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The Radical Roots of the Representative Jury

ABSTRACT. For most of American history, the jury was considered an elite institution, composed of "honest and intelligent men," esteemed in their communities for their "integrity," "reputation," or "sound judgment." As a result, jurors were overwhelmingly male, jurors were overwhelmingly white, and jurors disproportionately hailed from the middle and upper social classes. By the late 1960s, an entirely different, democratic conception of the jury was ascendant: juries were meant to pull from all segments of society, more or less randomly, thus constituting a diverse and representative "cross-section of the community." This Article offers an intellectual and social history of how the "elite jury" lost its hegemonic appeal, with particular emphasis on the overlooked radicals—anarchists, socialists, Communists, trade unionists, and Popular Front feminists—who battled to remake the jury. This Article offers a novel look at the history and tradition of the American jury, demonstrating how the Sixth Amendment's meaning was—gradually, unevenly, but definitively—reshaped through several decades of popular struggle, grassroots mobilization, strategic litigation, and social-movement contestation.

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INTRODUCTION

In 1975, when the U.S. Supreme Court first held that the Sixth Amendment right to a jury trial necessarily contemplates a jury drawn from a "fair cross section of the community," the outcome seemed like a "foregone conclusion."[1] Congress had already declared in 1968 that federal defendants had a statutory right "to grand and petit juries selected at random from a fair cross section of the community,"[2] and the Court was gradually recognizing that "the essential feature of a jury obviously lies . . . in . . . community participation and shared responsibility," which ("probably") meant juries large enough to serve as "representative cross-section[s] of the community."[3] Notably, as it took shape, the Supreme Court's fair-cross-section doctrine eschewed any focus on discriminatory intent: a jury drawn from an unrepresentative pool generally cannot be "impartial" within the meaning of the Sixth Amendment, regardless of whether the disparities are attributable to a clerk's discriminatory animus or an accidental computer glitch.[4] True, the Supreme Court has never required any particular petit jury to be perfectly, or even roughly, "representative" of the local community. The Court has repeatedly rejected the suggestion that a defendant might have the right to be judged by jurors sharing some particular identity or trait.[5] But the ideal of the jury that constitutes a fair cross-section of the community—or, what I will generally refer to as the "representative jury" throughout this Article—has triumphed.[6] When a high-profile jury trial occurs, we are accustomed to asking whether the petit jury is representative of the community from which it is

1. Taylor v. Louisiana, 419 U.S. 522, 527, 535 (1975).

2. Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53, 54 (codified at 28 U.S.C. § 1861).

3. Williams v. Florida, 399 U.S. 78, 100 (1970).

4. Duren v. Missouri, 439 U.S. 357, 371 (1979) (Rehnquist, J., dissenting) ("[U]nder Sixth Amendment analysis intent is irrelevant . . . ."). *But see* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 165-76 (2012) (critiquing lower courts' confusion on this point).

5. *See, e.g.*, Holland v. Illinois, 493 U.S. 474, 483 (1990); *Taylor*, 419 U.S. at 538; Fay v. New York, 332 U.S. 261, 284 (1947).

6. *See, e.g.*, People v. Wheeler, 583 P.2d 748, 759-60, 762 (Cal. 1978) ("[T]he goal of an impartial jury is pursued by insuring that the master list be a representative cross-section of the community and that the venire and the proposed trial jury be drawn therefrom by wholly random means . . . . [A] party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.").

drawn.[7] Americans expect, and want, juries to mirror the demographics of the community—if not in every case, at least in the aggregate.[8]

But this conception of the jury, now common sense, is new. In 1925, only a handful of radicals would have recognized it.[9] Indeed, for most of American history, juries were *not* "cross-sections" of the community, nor were they legally required to be "representative" in any meaningful sense. Most jurisdictions limited jury service to "honest and intelligent men . . . esteemed in the community for their integrity, good character and sound judgment."[10] Judges, jury commissioners, and "key men" tasked with identifying suitable jurors populated their lists with upstanding citizens who, in their minds, satisfied these subjective statutory requirements and were "above average" in every regard. The predictable result: jurors were men, jurors were white, and jurors disproportionately hailed from the middle and upper social classes.[11] As Judge Learned Hand wrote in 1950, defendants could repeat the phrase "cross-section" ad nauseum, but it was "idle

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7. *See, e.g.*, Calder McHugh, *How Much Do We Really Know About the Trump Jury?*, POLITICO MAG. (Apr. 19, 2024, 7:27 PM EDT), https://www.politico.com/news/magazine/2024/04/19/donald-trump-jury-00153466 [https://perma.cc/E3F8-GZJU] ("What we've learned after a week filled almost entirely with the process of jury selection is that the jurors appear to represent a reasonable cross section of the kind of people you generally find in Manhattan.").

8. Philip Bump, *The Chauvin Jurors Deserve Better than Partisan Armchair Assessments of Their Decision*, WASH. POST (Apr. 21, 2021), https://www.washingtonpost.com/politics/2021/04/21/chauvin-jurors-deserve-better-than-partisan-armchair-assessments-their-decision [https://perma.cc/G2SP-MLF4] ("The jury that convicted former police officer Derek Chauvin on murder and manslaughter charges on Tuesday looked the way we expect juries to look. It was a cross-section of the Minneapolis community in which Chauvin worked and in which his victim, George Floyd, died."); Spencer S. Hsu, *Case of George Floyd Protester Reveals D.C. Is Missing Black Jurors*, WASH. POST (Mar. 4, 2023), https://www.washingtonpost.com/dc-md-va/2023/03/04/dc-missing-black-jurors-federal-court [https://perma.cc/T5NC-ND2R] ("It is a mystery hiding in plain sight: Why do juries in federal court in Washington, D.C., have fewer Black people than juries seated in the city's local court, and why are juries in both courts less diverse than the city's population?").

9. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99 (1994) ("The cross-sectional jury is so familiar to us today that we forget how modern is its triumph."); DENNIS HALE, THE JURY IN AMERICA: TRIUMPH AND DECLINE 202 (2016) ("[T]he guiding principle of the Jury Selection and Service Act of 1968 . . . has become so much a part of the conventional wisdom that many are surprised at how new it is."); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 17 (1977) (noting the defeat of "elite-jury proponents" and the "commitment to summoning jurors from the whole community, without special qualifications, through random selection" as embodied in the Federal Jury Selection and Service Act of 1968).

10. ALA. CODE § 8603 (1923); *see also* HALE, *supra* note 9, at 140 ("In the traditional view, jurors—the famous 'twelve men good and true'—were a cut above the average citizen, marked by the special qualities thought to be necessary for judgment. These qualities were variously described as 'integrity,' 'reputation,' 'intelligence,' and 'character.'").

11. *See infra* notes 87-112 and accompanying text.

to talk of the justness of a sample, until one knows what is the composition of the group which it is to represent."[12] Historically, jurors were citizens possessing "intelligence, character and general information," so if a method of summoning jurors "resulted in weighting the [jury] list with the wealthy" (a disproportionate number of whom supposedly boasted such qualities), surely it could not be unlawful.[13] More recently, Justice Thomas has made a related point: the constitutional requirement that juries be drawn from a representative cross-section of the community "seems difficult to square with the Sixth Amendment's text and history."[14] The representative jury is not the inheritance of some unbroken tradition, but rather a deliberate, relatively recent departure from it.

To be sure, the democratic promise of a jury as a body of one's "peers" dates to the Magna Carta. "[J]urors and voters were conceptualized as complementary legislators" at the Founding,[15] with the jury box giving "the common people [as jurors]" a mechanism to wield control in the judiciary.[16] Throughout the nineteenth century, criminal defendants, often racial minorities and women, protested that unrepresentative juries denied them their basic constitutional rights.[17] But the "elite jury" still reigned.[18] In American law and culture, little incongruity existed between the idea of a "jury of one's peers" (or the "impartial" jury guaranteed by the Sixth Amendment) and the dominant practice of elite juries.[19] And democratizing the jury box by taking affirmative steps to include

12. United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950).

13. *Id.*

14. Berghuis v. Smith, 559 U.S. 314, 334 (2010) (Thomas, J., concurring).

15. Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1582 (2007).

16. Jenny E. Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 831 n.15 (2015) (quoting 2 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 253-55 (Bos., Little & Brown Co. 1850)).

17. *See, e.g.*, Thomas Ward Frampton, *The First Black Jurors and the Integration of the American Jury*, 99 N.Y.U. L. REV. 515, 539 n.133 (2024) ("[N]o colored man is ever tried by a jury of his peers." (quoting *Remarks of J.M. Langston of Oberlin*, ANTI-SLAVERY BUGLE (New-Lisbon, Ohio), Sep. 24, 1859, at 2)); Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 LAW & HIST. REV. 479, 487 (2002) ("No disenfranchised person is allowed to be judge or juror—and none but disenfranchised persons can be women's peers . . . ." (quoting 2 HISTORY OF WOMAN SUFFRAGE 634 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., Arno Press 1969) (1887))).

18. *See* ABRAMSON, *supra* note 9, at 108.

19. For a rough contemporary analogue, many would recognize the federal legislature as "representative" in some sense, though it is vastly older, whiter, wealthier, more educated, and more male than the population at large. *See* JENNIFER E. MANNING, CONG. RSCH. SERV., R47470, MEMBERSHIP OF THE 118TH CONGRESS: A PROFILE 2 (2024) (providing general demographic information about the members of the 118th Congress); *cf.* Akhil Reed Amar, Note,

those who lacked the superior qualities expected of jurors struck many as nonsensical.[20] So, what changed? How did our popular, common-sense understanding of the jury shift so dramatically over such a short period of time?

There are standard ways of answering these questions. The most superficial might stress the relatively late dates of landmark Supreme Court cases democratizing the jury—*Taylor v. Louisiana* in 1975 and *Batson v. Kentucky* in 1986, for example—and view these opinions exclusively as downstream (and belated) fruits of "the civil rights movement of the 1960s ca[tching] up with the jury."[21] On this view, the law of the jury is something of a backwater, with the most important civil-rights developments occurring in the realms of public education, voting, employment, or public accommodations. A more nuanced, though still top-down, doctrinal account might locate the seeds of the Supreme Court's mature "fair-cross-section" jurisprudence in cases decided somewhat earlier.[22] In 1940, for example, responding to an egregious record of racial exclusion of Black jurors in Harris County, Texas, Justice Black asserted for the majority, without citation, that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[23] In subsequent cases, dicta endorsing "the concept of the jury as a

Choosing Representatives by Lottery Voting, 93 YALE L.J. 1283, 1292-1303 (1984) (exploring alternative egalitarian systems for selecting representatives to legislatures).

20. *See, e.g.*, *Veto It*, OREGONIAN, Mar. 4, 1937, at 10 ("It is said . . . that the [voter] registration list is a fair cross-section of the public. It is. That is what is the matter with it as the basis for juror selection. The [state] constitution . . . rejects in positive language the cross-section as the foundation for juries."); Merrill E. Otis, *Selecting Federal Court Jurors*, 29 A.B.A. J. 19, 19-20 (1943) ("There is another thing some of [those who say the jury should be a 'cross-section of the community'] have in mind, although they do not mention it. . . . [I]t is the lowest stratum for whose representation they are most concerned. These gentlemen need juries of the weak and ignorant."); Sam J. Ervin, Jr., *Jury Reform Needs More Thought*, 53 A.B.A. J. 132, 134 (1967) ("[E]mphasis on proportional representation—'cross-section of the community' . . . —necessarily suggests that justice is a function of 'class.' The search for truth thus is regarded as a partisan operation—there is one truth for the poor and another for the rich; justice is one thing for the hyphenated American, another for the New England Yankee.").

21. ABRAMSON, *supra* note 9, at 117 ("Matters stood in this mixed position until the civil rights movement of the 1960s caught up with the jury."). Abramson's account is certainly more nuanced, but his phrasing here succinctly captures one approach I challenge in this Article.

22. HALE, *supra* note 9, at 193-206; ABRAMSON, *supra* note 9, at 99-142. An important exception—one of the few thorough historical accounts that explores how political pressures influenced the law of the jury—is Michael J. Klarman's remarkable book *From Jim Crow to Civil Rights*. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 3-7, 39-43, 55-57, 62-69, 100-16, 117-35, 152-58 (2004). Klarman's focus, however, is primarily the issue of racial equality across various areas of American law, including the law of the jury, and less so the broader cultural shifts in conceptualizing the American jury that I explore here (although, of course, the two are intimately linked).

23. Smith v. Texas, 311 U.S. 128, 130 (1940).

cross-section of the community" began appearing in Supreme Court opinions.[24] On occasion, the Court used its supervisory power to vacate federal criminal convictions where incontrovertible evidence established that wage earners[25] or women[26] had been improperly excluded from jury service as a class. After the Warren Court incorporated the right to trial by jury against the states in 1968,[27] it was only a matter of time before dicta from these earlier cases — and the inchoate democratic principles they articulated — crept into constitutional criminal procedure.

Looking beyond the Supreme Court, however, offers a far richer answer. From such a perspective, this Article argues that the "elite jury" lost its hegemonic appeal in significant part due to a forgotten struggle to democratize the American jury — beginning decades before what is classically viewed as the heyday of the Civil Rights Movement.[28] The protagonists of this story include not only litigators affiliated with well-known organizations like the NAACP and the ACLU, but also left-wing radicals — anarchists, Communists, socialists, trade unionists, and Popular Front feminists — who recognized the jury box as an important battleground in overthrowing capitalism, dismantling white supremacy, and expanding the horizons of twentieth-century American democracy. Their battle to remake the jury was waged not only in the courtroom but also through confrontational "mass defense" campaigns in the streets, often at substantial personal risk. Lawyers who raised jury-discrimination claims risked lynching and professional ruin; protestors supporting their efforts were sometimes met with

24. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 86 (1942).

25. *See* Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946).

26. *See* Ballard v. United States, 329 U.S. 187, 193 (1946).

27. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

28. On historical accounts adopting a "long civil rights movement" perspective, see, for example, Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 99 J. Am. Hist. 1233, 1245-48 (2005); Glenda Elizabeth Gilmore, Defying Dixie: The Radical Roots of Civil Rights, 1919-1950, at 2 (2008); Risa L. Goluboff, The Lost Promise of Civil Rights 4-5 (2007); and Robert Rodgers Korstad, Civil Rights Unionism: Tobacco Workers and the Struggle for Democracy in the Mid-Twentieth-Century South 5-6 (2003). *But see* Christopher W. Schmidt, *Legal History and the Problem of the Long Civil Rights Movement*, 41 Law & Soc. Inquiry 1081, 1082 (2016) (arguing that the "long civil rights movement" framework has "loosen[ed] the meaning of civil rights to the point where it has lost both its historical grounding and much of its analytical utility for sociolegal scholars"). Gilmore's work and Mary Rebecca Reynolds's dissertation were particularly generative in developing this Article. For additional insight on works foundational to this Article's arguments, see generally Gilmore, *supra*; and Mary Rebecca Reynolds, Red Lives: Grassroots Radicalism and Visionary Organizing in the American Century (2021) (Ph.D. dissertation, Yale University), https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1105&context=gsas_dissertations [https://perma.cc/7KT3-NGJS].

police truncheons and tear gas.[29] In the short term, their combined efforts achieved mixed results in individual cases—but they were effective in exposing the yawning gap between America's rhetoric of equal citizenship and the criminal-legal system's inegalitarian reality. In the long run, they played a critical role in transforming a core American institution.

This Article's basic aim, then, is to recover the role of nonelite, nonstate actors—radical lawyers, civil-rights organizers, labor activists, and excluded juror-citizens themselves—in enduring forms of lawmaking. The central contribution of this Article is *not* simply that the Supreme Court's fair-cross-section jurisprudence reflects the ideological contribution of socialists or Communists, actors often regarded as external or even hostile to American democracy.[30] Nor does this Article contend that radical activists were the representative jury's sole architects; the fair-cross-section requirement was propelled by a broad array of social, political, and legal developments alongside those this Article foregrounds.[31] Instead, this Article demonstrates that these radical litigants and the masses they

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29. *See infra* notes 135, 148, 185, 196, 213, 348 and accompanying text; *see also* GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA 7-20 (2012) (discussing the near lynching of Thurgood Marshall after his successful defense of Black defendants in Columbia, Tennessee); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 53-55 (1994) (discussing the jury challenge that preceded Marshall's near lynching in Tennessee).

30. To be sure, the frequency with which radical litigants played a key role in important and high-profile cases—and the effective erasure of these campaigns from leading court opinions and our collective memory—certainly suggests a "secret subtext" to the doctrine. *Cf.* David Alan Sklansky, *"One Train May Hide Another":* Katz*, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 878 (2008) ("For if the Warren Court downplayed the theme of racial equality in its criminal procedure cases, it steered clear of almost any discussion of homosexuality . . . . It is criminal procedure's secret subtext.").

31. To offer just one example, the advent of scientific polling techniques in the late 1930s, coupled with academic advances in calculating sampling error, likely helped normalize the concept of the "cross-section" as a representative and democratic ideal. *See, e.g.*, Sarah E. Igo, *"A Gold Mine and a Tool for Democracy": George Gallup, Elmo Roper, and the Business of Scientific Polling, 1935-1955*, 42 J. HIST. BEHAV. SCIS. 109, 112 (2006) ("Gallup merged this scientific vocabulary with a democratic one, as did the rest of his colleagues in the field. . . . The founder of the Gallup Poll advertised his craft as a fail-safe method for conveying the national will, one that could marshal Americans' collective intelligence to solve common problems."); George Gallup & Claude Robinson, *American Institute of Public Opinion—Surveys, 1935-38*, 2 PUB. OP. Q. 373, 373 (1938) ("The crucial factor in the entire undertaking is the nature of the cross-section used in the survey."). Or one could point to the "ineluctable forces of urbanization, industrialization, and expanded black education," migration patterns, shifting conceptions of civil rights and civil liberties, Cold War rivalries, the expansion of the American middle class, expanded suffrage, feminist and civil-rights activism in other arenas, or a plethora of other forces as shaping how Americans came to understand fairness in institutions like the jury. *See* KLARMAN, *supra* note 22, at 125. The history related in this Article is not intended to exclude other causal mechanisms that contributed to the development of the Supreme Court's fair-cross-section doctrine.

mobilized — and, in particular, their engagements with the legal institutions they viewed with profound skepticism — comprise a missing and indispensable vantage point from which to understand the doctrine's development. Following Lani Guinier and Gerald Torres, this Article's genealogy of the fair-cross-section doctrine is offered as a "demosprudential" case study in how popular participation and collective action — not just courts or legislatures — influenced cultural understandings of the jury, the development of legal norms, and, eventually, constitutional law.[32] Put slightly differently, while radical lawyers and high-profile criminal cases play an important role in this story, this Article is fundamentally concerned with how the Sixth Amendment's meaning was — gradually, unevenly, but definitively — reshaped through several decades of popular struggle, grassroots mobilization, strategic litigation, and social-movement contestation.

This Article proceeds in five parts. Part I is a prelude of sorts, briefly introducing the American jury circa 1925. It surveys the state of the law, the composition of juries in the real world, and the increasingly contested social understandings of what the jury *ought* to be. During the 1920s, the embattled American labor movement modeled an alternative vision of the jury: in high-profile trials, unions would deploy racially diverse "labor juries" to monitor proceedings from the audience, eventually deliberating and rendering their own verdicts (which often conflicted with those returned by the bourgeois juries of the courts).[33] The post-World War I crackdown on Communists, anarchists, and other labor radicals, Part I argues, helped crystallize the importance of public "mass defense" campaigns and heightened the salience of jury-selection practices to those struggling to transform American society. Toward the decade's end, as Communists came to recognize that white Southerners were "us[ing] the criminal justice system to enforce their political economy,"[34] the jury box became a central battleground for larger fights over citizenship, white supremacy, and economic inequality.

Part II focuses on the work of the International Labor Defense (ILD), a Communist-backed "mass defense" organization that emerged from the labor battles surveyed in Part I. While the ILD's efforts on behalf of the Scottsboro Boys in Alabama are well known,[35] its other major cases from the era have been

32. *See* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014) ("Demosprudence is the study of the dynamic equilibrium of power between lawmaking and social movements. Demosprudence focuses on the legitimating effects of democratic action to produce social, legal, and cultural change.").

33. *See infra* notes 66-77, 128-138 and accompanying text.

34. GILMORE, *supra* note 28, at 99.

35. *See, e.g.*, *id.* at 106-56. *See generally* JAMES GOODMAN, STORIES OF SCOTTSBORO (1994) (providing the definitive history of the case).

overlooked, and the organization's critical role in repeatedly pressing jury-discrimination claims, including in the Scottsboro case itself, has received no scrutiny whatsoever. Across the country, from Maryland[36] to Georgia,[37] the ILD established itself as the country's most militant champion of Black citizens' rights in the early 1930s, in significant part by scoring key legal victories against the all-white jury.[38] Apart from demonstrating that such legal claims *could* be successfully brought, even in the Deep South, the Communists' daring assaults on the all-white jury—and their inflammatory denunciations of their rivals—prodded more established groups like the NAACP to begin raising similar challenges, too.[39] But in the early years, it was the ILD that forced open a space for jury-discrimination claims in both the courts and the country's political imagination—often through confrontational "mass defense" tactics that the NAACP eschewed.

