that it is illegal to speak or leaflet so as to advocate "change in industrial ownership" or to "effect radical change" by so-called criminal means. It is an anti-labor law which was last used in 1937 to convict farm labor organizers in the Sacramento Valley in 1937. The law was written to deal with revolutionary socialists and is a candid reflection of the undemocratic essence of American society, in which all power and wealth is concentrated into the hands of a tiny ruling class.

FOR BLACK LIBERATION

Now it is being used to intimidate those who speak out against the countless inhumanities and acts of brutality committed in the name of "freedom" at home and around the globe. This particular charge of "criminal syndicalism" is being directed against John Harris, a Progressive Labor Party member, who has been arrested and charged with the murder of a black man in the 1968 election. He was arrested because he opposed the U.S. Government's economic war in Vietnam. He was arrested because he urged his Black brothers not to fight for the Imperialist enemy. He was arrested because he was a criminal, a revolutionary, a member of the Progressive Labor Party and proud of it. He was arrested because he was a man who had the guts to fight back the U.S. imperialist system must be destroyed and replaced by a socialist system.

The arrest of John Harris is part of a general political attack on the Afro-American people in this country. Similar attacks are being made in other countries. In England, especially in London, the Black Panther Party has been the target of a similar attack. In the U.S., especially in the South, the Black Panther Party has been the target of a similar attack. In the U.S., especially in the South, the Black Panther Party has been the target of a similar attack.

AGADNST U. S. AGGRESSION IN VIETNAM

The Progressive Labor Party stands clear in its opposition to the systematic extermination of Black people in the U.S. and supports their demand for self-determination, the right to decide their own destiny, and the right to be free from all forms of discrimination and oppression. The Party's opposition to the Vietnam War is based on the fact that the U.S. is engaged in a war of aggression against the Vietnamese people in their own land. The Party's opposition to the Vietnam War is based on the fact that the U.S. is engaged in a war of aggression against the Vietnamese people in their own land. The Party's opposition to the Vietnam War is based on the fact that the U.S. is engaged in a war of aggression against the Vietnamese people in their own land.

STOP THE PROCEEDINGS!

In Los Angeles Superior Court November 29, Harris' attorneys Frank Pestana of the National Lawyers Guild and Al Wirth of the American Civil Liberties Union will present a motion seeking to halt the proceedings on the basis that the "Criminal syndicalist" law is unconstitutional and violates the defendant's right of free speech.

invokes the argument a right of free speech. This is just the beginning of a long process of legal and political maneuvers that will be carried out by the ruling class in the Harris case. Your support, both moral and financial, is urgently needed to insure victory in this case. Please send contributions and statements of support as soon as possible to: Progressive Labor Party, P.O. Box 19724, Los Angeles 19, Calif.

PROTEST THE HEARING NOVEMBER 29!
 Picket line begins at 8 a.m. outside the Hall of Justice, 211 W. Temple Street, Los Angeles.

come to a
PARTY
for the defense of
—John Harris—
Black Revolutionary, Communist,
ACCUSED Criminal Syndicalist
Drinks
Fun
8:30 →
ON FRIDAY NIGHT—
November 25
1625 S GRANVILLE AVE
Apt. #3
(\$1.00 Donation)
(For info call 394-6804
662-8729)

610. Comm. to Def. John Harris, Support John Harris! Flyer (1966), in *Subversive Influences*, *supra* note 62, at 1254-55.

APPENDIX FIGURE 2: DEFEND JOHN HARRIS FLYER 2⁶¹¹

PROGRESSIVE LABOR PARTY CHARGES DEF. JOHN HARRIS ON TRIAL FOR CRIMINAL SYNDICALISM

SUPPORT BLACK MILITANTS

Come to the Courtroom - Nov. 29

On September 20, 1966, John Harris, militant Black leader and Progressive Labor Party organizer in Watts, was arrested on the charge of criminal syndicalism. His "crime" -- passing out leaflets at the Deadwyler inquest, pointing out that the cop who shot Deadwyler was a murderer and denouncing the system that creates such a "legal" murder.

John now faces 16 years in prison.

The Criminal Syndicalism Law is an anti-labor law passed in '19, and was last used to convict Team labor organizers in the Sacramento Valley in 1937.

In Court, Tuesday, November 29th, at 9:00 A.M., Harris' attorneys will present a motion to halt the proceedings on the basis that the law is unconstitutional.

LET THE PUBLIC KNOW THAT YOU SUPPORT JOHN HARRIS AND ALL OTHERS WHO ARE FIGHTING AGAINST THE INFAMITY OF A SYSTEM WHICH LEGALIZES "OFFICIAL" KILLINGS OF BLACK PEOPLE, AND IMPRISONES THOSE WHO PROTEST THIS INJUSTICE.

Show Your Support - - -

GO TO THE HALL OF JUSTICE, 211 W. Temple St., Los Angeles - Tuesday, Nov. 29th

Picket Line begins at 8:00 A.M.

PARK THE CAR -- DEPARTMENT 105 -- HEARING SET FOR 9:00 A.M.

611. Comm. to Def. John Harris, Support Black Militants Flyer (1966), in *Subversive Influences*, *supra* note 62, at 1253.

APPENDIX FIGURE 3: DEFEND JOHN HARRIS FLYER ⁶¹²

forum on -
**BLACK
LIBERATION**
and
CRIMINAL SYNDICALIST LAW

hear **JOHN HARRIS** — PROGRESSIVE LABOR PARTY
ORGANIZER IN WATTS.
RECENTLY ARRESTED FOR "CRIMINAL
SYNDICALISM" FOR THE "CRIME" OF
PASSING OUT LEAFLETS DENOUNCING
THE POLICE KILLING OF LEONARD
DEADWYLER & THE SYSTEM WHICH
ALLOWS SUCH A "LEGAL" MURDER.

FRANK GREENWOOD — NOTED PLAYWRITE,
AUTHOR OF "BURN, BABY BURN", & HEAD
OF THE AFRO-AMERICAN CULTURAL ASSOC.

ROSE ROSENBERG — ATTORNEY, FIGHTER FOR
CIVIL RIGHTS & CIVIL
LIBERTIES & VETERAN OF THE MISSISSIPPI
FREEDOM RIDES.

SAT. DEC. 10TH 8:PM
at The FIRST UNITARIAN CHURCH
(CHANNING HALL) 8TH & VERMONT
donation \$1.00

Spon. By the Committee to Defend John Harris

612. Comm. to Def. John Harris, Forum on Black Liberation and Criminal Syndicalist Law Flyer (1966), in *Subversive Influences*, *supra* note 62, at 1248.