Part III turns to the prosecution and ultimate execution of Odell Waller, a Black sharecropper who shot and killed his white landlord in 1940. There are no historical markers commemorating Waller's case in the town of Gretna, Virginia, today, but at the time, Waller was a household name across America. On the eve of his execution in 1942, Harlem went dark as residents turned out their lights in protest, and twenty thousand supporters rallied to save his life inside Madison Square Garden.[40] Behind the scenes, Eleanor Roosevelt was lobbying Justice Frankfurter on Waller's behalf, and President Franklin D. Roosevelt secretly appealed to Virginia's governor to spare his life.[41] In many ways, the campaign to save Waller resembled the ILD's efforts described in Part II: Waller was originally defended by a tiny Trotskyite group and later by the more mainstream socialists of the Workers Defense League (WDL); organizers embraced a "mass defense" strategy, litigating their cause both in court and in the streets; and the appeals in the capital case turned on a jury-discrimination claim. But whereas the ILD's campaigns in the 1930s focused exclusively on race, Odell Waller's appeals challenged Virginia's use of "poll-tax juries," which excluded both Black *and* poor white citizens. The unprecedented use of the Equal Protection Clause to attack wealth-based legal discrimination thus advanced a more capacious understanding of what it meant for a jury to reflect a "fair cross-section of the community." And it put a national spotlight on Virginia's longstanding practice of limiting the political rights of the poor, raising uncomfortable questions about

36. *See infra* Section II.A.

37. *See infra* Section II.B.

38. *See infra* notes 144-244 and accompanying text.

39. *See infra* notes 249-257 and accompanying text.

40. *See infra* notes 316-320 and accompanying text.

41. *See infra* notes 330-334 and accompanying text.

the United States's commitment to democracy at home as the country geared up to fight totalitarianism abroad.[42]

On the other side of World War II, jury-selection practices once again played a central role in the country's highest-profile trial: the 1948-1949 conspiracy prosecution of the leaders of the Communist Party USA (CPUSA). Part IV revisits the Foley Square Trial, today best remembered as a landmark free-speech case in which the Supreme Court upheld the Smith Act against a First Amendment challenge.[43] But for its first eight weeks, the prosecution was derailed by the most comprehensive challenge to jury-selection practices ever seen in an American courtroom, going far beyond the type of discrimination claims at issue in Parts II and III. The Communists alleged that the ad hoc method of summoning jurors in the Southern District of New York (SDNY) resulted in the unconstitutional underrepresentation of the "poor" and "propertyless"; manual workers; residents of "low rent" neighborhoods; "Negroes and other racial and national minorities"; women; Communists; and a variety of other groups.[44] In effect, the Communists asserted a constitutional right to a jury that was a true cross-section of New York, and they compiled droves of evidence demonstrating how SDNY's juries fell short of this ideal. Once again, the proponents of the representative jury lost the immediate battle. The Communists' "attack on the jury system," however, gave pause to even the most anti-Communist liberals and effectively prefigured the model of random jury selection that would become federal law within two decades' time.[45]

Part V concludes by returning to Alabama, thirty years after the Scottsboro Boys' convictions were vacated on jury-discrimination grounds, to reexamine another landmark case in the ascendance of the representative jury: *White v. Crook*.[46] While the campaigns and litigation examined in Parts II through IV had done a great deal to democratize the jury box, women were still regularly excluded from the "cross-section of the community" that juries were meant to reflect. Gardenia White, a Black female activist in "Bloody" Lowndes County, Alabama, served as lead plaintiff in a 1965 class-action lawsuit that aimed to change that. The litigation was pathbreaking in multiple regards: (1) the lawsuit was the first time that prospective jurors themselves, as opposed to defendants, had

42. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (addressing similar themes with a particular focus on the post-WWII Cold War period).

43. Dennis v. United States, 341 U.S. 494, 516 (1951) (holding that the First Amendment does not extend to plans to overthrow the government).

44. Joint Appendix at *13038-39, United States v. Dennis, 183 F.2d 201 (2d Cir. 1950) (No. 242).

45. *See* Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53, 54-56 (codified at 28 U.S.C. § 1863).

46. 251 F. Supp. 401 (M.D. Ala. 1966).

sued to vindicate their own rights as jurors, and (2) the plaintiffs advanced the novel argument that the Equal Protection Clause barred discrimination based on race *and* sex.[47] The animating theory—that sex-based discrimination and race-based discrimination were not only analogous, but interrelated forms of subordination[48]—echoed arguments unsuccessfully advanced by Odell Waller twenty-five years earlier, and for good reason. The Alabama litigation was the brainchild of a queer Black lawyer, Pauli Murray, whose decision to enroll at Howard Law School was prompted by her work as the WDL's lead field organizer on the Waller campaign.[49] In early 1966, a three-judge panel sided with Murray and White; it was the first time a federal court had held that sex-based discrimination violated the Equal Protection Clause.

Linking these cases and campaigns, in addition to a recurring cast of key figures, is the enduring influence of a particular form of grassroots American radical politics—sometimes labeled Popular Frontism—that emerged as a mass social movement in the 1930s.[50] More than an ephemeral liberal-left political alliance against European fascism,[51] the Popular Front took shape as "a radical social-

47. *See infra* notes 471-478 and accompanying text.

48. *See* Serena Mayeri, Reasoning from Race: Feminism, Law, and the Civil Rights Revolution 3-4 (2011).

49. *See infra* notes 339-341 and accompanying text. I use she/her pronouns for Pauli Murray in this piece, consistent with the pronouns Murray used publicly during her lifetime. Murray's private writings and correspondence, however, reveal a lifelong struggle with gender identity, including expressions of discomfort with being perceived as a woman and a desire to receive hormone therapy. *See, e.g.*, Sarah Azaransky, The Dream Is Freedom: Pauli Murray and American Democratic Faith 31 (2011); Rosalind Rosenberg, Jane Crow: The Life of Pauli Murray 79-80, 199 (2017). Scholars have interpreted these records as evidence that Murray would have identified as transgender or nonbinary, had such language and frameworks been readily available, while reaching different conclusions on the best way to write about Murray today. *See, e.g.*, Doreen M. Drury, *Boy-girl, Imp, Priest: Pauli Murray and the Limits of Identity*, 29 J. Feminist Stud. in Religion 142, 143 (2013) ("Not only did Murray *not* call herself by such terms, but these attributions ['lesbian' or 'transgender'] have also ignored the specific race, class, and sex/gender contexts that shaped Murray's approach to her gender and sexuality."); Simon D. Elin Fisher, *Pauli Murray's Peter Panic: Perspectives from the Margins of Gender and Race in Jim Crow America*, 3 Transgender Stud. Q. 95, 101 n.1 (2016) ("My desire is to use a third-gender pronoun; yet I feel the contemporary *they* is ahistorical. As scholars continue to consider the lives of gender-nonconforming people living before the availability of a transgender/transsexual identity, a more uniform system of pronoun usage will likely emerge."); *see also Pronouns, Gender, and Pauli Murray*, Pauli Murray Ctr. for Hist. & Soc. Just., https://www.paulimurraycenter.com/pronouns-pauli-murray [https://perma.cc/5QWA-U6EN] (providing further context regarding Pauli Murray's pronouns).

50. *See* Reynolds, *supra* note 28, at 2-3.

51. *See* Joseph Fronczak, Everything is Possible 185 (2023) ("The older historiographical answer, shaped by the Cold War, had it that the Comintern came up with the idea of the

democratic movement forged around anti-fascism, anti-lynching, and . . . industrial unionism."[52] It emerged in nascent forms in the United States before Moscow abandoned the ultrasectarian posturing of the Soviet Union's Third Period in the early 1930s,[53] and it endured long after the Popular Front nominally ended by 1940.[54] For the people who shaped and were shaped by its culture, the Popular Front promoted

> support for a multiracial American national identity [cast by] people of color, immigrants and radicals[;] . . . insistence that political and labor movements be grassroots and rank-and-file led[;] . . . and adherence to a revolutionary politics based in multiracial and cross-class campaigns for race, gender, and economic justice, simultaneously.[55]

And, in many ways, the campaigns and political program of the ILD (discussed in Part II) served not only as "the heart of the political and artistic energies of the proletarian avant-garde" of the 1930s,[56] but also provided strategies and an ethos that reverberated in legal fights over the subsequent decades.[57] It should come as no surprise, then, that the figures who emerged later in this history had

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Popular Front in the mid-1930s as a strategic cover for Soviet foreign policy. That claim still shades how historians discuss Popular Front politics. And yet it never quite made sense." (citations omitted)); James R. Barrett, *Rethinking the Popular Front*, 21 RETHINKING MARXISM 531, 531-33 (2009).

52. MICHAEL DENNING, THE CULTURAL FRONT: THE LABORING OF AMERICAN CULTURE IN THE TWENTIETH CENTURY, at xviii (1996); *see* ROBIN D.G. KELLEY, HAMMER AND HOE 119-37 (1990); GILMORE, *supra* note 28, at 4-7; RANDI STORCH, RED CHICAGO 2-8 (2009); MARK NAISON, COMMUNISTS IN HARLEM DURING THE DEPRESSION 169-92 (1983); KATE WEIGAND, RED FEMINISM 21-27 (2001).

53. Barrett, *supra* note 51, at 533 ("The Popular Front strategy had been evolving on a local and national level for some time before its formal declaration by Comintern leaders in Moscow."); DENNING, *supra* note 52, at 125 ("The dramatic change in rhetoric from the Third Period's 'Toward Soviet America' to the Popular Front's 'Communism is Twentieth-Century Americanism' has often obscured the deeper continuities in left-wing activism.").

54. *See* DENNING, *supra* note 52, at 21-27, 463-72 (discussing periodization); Reynolds, *supra* note 28, at 2 ("Offering detailed narratives of the left-affiliated movements and diverse political theories that formed these women's times and careers, 'Red Lives' presents fresh evidence of a grassroots American radicalism — Popular Frontism — far more influential, lasting, and independent from the control of either Soviet or American Communist Party leaders than previously recognized.").

55. Reynolds, *supra* note 28, at 3.

56. DENNING, *supra* note 52, at 66.

57. *Id.* at 125 ("[T]he Popular Front combined three distinctive political tendencies: a social democratic laborism based on a militant industrial unionism; an anti-racist ethnic pluralism imagining the United States as a 'nation of nations'; and an anti-fascist politics of international solidarity. Each of these was rooted in the politics of the early Communist Party and the International Labor Defense, and continued in different forms throughout the age of the CIO.").

formative political experiences in the jury struggles that preceded them. The roots of the representative jury are found in the democratic and egalitarian soil of this political milieu, which shaped the worldview and lives of so many of this Article's protagonists.[58]

The primary focus of this Article is to track how these efforts reshaped the American jury, but it also illuminates how fights over the jury box prefigured and sometimes directly influenced developments in other areas of American law. When Euel Lee's Communist lawyer persuaded Maryland's high court to vacate his murder conviction in 1931, for example, Lee successfully argued that the implicit biases of the white judge who compiled the jury lists rendered the process unlawful, decades before such terminology would enter popular usage.[59] Thurgood Marshall—who, as a recent law-school graduate, was tangentially involved in the case—would use strikingly similar language fifty-five years later in arguing for the abolition of race-based peremptory strikes in *Batson v. Kentucky*.[60] The jury challenge made by the Communists in the Foley Square Trial essentially anticipated the modern fair-cross-section doctrine that would solidify within two decades' time. And, as mentioned above, the *Waller* and *White* cases both involved groundbreaking attempts to expand the scope of the Equal Protection Clause to classifications based on wealth and sex, respectively. Though largely forgotten today, feminist activists regarded the latter as the "*Brown v. Board of Education* for women" when it was first issued.[61] Far from a backwater, throughout the twentieth century, the law of the jury served as a key battleground for those contesting the subordination of workers, racial minorities, and women. It provided a foundational site of struggle for those who understood all three phenomena as intertwined features of American political economy.

I. PRELUDE: LABOR JURIES VS. THE IRON HEEL

On July 22, 1916, a bag of dynamite exploded on San Francisco's Steuart Street, killing ten and injuring scores of participants in a pro-war "Preparedness

58. Those figures include Ben Davis, Jr., profiled in Parts II and IV, and Pauli Murray, profiled in Parts III and V.

59. *See infra* Section II.A; *see also* B. Keith Payne & Bertram Gawronski, *A History of Implicit Social Cognition: Where Is It Coming From? Where Is It Now? Where Is It Going?*, *in* HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS 1, 1-2 (2010) (Bertram Gawronski & B. Keith Payne eds., 2010) (describing the origins of the implicit-social-cognition field in the 1970s).

60. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

61. *See infra* text accompanying note 498.

Day" parade.[62] Despite scant evidence linking them to the bombing,[63] radical labor leaders Tom Mooney and Warren Billings were soon arrested and convicted for the bombing, and Mooney was initially sentenced to death.[64] It would take more than two decades for campaigners to secure freedom for Mooney and Billings.[65]

Less well remembered is the capital prosecution of Rena Mooney—Tom Mooney's wife, fellow radical, and alleged coconspirator—and a controversial tactic that union activists deployed in hopes of saving her life: the "labor jury." When the official jury was impaneled to try her case, labor leaders announced that a separate panel of working-class union members would also be sworn and seated in the courtroom, tasked with monitoring the case and delivering their own "verdict" at the close of evidence.[66] The local press decried the move as a "Russian Idea,"[67] an "invasion of the Temple of Justice" calculated to intimidate the official jurors.[68] But the local Central Labor Council pressed ahead, sending

62. *See* CURT GENTRY, FRAME-UP: THE INCREDIBLE CASE OF TOM MOONEY AND WARREN BILLINGS 11-30 (1967); AHMED WHITE, UNDER THE IRON HEEL: THE WOBBLIES AND THE CAPITALIST WAR ON RADICAL WORKERS 111 (2022). As White recounts, one of the period's most popular novels among Wobblies was Jack London's *The Iron Heel*, a work of speculative fiction about a powerful oligarchic force that crushes a revolutionary movement of the dispossessed. WHITE, *supra*, at 29-32.

63. *See* Rebecca Roiphe, *Lawyering at the Extremes: The Representation of Tom Mooney, 1916-1939*, 77 FORDHAM L. REV. 1731, 1737-44 (2009) (describing Mooney's legal representation). For skeptical accounts from both journalists and government officials in the 1930s, see generally ERNEST JEROME HOPKINS, WHAT HAPPENED IN THE MOONEY CASE (1932); and THE MOONEY-BILLINGS REPORT: SUPPRESSED BY THE WICKERSHAM COMMISSION (1932).

64. GENTRY, *supra* note 62, at 30, 116; WHITE, *supra* note 62, at 111-12.

65. Roiphe, *supra* note 63, at 1731; MICHAEL MARK COHEN, THE CONSPIRACY OF CAPITAL: LAW, VIOLENCE, AND AMERICAN POPULAR RADICALISM IN THE AGE OF MONOPOLY 199 (2019).

66. *Labor Jury May Hear Bomb Cases*, S.F. BULL., Feb. 22, 1917, at 2; *Labor Jury to Reach 'Verdict' in Bomb Case*, MORNING REG. (Eugene, Or.), Feb. 22, 1917, at 4; *"Silent Labor Jury" Tries San Francisco Court on Charge of Unfairness*, N.Y. TRIB., July 1, 1917, at B1 (noting some labor jurors' objections to the swearing-in oath as "a slavish imitation of outgrown court fetiches [sic]"); *Labor to "Try" Mrs. Mooney: Unofficial Jury Will Weigh Evidence in Bomb Plot Case*, WASH. POST, May 26, 1917, at 1.

67. *Lay Jury for Mooney Trial Russian Idea*, S.F. EXAM'R, May 30, 1917, at 6; *see also Russianism in an American Court*, BUFF. NEWS, July 28, 1917, at 8 ("We have only to look upon Russia to see where this theory of government leads.").

68. *This "Labor Jury" Should Not Be Permitted*, SACRAMENTO BEE, June 7, 1917, at 6; *see also Silent Jury Plan for Mooney Case Criticised*, S.F. EXAM'R, May 29, 1917, at 7 (quoting local attorneys and labor leaders to demonstrate the "[v]aried expressions of opinion" on the labor jury).

"summonses" via telegram to their counterparts across the western states.[69] The physical contrast between the two juries was striking: whereas most of the actual jurors were retired professionals,[70] one of the "labor jurors" was a "'hard-rock' miner" from Arizona with bulging shoulders and biceps, "six feet four inches tall and weighing 240 pounds . . . wear[ing] a soft shirt, open at the throat, with no necktie."[71] At the close of evidence, the labor jury deliberated for less than an hour before delivering a "not guilty" verdict and a statement condemning the prosecution; newspapers across the country reprinted their findings.[72] An additional fifty hours of deliberations were required for the actual jury to reach the same verdict.[73]

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69. *"Labor Jury" Will Watch Bomb Trial*, Oakland Trib., May 25, 1917, at 1 ("The idea of the 'labor jury' for the bomb trials originated in the Alameda County Central Labor Council . . . ."); *Oxman to Appear in Court Monday*, Or. Sunday J., May 27, 1917, at 2 (noting the summonses); *12 Men Who Will Sit in Bomb Trial*, S.F. Exam'r, Oct. 24, 1917, at 17.

70. San Francisco jurors at the time were drawn from a list that was handpicked by local judges; each judge nominated 144 potential jurors, who were then summoned at random. *See Superior Judge Favors Increased Jury Panels*, Recorder (S.F.), Nov. 22, 1916, at 1. Reformers of all stripes critiqued this system of "professional jurors" and noted that when a regular juror "failed to convict, where the authorities desired a conviction, his services were no longer sought." *League Formed for Remedy of Jury Practices*, S.F. Chron., Nov. 18, 1916, at 5; *see also Professional Jurors to Be Fought*, S.F. Exam'r, Nov. 10, 1916, at 1 (quoting a criminal-defense attorney's description of professional jurors as "a menace to the proper administration of justice"); *Superior Judge Favors Increased Jury Panels*, *supra*, at 1 (reporting a judge's fear that the current system produced jurors who "give[] undue heed to the prosecutor, fearing that if he does not obey the wishes of the prosecution he will be cut off from future service").

71. *"Silent Labor Jury" Tries San Francisco Court on Charge of Unfairness*, *supra* note 66, at B1. Early reports suggested the labor jury in Mrs. Mooney's case would include even numbers of men and women, but other reports indicate that the final panel included only one woman in the role of the jury's "secretary." *Compare Prosecution States Its Case Against Mrs. Rena Mooney*, S.F. Bull., June 11, 1917, at 1, 16 (listing six female jurors), *and Judges Denies New Jury in Mooney Case*, S.F. Exam'r, June 1, 1917, at 1, 6 ("There are six women on the labor jury."), *and Rena Mooney's Bomb Plot Trial Begun*, Oakland Trib., June 11, 1917, at 1 ("Directly in back of Mrs. Mooney sat the so-called labor jury, composed of five women and seven men, who have been delegated by the labor factions to sit throughout the murder trial and report their findings to the labor bodies interested in the case."), *with "Labor Jury" in Bomb Case to Be Sworn In*, Oakland Trib., June 11, 1917, at 2 (listing only one woman, Luella Twining, as the "secretary" for the labor jury), *and "Silent Labor Jury" Tries San Francisco Court on Charge of Unfairness*, *supra* note 66, at B1 (describing "Miss Luella Twining" as "the one woman member, and the jury's secretary"). *But see Russianism in an American Court*, *supra* note 67, at 8 (discussing "two 'unofficial juries,'" one "constituted of men representing the labor unions; the other of women").

72. *'Silent Jury' in Mooney Case Acquits*, S.F. Exam'r, July 24, 1917, at 4; *Unofficial Labor Jury Acquitted Mrs. Mooney*, Hou. Daily Post, July 24, 1917, at 5; *Mrs. Mooney's Acquittal*, N.Y. Times, July 28, 1917, at 5 (noting the labor jury's verdict).

73. *Mrs. Mooney Freed of Murder Charge*, N.Y. Times, July 26, 1917, at 20.

Labor juries became an occasional feature of high-profile or politically fraught trials over the next decade, and they served multiple purposes. At the most basic level, their presence communicated to judges, prosecutors, jurors, and journalists that their work was being carefully audited. (In this sense, American labor juries may have been the earliest iteration of "court watch" activism, a concerted attempt through collective action to "shift the power dynamics within the courtroom, reminding institutional players of the larger public dimensions of individual cases."[74]) Labor jurors were also organizers and propagandists: they were expected to return to their local unions and report back what they had witnessed, perhaps to galvanize "mass defense" campaigns on behalf of unfairly targeted workers.[75] Perhaps most importantly, the alternative labor juries also served as a powerful indictment of how ordinary juries were constituted in the "Capitalist Courts" of early twentieth-century America[76] and a reminder that the composition of juries dictated the quality of the justice those courts meted out. Labor jurors were often randomly selected from the membership of the participating unions, more likely to be women or racial minorities, and therefore more "representative of masses of workers and workers' organizations" than typical juries.[77]

* * *

The very existence of labor juries challenged the reigning model of the elite jury, which was constituted very differently. There was no single method of summoning and selecting actual jurors in America circa 1925 (mirroring today's lack of uniformity in jury selection). Early statutes and state constitutions echoed the Magna Carta's pronouncement that a freeman is entitled to a "judgment of his peers,"[78] and in some areas, the jury was slowly moving in a more democratic

74. Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 269 (2019); *see also* Jessica K. Steinberg, *Law School Clinics and the Untapped Potential of the Court Watch*, 6 IND. J.L. & SOC. EQUAL. 176, 185-90 (2018) (discussing the value of "court watch research" to better understand access-to-justice issues).

75. *See* Carl Sklar, *Conduct of Communist Trials*, DAILY WORKER (N.Y.C.), Sep. 22, 1930, at 6; *The Labor Jury*, SEATTLE UNION REC., Mar. 11, 1920, at 10 (describing a labor jury as "men chosen by the great labor bodies of the Northwest to bring back to the rank and file of labor a true account of what the evidence shows to have happened at Centralia during the afternoon and night of terror following the Armistice Day parade").

76. *See* Report on Cases Handled by the International Labor Defense 1 (Dec. 1929) (on file with N.Y.U., Tamiment Library and Robert F. Wagner Labor Archives, Communist Party of the United States of America Records [hereinafter CPUSA Records], Box 252, Folder 35).

77. Sklar, *supra* note 75, at 6.

78. CLARENCE N. CALLENDER, THE SELECTION OF JURORS: A COMPARATIVE STUDY OF THE METHODS OF SELECTION AND THE PERSONNEL OF JURIES IN PHILADELPHIA AND OTHER CITIES 9-10 (1924) ("The time honored pronouncement of the Magna Charta [sic] that a

direction. By the late nineteenth century, property requirements for jury service were becoming less common,[79] and some critics worried that "men from the farm, the workshop and other like avocations" were increasingly called upon to resolve important and complex questions.[80] Legal elites in the Progressive era worried about the relative paucity of educated and professional men on juries, fearing that their frequent exemption from jury service meant that juries were increasingly "below average with respect to the qualities of judgment required of jurors."[81] But similar anxieties were voiced throughout the nineteenth century, too,[82] and as one prominent 1924 study of jury-selection practices put it, language promising a "jury of one's peers" was proving "meaningless in a democratic country" given the legal malleability and capaciousness of the word "peer."[83] Nowhere in the United States did the phrase denote a broadly representative, racially and economically diverse body of men and women.

Poor and working-class men were often excluded by statutes or underrepresented by the operation of discretionary jury-selection systems that filled jury lists with wealthier and more-educated citizens. In Philadelphia, a jury board consisting of judges and the sheriff compiled a list of "sober, healthy, and discreet citizens" to serve as potential jurors; "unskilled workers" (e.g., "laborers, watchmen . . . drivers, [and] helpers") were significantly underrepresented, and women were almost entirely excluded from these lists.[84] New York County's jury lists were assembled from city and telephone directories, but only male citizens owning more than $250 in property were eligible to serve.[85] In important cases,

freeman is entitled to be judged by a jury of his peers is copied into the statutes and accepted by the courts of this country . . . ."); *see, e.g.*, PA. CONST. of 1776, ch. 1, art. IX ("[N]or can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers."); MASS. CONST. of 1780, pt. 1, art. XII ("And no subject shall be . . . deprived of his life, liberty, or estate; but by the judgment of his peers . . . ."); Northwest Ordinance of 1787, ch. 8, 1 Stat. 50, 52 n.(a) (1789) ("No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land . . . .").

79. HALE, *supra* note 9, at 141.

80. *See* Oliver P. Shiras, *The Jury System*, 1 YALE L.J. 45, 46 (1891).

81. HALE, *supra* note 9, at 200.

82. *See, e.g.*, Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 881 (1994) (surveying antebellum criticism of median jurors as "miserable wretches," "vagabonds," and "[l]oafers and drunkards").

83. CALLENDER, *supra* note 78, at 10.

84. *Id.* at 13, 21, 25, 26. Callender's study also examined the parties' use of peremptory strikes in a dozen murder cases. He observes: "It appears that it is the aim of the commonwealth to eliminate the laboring classes and women; that the defendants strike more persistently from the higher grade occupations." *Id.* at 41. In Philadelphia's federal district court, women served as jurors with greater frequency, but laborers were "almost non-existent" on juries. *Id.* at 48.

85. *Id.* at 52.

commissioners selected "special juries" of only the "best qualified by education, training, or previous experience."[86] Chicago's jury commissioners sent surveys to men listed in the city directory, then used their detailed responses to select those "of fair character, of approved integrity, of sound judgment, well informed and who understand the English language."[87] With some variation, similar systems prevailed in Pittsburgh,[88] Boston,[89] Baltimore,[90] St. Louis,[91] and elsewhere.[92] While working-class jurors occasionally made their way onto juries, in none of these jurisdictions were they represented proportionately.[93] And, if anything, elite legal opinion was united in the view that the jury system still inadequately screened for intelligence and "quality."[94] Many Progressive reformers would have scrapped the jury system altogether, considering it inefficient and ill-suited to the needs of modern adjudication.[95]

While discrimination against jurors on the basis of race had ostensibly been a criminal offense since the Civil Rights Act of 1875,[96] in practice, the exclusion of Black jurors was near total in the first decades of the twentieth century.[97] In 1909, one researcher conducted a survey of more than three hundred counties in

86. *Id.* at 54; *see also* Fay v. New York, 332 U.S. 261, 264 (1947) (affirming a conviction returned by a "blue ribbon" New York jury).

87. CALLENDER, *supra* note 78, at 61-62 (quoting Act of May 7, 1873, § 2, 1873 Ill. Laws 107, 108). *But see* Carl A. Ross, *The Jury System of Cook County, Illinois*, 5 ILL. L. REV. 283, 292 (1910) (urging greater initial screening).

88. CALLENDER, *supra* note 78, at 64 (explaining that jury commissioners and the judge were to create a list "of sober, intelligent and judicious persons").

89. *Id.* at 67-71 (noting that a bipartisan board of election commissioners selected a list of inhabitants "of good moral character, of sound judgment and free from all legal exceptions").

90. *Id.* at 71-74 (explaining that judges and their appointees selected names from voter lists and tax-assessment lists "with special reference to the intelligence, sobriety and integrity of such persons and without the least reference to their political opinions").

91. *Id.* at 74-76 (providing that the list was to be made up of "every male citizen of the state, resident in the city, sober and intelligent, of good reputation, over twenty-one years of age and not exempt by law"); *see also id.* at 76 ("It seems, however, that an effort is made to eliminate the undesirables.").

92. *See, e.g.*, J.A.C. Grant, *Notes on Judicial Organization and Procedure*, 24 AM. POL. SCI. REV. 117, 123 (1930) (discussing jury selection in Milwaukee). On jury-selection practices slightly later, see HALE, *supra* note 9, at 188-93, which discusses the "Cleveland system" and an ABA study.

93. *See* CALLENDER, *supra* note 78, at 57-76.

94. *See* Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 394-411 (2018).

95. *Id.*; *see* HALE, *supra* note 9, at 180-81.

96. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336-37 (codified at 18 U.S.C. § 243).

97. *See generally* GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW (1910) (surveying juries' racial composition in Southern counties and finding few, if any, Black jurors).

Southern states where Black residents constituted a majority of the population to determine whether "Negroes actually serve on the juries in those communities where they are numerous."[98] Only a handful of counties recorded any Black jurors in recent memory.[99] In the unusual cases where Black men managed to serve as jurors, there were occasionally reports that they would be "segregated . . . and permitted . . . to remain unattended away from the others while the verdict was being reached."[100] A starker account came from one Alabama county:

> Once in the past four years, a Negro was drawn . . . (by mistake) . . . he served two days, when he was taken out at night and severely beaten, and was then discharged on his own petition . . . . The fact is, Negroes have never been or never will be allowed to sit on juries in this county.[101]

Black jurors may have faced less overt discrimination outside the South,[102] but in 1920, "9 million African Americans lived within the confines of the Old Confederacy, the border states of Kentucky and Oklahoma, and the mid-Atlantic states of Maryland and Delaware," while only 1.5 million lived elsewhere.[103]

By the 1920s, the American jury was moving, haltingly, in one inclusive direction: the easing of sex-based exclusion.[104] Women had sporadically served as jurors as early as the 1870s.[105] In 1880, however, in the same breath that it held that a statutory bar against Black jurors was "practically a brand upon them, affixed by the law, an assertion of their inferiority,"[106] the U.S. Supreme Court

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98. *Id.* at 253.

99. *Id.* at 253-72.

100. *See, e.g.*, *Charge a Juror Was Barred*, KAN. CITY STAR, Dec. 29, 1921, at 10; *see also* STEPHENSON, *supra* note 97, at 257 ("I am satisfied if [a Black man] should be put on any jury that the white men would flatly refuse to serve at all . . . ."); STEPHENSON, *supra* note 97, at 264 ("While probably under our laws Negroes would be legal jurors, the county court of this county will not draw them . . . . Further, I am sure that no white man here would serve on a jury with a Negro, even though his refusal to so serve would subject him to a jail sentence . . . .").

101. STEPHENSON, *supra* note 97, at 253-54.

102. *See, e.g.*, *State Has Strong Wall of Evidence Against the Mayor*, PHILA. INQUIRER, Jan. 27, 1919, at 1 (noting that "the colored juror stood slightly apart from his brother jurymen," all sequestered, during the trial of Mayor Thomas Smith); *A Glimpse at Our State Supreme Court and Denver District and County Courts*, COLO. STATESMAN, Dec. 4, 1920, at 1 (noting a "present increase of Negro jurors" as a response to concerns of underrepresentation).

103. GILMORE, *supra* note 28, at 30.

104. *See* Ritter, *supra* note 17, at 503-06. *See generally* HOLLY J. MCCAMMON, THE U.S. WOMEN'S JURY MOVEMENTS AND STRATEGIC ADAPTATION (2012) (examining disparate outcomes of state-level campaigns for legal reforms to allow women to serve as jurors).

105. MCCAMMON, *supra* note 104, at 39.

106. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

breezily affirmed the authority of states to limit jury service "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications."[107] Throughout the early twentieth century, women faced not only the common-law prohibition on jury service *propter defectum sexus*,[108] but also "the continued presumption that women's identities were more firmly rooted in the private than in the public realm."[109] Many women's rights activists hoped that the ratification of the Nineteenth Amendment in 1920 would usher in broader changes; they championed an "emancipatory" reading of the Amendment that "represented the symbolic and substantive assertion of women's rightful place as men's equals."[110] Feminists of various stripes prioritized jury service as a political goal throughout the 1920s, even as the women's movement splintered.[111] Yet, despite some initial progress, these efforts largely stalled within a few years. "By the middle of the 1920s it was increasingly evident that the courts and legislatures were resistant to further extensions of women's rights" to jury service.[112]

* * *

The Mooney trials — emblematic of the exclusionary jury-selection practices of early twentieth-century America — presaged the wave of repression that would decimate the American left and the radical labor movement during and after World War I, often at the hands of unrepresentative juries. Violent crackdowns on labor, both private and state-sanctioned, were nothing new.[113] But by 1919, under the direction of Attorney General A. Mitchell Palmer and the "wunderkind

107. *Id.* at 310.

108. Due to a "defect of sex." 3 WILLIAM BLACKSTONE, COMMENTARIES *362.

109. Ritter, *supra* note 17, at 510.

110. Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2176 (1993).

111. Some activists prioritized an Equal Rights Amendment (ERA) to the U.S. Constitution, while others, especially those affiliated with left-wing groups and labor unions, feared that such an amendment would jeopardize protective legislation. "If there [was] one subject which all the woman's organizations [were] agreed upon," however, "it [was], probably, jury service for women." Ritter, *supra* note 17, at 503 (quoting Burnita Shelton Matthews).

112. *Id.*

113. *See generally* THOMAS G. ANDREWS, KILLING FOR COAL: AMERICA'S DEADLIEST LABOR WAR (2008) (detailing the deadly conflicts between striking miners and state militia that culminated in the Ludlow Massacre of 1914); PAUL KRAUSE, THE BATTLE FOR HOMESTEAD (1992) (describing the Homestead Strike of 1892); PAUL AVRICH, THE HAYMARKET TRAGEDY (1984) (recounting the antilabor crackdown that led to the Haymarket bombing in Chicago in 1886); PHILIP S. FONER, THE GREAT LABOR UPRISING OF 1877 (1977) (recounting the General Strike of 1877); MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD (1969) (reviewing the Colorado Labor Wars from 1903 to 1904).

head of the Justice Department's new Radical Division," J. Edgar Hoover, the federal government declared a new sort of war against anarchists, socialists, and Communists.[114] Wartime laws like the Espionage Act and the Sedition Act granted the federal government powerful tools to crack down on dissent, and massive coordinated raids netted thousands of arrests.

The results were dramatic. In 1917, the anarchist Industrial Workers of the World (IWW) may have boasted as many as 150,000 militant members; within a decade, it was "effectively destroyed."[115] The Socialist Party's leader, Eugene Debs, was sentenced to a decade in federal prison in 1918 for delivering an anti-war speech that violated the Espionage Act.[116] And criminal prosecutions forced the various left-wing factions that would eventually form the CPUSA to go "partially underground[,] [where they] operated for the next several years in semi-illegality."[117]

While some of this repression occurred through administrative proceedings—as hundreds of the country's most prominent radical immigrants, including Emma Goldman and Alexander Berkman, were deported to Russia[118]—a remarkable feature of the post-WWI Red Scare was its reliance on criminal courts, and hence criminal juries.[119] Three major federal trials in Chicago, Kansas City, and Sacramento yielded 171 convictions of IWW members, for example.[120] Very

114. Beverly Gage, G-Man: J. Edgar Hoover and the Making of the American Century 61 (2022).

115. White, *supra* note 62, at 4-5.

116. *See* Debs v. United States, 249 U.S. 211, 215 (1919) (affirming Debs's conviction under the Espionage Act where the probable and intended effect of his speech was to "obstruct" recruiting for the war effort); Nick Salvatore, Eugene V. Debs: Citizen and Socialist 294-96 (2d ed. 2007); Ray Ginger, The Bending Cross 359-76 (1949).

117. Jennifer Ruthanne Uhlmann, The Communist Civil Rights Movement: Legal Activism in the United States, 1919-1946, at 39 (2007) (Ph.D. dissertation, University of California, Los Angeles) (ProQuest).

118. William Preston, Jr., Aliens and Dissenters: Federal Suppression of Radicals, 1903-1933, at 100 (1995) ("Prosecuting attorneys and employers also looked upon deportation as the most flexible and discretionary weapon available for their attack upon radical labor agitators. Proof of individual guilt was the great stumbling block in labor disturbances."); Cohen, *supra* note 65, at 227.

119. Cohen, *supra* note 65, at 119 ("From 1917 to 1919 the legal prosecution of radicals now characterized their suppression."). Labor injunctions, which employers regularly used to thwart concerted activity by unions between 1880 and 1930, could still be obtained and enforced without the inconvenience and uncertainty of jury trials. *Id.* at 69.

120. White, *supra* note 62, at 190; Cohen, *supra* note 65, at 182-86; Laura Weinrib, The Taming of Free Speech 82-100 (2016).

occasionally, radicals won an acquittal or a hung jury.[121] For the most part, however, "[t]he juries turned out to be frightened, jingoistic, and vindictive, all in all thoroughly sympathetic to the government's aims."[122] As federal prosecutors reported to the Attorney General, "[I]f these cases are presented to the grand jury, indictments will necessarily follow, and, if indictments should be returned, convictions will be secured as a matter of course."[123]

The bitter defeats before, during, and after the Red Scare of 1920-21 helped catalyze the founding of a new legal-defense organization by mid-decade: the ILD. Formally, the ILD was a "nonpartisan" entity committed to fighting for "the release of . . . class war prisoner[s]," and the organization's leadership consisted of "IWW types, Socialists, liberals, and others" outside of the Party cadre.[124] The organization supported left-wing prisoners of all persuasions, including the anarchists Nicola Sacco and Bartolomeo Vanzetti.[125] It was also a Communist Party front organization, likely first envisaged in a Moscow hotel room by the former IWW leader Big Bill Haywood,[126] and it soon "outclassed all the other early fronts in staying power, widespread activity, and far-reaching influence."[127]

Labor juries were deployed in high-profile prosecutions after the Mooney case, both before and after the ILD came onto the scene,[128] but perhaps none was

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121. *See, e.g.*, WEINRIB, *supra* note 120, at 153 (discussing the acquittal of Industrial Workers of the World (IWW) delegate William Moudy, who "took the stand in his own defense and boldly admitted his work for the organization and unapologetically defended its aims and social vision"); *id.* at 187 (describing the internal party struggles precipitated by the IWW's new prominence within the radical movement).

122. PRESTON, *supra* note 118, at 122.

123. *Id.*; *see also* WEINRIB, *supra* note 120, at 98 ("Juries in the earlier Espionage Act cases [before the Chicago IWW trial] had convicted defendants far less reviled on evidence far less damning.").

124. Uhlmann, *supra* note 117, at 97, 98; Ann Fagan Ginger, *Workers' Self-Defense in the Courts*, 47 SCI. & SOC'Y 257, 265 (1983) (quoting an International Labor Defense (ILD) leader in the *Labor Defender*).

125. Uhlmann, *supra* note 117, at 133-39. On how the jury that convicted Sacco and Vanzetti "did not properly represent the community," see G. LOUIS JOUGHIN & EDMUND M. MORGAN, THE LEGACY OF SACCO AND VANZETTI 204-05 (1948).

126. Uhlmann, *supra* note 117, at 97; COHEN, *supra* note 65, at 258.

127. COHEN, *supra* note 65, at 96; THEODORE DRAPER, AMERICAN COMMUNISM AND SOVIET RUSSIA: THE FORMATIVE PERIOD 180-81 (1960).

128. *See, e.g.*, *Judge Scores Attorneys in M'Hugh Case*, S.F. EXAM'R, Nov. 14, 1919, at 2 (discussing a defendant's request, rejected by court, that a "labor jury be allowed to sit inside the court railing during the trial"); *Labor 'Jury' Acquits I.W.W. at Montesano*, OREGONIAN, Mar. 16, 1920, at 1; *Labor Jury in Everett Declares Pat Cantwell Not Guilty as Charged*, SEATTLE UNION REC., Nov. 26, 1920, at 4; *The Central Labor Council*, LABOR J. (Everett, Wash.), Dec. 3, 1920, at 1 (reporting the labor jury's "acquittal" of Walter Smith on criminal-syndicalism charges);

as important as the group that the ILD sent to Gastonia, North Carolina. In 1929, Communist-led unions made their first major organizing foray into the South, seeking to organize thousands of low-wage textile workers in and around Gaston County.[129] In so doing, the Communist Party sought to demonstrate its new commitment to absolute "social equality" between white and Black workers (and perhaps even more provocatively, to the rights of "national minorities" to "self-determination").[130] Communist organizers declared war not only against the mill owners but also against the "capitalist race prejudice" that divided workers, thus "touch[ing] a southern powder keg with a Red match."[131] On June 7, 1929, matters came to a head with the killing of a local police chief during a raid on the strikers' encampment; twelve union men and several union women were charged with murder.[132]

Skeptical that the union defendants would receive a fair hearing from the actual jury, the ILD sent their own labor jury to monitor the trial: the group of twelve included two Black men and two white women. As they took their seats in the Charlotte, North Carolina courtroom, a bailiff

> immediately told the Negro workers . . . that Negroes were not permitted to sit with white workers and that they would have to go to the balcony, where Negroes are usually Jim Crowed. The whole labor jury arose in a body as a protest against this racial discrimination and started to the balcony.[133]

This gesture of solidarity apparently "alarmed" the judge, who initially expelled the labor jury from the courtroom altogether, but they were permitted to return to the balcony the next day to watch the remainder of the trial.[134] These

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Council Opposed to Labor Jurors in Flyzik Trial, Seattle Union Rec., Dec. 20, 1923, at 6 (discussing the decision *not* to send a labor jury to a labor leader's trial); Allan Powell, Next Time We Strike 186 (1992) (discussing the use of labor juries as a tactic in defense of seven union miners prosecuted in Utah in 1933).

129. Gilmore, *supra* note 28, at 69-78.

130. *Id.* at 64-65.

131. *Id.* at 65.

132. *Id.* at 92-93.

133. *Labor Jury Thrown out of Gastonia Case Court*, Daily Worker (N.Y.C.), Oct. 8, 1929, at 1; *see also Murder Case Witnesses Tell of Wild Scenes*, Charlotte News, Oct. 7, 1929, at 1 ("They were subjected to the customary 'Jim Crow' rules of the courtroom . . . ."); *Southern Court of "Justice" Gets Rare Thrill*, Pitt. Courier, Oct. 19, 1929, at 5 (reporting the decisions of the "alarmed" judge); *7 Deputy Sheriffs Fired at Strikers, Says Witness*, Daily News (N.Y.C.), Oct. 8, 1929, at 9 ("Court Draws Color Line in Strike 'Labor Jury.'"); *Communists on Defense Enliven Aderholt Trial*, Chi. Trib., Oct. 10, 1929, at 16 ("[T]he courtroom took on the air of communist headquarters . . . .").

134. *They Sat in Gastonia's Jim-Crow Balcony*, Afro-Am. (Balt.), Oct. 19, 1929, at 1.

labor jurors' extraordinary attempts to desegregate a Southern courtroom carried real personal risks; comrades in New York, not unreasonably, worried they might be lynched.[135] Of course, the Gastonia labor jury lacked any real power, and the defendants, unsurprisingly, were convicted and given lengthy prison sentences.[136]

FIGURE 1. PORTRAIT OF GASTONIA LABOR JURY[137]

ADERHOLT LABOR "JURY" HERE

—Observer Staff Photo

ATTEND TRIAL—The labor jury, elected by the Trade Union Unity league convention, which arrived in Charlotte Monday to be in attendance at the third trial of the Gastonia strikers for the murder of Chief of Police O. F. Aderholt. They are front row left to right: Hubert Carrol, youth section, Forsythe, Ga.; Ida Simmons, Needle Trades Workers Industrial union, New York City; Daisy McDonald, National Textile Workers union, Gastonia, N. C.; E. P. Cush, iron, steel and tin worker, Pittsburgh; Wes Williams, National Textile worker, Bessemer City, N. C.; Charles Summey, National Textile worker of Charlotte. Top row: Taylor Shytle, National Textile worker, McAdenville, N. C.; Charles Frank, American Negro Labor congress, New York; Joe Golden, Marine Workers league, New York City; Sol Harper, Trade Union Unity league, negro department, Rochester, N. Y.; Leo Hoffbauer, iron and bronze worker, New York City; Henry Buckley, International Shoe and Leather worker, New York City.

135. GILMORE, *supra* note 28, at 95.

136. *Id.* at 96.

137. Photograph of Gastonia, N.C., Labor Jury, *in* CHARLOTTE OBSERVER, Oct. 8, 1929, at 15.

But the ILD's labor jury offered a tantalizing vision of how a jury *might* look. Their verdict, reprinted throughout the country's newspapers, declared:

> One of the principal illusions of the legal system in the United States is that every man is entitled to a trial by a jury of his peers. If our brothers who faced trial in Charlotte had been tried by a jury of their peers, it would have been a labor jury, a jury of workers who understand the nature of their struggle and of labor's struggle in general. It is the purpose of the state in such cases not to secure a jury of peers of defendants, but to secure a mercenary, service jury that WILL CONVICT REGARDLESS OF THE EVIDENCE PRESENTED. We, the labor jury, find the defendants not guilty.[138]

In the coming years, shaped by its encounters with the elite juries of the 1920s and the alternative possibilities demonstrated by largely symbolic labor juries, the ILD would prove relentless in promoting the notion of a true jury of one's peers.

II. THE ILD AND THE JIM CROW JURY

In June 1932, the ILD published a thirty-page booklet entitled *Under Arrest! Workers' Self-Defense in the Courts*, intended to offer advice to trade unionists and other workers in case they found themselves arrested, questioned, or tried "in the courts of capitalist class justice."[139] Among the helpful pointers on avoiding stool pigeons in jail and conducting voir dire, the pamphlet contained the following remarkable passage on the jury:

> **Demand a Working Class Jury**
>
> . . . .
>
> Before the jury-panel is sworn in by the clerk, get up, and state that you challenge the entire panel of prospective jurors on the ground that it is composed of people whose social and economic interests will prejudice them against you, the defendant.
>
> Expose the method of selecting jury-panels, for which no workers actually in industry, are called to serve. Make a demand for a new panel to

138. *Social Equality Plays Part in Gastonia Murder Trial*, AFRO-AM. (Balt.), Oct. 26, 1929, at 1; *see Verdict of the Labor Jury in Gastonia Class War Case*, DAILY WORKER (N.Y.C.), Oct. 22, 1929, at 1; *Labor Jury Gives Verdict by Radio*, DAILY WORKER (N.Y.C.), Oct. 24, 1929, at 1; *Testimony of Woman Under Fire of State Lawyer Group*, TWIN CITY SENTINEL (Winston-Salem, N.C.), Oct. 15, 1929, at 1, 4.

139. INT'L LAB. DEF., UNDER ARREST! WORKERS' SELF-DEFENSE IN THE COURTS 3 (1932).

> be picked from a cross-section of the working class population in the city,—Negro and white workers from basic industries, etc. State that only such a jury can judge your case properly, and without prejudice to your cause.[140]

The admonition to insist upon a jury representing a "cross-section" of the community (or, here, the local proletariat) is striking. In 1932, very few people appear to have thought of juries in this way,[141] and it would be almost a decade before the Supreme Court first hinted, in dicta, that the cross-sectional ideal was an appropriate way to think of a properly constituted jury.[142]

But it was not just in educational materials that the ILD promoted this vision of the jury. In a series of important and high-profile (but now largely forgotten) criminal cases in the early 1930s, the ILD launched a frontal assault on the all-white jury. As Communist theoreticians labored to formulate what "self-determination" for an oppressed national minority might look like—and how to engage in radical lawyering through the bourgeois courts—the jury box proved an inviting target. Though the ILD raised the issue in other cases, too,[143] major campaigns in Maryland, Georgia, and Alabama featured sustained litigation over the meaning of the democratic jury. Notably, each campaign included "mass defense" efforts, with ILD members and supporters rallying in the streets against all-white juries. It was in this context that "fair-cross-section" jury claims were first articulated.

A. Euel Lee

On October 12, 1931, a white family of four was found murdered in their rural farmhouse on Maryland's Eastern Shore. An older Black farmworker named Euel Lee (also known as "Orphan Jones") was hastily targeted as a suspect, arrested, beaten, and interrogated for sixteen hours. Angry crowds amassed around the

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140. *Id.* at 20. On the collective authorship of the pamphlet under the supervision of Carol Weiss King, see Ginger, *supra* note 124, at 270.

141. I have found only two pre-1932 state cases (and no federal cases) at any level that use the phrase or some variant of it in connection with juries, and neither discuss the issue at any length. *See* Salt River Valley Water Users' Ass'n v. Berry, 250 P. 356, 357 (Ariz. 1926) ("Surely, jurors, a fair cross section of the community, can be selected from a list so large with no suspicion that their verdict would be colored by their personal interests, and, if that is true, defendant has no real reason to complain."); Lutes v. State, 174 N.E. 745, 746 (Ohio Ct. App. 1930) ("It is urged that the names were 'hand-picked,' but the list of electors ultimately chosen [as prospective jurors] appears to be a fair cross-section of the qualified electors of the county, and we find no prejudicial error in overruling the challenge to the array.").

142. *See* Glasser v. United States, 315 U.S. 60, 85 (1942); *infra* note 338 and accompanying text.

143. *See infra* note 245.

local jail and made several attempts to lynch Lee, prompting local authorities to transport Lee across the Chesapeake Bay to Baltimore. The sensational murder—and ongoing reports of mob violence against Black residents on the Eastern Shore—quickly became a major news event.[144]

Within days, a twenty-seven-year-old Communist and ILD attorney named Bernard Ades enrolled as Lee's attorney. Although a complete novice in criminal practice, Ades recognized the challenges Lee faced and was unafraid to upset the Eastern Shore's legal establishment. The ILD would "object[] to a trial anywhere on the Eastern Shore . . . and [it was the] intention of the defense to attempt to eliminate all questions of race prejudice by demanding that Negroes be included in the jury that is to try Jones."[145] It was a bold strategy: nobody had ever attacked the composition of Eastern Shore juries, and it had been more than a quarter century since the Supreme Court had reversed a criminal conviction anywhere in the country based on the exclusion of Black jurors.[146]

When Ades and two ILD staff returned to the Eastern Shore seeking a change of venue on November 1, 1931, "pandemonium broke loose" outside the courthouse.[147] A crowd of hundreds attacked Ades and his companions, beating them badly.[148] Ades's woman "protector," who carried a pistol in her purse, was briefly arrested, but the ILD workers escaped.[149] They were fortunate. A month later, in nearby Salisbury, Maryland, a Black man named Matthew Williams, while ostensibly in the custody of the state, was seized by a white mob, tied to a lamppost, doused in gasoline, and set afire.[150] Many white residents placed the blame for the lynching of Williams squarely on Ades and the ILD. As one local

144. Sherrilyn A. Ifill, On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century 50-54, 83-86, 92-98 (2007). *See generally* Joseph E. Moore, Murder on Maryland's Eastern Shore: Race, Politics, and the Case of Orphan Jones (2006) (exploring the case in further depth).

145. Moore, *supra* note 144, at 47 (quoting an October 1931 letter from Bernard Ades to F. Leonard Wailes about the matter).

146. Klarman, *supra* note 22, at 43; *see also id.* at 56-57 (discussing United States v. Shipp, 203 U.S. 563 (1906)).

147. Moore, *supra* note 144, at 53 (quoting from a November 7, 1931 newspaper article titled, *Ades' Woman Defender with Gun, Responsible for Mob Attacks!*).

148. *Id.*; *see Attorney for Slayer of Four Driven from Snow Hill by Mob*, Daily News (D.C.), Nov. 5, 1931, at 4; *Court to Set Date of Lee Murder Trial*, Salisbury Times, Nov. 4, 1931, at 1.

149. Local newspapers refer to the woman as Helen Mays, a cover name for ILD activist Isabelle Allen, who played an important role in the ILD's defense of the Scottsboro Boys as well as in the Communist Party for many decades. *See* James S. Allen, Organizing in the Depression South: A Communist's Memoir 126-27 (2001) (discussing the experience of Isabelle, the author's wife, with the Snow Hill mob).

150. Ifill, *supra* note 144, at 48-49; Charles L. Chavis, Jr., The Silent Shore: The Lynching of Matthew Williams and the Politics of Racism in the Free State 3 (2021).

newspaper put it, "The Eastern Shore wants nothing more at this time than to be left alone in the settling of its problems. Outside interference which caused the delay in the [Lee] case . . . was directly responsible for the deplorable lynching in Salisbury."[151]

Lee's trial was removed to Baltimore County after the Williams lynching,[152] but the all-white jury was as ubiquitous in the relatively enlightened Baltimore criminal-justice system as it was on the Eastern Shore.[153] Ades was joined by the ILD's David Levinson, one of several ILD lawyers working on the Scottsboro Boys' case. Lee's defense team insisted that Judge Duncan, the circuit-court judge responsible for assembling the jury lists, respond to questions on the record and under oath.[154] Under cross-examination, the judge explained that his method for assembling the jury lists had always been the same:

> [A] witness may impress me on the stand favorably; I may meet someone at some social gathering or some church gathering; I make a memorandum of him . . . . [A]nd the next step is to inquire from people in the community in which he lives, whether he is a good man, whether he pays his debts, is honest, sober and if he is thought well of in the community. These are the only qualifications that I am looking for . . . .[155]

When Levinson asked if the judge "excluded from consideration negroes," he answered, "I didn't consider them at all. I didn't exclude them from consideration, but I didn't consider them at all."[156] "You didn't consider them at all," Levinson underscored.[157] Moments later, though, Judge Duncan clarified that he wasn't *prejudiced* against Black people, but rather, he "proceed[ed] about on the same line that the President of the United States does when he selects a cabinet."[158] A President is looking for people who are "competent," "he wants a harmonious body," and that was all that Duncan was "try[ing] to do in the selection

151. *Mencken Is Denounced by Shore Newspapers*, BALT. SUN, Dec. 12, 1931, at 3 (quoting an editorial from the *Chesterton Enterprise*); *see also* IFILL, *supra* note 144, at 53 ("The charge that 'Communist interference' was to blame for the racial violence that beset the region from 1931 to 1933 became a kind of mantra in Shore newspapers.").

152. Lee v. State, 157 A. 723, 727-28 (Md. 1931).

153. *See* Lee v. State, 161 A. 284, 288 (Md. 1932).

154. Record at 17, *Lee*, 161 A. 284 (No. 64) (on file with Salisbury Univ., Edward H. Nabb Ctr., Joseph Moore Collection, Box 1, Folder 1/12); *id.* at 22 (requesting sworn testimony).

155. *Id.* at 17-18.

156. *Id.* at 19.

157. *Id.*

158. *Id.* at 20.

of jurors."[159] Based largely on this disavowal of discriminatory intent, a panel of circuit judges—Duncan's colleagues—denied Lee's challenge; Lee had introduced nothing to disprove Duncan's assertion that he harbored no ill will toward Black Baltimoreans.[160] Twelve white men were selected, the trial went forward, and (after thirty minutes of deliberations) Lee was convicted and sentenced to death.[161]

On appeal, Lee and the ILD faced an uphill battle. Both the Maryland Court of Appeals (the state's apex court) and the U.S. Supreme Court had regularly rejected jury-discrimination claims based on the absence of Black jurors on particular panels or venires.[162] To make matters worse, Lee had introduced no direct evidence demonstrating that Judge Duncan was dishonest when he disavowed overt discriminatory bias against Black jurors. But the ILD addressed these representations head-on in their brief, waging a frontal assault on what, a half century later, would become known as implicit bias:

> There is no question that Judge Duncan firmly believes in his own mind that he has no prejudice against Negroes. He states so clearly and emphatically. He never consciously excluded them from jury service . . . . But the existence of prejudice in a man's mind cannot be ascertained by questioning the man. The very idea of prejudice is that the holder of it is unable to realize his bias . . . . [A] prejudiced person . . . is unable (not unwilling) to consider the facts in their true relations and of this incapacity he is totally unaware. To him his distorted view seems to be the correct one and he cannot understand why he is accused of prejudice. Bearing the real nature of prejudice in mind it is manifestly absurd to investigate the matter through the statements of the very person who allegedly harbors the prejudice; it is necessary to examine his actions and from them to draw a conclusion as to his prejudice, if any.[163]

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159. *Id.*

160. *Id.* at 22.

161. MOORE, *supra* note 144, at 133.

162. *See, e.g.*, Martin v. Texas, 200 U.S. 316, 320-21 (1906); Thomas v. Texas, 212 U.S. 278, 283 (1909) ("It may be that the jury commissioners did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit jurors in this case, still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated." (quoting Thomas v. State, 95 S.W. 1069, 1073 (Tex. 1906))).

163. Appellant's Brief at 15-16, *Lee*, 161 A. 284 (No. 64) (on file with Salisbury Univ., Edward H. Nabb Ctr., Joseph Moore Collection, Box 1, Folder 11); *cf.* Charles R. Lawrence III, *The Id,*

Even if Judge Duncan *could* be scrupulously unbiased in any individual encounter, Ades continued, a still deeper problem remained: "[R]egardless of the good intentions of the judge . . . [and] [e]stimable as the friends of Judge Duncan may be, they surely do not represent a cross section of the community."[164] As the *Daily Worker* boasted, "The I. L. D. is making this fact the chief basis for the appeal—the first time this has ever been done. The I. L. D. is now challenging capitalist justice, not in general terms, but on the basis of specific court records and of statements made by the judges themselves."[165]

But cunning legal arguments alone, the ILD maintained, would never persuade the Maryland courts, and so Euel Lee's lawyers augmented their appellate efforts with an equally audacious "mass defense" strategy.[166] "Not legal pressure alone, but mass pressure, into which the legal defense is merged," was the ILD's strategy for extracting concessions from the "capitalist courts."[167] Thus, as oral argument before Maryland's high court neared, ILD members and Communist-affiliated unions picketed the home of Chief Judge Bond.[168] Several days later, a vanguard of Black and white Communists drew a crowd of one hundred in Annapolis to protest at the appeals court and the governor's mansion.[169] While dozens of state police armed with tear-gas guns watched, the group paraded around

Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987) (critiquing the doctrine of discriminatory purpose in similar terms). I am indebted to Professor Joseph Blocher for highlighting this connection. For another echo of the implicit-bias argument Lee's lawyers raised on appeal, see *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring), which explains:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

164. Appellant's Brief, *supra* note 163, at 8.

165. *Mass Protests Must Save Orphan Jones*, DAILY WORKER (N.Y.C.), May 21, 1932, at 6. Although his name does not appear on the briefs, newspapers reported that oral argument was delivered by Joseph Brodsky, best known for his work on the Scottsboro Boys case. *See Lee Case Considered by Court of Appeals*, BALT. SUN, May 20, 1932, at 6.

166. *See, e.g.*, *Mass Protests Must Save Orphan Jones*, *supra* note 165, at 6.

167. Mark Tushnet, *The Hughes Court and Radical Political Dissent: The Cases of Dirk De Jonge and Angelo Herndon*, 28 GA. ST. U. L. REV. 333, 353 (2012) (quoting CHARLES H. MARTIN, THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE 15 (1976)); *see also* Uhlmann, *supra* note 117, at 100 (describing how the ILD attempted to provide support to the dependents of male workers imprisoned as a result of labor activism).

168. *Yuel Lee's Freedom Demanded Before House of Judges*, EVENING SUN (Balt.), May 14, 1932, at 3.

169. *Yuel Lee Protest Parade Is Staged*, EVENING SUN (Balt.), May 18, 1932, at 10; *Communist Group Protests Conviction of Lee*, EVENING SUN (Hanover, Pa.), May 18, 1932, at 4.

the Executive Mansion waving placards reading "[w]e demand Negroes on the jury" and "[d]own with race discrimination."[170]

On July 5, 1932, Lee and the ILD won. Maryland's high court, for the first time, vacated a criminal conviction due to the exclusion of Black jurors.[171] In a unanimous opinion authored by Chief Judge Bond, the court acknowledged that the ILD had established a "long, unbroken absence of negroes from the juries selected, [and appeared] to show an established practice [of] confining selections to white men as effectually as if such a restriction were prescribed by statute."[172] That was enough to demonstrate a denial of "equal protection of the laws" and entitle Lee to a new trial.

B. Angelo Herndon

Angelo Herndon was called to Depression-era Atlanta in September 1931 to organize the unemployed and build the Communist Party.[173] He was attractive, well dressed, indefatigable, and effective. On June 30, 1932, the same week Euel Lee's capital conviction was vacated in Maryland, the nineteen-year-old Herndon led one thousand unemployed workers in a peaceful protest that made for "the largest integrated march Atlanta had ever seen."[174] Ten days later, he was arrested and charged with the capital offense of "[a]ttempting to incite insurrection."[175] The gravamen of the charges against Herndon was, essentially, that he was a Communist organizer who possessed radical literature: "He had organized the unemployed through speeches, literature, and protests; he had received Communist publications in the mail; and he boasted of his membership in the

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170. *34, Opposing Euel Lee Sentence, Fail to See Governor*, News J. (Wilmington, Del.), May 19, 1932, at 4; *Yuel Lee Protest Parade Is Staged*, *supra* note 169, at 10.

171. Lee v. State, 161 A. 284, 287-88 (Md. 1932).

172. *Id.* at 288.

173. *See* Brad Snyder, You Can't Kill a Man Because of the Books He Reads: Angelo Herndon's Fight for Free Speech 13 (2025). Herndon arrived in the city by early 1932. *See* Charles H. Martin, The Angelo Herndon Case and Southern Justice 10 (1976).

174. Gilmore, *supra* note 28, at 163; *see also* Snyder, *supra* note 173, at 16 ("The city of Atlanta had never seen such an interracial demonstration."); Martin, *supra* note 173, at 5-6 (describing the protest taking place on June 30). Some sources suggest that the protest occurred on July 10, 1932, rather than on June 30. *See, e.g.*, Gilmore, *supra* note 28, at 163.

175. Snyder, *supra* note 173, at 17; *see* Gilmore, *supra* note 28, at 164.

Communist Party."[176] Even more dangerously, he was a Black Communist.[177] ILD activists in the South promptly wrote to the organization's leadership in New York that defending a charismatic young organizer like Herndon should be a national priority and that "we should raise the issue of Negroes on the jury" from the outset.[178]

Finding the right lawyers for Herndon proved difficult. Atlanta's white liberals were skeptical of the Georgia attorney general's use of the Civil War-era insurrection statute against Herndon,[179] and some fretted that the prosecution might tar Atlanta as "another Scottsboro."[180] Yet the ILD interviewed over a dozen white lawyers without finding anyone who was prepared to mount a defense the way they, and Herndon, wanted to litigate it. Specifically, "they all refused to raise the issue of the exclusion of Negroes from the jury."[181] Eventually, the ILD hired Ben Davis, Jr. and John Geer, two young Black attorneys with sterling pedigrees, to lead the charge.[182] Geer was already on board with the Communist program; Davis "walked into the packed courtroom a nominal Republican [and] strode out a card-carrying Communist."[183] Placing two Black attorneys in charge of such a high-profile defense was itself a coup. In hiring Geer and Davis, the ILD aimed to send a message "to the South and the NAACP, which still exclusively used white lawyers in court, that it was the most advanced labor and civil rights legal organization of its time."[184] It was also dangerous. When Davis challenged the exclusion of Black jurors on the eve of trial, he awoke

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176. GILMORE, *supra* note 28, at 161.

177. *Id.* at 166 (noting the defense's argument that "[h]is only crime is his color"); *see also* CHARISSE BURDEN-STELLY, BLACK SCARE / RED SCARE 2 (2023) (arguing that "capitalist racism created the conditions for the Black Scare and the Red Scare and positioned Radical Blackness as a preeminent threat").

178. Uhlmann, *supra* note 117, at 206 (quoting a July 26, 1932, letter from Clarina Michelson to Carl Hacker).

179. GILMORE, *supra* note 28, at 115-17.

180. *Id.* at 164 (noting the worries of Will Alexander of the Commission on Interracial Cooperation).

181. Letter from Roger Baldwin to George Haynes (Apr. 22, 1933) (on file with Princeton Univ., Mudd Library, ACLU Papers [hereinafter ACLU Papers], Correspondence-Cases By State: Georgia, Vol. 654, Sub-Series 21 (1933)); *see also* Uhlmann, *supra* note 117, at 207 (describing how an ILD activist "visited over a dozen attorneys in the region").

182. *See* GERALD HORNE, BLACK LIBERATION / RED SCARE: BEN DAVIS AND THE COMMUNIST PARTY 35-37 (1994).

183. GILMORE, *supra* note 28, at 165.

184. Uhlmann, *supra* note 117, at 207; *see also* Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931-1941*, 93 J. AM. HIST. 37, 45 (2006) ("In the early 1930s, it was by no means clear that the NAACP would employ black lawyers in important cases, even in the North.").

the next morning to find that the Ku Klux Klan had installed on his lawn a large white cross with a note instructing him to "[g]et out of the Herndon case."[185]

Davis and Geer pulled no punches. From the outset, they made the exclusion of Black Atlantans from the grand jury that indicted Herndon a central issue. The *Labor Defender*, the illustrated monthly magazine of the ILD, promised no less: "The fight to save Herndon from death on the chain gang will be linked with the fight against exclusion of Negroes from juries."[186] The ILD announced plans to "subpoena the six Jury Commissioners, the Clerk of the Superior Court, the Tax Receiver, the Sheriff and Deputy Sheriff, and Negroes who are qualified to serve on grand and trial juries to support the motions to set aside both the indictment and the jury panels."[187] The judge insisted that the December 1932 hearing take place in his chambers rather than open court, thus depriving the public of "see[ing] white officials cross-examined on the stand by Negro lawyers."[188] But the defense felt good about their evidence. The ILD appeared to have established that Black citizens, who made up one-third of the population of Fulton County, had been systematically excluded from jury service since Reconstruction.[189] "This is the first time that the question of exclusion of Negroes from juries is being raised in Georgia," the Communist press boasted.[190] Such publicity was no accident. ILD memoranda underscored, "In releases stress jury question and role of two young Negro attorneys."[191]

Then came a shocking development. In early January 1933, before the trial judge issued a ruling, two Black men—the first in living memory[192]—were summoned as jurors to the Fulton County courthouse. The men, a railway fireman

185. MARTIN, *supra* note 173, at 44; SNYDER, *supra* note 173, at 27-29.

186. *Flash! Herndon Atlanta "6" to Trial*, LAB. DEF. (N.Y.C.), Feb. 1933, at 9.

187. *Force Reduction of Herndon Bail*, DAILY WORKER (N.Y.C.), Dec. 14, 1932 (on file with N.Y. Pub. Libr., Schomburg Ctr. for Rsch. in Black Culture, Manuscripts, Archives and Rare Books Division, International Labor Defense Records, 1926-1946 [hereinafter ILD Records], Reel 18).

188. *Bar Negroes from Ga. Juries*, DAILY WORKER (N.Y.C.), Dec. 19, 1932 (on file with ILD Records, *supra* note 187, Reel 18).

189. *Id.*; *Georgia Calls Negro Jurors to Dodge Communistic Issue*, PITT. COURIER, Jan. 14, 1933, at 1.

190. *Herndon Trial Set for Dec. 13*, DAILY WORKER (N.Y.C.), Dec. 8, 1932 (on file with ILD Records, *supra* note 187, Reel 18); *see also Herndon Death Trial Up Today*, DAILY WORKER (N.Y.C.), Dec. 13, 1932 (on file with ILD Records, *supra* note 187, Reel 18) ("This is the first time that exclusion of Negroes from juries is being made an issue in Georgia.").

191. ILD Memorandum (Dec. 13, 1932) (on file with ILD Records, *supra* note 187, Reel 18).

192. *Cf. By Telegraph*, CHATTANOOGA DAILY TIMES, July 8, 1880, at 2 (noting "Negro jurors" in Atlanta).

and a business owner, were sworn in, and prosecutors accepted them.[193] A "member of the jury commission[] testified he had recommended the names of ten negroes for the recently revised petit jury list and that they had been approved."[194] On the one hand, the integration of the Fulton County jury lists was certainly a victory in the eyes of the Black press, one that vindicated the ILD's dogged emphasis on the issue. On the other, the maneuver was also a transparent attempt "to off set [Herndon's] contention" of the "systematic exclusion" of Black jurors in his case, and, as the ILD anticipated, the trial court subsequently denied his motion.[195] Davis renewed the objection once more, calling additional witnesses, and was nearly held in contempt.[196]

When Angelo Herndon took the stand in his own defense at trial, he delivered an impassioned denunciation of racism and a defense of Communism. But Herndon's audience was not the "hand-picked lily-white jury" that held his fate in their hands.[197] Rather, he was talking to the jury of "white and Negro workers who sat on the benches, watching, listening, learning. And beyond them . . . an unseen jury—the thousands and millions of workers all over the world to whom this case was a challenge."[198] He was convicted and sentenced to eighteen to twenty years. For all their courage and dedication, Davis and Geer were inexperienced, and they made basic mistakes like failing to take exception when the trial court denied their jury challenges. It would be another four years before the ILD, aided by Herbert Wechsler, would prevail upon the U.S. Supreme Court, in a 5-4 decision, to strike down the Georgia statute on First Amendment grounds.[199]

C. The Scottsboro Boys

The fights to save Euel Lee from Maryland's electric chair and Angelo Herndon from Georgia's chain gangs both took place in the shadow of the ILD's most

193. *Georgia Calls Negro Jurors to Dodge Communistic Issue*, *supra* note 189, at 1. But they did not serve, at least at first: the defendant's lawyer in the first case in which they were called, "a white lawyer, [who] was charged with defrauding a [Black] woman . . . of $250," wielded his peremptory strikes against them. *Negroes Called on Jury in Atlanta Following Struggle of the I.L.D.*, DAILY WORKER (N.Y.C.), Jan. 10, 1933, at 2.

194. *Death Penalty Asked for Negro Communist as Trial Opens Here*, ATLANTA J., Jan. 17, 1933, at 5.

195. *Georgia Calls Negro Jurors to Dodge Communistic Issue*, *supra* note 189, at 1, 4; *see also* SNYDER, *supra* note 173, at 27 (noting the initial dismissal of Davis and Greer's motion).

196. SNYDER, *supra* note 173, at 27-29.

197. ANGELO HERNDON, "YOU CANNOT KILL THE WORKING CLASS" 26 (1934) (on file with ILD Records, *supra* note 187, Reel 18).

198. *Id.* at 25-26.

199. Herndon v. Lowry, 301 U.S. 242, 243, 264 (1937).

prominent case, which wound its way through the Alabama courts throughout the 1930s and beyond. On March 25, 1931, a white posse in Paint Rock, Alabama, seized nine Black youths, ranging in age from thirteen to nineteen, who had been riding a freight train in search of work.[200] The boys were initially detained for brawling with a group of white boys on the same train but soon found themselves accused of brutally raping two young white women discovered within the group.[201] Four trials before separate all-white juries took place between April 6 and April 9 in Scottsboro, Alabama; all of the boys were convicted, and all but the thirteen-year-old were sentenced to death.[202]

The legal battle to save the Scottsboro Boys from Alabama's electric chair—including the bitter feud between the ILD and the NAACP for control of the case—is well known,[203] but the extent to which the campaign to save the boys was also a battle over the all-white jury has faded from memory. To the Communists, the "legal lynching" of the Scottsboro Boys reflected "a determination of the white rulers of the South to terrorize all Negroes and . . . to smash the growing unity of the Negro and white toilers against unemployment and starvation."[204] In their view, the white ruling class used "an exclusively white jury and . . . an atmosphere of terrorism and lynch law" to divide the working class, and getting "a semblance of justice" would require a new trial with "a 'jury of our peers.'"[205] ILD attorneys raised a host of legal deficiencies before the Alabama Supreme Court in early 1932 and then before the U.S. Supreme Court later that summer, but foremost among them was the exclusion of Black jurors.

Perhaps more than any other ILD campaign, the fight for the Scottsboro Boys played out in the streets as much as in the "landlord court[s]."[206] The Communists insisted that only "mass pressure could be used against the bosses," under the leadership of the ILD, to prevent "these nine innocent Negro boys" from

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200. GOODMAN, *supra* note 35, at 3-5.

201. *Id.*

202. *Id.* at 6, 13.

203. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 333 (1979) ("Roger Baldwin of the ACLU had no compunctions about working with the ILD, and White was willing to restrain his resentment if it would aid the Scottsboro boys. But Haynes and the other members of the American Scottsboro Committee were still smarting from the bitter attacks of the Communists and were in an uncooperative mood.").

204. Int'l Lab. Def., Resolution: Demanding a New Trial for the 9 Scottsboro Defendants (c. 1931) (on file with ILD Records, *supra* note 187, Box 3, Scottsboro—Publicity and Organization—General, 1931).

205. *Id.*; *see also The Issues of the Scottsboro Case*, S. WORKER, Apr. 25, 1931, at 4 (connecting the right to jury service with the right to cash relief for Black and white workers and tenants).

206. Int'l Lab. Def., Save the 9 Scottsboro Negro Boys!: Smash the Lynch Terror (c. Jan. 1932) (on file with ILD Records, *supra* note 187, Box 3, Scottsboro—Publicity and Organization—General, 1932).

being "railroaded to death."[207] Some alleged that the ILD's incendiary approach cynically exploited the boys' plight and endangered their lives for the sake of furthering the Communists' political agenda, and some leaders of the NAACP were "hostile to Communist involvement in legal cases."[208] There was no denying, however, that the ILD's efforts to arouse mass sympathy were effective. Alabama officials soon found themselves deluged by telegrams and letters sent from individuals and "radical" organizations around the world.[209] Communist-associated mass meetings and protests attracted hundreds or sometimes thousands of Black and white supporters.[210]

When the case first reached the U.S. Supreme Court on October 10, 1932, the courtroom was packed with mostly Black supporters. Euel Lee's lawyer, Bernard Ades, joined other ILD lawyers at the defense table.[211] When the Court convened a month later to announce its decision, the ILD led a "picket demonstration before the Supreme Court on behalf of the Scottsboro boys."[212] Soon after the picketers arrived, a riot broke out: amidst the melee, police used a "tear gas bomb" to deter ILD protestors and arrested "[t]en men and four women."[213]

An hour later, the Court released its opinion in *Powell v. Alabama*. Liberals immediately hailed it as "a notable chapter in the history of liberty."[214] The ILD had raised three independent grounds for reversal: (1) lynch-mob domination of the trial, (2) systemic exclusion of Black jurors, and (3) the denial of counsel for the defendants.[215] In a landmark but fact-bound decision, the Court reversed on denial-of-counsel grounds, holding that given "the ignorance and illiteracy

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207. Int'l Lab. Def., Material for Discussion: The Scottsboro Case 1 (Jan. 1932) (on file with ILD Records, *supra* note 187, Box 3, Scottsboro – Publicity and Organization – General, 1932).

208. *See, e.g.*, GOODMAN, *supra* note 35, at 6-7, 161-62; TUSHNET, *supra* note 29, at 44.

209. GOODMAN, *supra* note 35, at 48; F. Raymond Daniell, *Governor Pledges Negroes Fair Trial*, N.Y. TIMES, Mar. 12, 1933, at 27 ("Governor Miller said he had received more than 15,000 communications from radical and labor organizations throughout the world protesting against the executions . . . .").

210. GOODMAN, *supra* note 35, at 51.

211. Though he does not appear on the briefs, Bernard Ades apparently was part of the defense team. *See Show That Scottsboro Trial Was Dominated by Bosses' Lynch Law*, DAILY WORKER (N.Y.C.), Oct. 11, 1932, at 1 (listing the lawyers present at the defense table before oral argument in the U.S. Supreme Court).

212. *See* Wm. L. Patterson, *The Scottsboro Decision: An Analysis*, LAB. DEF. (N.Y.C.), Jan. 1933, at 229 (claiming this occurred "[f]or the first time in history").

213. *See The Scottsboro Case*, N.Y. TIMES, Nov. 8, 1932, at 20; *7 Negroes Win New Trial as Radicals Riot*, BALT. SUN, Nov. 8, 1932, at 1; *14 Jailed as Clubs Rout Attack*, WASH. TIMES, Nov. 7, 1932, at 1.

214. Felix Frankfurter, Letter to the Editor, *A Notable Decision: The Supreme Court Writes a Chapter on Man's Rights*, N.Y. TIMES, Nov. 13, 1932, at 68.

215. Powell v. Alabama, 287 U.S. 45, 50 (1932).

of the defendants, their youth, the circumstances of public hostility . . . and, above all, that they stood in deadly peril of their lives . . . the failure of the trial court to give them reasonable time and opportunity to secure counsel" constituted a denial of the Fourteenth Amendment's guarantee of "due process."[216] The Communists claimed the decision as a "complete vindication"[217] of their confrontational approach, but also denounced the Court for bypassing what they viewed as the more important issues.[218] By dodging "the exclusion of Negroes from the juries which tried the boys," the Court was simply "point[ing] the way for the more careful covering up of the lynch verdicts" moving forward.[219] ILD-sympathetic lawyers across the country signed petitions underscoring the same point.[220]

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216. *Id.* at 71.

217. *Communist Party Urges Follow-up Scottsboro Victory*, DAILY WORKER (N.Y.C.), Nov. 10, 1932, at 1.

218. *Id.*

219. *Alabama Bosses Try to Rush New Scottsboro Trial; Conspire to Prevent a Change of Venue*, DAILY WORKER (N.Y.C.), Nov. 9, 1932, at 1 (describing the case as a "tremendous, but partial, victory").

220. *Statement of Lawyers on the Scottsboro Case* (on file with ILD Records, *supra* note 187, Reel 4) ("[Although] the Scottsboro case represents a landmark in the struggle of the Negro people for freedom . . . we are not persuaded that the decision represents the beneficent recognition by the Supreme Court of the principle of the rights of Negroes to the guarantees of the Fourteenth and Fifteenth Amendments . . . . The Supreme Court completely ignored the [challenges based on the mob atmosphere and the systemic exclusion of Black jurors], the very grounds which raised sharply the whole question of systematic denial of Constitutional Rights to Negroes . . . .").

FIGURE 2. A FULL-PAGE PHOTO ESSAY FROM THE *WASHINGTON HERALD*, NOV. 8, 1932

Though the Communists' wariness of the Court's decision in *Powell* reflected an astute and ultimately vindicated analysis of the opinion's limitations, there was also a less invidious explanation for the Court's decision to sidestep the jury issue: the Scottsboro Boys' court-appointed trial attorney had failed to object or build an adequate record (or, indeed, do much of anything else).[221] The ILD would not make the same mistake. Led by one of the country's leading criminal-defense attorneys, Samuel Leibowitz, the defense's first order of business when the cases returned to Alabama for retrial was to challenge the state's system of selecting grand and petit jurors.[222]

Over three full days of tense testimony, Leibowitz questioned (and sometimes shouted at[223]) newspaper editors, jury commissioners, and court clerks. These witnesses explained how an initial list of potential jurors was compiled using voter-registration lists, tax lists, and the telephone directory, then culled by jury commissioners, aided by reputable men in each precinct, to identify the best-qualified individuals to make up the official venires.[224] With startling frankness, the white witnesses conceded that Black jurors had not served as petit or grand jurors in northern Alabama since Reconstruction, but they attributed this absence to a complete dearth of Black community members with "sound judgment" rather than race discrimination.[225] ("I might say the same thing about women," a local newspaper editor offered.[226]) Perhaps most provocatively, the ILD then called a parade of leading Black residents, most with college degrees, to the stand, who testified as to their suitability for jury service and to the fact that they had never been summoned.[227] These witnesses, in turn, presented "[f]rom what might be described as an impromptu blue book of the Negro citizenry of Morgan County," reading into the record "the names of about 180

221. *See* Powell v. State, 141 So. 201, 209-10 (Ala. 1932) (emphasizing the lack of contemporaneous objection or record evidence in support of the discrimination claim); GOODMAN, *supra* note 35, at 41 (noting attorney Milo Moody's reputation as "an ancient Scottsboro lawyer of low type and rare practice").

222. GOODMAN, *supra* note 35, at 118 (noting the ILD's confirmation of "reports [that] had been circulating for weeks . . . that [defense] would challenge the jury system"); F. Raymond Daniell, *Pick Jury to Hear Scottsboro Case*, N.Y. TIMES, Apr. 1, 1933, at 34.

223. *See* F. Raymond Daniell, *Negro Defense Gets Test of Juror List*, N.Y. TIMES, Mar. 31, 1933, at 9 ("'Do you mean that for an honest answer?' shouted Mr. Leibowitz [at the jury commissioner].").

224. Transcript of Record at 57-119, Norris v. Alabama, 294 U.S. 587 (1934) (No. 534).

225. *Id.* at 94.

226. *Id.*

227. *See, e.g.*, *id.* at 119-49, 430-73; GOODMAN, *supra* note 35, at 121-22; Daniell, *supra* note 223, at 9.

colored acquaintances, whose qualifications, they averred, were as good as theirs."[228]

As in Maryland and Georgia, the very act of mounting such a challenge to the jury system was a uniquely provocative and dangerous act. One Scottsboro newspaper brazenly threatened in its weekly editorial, "[W]e are told that we must have negro jurors on any jury trying the blacks if they are to get 'their rights.' A negro juror in Jackson would be a curiosity—and some curiosities are embalmed, you know."[229] Alabama's attorney general told the *New York Times*, "When you challenge the right of jury commissioners to exercise their discretion in the selection of veniremen, . . . you challenge the jury system, not only of Alabama but the whole United States. That is an issue of great importance in this case."[230] Defending the Scottsboro Boys was one thing, but the ILD's "fight against the existing jury system" in particular "aroused such antagonism among certain elements" that Leibowitz was assigned five National Guardsmen, with bayonets fixed, to protect him at all times.[231]

The renewed mass defense campaign to save the Scottsboro Boys emphasized their innocence, to be sure. But more than ever, the ILD identified the all-white jury as the legal mechanism by which the ruling-class courts kept workers divided and maintained lynch law. In April 1933, when the ILD's jury challenges were rejected and an all-white jury returned another guilty verdict in the first of the Scottsboro Boys' retrials, the governor of Alabama received 25,000 protest telegrams in a single day.[232] A few weeks later, thousands of marchers, mostly Black, descended on Washington hoping to present President Roosevelt with a Communist-drafted "Bill of Civil Rights."[233] Second from the top of the list of demands for new federal legislation was the declaration that

> [n]o person shall be deprived of the right to serve on grand juries or petit juries or excluded from jury lists or panels for any of the above reasons [including race, tax nonpayment, educational or property qualifications]

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228. Daniell, *supra* note 223, at 9; *see also* Transcript of Record, *supra* note 224, at 433-34, 449-50 (quoting witnesses providing lists of other qualified Black citizens).

229. *Editorially Speaking*, JACKSON CNTY. SENTINEL, Apr. 23, 1931, at 4.

230. F. Raymond Daniell, *Backs Jury Policy in Negroes' Trial*, N.Y. TIMES, Mar. 11, 1933, at 28.

231. Daniell, *supra* note 222, at 34.

232. GOODMAN, *supra* note 35, at 149.

233. *See Scottsboro March in Washington Today; to Present Demands*, DAILY WORKER (N.Y.C.), May 8, 1933, at 1; Uhlmann, *supra* note 117, at 229-30.

> nor by any device directly or indirectly to accomplish the same purpose.[234]

Mass meetings and protests continued throughout 1933 and 1934.[235] The ILD viewed the campaign as "the most important event to the Negroes of America since the Civil War. It will obtain for them what the Civil War failed to deliver: true franchise, the right to jury service or trial by peers, and other Constitutional guarantees."[236]

In April 1935, the Supreme Court again vacated the Scottsboro Boys' convictions in *Norris v. Alabama* and *Patterson v. Alabama*, this time on the ground that Alabama's exclusion of Black jurors denied the defendants "equal protection of the laws."[237] Though the decisions were again fact-bound and purported not to chart any new legal terrain, this time the ILD promoted the "far-reaching"[238] and "revolutionary implications" of the unanimous opinions.[239] The Supreme Court had "evaded" the jury issue in *Powell*, but now the ILD had "forced from the . . . Court" a clear affirmation "on the right of Negroes to serve on grand and petit juries"; the ILD celebrated the ruling as "the first great victory ever obtained to directly offset the Dred Scott decision of 1857 [that] 'Negroes have no rights white men are bound to respect.'"[240]

Of course, the ILD warned that "like the fourteenth and fifteenth amendments, the Scottsboro decision will remain on paper unless mass struggles are organized to put it into effect."[241] In the wake of the opinion, the Communist Party in Birmingham printed thousands of leaflets calling upon and urging Black workers to "rise up and demand the right of Negroes to sit upon juries and to vote"; a group of Black women, led by the ILD, "marched to the Jefferson County courthouse [in Alabama] and demanded that their names be placed on the jury

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234. League of Struggle for Negro Rts., Bill of Civil Rights for the Negro People 1 (1933) (on file with CPUSA Records, *supra* note 76, Box 259, Folder: Negro Issues, Notes, Reports, Resolutions).

235. *See, e.g.*, Press Release, ILD, I.L.D. Sends President Scottsboro Statement He Asked For (June 23, 1934) (on file with ILD Records, *supra* note 187, Reel 10).

236. Uhlmann, *supra* note 117, at 225-26; Press Release, ILD Press Service 2 (Oct. 4, 1934) (on file with ILD Records, *supra* note 187, Reel 10) (quoting Executive Committee member Samuel Ornitz).

237. Norris v. Alabama, 294 U.S. 587, 589 (1935); Patterson v. Alabama, 294 U.S. 600, 607 (1935).

238. Press Release, ILD, Developments Move Fast in First Week After Scottsboro Decision 1 (Apr. 9, 1935) (on file with ILD Records, *supra* note 187, Reel 10).

239. Anna Damon, *Scottsboro Victory Rocks the South*, Lab. Def. (N.Y.C.), May 1933, at 7.

240. Press Release, ILD, U.S. Supreme Court Reverses Scottsboro Decision 3 (Apr. 1, 1935) (on file with ILD Records, *supra* note 187, Reel 10).

241. Damon, *supra* note 239, at 7; Press Release, *supra* note 238, at 4.

rolls."[242] The response from white Alabama authorities was equally swift and forceful. "[N]ew legislation" restricting eligibility for jury service, "peremptory challenges," and "actual terror" remained "methods whereby Negroes [were] deprived of their jury rights, in the future as in the past."[243] But for four years—at no small personal risk to the lawyers and activists involved—the ILD had waged war against the all-white jury; the *Norris* and *Patterson* decisions represented a "great victory" in that effort.[244]

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The campaigns to free Euel Lee, Angelo Herndon, and the Scottsboro Boys were, in many senses, profound losses, too. On retrial, Lee was convicted and ultimately executed in October 1934; Herndon remained imprisoned until August 1934, when he was released on bail pending appeal; and while the ILD saved the lives of the Scottsboro Boys, some remained imprisoned as late as 1950. Likewise, it is certainly true that overt discrimination against Black jurors remained pervasive for many more decades.

But the ILD's efforts, in these cases and others,[245] demonstrated for the first time that the all-white jury was not impregnable. In the wake of the 1932 *Lee* decision, counties across Maryland began integrating their jury lists.[246] The Herndon defense led to the first Black jurors in Atlanta's courts since Reconstruction. And after *Norris* and *Patterson*, jurisdictions around the country began reporting the impanelment of the first Black jurors in living memory: Black defendants raised and won jury challenges in San Marcos, Texas; Clarksdale, Mississippi; and Newark, New Jersey.[247] When Southern liberals like the

242. KELLEY, *supra* note 52, at 123.

243. Damon, *supra* note 239, at 7.

244. *Id.*

245. The Lee, Herndon, and Scottsboro cases were by no means the only venues where the ILD pressed the point. *See, e.g.*, Mack, *supra* note 184, at 45 (discussing the 1932 prosecution of a Philadelphia man named Willie Brown in which ILD activists rallied for "Negro workers on the jury"); KELLEY, *supra* note 52, at 43 (discussing the ILD's "focus[] on the exclusion of blacks from Southern juries" in their legal defense of Camp Hill, Alabama, sharecroppers in 1931).

246. *See Another Negro Juror*, DAILY MAIL (Hagerstown, Md.), Sep. 3, 1932, at 12 ("Following the action of several other counties of the state, Kent county now has has [sic] a negro drawn for service on the October term jury . . . ."); *Washington County Has a Negro Juror*, DAILY TIMES (Salisbury, Md.), Nov. 14, 1932, at 5 ("For the first time in over 35 years a negro today was drawn for jury duty in Washington county. The names of four negroes were in the box . . . .").

247. *See* Negro on Texas Grand Jury (n.d.) (on file with ILD Records, *supra* note 187, Box 4, c41 Scottsboro—Special—Negro Jurors Ruling, 1935); Negro Juror Seated in Mississippi (Oct. 12, 1935) (on file with ILD Records, *supra* note 187, Box 4, c41 Scottsboro—Special—Negro Jurors Ruling, 1935); Race to Receive Seats on Juries After Ruling (June 29, 1935) (on file

Commission on Interracial Cooperation tepidly endorsed a 1933 resolution that jurors be selected "with the sole consideration as to fitness for such service," not race, the Black press lampooned them as "appear[ing] as a timid soul who holds back until an opponent is knocked down by someone else before joining the attack."[248]

The ILD's "jury attacks" also presented a major challenge to the other main legal organization fighting for racial equality in the 1930s: the NAACP.[249] In the summer of 1933, amidst financial struggles and a growing sense that the ILD had become the "real champion of Negro rights,"[250] the NAACP's annual conference was marked by unprecedented debate. Addressing the conference's closing session, Dean of Howard University Law School and future NAACP Legal Director Charles H. Houston admonished his "ultra radical friends" to "get your bearings."[251] "With all due credit to the I.L.D.," Houston defensively underscored, "let us say that the National Association has not been blind to the question of jury discrimination in the South."[252] The NAACP was "follow[ing] closely upon the heels of the jury attack which was made by the International Labor Defense"

with ILD Records, *supra* note 187, Box 4, c41 Scottsboro—Special—Negro Jurors Ruling, 1935).

248. *Kicking the Man Who Is Down*, AFRO-AM. (Balt.), May 6, 1933, at 10.

249. On the rivalry between the organizations, see generally Mack, *supra* note 184; KELLEY, *supra* note 52; and GOODMAN, *supra* note 35.

250. Conference—For Mr. Roy Wilkins (May 24, 1933) (on file with Libr. of Cong., National Association for the Advancement of Colored People Records [hereinafter NAACP Papers], Part I: Meetings of the Board of Directors, Records of Annual Conferences, Major Speeches, and Special Reports, Folder: 1933 Annual Convention).

251. Charles H. Houston, Address Delivered by Charles H. Houston Before the Twenty-Fourth Annual Conference of the NAACP 3 (July 2, 1933) (on file with NAACP Papers, *supra* note 250, Part I: Meetings of the Board of Directors, Records of Annual Conferences, Major Speeches, and Special Reports, Folder: 1933 Annual Convention); *id.* at 7.

252. *Id.* at 5.

by litigating its own legal challenges.[253] The organization has remained heavily involved in litigating jury-discrimination cases ever since.[254]

No figure would play a bigger role in the NAACP's efforts to realize the democratic jury over the next several decades than Charles Houston's brilliant young protégé, Thurgood Marshall, who played an indirect role in Euel Lee's case. In 1933, Maryland officials sought to have ILD lawyer Bernard Ades disbarred in retaliation for his aggressive work on behalf of Lee and several other Black defendants.[255] Ades hired Houston and Marshall, who was just months out of Howard Law School, to represent him in the disbarment proceedings.[256] The pair's successful representation of Ades was one of Marshall's first important cases, and the first time Black attorneys had ever appeared in court on behalf of a white client in such a proceeding.[257]

III. ODELL WALLER

On the eve of Odell Waller's execution in 1942, the only Americans unfamiliar with the plight of the Black sharecropper convicted of murdering his white landlord were those "unable to read and hear."[258] Under massive banners reading "SAVE ODELL WALLER," twenty thousand Black New Yorkers packed

253. *Id.* Indeed, in one early case that Houston spearheaded, a federal judge in Boston temporarily halted the extradition of a Black murder suspect to Virginia on the grounds that Black men had been excluded from the Virginian grand jury that indicted him. *See* Associated Press, *Ask Supreme Court to Act on Crawford*, N.Y. TIMES, Sep. 1, 1933, at 36; KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 173-80 (2014) (discussing the Crawford case). "[E]specially in view of the Euel Lee case in Maryland last July," Houston wrote to NAACP Secretary Walter White confidentially, the case could be "something big if properly handled." Letter from Charles H. Houston to Walter White (Mar. 10, 1933) (on file with NAACP Papers, *supra* note 250, Part VIII: Discrimination in the Criminal Justice System, 1910-1955, Series A: Legal Department and Central Office Records, 1910-1939, Folder: Cases Supported – George Crawford).

254. *See* Eric W. Rise, *Crime, Comity and Civil Rights: The NAACP and the Extradition of Southern Black Fugitives*, 55 AM. J. LEGAL HIST. 119, 143-45 (2015).

255. *See In re* Ades, 6 F. Supp. 467, 468 (D. Md. 1934).

256. Letter from Thurgood Marshall to William E. Taylor, Acting Dean, Howard L. Sch. (Dec. 27, 1935), *reprinted in* THURGOOD MARSHALL, SUPREME JUSTICE: SPEECHES AND WRITINGS 7-8 (J. Clay Smith, Jr. ed., 2003); *see also* Henry J. McGuinn, *Equal Protection of the Law and Fair Trials in Maryland*, 24 J. NEGRO HIST. 143, 156 & n.22 (1939) (discussing Houston's and Marshall's involvement in Ade's disbarment proceedings).

257. Letter from Marshall to Taylor, *supra* note 256, at 8.

258. *In the Old Arm Chair with Louis Pilman*, NEWS-VIRGINIAN, June 26, 1942 (on file with Wayne St. Univ., Walter P. Reuther Library, Workers Defense League Collection [hereinafter WDL Collection], Box 257).

Madison Square Garden calling for his release.[259] Denied an audience with President Roosevelt, A. Philip Randolph warned Justice Department officials, "As all Americans remember Pearl Harbor, Negro Americans will remember Odell Waller."[260] To no avail: the State of Virginia executed Waller using the electric chair on July 2, 1942.[261]

As with the Scottsboro Boys, the campaign to save Waller, both inside and outside the courtroom, focused on the unrepresentative character of the all-white jury that convicted him. And, once more, those responsible for leading these fights were left-wing radicals: first an obscure Trotskyist group called the Revolutionary Workers League, then the comparatively mainstream Workers Defense League. But whereas the ILD's cases in the early 1930s focused exclusively on racial discrimination in jury selection, Waller's jury attack was somewhat more nuanced, implicating both race *and* class. By selecting jurors solely from the list of those who had paid the poll tax, Virginia impermissibly discriminated, Waller argued, against both Black men and poor white sharecroppers in violation of the Equal Protection Clause.[262] Waller's attack on the "poll tax jury" was the first time such an argument—that the Fourteenth Amendment forbade wealth-based classifications—had ever been presented to the U.S. Supreme Court.[263] As the country mobilized to fight fascism in Europe, Waller's case thus raised uncomfortable questions about how democratic citizenship was defined and circumscribed in the United States. Through his attack on Virginia's "poll tax jury," Waller became, in the words of author Pearl S. Buck, "a personification of all those to whom democracy is denied in our country."[264]

* * *

There was no dispute that on July 15, 1940, twenty-three-year-old Odell Waller shot and killed his landlord, Oscar Davis, in the small town of Gretna, Virginia. Since the previous January, Waller had helped Davis grow corn, tobacco, and wheat. In exchange for his labor, Waller was supposed to receive a small tract of land to farm for himself and one-fourth of the corn and wheat

259. Richard B. Sherman, The Case of Odell Waller and Virginia Justice, 1940-1942, at 130-32 (1992).

260. *Efforts to Save Odell Waller Fail; Sharecropper Dies in Va. Electric Chair*, St. Paul Recorder, July 10, 1942, at 1.

261. *Id.*

262. Sherman, *supra* note 259, at 98, 115.

263. *Id.*

264. Pearl S. Buck, Letter to the Editor, *Odell Waller's a Test Case*, N.Y. Times, May 30, 1942, at 14; *see also A Petition to the President*, Evening Star (D.C.), July 1, 1942, at A19 (on file with WDL Collection, *supra* note 258, Folder 184-3) (full-page petition); *If Odell Waller Dies, South's Poll Tax System Is to Blame*, Call (Kan. City), June 19, 1942, at 22 ("Odell Waller has become the symbol of second-class justice for second-class citizens.").

crops he brought Davis. But Davis balked at paying Waller, and a dispute arose.[265] According to prosecutors, Waller angrily confronted Davis and shot him dead without provocation; Waller insisted he fired only after Davis "used some dirty words" and "[ran] his hand in his pocket like he was trying to pull out something."[266] As word of the shooting spread that afternoon, Waller fled to Ohio "to keep 'em from stretching me up."[267]

Waller's arrest two weeks later drew the attention of a small Chicago-based organization, the Revolutionary Workers League (RWL), which spearheaded the defense from his extradition hearing through his trial. The RWL—which was committed to the "organization of a revolutionary Marxian, that is, a Communist party . . . [and] establishment of the dictatorship of the proletariat"[268]—was a splinter of a splinter group. Like other Trotskyites, its leaders had been at odds with the "Stalinist" CPUSA since the late 1920s. However, when Trotsky directed his followers to "enter" and capture socialist parties in 1935, some American Trotskyites refused, forming the RWL as an independent revolutionary party instead.[269] Never boasting more than a few hundred members, the RWL managed to play an important role in some union campaigns in Detroit and regularly published a radical newspaper, the *Fighting Worker*.[270] To conservative white Virginians, the appearance of such "professional agitators" in Pittsylvania County, home to the town of Gretna, "was calculated to prejudice the jury from the start."[271]

While the RWL had no prior presence in the region, it had contacts with sympathetic lawyers in Richmond like Thomas Stone, who spent the early 1930s

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265. For a fuller account of the economic dispute leading to the shooting, see SHERMAN, *supra* note 259, at 9-12; and Pauli Murray & Murray Kempton, *All for Mr. Davis: The Story of Sharecropper Odell Waller*, WORKERS DEF. LEAGUE 12-13 (1941) (on file with WDL Collection, *supra* note 258, Folder 186-2).

266. *See* Record at 120, Waller v. Commonwealth, 16 S.E.2d 808 (Va. 1941) (No. 2442) (on file with Wash. & Lee Sch. of L., Virginia Supreme Court Records Collection) (testimony of Odell Waller).

267. *Id.*

268. REVOLUTIONARY WORKERS LEAGUE CONST. art. 1, § 1 (amended 1938).

269. *See* SHERMAN, *supra* note 259, at 16-17; Robert J. Alexander, *Splinter Groups in American Radical Politics*, 20 SOC. RSCH. 282, 300-01 (1953).

270. SHERMAN, *supra* note 259, at 16-17.

271. *See* Editorial, *The Waller Hearing Today*, RICHMOND TIMES-DISPATCH, June 29, 1942, at 6. Many Black Virginians felt the same way. *See* SHERMAN, *supra* note 259, at 34 (quoting an editorial from a Black newspaper in Norfolk arguing that it was "extreme recklessness" for the Revolutionary Workers League (RWL) to appear in a Southern courtroom, as doing so "prejudiced the case and identified the defense with the usual headquarters of the workers' revolution—Soviet Russia").

heavily involved in multiracial Communist organizing.[272] Stone traveled to Chatham, Virginia (the Pittsylvania County seat, near Gretna), and immediately did what no local lawyer would have: he challenged the grand jury and petit jury for being "selected from a list exclusively of polltax payers."[273] This method of jury selection, Stone argued, deprived Waller of the "protection of . . . the Fourteenth Amendment of the United States, and . . . a trial by a jury of his peers."[274] "[T]here is no requirement that the accused have persons of the same economic or social category on either the grand or the petit jury," Stone conceded, but there *was* a prohibition on the Commonwealth affirmatively excluding jurors of "the same general social and economic category" as the defendant.[275] Because "[p]ersons who are unable to pay their poll tax are excluded and the accused is in the same general social and economic category," Stone contended, the Virginia system was unlawful.[276] The trial judge brusquely dismissed the argument: "I am always glad to see a person pay his poll tax. I think people ought to . . . take an interest in their government."[277] Stone continued to press the issue during voir dire, moving the court to dismiss "for cause" all prospective jurors who used sharecroppers on their land. The case "involve[d] a killing of a landlord by a sharecropper and since it is our contention it arose out of economic circumstances," Stone argued, landlords would necessarily be biased against the defendant.[278] This objection garnered a stronger rebuke: "Mr. Stone, we try cases in court according to law and evidence and not because of some social standing that may exist."[279]

The final jury consisted of eleven white farmers—six of whom used sharecroppers—and a wage-earning white carpenter.[280] After hearing sharply conflicting accounts of what had happened in July, the jury deliberated for fifty-two minutes before it delivered its verdict: "We the jury find the defendant Odell

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272. SHERMAN, *supra* note 259, at 19-20; *see also CWA Group Kept Out of City Hall*, RICHMOND NEWS LEADER, Mar. 16, 1934, at 2 ("Accompanying the [racially mixed] group was Thomas Stone, leader of the local Communist movement."); *Richmond Reds Talk and Cheer; Police Look, Then All Go Home*, RICHMOND TIMES-DISPATCH, May 2, 1934, at 3 (including a picture of "local Communist leader" Thomas H. Stone addressing a racially mixed rally). *But see* Thomas Stone, *Ex-Red Describes Swing to F.D.*, RICHMOND NEWS LEADER, Oct. 12, 1934, at 4 (rejecting "fanatical, and dogmatic theses of the communists" and supporting the New Deal).

273. Record, *supra* note 266, at 59.

274. *Id.* at 60.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 75.

279. *Id.*

280. *Id.* at 77; SHERMAN, *supra* note 259, at 25.

Waller guilty of Murder in the First Degree as charged in the indictment [and] fix his punishment at death."[281] Waller was condemned to be "electrocuted until death" in ninety-one days.[282]

In the hectic weeks and months that followed, primary responsibility for the Waller defense transferred from the RWL to a better-resourced and comparatively mainstream left-wing group, the WDL. Much like the ILD grew out of CPUSA, the WDL derived from Norman Thomas's Socialist Party, though it operated with greater independence and worked closely with liberal organizations.[283] Publicly, the WDL billed itself as a "militant, politically nonpartisan organization . . . devote[d] exclusively to the protection of labor's rights,"[284] while to the liberal press, it described itself as "a national non-Communistic, nonpartisan, labor organization."[285] The RWL and WDL would snipe at one another consistently over the next two years, though sometimes the significant ideological differences between the two groups were lost on outsiders.[286]

The WDL's involvement helped launch Waller's case into the national spotlight, largely through the efforts of its extraordinarily talented field secretary, Pauli Murray. Though still in her twenties, Murray had been arrested on picket lines;[287] joined and, disillusioned, quit a small Communist party;[288] and attempted, unsuccessfully, to desegregate the University of North Carolina.[289] The "young militant Negro . . . socialist"[290] had also struck up an unlikely friendship with Eleanor Roosevelt, one that would endure and deepen over the following decades.[291] Perhaps most importantly, however, Murray also had personal experience with Virginia's criminal-justice system: in March 1940, Murray and a companion spent several harsh nights in a Petersburg, Virginia, jail for refusing

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281. Record, *supra* note 266, at 24; *see* SHERMAN, *supra* note 259, at 32.

282. Record, *supra* note 266, at 21, 24.

283. SHERMAN, *supra* note 259, at 17.

284. *Id.*

285. David L. Clendenin, *Odell Waller's Defenders*, RICHMOND TIMES-DISPATCH, Jan. 13, 1941, at 6.

286. *See Poll Taxes and Juries*, RICHMOND TIMES-DISPATCH, Dec. 21, 1940, at 10 (misattributing the RWL's "inflammatory literature" to the WDL); Clendenin, *supra* note 285, at 6 (pointing out the misattribution).

287. Interview by Genna Rae McNeil with Pauli Murray 44 (Feb. 13, 1976), https://docsouth.unc.edu/sohp/G-0044/G-0044.html [https://perma.cc/647U-7A3X].

288. ROSENBERG, *supra* note 49, at 52-55.

289. *Id.* at 70-77.

290. Interview by Thomas F. Soapes with Pauli Murray 11, 13 (Feb. 3, 1978) (on file with Franklin D. Roosevelt Presidential Libr. & Museum, Murray Archive, Box 1, #10) (recording Murray's self-identification).

291. ROSENBERG, *supra* note 49, at 69.

to leave the "whites only" section of a Greyhound bus.[292] Murray was invited to join the national board of the WDL soon after the ordeal; when the Waller case came before the organization, Murray felt compelled to champion his cause in part due to her experience in Petersburg.[293]

Murray, along with Odell's mother, Annie Waller, soon began touring the country to raise money for the WDL's appeals and to raise mass awareness about his case. The WDL succeeded in obtaining several stays of the execution, which bought time to litigate and campaign against the "poll tax jury" that convicted Odell.[294] "Mother" Waller's first trip north in November and December 1940 raised nearly $1,500, and a separate tour through the Midwest in January 1941—with twenty-two events over seventeen days drawing 6,985 in total attendance—raised another $500.[295] As important, newspaper coverage of Waller's case began to migrate from radical and Black news sources to liberal, white papers. Virginius Dabney, the liberal editor of the *Richmond Times-Dispatch*, likely spoke for many white Virginians when he denounced the "inflammatory literature" disseminated by Waller's champions and expressed skepticism about Waller's innocence. Nevertheless, he recognized the fundamental problems with the jury that sentenced Waller to death:

> [If] the voting list was used in picking the men who tried Waller . . . the system is wrong, even though Waller may be guilty of first-degree murder. In a case involving a controversy between a sharecropper and a landlord, the jury ought by all means to include several sharecroppers, if it is to include several landlords. Otherwise the landlord's point of view is apt to carry undue weight, when the jurors arrive at their verdict . . . . [T]he practice should be discontinued.[296]

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292. *See id.* at 81-91.

293. Interview by McNeil with Murray, *supra* note 287, at 60.

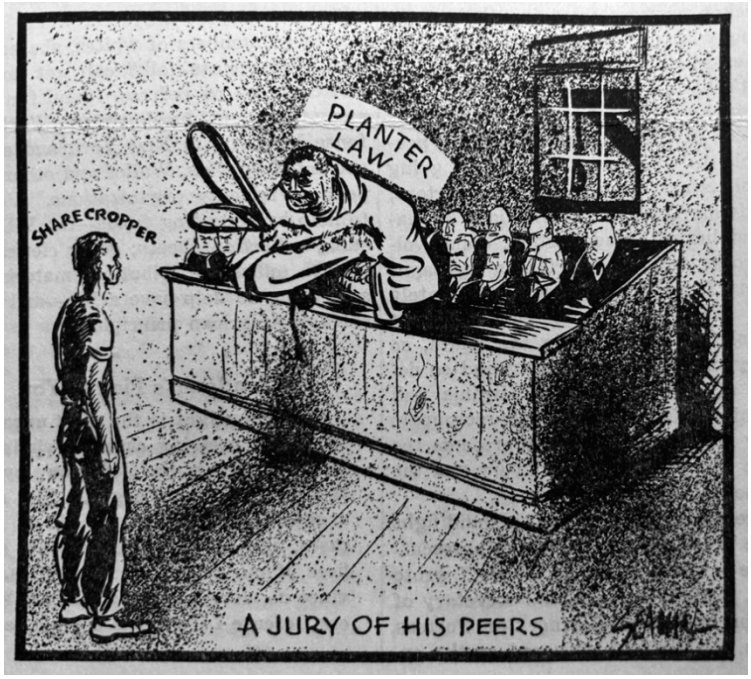
294. SHERMAN, *supra* note 259, at 62 (quoting John F. Finerty, Letter to the Editor, *Is Waller Guilty?*, NATION, Feb. 22, 1941, at 223, 224). Connecting Waller's case to some of the major cases mentioned in Part I, *supra*, the WDL enlisted John Finerty to assist in representing Waller. Finerty's previous clients included Tom Mooney, Nicola Sacco, and Bartolomeo Vanzetti. GILMORE, *supra* note 28, at 342.

295. SHERMAN, *supra* note 259, at 45-46 (discussing the November and December 1940 tours); Pauli Murray, Report—Pauli Murray-Annie Waller Tour (Jan. 7-Jan. 27, 1941) (on file with WDL Collection, *supra* note 258, Folder 187-23). Annie Waller would conduct several more tours, with and without Pauli Murray, over the next eighteen months. *See, e.g.*, Report on Murray-Waller Tour 2 (on file with WDL Collection, *supra* note 258, Folder 187-24) (showing the itinerary for the May 1941 tour); SHERMAN, *supra* note 259, at 109.

296. *Poll Taxes and Juries*, *supra* note 286, at 10.

Throughout early 1941, the WDL emphasized that as much as Waller "deserve[d] a trial by a jury of his peers," his case was equally an effort to ensure that "millions of Negro and poor white citizens of the South could take the first long steps toward economic and political democracy."[297]

FIGURE 3. "A JURY OF HIS PEERS" CARTOON[298]



But it was another matter to convince the Supreme Court of Appeals of Virginia that the exclusion of sharecroppers from the jury, via a poll tax or otherwise, was *unconstitutional*. Just as opponents of sex discrimination would "reason from race" in the 1960s,[299] Waller's lawyers explicitly argued that "it must be true by analogy" to the Supreme Court's cases involving race and the jury that

297. Press Release, Workers Def. League, The Case of Sharecropper Waller—A Statement of Facts, (Feb. 4, 1941) (on file with WDL Collection, *supra* note 258, Folder 183-2).

298. Murray Kempton, *A Sharecropper's Mother*, CALL (Kan. City), Dec. 21, 1940 (on file with Harv. Univ., Workers Defense League: Printed Materials, 1939-1940, Workers Defense Bulletin, Dec. 1940 Issue, Box 72, #1248).

299. *See* MAYERI, *supra* note 48, at 58.

economic discrimination denied Waller an "impartial" jury, too.[300] As in the *Lee* case, Waller's attorneys pressed that it was not enough for a juror to disclaim partiality, since only "super-men" could set aside their "whole social training, economic environment, and subconscious feeling inspired by pecuniary motives."[301] "From the time of Ignatius Loyola to Sigmund Freud," the WDL argued, "science increasingly reveals that what a man thinks of himself and what he really is are two entirely different quantities . . . . [The] basic necessity [of earning a living] moulds all consciousness."[302] As such, the body that judged Waller was "strictly a class jury," whereas the jury "as contemplated by the law [is] a cross-section of the community."[303] Like Euel Lee, who also invoked the "cross-section" metaphor, Waller provided no legal citation for this crucial claim. Though similar language had been appearing in left-wing briefs and propaganda for years, the choice of phrase is noteworthy: such language would not appear in the U.S. Reports until the following year.[304]

In October 1941, Virginia's high court rejected Waller's appeal, faulting Waller's trial attorney for failing to substantiate his jury challenge. Waller had failed to produce "a scintilla of evidence . . . to show [whether he] had, or had not, paid a poll tax" himself, and "hence, he is in no position to complain of such discrimination, had it existed."[305] Moreover, in a surprise move, the court held that one did not need to appear on the voting rolls in order to serve as a Virginia juror (even if state statutes seemed to indicate as much and, in practice, local custom required it).[306] Again, Waller had failed to build a proper evidentiary record to show that only poll-tax payers were allowed onto jury venires in Pittsylvania County.[307] These were basic missteps that, by 1940, a careful trial attorney mounting a jury challenge should have foreseen: as Murray would later put it, Waller's attorney was "very well intentioned" but "inexperienced."[308]

The setback forced the WDL to return to Pittsylvania County to build a more thorough record for a habeas challenge. Meanwhile, the national campaign to

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300. Petition for Writ of Error at 13, Waller v. Commonwealth, 16 S.E.2d 808 (Va. 1941) (No. 2442).

301. *Id.*

302. *Id.*

303. *Id.*

304. Glasser v. United States, 315 U.S. 60, 86 (1942) (referring to the "concept of the jury as a cross-section of the community"). For examples from left-wing propaganda and briefs, see INT'L LAB. DEF., *supra* note 139, at 20; and Appellant's Brief, *supra* note 163, at 19.

305. *Waller*, 16 S.E.2d at 810.

306. SHERMAN, *supra* note 259, at 84-87.

307. *Id.*

308. Interview by McNeil with Murray, *supra* note 287, at 62.

build popular support for Waller (and perhaps clemency) was redoubled. As it turned out, every member of Waller's jury *had* paid their poll tax in each of the past three years, and a review of the hundreds of names on the Pittsylvania County jury list confirmed that they were all poll-tax payers, too.[309] Thus, the WDL argued, both in court and in the press, payment of poll taxes was a de facto qualification for jury service, even if not a de jure qualification.[310] Waller's looming execution generated popular support for this argument, which focused on the undemocratic jury that convicted him. As an "Emergency Appeal!" signed by John Dewey, Reinhold Niebuhr, the editors of the *Nation*, *New Republic*, and *Common Sense*, and a dozen other prominent "labor, Negro, church & liberal leaders" put it:

> [T]his is a case of deepest concern to every person interested in maintaining American democracy . . . . The United States Supreme Court must be persuaded, if possible, to decide squarely whether a trial by a jury of his peers is the constitutional right of every accused American citizen.[311]

Dewey and Pearl Buck published letters in the *New York Times* underscoring the same point, both highlighting the connection between Waller's jury-discrimination claim and America's "fight[] for . . . freedom" abroad.[312] The *New York Times*'s editors themselves were less subtle: Virginia's governor would be "helping his country's reputation among all the dark-skinned and yellow-skinned peoples" of the world if he commuted Waller's sentence.[313]

Though the WDL did not champion "mass defense" quite so aggressively as the ILD, the campaign to save Waller was hardly confined to newspapers and

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309. SHERMAN, *supra* note 259, at 90.

310. Brief in Support of Petition for Writ of Certiorari at 3, Waller v. Youell, 316 U.S. 712 (1942) (No. 1097) (on file with WDL Collection, *supra* note 258, Folder 185-4).

311. SHERMAN, *supra* note 259, at 110; Press Release, WDL Press Serv., Say 15 Labor, Negro, Church & Liberal Leaders, "Save Odell Waller's Life" (May 18, 1942) (on file with WDL Collection, *supra* note 258, Folder 183-2).

312. Buck, *supra* note 264, at 14 (discussing "those abroad who are watching us to see if we mean what we say when we talk about fighting for four freedoms"); John Dewey, Letter to the Editor, *The Case of Odell Waller*, N.Y. TIMES, May 19, 1942, at 18 ("Colored people regard this unexplained refusal [to grant relief to Waller] as just one more evidence that when white people speak of fighting to preserve freedom, they mean freedom for their own race.").

313. *Odell Waller: A Test Case*, N.Y. TIMES, June 11, 1942, at 22; *see also* Editorial, *supra* note 271, at 6 ("Colored peoples in both hemispheres will believe, whether rightly or wrongly, that Negroes do not get justice in America, if Waller goes to the chair. In that event, the Axis can be counted on to make the most of the electrocution, and to use it with particular effect in China and India, and throughout the Arab world. This is no local issue, but a cause of international dimensions.").

magazines. The largest showings of support came as part of A. Phillip Randolph's "March-on-Washington Movement," which sought to mobilize mass Black protest against "lynch law, segregation, Jim Crow, and second class citizenship."[314] On June 16, 1942, a Tuesday night, twenty thousand packed Madison Square Garden for a "funeral of 'Uncle Toms'" that Black newspapers dubbed "the greatest mass demonstration ever staged."[315] Rally attendees had a host of demands, but the emotional high point of the evening came when Odell's mother, Annie Waller, took the stage to plead for her son's life.[316] Short on time, A. Phillip Randolph abandoned his prepared remarks and instead read a petition to President Roosevelt on Waller's behalf; the crowd unanimously rose to its feet to adopt it.[317] (No resolution in support of the war effort was put forward.[318]) Thousands more who were unable to attend the rally showed support by staging a fifteen-minute "Blackout Protest" throughout Harlem.[319] Two weeks later, in front of another twenty-thousand-person crowd in Chicago, the NAACP's Walter White asked, "How can colored people in the light of the record believe the fine, brave words about democracy when tonight Odell Waller sits in death row in a Virginia prison?"[320]

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314. Roscoe E. Lewis, *The Role of Pressure Groups in Maintaining Morale Among Negroes*, J. Negro Educ. 464, 464 (1943) (citing A. Phillip Randolph, *Why Should We March?*, 31 Surv. Graphic 488, 489 (1942)).

315. Afro-Am. (D.C.), June 20, 1942, at 19; *see also 20,000 Storm Madison Square Garden to Help Bury Race's "Uncle Toms,"* N.Y. Amsterdam Star-News, June 20, 1942, at 1 (describing the audience as "one of the largest crowds of Negroes ever to attend a meeting of this kind").

316. *20,000 Negroes Protest at Garden*, Cath. Worker, Aug. 1942, at 6 ("Of all the speakers at the meeting, the briefest, the saddest, was Mrs. Waller . . . .").

317. *25,000 Storm Jim Crow Protest Confab*, Atlanta Daily World, June 21, 1942, at 5; *Randolph Tells Why He Didn't Make His Talk*, Amsterdam News, June 20, 1942, at 1.

318. Horne, *supra* note 182, at 95 (noting the Communist Party's frustration at the perceived lack of enthusiasm for the war effort at the event).

319. *See Blackout Harlem June 16th!*, Black Worker (N.Y.C.), June 1942, at 1 (on file with WDL Collection, *supra* note 258, Folder 183-15).

320. *20,000 Cheer "For Freedom Now" at Stadium in Chicago*, Afro-Am. (Balt.), July 4, 1942, at 1; Garfield L. Smith, Jr., *20,000 Chicagoans Cheer A. Phillip Randolph*, Pitt. Courier, July 4, 1942, at 14; Afro-Am. (D.C.), July 4, 1942, at 1.

FIGURE 4. BANNERS READING "SAVE ODELL WALLER" DURING THE MARCH ON WASHINGTON MOVEMENT'S RALLY, JUNE 16, 1942[321]

Meanwhile, the WDL continued fighting for Waller in the courts. In January 1942, Virginia's high court dismissed Waller's habeas petition without an opinion,[322] thus teeing up the long-anticipated fight before the U.S. Supreme Court. Once again, the WDL argued that the poll-tax jury was unconstitutional. They were joined by the ACLU, which submitted an amicus brief (authored by Thurgood Marshall) agreeing that the Equal Protection Clause's sweep was "not limited to denials because of race or color, but extend[ed] as well to denials based on politics, nativity, religion, economic status, or any other class discrimination,"

321. Photograph of Mass Meeting for the March on Washington (on file with Getty Images, Bettmann Collection).

322. *See* Letter from M.B. Watts, Clerk, Va. Sup. Ct. App., Exhibit No. 2, Notice of Motion for Leave to File Original Petition for Writ of Habeas Corpus and Petition for Writ of Habeas Corpus, Waller v. Youell, 316 U.S. 679 (1942) (No. 1097) (on file with WDL Collection, *supra* note 258, Folder 185-4).

at least in the jury-discrimination context.[323] A Virginia jury that excluded "so numerous and widespread" a class as poll-tax nonpayers could not "be 'truly representative' of the community," the brief continued.[324] Waller's petition was summarily denied in May.[325] While the WDL and other allies turned their focus to the governor in hopes of winning clemency, the lawyers made one final, unsuccessful attempt to seek rehearing before the U.S. Supreme Court. This time, a broader array of amici—the WDL, ACLU, NAACP, Urban League, several unions, and a "citizens committee" including prominent religious leaders and intellectuals—joined the push.[326] The brief, again authored by Marshall,[327] emphasized that by failing to address the merits of Waller's claims, the Court left unanswered whether defendants were really entitled, under the U.S. Constitution, to "a jury composed of a cross section of the community and from which the economic depressed will not be excluded."[328] The Court denied rehearing without explanation.[329]

But, far more than they realized, those rallying to save Waller and dismantle the poll-tax jury had the ear of America's top officials. Eleanor Roosevelt had known about Waller's case through conversations with Pauli Murray since late 1940,[330] and as the execution date drew near in June 1942, she privately reached out to Justice Frankfurter. Frankfurter returned her letter, which he "read with the greatest care," and called her secretary with advice: if the Supreme Court did not act, Frankfurter offered talking points for Eleanor to use when lobbying

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323. Brief for American Civil Liberties Union as Amicus Curiae Supporting Petitioner at 3, *Waller*, 316 U.S. 679 (No. 1097).

324. *Id.* at 4. Privately, Marshall worried that Waller was probably guilty and that his case was a poor vehicle for raising the issue. Carl T. Rowan, Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall 141 (1993); *see also infra* note 332 (explaining the reasons why the defendant in Rowan's account of this episode was almost certainly Waller).

325. *Waller*, 316 U.S. at 679 (denying cert. to Waller v. Commonwealth, 16 S.E.2d 808 (Va. 1941)).

326. Brief for National Association for the Advancement of Colored People et al. as Amici Curiae in Support of the Petition for Rehearing at 5, *Waller*, 316 U.S. 712 (No. 1097) [hereinafter Brief for NAACP as Amicus Curiae] (on file with NAACP Papers, *supra* note 250, Part VIII: Discrimination in the Criminal Justice System, 1910-1955, Series B: Legal Department and Central Office Records, 1940-1955, Folder: Odell Waller Murder Case in Gretna, Virginia).

327. *Id.* at 5. The brief is signed by both Arthur Garfield Hays and Thurgood Marshall, but drafts in the WDL archives indicate that Marshall was the principal author. *See* Draft Brief for American Civil Liberties Union, National Association for the Advancement of Colored People as Amici Curiae in Support of the Petition for Rehearing 1, *Waller*, 316 U.S. 712 (No. 1097) (on file with WDL Collection, *supra* note 258, Folder 184-29).

328. Brief for NAACP as Amicus Curiae, *supra* note 326, at 4.

329. *Waller*, 316 U.S. at 712.

330. Sherman, *supra* note 259, at 42.

Virginia's governor for clemency.[331] Decades later, Thurgood Marshall would tell his biographer that he remembered Attorney General Francis Biddle allowing him to listen, surreptitiously, to a call between Biddle and President Roosevelt about the Waller case. Per Marshall's recollection, Roosevelt quickly lost his cool: "I warned you not to call me again about any of Eleanor's niggers. Call me one more time and you are fired."[332] But Eleanor's lobbying *did* move her husband. Unbeknownst to activists, on June 15, 1942, President Roosevelt wrote a heartfelt, "personal and unofficial" letter to Governor Colgate Darden about Odell Waller. Roosevelt's tone was deferential and diplomatic, but his intent was clear. He shared that he had dealt with "a somewhat similar case" (also involving a contested claim of self-defense) when he was governor of New York, and that he had ultimately commuted the man's sentence. "I shall always be glad I did so," Roosevelt wrote.[333] Darden promptly responded that he welcomed the advice and would give the case "every possible consideration," but that he found himself in a "most difficult situation."[334]

The entreaties failed. On the evening of July 2, 1942, officials at the Virginia State Penitentiary in Richmond strapped Odell Waller to the electric chair and executed him.

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331. Memorandum from Malvina C. Thompson, Sec'y to First Lady Eleanor Roosevelt, to Eleanor Roosevelt (July 1942) (on file with Franklin D. Roosevelt Presidential Libr. & Museum, Anna Eleanor Roosevelt Papers, Part 1, 1884-1964, Series 19: Correspondence with Government Departments (70), 1934-1945, Box 368, Fl-Fu, 1942) (relaying a message from a phone call with Justice Frankfurter that "if finally there should be no appeal in this court (Supreme Court) then he suggests it would be most appropriate to write to the Governor urging clemency. He thinks you should read this letter of Prof. John Dewey and enclose it to the Governor stating that you do not know whether these are the facts but if they are, you feel entitled to refer it to him for clemency").

332. ROWAN, *supra* note 324, at 141; *see also id.* (noting that, although Marshall recalled "Roosevelt only [saying] 'nigger' once, . . . once was enough for [him]"). Neither Rowan nor Marshall explicitly refer to Waller (and, in Rowan's account, the Black defendant whose cause Eleanor Roosevelt championed had shot a deputy rather than his landlord), but context clues make clear that Waller was the subject of Roosevelt's reported slur. Marshall recalled that the comment was in reference to a Virginia man whose self-defense claim failed at trial, Francis Biddle became Attorney General in August 1941, and Biddle held meetings with Waller's champions on other occasions. *See* SHERMAN, *supra* note 259, at 162 (noting Biddle's meetings with Paul Robeson and others). There is no historical evidence to suggest that Eleanor Roosevelt and the NAACP were lobbying on behalf of a different individual matching that description at the time.

333. Letter from President Franklin D. Roosevelt to Governor Colgate W. Darden, Jr. (June 15, 1942) (on file with Franklin D. Roosevelt Presidential Libr. & Museum, Franklin D. Roosevelt, Papers as President: The President's Secretary's File, 1933-1945, Box 129, Folder: D - General).

334. Letter from Governor Colgate W. Darden, Jr. to President Franklin D. Roosevelt (June 18, 1942) (on file with Franklin D. Roosevelt Presidential Libr. & Museum, Franklin D. Roosevelt, Papers as President: The President's Secretary's File, 1933-1945, Box 129, Folder: D - General).

* * *

The WDL's campaign was unsuccessful in its immediate goal of saving Waller's life and equally unsuccessful in toppling the poll tax. It was not until 1964 that the Twenty-Fourth Amendment abolished its use by states in federal elections, and 1966 that the Supreme Court finally declared the practice unconstitutional altogether.[335]

Yet the WDL's campaign in 1940-1942 forced a deeper reckoning with the meaning of the right to trial by jury—and jury service itself—than any that had come before.[336] It raised basic questions about race, class, and citizenship, and it used the jury to interrogate the sincerity of American liberal democracy's commitment to equal rights. There were, unquestionably, important limitations: the question of sex discrimination was almost wholly absent from the litigation and popular mobilization, and Waller's lawyer's vision of the jury as a "cross-section of the community" remained inchoate. Still, as Waller's case worked its way through the courts (and the court of public opinion), and as America's confrontation with fascism at home and abroad continued to escalate, there was a notable shift in how the Supreme Court conceptualized the criminal jury. In the 1940 case *Smith v. Texas*, Justice Black, on behalf of a unanimous Court, underscored:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups . . . is at war with our basic concepts of a democratic society and a representative government.[337]

Then, in early 1942, the Court built on this language with expansive dicta in *Glasser v. United States*. There, the Court ultimately rejected a criminal appeal based on the purported exclusion of female jurors, but it also referenced and seemed to endorse the "cross-sectional" ideal for the first time:

> Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government . . . . [T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community," and not the organ of any special group or class . . . . [O]fficials charged with choosing federal jurors may exercise

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335. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes . . . affluence . . . an electoral standard").

336. *See* SHERMAN, *supra* note 259, at 160, 166-67.

337. 311 U.S. 128, 130 (1940).

> some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.[338]

Waller's appeals, however, were rejected by both Virginia's high court and the U.S. Supreme Court without opinion.

Waller's death dealt a particularly harsh blow to Pauli Murray. Overcome with grief, Murray skipped Waller's funeral in Gretna, Virginia, instead returning to New York to attend a mass memorial meeting and to plan a silent funeral march in Waller's honor. At the memorial service, Murray thanked those who had supported Waller, read from the paper on which Waller had handwritten his "last message," and shared how the fight to save Waller had impelled her "to make legal practice her life work."[339] As Murray later told an interviewer, "I kept saying to myself, 'If we lose this man's life, I must study law.' And we lost his life."[340] Indeed, Murray had already enrolled in Howard Law School by that point, and in June 1944, she graduated at the top of her class. Shortly before graduation, Murray sent an engraved invitation to the ceremony to Virginia Governor Darden, who had refused entreaties to spare Waller's life. Murray "remind[ed] him of the Odell Waller case and [Murray's] role in it, and suggest[ed] to him that a live lawyer was far more a danger to his system than a dead sharecropper."[341]

IV. THE FOLEY SQUARE TRIAL

The ILD's challenge to Atlanta's all-white juries in its defense of Angelo Herndon was spearheaded by the dapper young Ben Davis, Jr., "an up and coming member of the 'black bourgeoisie.'"[342] As an old colleague recalled, Davis "was a fashion plate of New York and the South . . . mustache trimmed to a Parisian nicety, his finger nails manicured . . . his hair slicked down and parted at just the right angle."[343] But just a few years later, radicalized by his experience during the Herndon trial and immersed in the Communist Party, Davis was a

338. Glasser v. United States, 315 U.S. 60, 85, 86 (1942).

339. *Harlem Spurns Reds' Bait at Waller Mass Meeting*, N.Y. AMSTERDAM STAR-NEWS, July 11, 1942, at 2.

340. Interview by McNeil with Murray, *supra* note 287, at 63.

341. *Id.*

342. HORNE, *supra* note 182, at 36.

343. *Id.* at 55 (quoting Wilkin's statement in the November 23, 1936, issue of the Baltimore-based *Afro-American* newspaper).

changed man: "Ben took on the religion of Moscow, he shook all the sins of the money world from his sandals."[344] As Harlem mobilized for Odell Waller and against "poll tax juries" in 1942, Davis's prominence in the Communist Party was growing.[345] Under his stewardship, party membership in Harlem grew rapidly.[346] The following year, Davis was elected to the New York City Council. Mocking the handwringing of the white press, Roy Wilkins quipped: "A Negro in the council is bad enough, but a Negro communist!"[347]

At the decade's end—seventeen years after his work challenging the Herndon jury as a novice attorney—Davis would once again be involved in another high-profile battle over the shape of the American jury. But this time, the defendant was Davis himself. Davis was indicted under the Smith Act, along with eleven other members of the National Committee of the CPUSA, for conspiring to overthrow and destroy the government of the United States.[348] The "Foley Square Trial," as it would come to be known, would soon devolve into "the longest criminal trial in the history of the United States"[349] to date. Today, the trial is best remembered for crippling the CPUSA and producing the U.S. Supreme Court's (subsequently repudiated) opinion in *United States v. Dennis*, which upheld the Smith Act against a First Amendment challenge.[350] But the conspiracy trial *also* produced the lengthiest and most sophisticated attack on jury-selection practices that had ever occurred in an American courtroom. Whereas earlier litigation had focused on race and class, Davis and his codefendants insisted upon a jury that was a true "cross-section" of New York in nearly every conceivable respect. For eight weeks at the outset of the trial—as the country watched closely and hundreds of protestors picketed the federal courthouse—the Communist Party put the American jury system on trial, insisting that the U.S. Constitution prohibited

344. *Id.* at 56.

345. *Id.* at 86-92.

346. HORNE, *supra* note 182, at 111. Davis regularly spoke out against the poll tax, *id.* at 92, but his rivalry with A. Philip Randolph (and the deeper enmity between the Communist Party and the March on Washington Movement) limited direct involvement of the Communists in the Waller campaign. *See id.* at 93-96; SHERMAN, *supra* note 259, at 133-34.

347. Roy Wilkins, *The Watchtower*, N.Y. AMSTERDAM NEWS, Nov. 20, 1943, at 13.

348. MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES 51-53 (1977).

349. HORNE, *supra* note 182, at 210 (quoting *11 Communists Convicted of Plot; Medina to Sentence Them Friday; 6 of Counsel Jailed in Contempt*, N.Y. TIMES, Oct. 15, 1949, at 1); *see also* BELKNAP, *supra* note 348, at 7 (discussing the consequences of the Foley Square litigation).

350. 341 U.S. 494, 501 (1951).

the ad hoc manner of calling grand and petit jurors in the busiest federal district court in the country.[351]

* * *

On July 20, 1948, federal agents raided the headquarters of the CPUSA in Manhattan, arresting Party Chairman William Z. Foster, General Secretary Eugene Dennis, and a handful of other party leaders.[352] Just hours earlier, a federal grand jury sitting in the Southern District of New York had indicted the "C.P. 12" under the Smith Act. The coconspirators were not accused of plotting to use "force and violence" to overthrow the government directly but of being "unwilling to work within our framework of democracy [and] intend[ing] to initiate a violent revolution whenever the propitious occasion appeared."[353] Civil libertarians decried the indictments as an affront to the First Amendment,[354] but most Americans cheered President Truman and Attorney General Tom Clark's move: a Gallup poll in 1949 registered sixty-eight percent support for outlawing the CPUSA.[355]

The assignment of the case to Judge Medina, whose work on the case would soon make him "the best-known trial judge in the country,"[356] offered the defendants an intriguing opening. There was certainly no reason to think that Medina, who had just recently been appointed, harbored some secret affinity for the Communists.[357] But shortly before taking the bench, he had represented two union officials convicted of extortion in New York courts.[358] On appeal, Medina had argued to the U.S. Supreme Court that New York's use of special "blue ribbon" juries in high-profile or complicated criminal cases was unconstitutional.

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351. Malcolm Logan, *Reds Turn Prosecutor in Trial's First Week*, N.Y. POST, Jan. 23, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis–Clippings").

352. BELKNAP, *supra* note 348, at 52.

353. *Dennis*, 341 U.S. at 497. There was actually one conspiracy indictment accusing the twelve defendants of jointly "organiz[ing] as the Communist Party" to "teach and advocate the overthrow . . . of the Government," and twelve individual indictments accusing each defendant with membership in a proscribed organization. *Id.* at 512.

354. BELKNAP, *supra* note 348, at 52.

355. *Id.* at 43.

356. J. Woodford Howard, Jr., *Judge Harold R. Medina: The Freshman Years*, 69 JUDICATURE 127, 138 (1985) (citation omitted).

357. Indeed, Medina "repeatedly demonstrated a loathing for the defense team and the defendants." Hayden Thorne, *The Influence of Legal Strategy in* Dennis v. U.S. *(1951) and* Yates v. U.S. *(1957)*, 44 J. SUP. CT. HIST. 170, 172 (2019); *see also* Sacher v. United States, 343 U.S. 1, 19 (1952) (Black, J., dissenting) ("Yet from the very parts of the record which Judge Medina specified, it is difficult to escape the impression that his inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs attributed to their Communist leader clients.").

358. Fay v. New York, 332 U.S. 261, 264-65 (1947).

Under New York law, prosecutors could demand a "blue ribbon" jury rather than a regular jury (which already had a class bias due to a $250 property requirement for all jurors).[359] "Blue ribbon" panels were culled from the full venire by court officials based on the "degree of intelligence" the prospective jurors demonstrated in responding to a questionnaire, "augmented by personal interviews."[360] Medina had assembled data suggesting that the "blue ribbon" panels tended to underrepresent working-class and women jurors and that they were more prone to convict defendants than ordinary juries. At oral argument, he insisted, "We are entitled to a jury that is made up of a cross section of the community."[361] Although Medina's appeal was rejected 5-4, the majority held open the possibility that a system that discriminated against certain occupations or social classes might be unconstitutional. However, the Justices repeatedly faulted the defendants for failing to establish a more detailed factual record to carry their burden on the allegations.[362] Writing for himself and three others, Justice Murphy dissented that "blue ribbon" juries "den[y] the defendant his constitutional right to be tried by a jury fairly drawn from a cross-section of the community" and "tend[] to obliterate the representative basis of the jury."[363]

When it came time for the CPUSA leaders' trial to open on January 17, 1949, a bivouac of four hundred armed policemen—along with several hundred peaceful picketers—ringed the Foley Square Courthouse.[364] But before the jury could be called, the defendants insisted on a hearing to support their challenge to the court's method of summoning the grand jurors who indicted them and the petit jurors who would try their case. "You were looked upon as a starry eyed reformer when you attacked the 'blue ribbon' system," one of the Communists' attorneys gamely told Judge Medina,[365] emphasizing that he had "profited" from reading Medina's brief in *Fay v. New York*.[366] "Well, you know, I got licked in that case," Judge Medina replied. "[T]hat is one of the reasons, your Honor, that I have

359. *Id.* at 267.

360. *Id.* at 298 (Murphy, J., dissenting).

361. *'Blue Ribbon' Juries Hit by Fay's Lawyer*, STAR-LEDGER (Newark, N.J.), Apr. 4, 1947, at 23.

362. *See, e.g.*, *Fay*, 332 U.S. at 266.

363. *Id.* at 298 (Murphy, J. dissenting).

364. Defense counsel immediately decried the police presence as creating the same atmosphere as the "infamous Scottsboro trial." Joint Appendix, *supra* note 44, at *65; *see* Milton Lewis, *450 Turn Out to Picket Trial*; *Won't Say Why*, N.Y. HERALD TRIB., Jan 18, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis—Clippings").

365. *11 Alleged Reds Rip U.S. 'Silk Stocking' Juries*, CHI. TRIB., Jan. 20, 1949, at 14.

366. Joint Appendix, *supra* note 44, at *243.

profited," came the retort, as the Communists intended to build the evidentiary record that Medina had not.[367]

But the defendants intended to go further than previous challenges, too. They insisted that all grand and petit juries be "as required by the Constitution, representative of a democratic cross-section of the community."[368] For the past decade, jurors in SDNY had been "hand-picked" by Chief Judge Knox and his staff, much like the "blue-ribbon panels" in New York's state courts.[369] As Knox candidly conceded, "I am told that the selection of jurors should be a democratic process and that persons who serve in the [SDNY] are handpicked. In answer to this indictment, I cannot do otherwise than admit my guilt."[370] The defendants argued that a study of SDNY's jury lists over the past few years demonstrated that the court had systematically discriminated against and excluded numerous marginalized groups, including the "poor" and "propertyless"; "persons of humble station in life"; "laborers" and "other manual workers"; those who "work by the day or hour"; residents of poorer neighborhoods; "Negroes and other racial and national minorities"; women; "persons who are not members of, or closely allied with, the upper strata of social life in the community"; and Communists and other political radicals.[371] After several days of argument, Judge Medina conceded that the defendants had raised "a fundamental matter of the administration of justice" that "should be fully inquired into,"[372] and he allowed for an evidentiary hearing.[373]

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367. *Id.*

368. Russell Porter, *Communists Win Right to Witnesses Against U.S. Jury*, N.Y. TIMES, Jan. 21, 1949, at 1.

369. Harry Raymond, *Undemocratic Jury System Bared in Petition of '12' C.P. Leaders*, DAILY WORKER (N.Y.C.), Jan. 10, 1949, at 2.

370. Ira Wolfert, *Jury Selectivity Defended by Knox*, N.Y. TIMES, Jan. 23, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis–Clippings, January 23-26, 1949"); *The Court Strikes Again*, DAILY WORKER (N.Y.C.), Jan. 11, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis–Clippings, January 1-12, 1949").

371. Joint Appendix, *supra* note 44, at *13038-39.

372. *Id.* at *353; *see also* Russell Porter, *Jury Examination in Red Trial Begun; Court Is Picketed*, N.Y. TIMES, Mar. 8, 1949, at 1 (reporting Judge Medina's description of the challenge to the jury-selection system as a "fundamental matter of the administration of justice" that merited his "thorough consideration and study").

373. One of the Communists' lawyers, Richard Goldstein, had recently mounted a similar challenge to the jury system in a Hawaii case brought against left-wing union leaders. *See* Walter Arm, *The Defense Doesn't Rest*, N.Y. HERALD TRIB., Jan. 28, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis–Clippings, January 27-31, 1949") (noting Goldstein's involvement in the Hawaii case). For a more detailed exploration of how that jury case emerged from the organizing work of left-wing women affiliated with the International Longshore and Warehouse Union, see Reynolds, *supra* note 28, at 299-326.

What ensued was "[a] headline-making 'trial within a trial'"[374] that did not end until March 4, 1949, some eight weeks later. (Prosecutors initially anticipated the entire trial taking two months.) Before it was over, the court had heard from forty-two witnesses—including the chief judge of SDNY, the director of the Administrative Office of the U.S. Courts, a U.S. congressman, and several experts—and reviewed over four hundred exhibits.[375] The hearing transcript ran thousands of pages. It was, in many ways, the most sophisticated challenge to the jury system ever litigated, before or since.

The hearing opened with the Communists seeking to "establish [their] basic contention that the jury system is loaded—with the rich, the well-to-do" in a provocative fashion: by subpoenaing the jurors themselves.[376] The first to testify was an investment banker who sat on the grand jury that returned the indictment. "Mr. Allen, what is in round figures the assessed valuation of the home in which you live?" the Communists' attorney asked in the opening minutes.[377] "Do I have to answer that, your Honor?" the witness asked Judge Medina. (He did not.[378]) Then followed a series of questions regarding the value of his investments, stocks, and bonds. (All objections sustained.[379]) The attorney continued this barrage of inquiries, asking whether any restrictive covenants in his neighborhood limited ownership to the Caucasian race, whether any servants or attendants lived with him, whether his net worth exceeded a million dollars, and so on.[380] The hearing carried on in a similar fashion for several days, as the defendants questioned twenty-one grand jurors and six prospective petit jurors.

By January 27, Judge Medina had lost his patience and ordered the defendants to shift their focus,[381] but the defense's gambit succeeded in shifting the narrative around the high-profile trial. After the first week, the *New York Post* wrote, "[T]he defense had won a substantial propaganda victory—even if it

374. Mary Hornaday, *'Trial Within a Trial' Pushed by Communists*, CHRISTIAN SCI. MONITOR, Jan. 21, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis—Clippings").

375. *See generally* Joint Appendix, *supra* note 44 (documenting, respectively, transcripts, motions and opinions, and exhibits).

376. Norma Abrams & Kermit Jaediker, *Reds May Grill Whole Jury Panel, Stall Trial Weeks*, DAILY NEWS (N.Y.C.), Jan. 22, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis–Clippings, January 21-22, 1949").

377. Joint Appendix, *supra* note 44, at *376.

378. *Id.*

379. *Id.* at *387-93.

380. *Id.*

381. *See* BELKNAP, *supra* note 348, at 71.

should end in legal defeat—by reversing its role and turning prosecutor."[382] Walter Winchell decried the spectacle as "rats scurrying towards loopholes,"[383] and the Communists were criticized for turning the proceedings into a "circus."[384] But even some outlets hostile to the Communists grudgingly conceded that the jury challenge was well "justifiable."[385] No criminal matter had attracted as much media attention since the Lindbergh case some fifteen years earlier,[386] but for the first two months of the proceedings, it was the American jury system (not the Communists) on trial.[387]

382. Logan, *supra* note 351; *see also Trial of the Jury System*, N.Y. STAR, Jan. 24, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis—Clippings, January 23-26, 1949") (noting that Communists "have succeeded in converting their trial into a prosecution of the Federal District Court's system of jury selection").

383. Walter Winchell, N.Y. DAILY MIRROR, Jan. 24, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis—Clippings, January 23-26, 1949").

384. *Reds Make It a Circus*, INDIANAPOLIS STAR, Jan. 29, 1949, at 18; *see also Don't Let Reds Hide Real Trial Issue*, PHILA. INQUIRER, Jan. 24, 1949, at 12 ("The attack on the jury system shows the Communist mind at its worst. The idea that jurors can be chosen on the basis of ability and impartiality never occurs to a Communist; what the Communists want, apparently, is a one-sided jury which will find nothing wrong with Communism.").

385. *Trial of the Jury System*, *supra* note 382.

386. *Commies' Trial Draws Biggest Press Coverage Since 1935 Lindbergh Case*, N.Y. WORLD-TELEGRAM, Jan. 18, 1949 (on file with CPUSA Records, *supra* note 76, Box 4, Folder: "U.S. v. Dennis–Clippings, January 18, 1949").

387. And this was, in fact, the point. *See* Joint Appendix, *supra* note 44, at *261 (referring to defense counsel announcing a plan "to put the Government on trial rather than having these defendants on trial").

FIGURE 5. "WHO'S ON TRIAL" CARTOON[388]

Over the ensuing weeks, Chief Judge Knox's system for summoning "superior," "very high type," "better," and "more select" jurors was explored and assailed.[389] Though jury officials — all white men — began the process of identifying jurors through voter-registry lists, they "supplemented" this source with

388. *Who's on Trial?*, JERSEY J., Feb. 3, 1949, at 28. This cartoon was nationally syndicated and ran in major newspapers, including the *New York Times*. *See* N.Y. TIMES, Jan. 30, 1949, at E10.

389. Brief for Appellants on Jury Challenge at 12, United States v. Dennis, 183 F.2d 201 (2d Cir. 1950) (No. 21538) (on file with CPUSA Records, *supra* note 76, Box 13, Folder 1: "United States v. Eugene Dennis et al. — U.S. Court of Appeals Brief and Appendix on Jury Challenge") (providing a summary of the evidence).

directories like *Who's Who in New York*, *Poor's Directory of Directors*, the alumni directories of several Ivy League colleges, and a telephone directory "arranged by street numbers rather than alphabetically by names," thus allowing the jury commissioner to select jurors from neighborhoods where "suitable material [was most likely to] reside."[390] Court officials also solicited and made use of recommendations from the U.S. Attorney's Office and the Federal Grand Jurors Association (a private organization) to further screen and supplement the lists.[391] Finally, jurors selected through this process filled out questionnaires and were interviewed by a jury clerk, who placed a subset of the interviewees onto a "qualified" list.[392] Although this process was used to assemble the pools of both grand jurors and petit jurors, there was some evidence that the grand-jury screening process was even more selective, requiring a juror to have "satisfactorily" served as a petit juror and survived vetting by the Federal Grand Jurors Association.[393]

Not surprisingly, this method of jury selection produced panels that substantially underrepresented certain populations within the Southern District of New York. The most detailed and substantial analysis the defendants introduced came through the testimony of Doxey Wilkerson, a Communist educator with a background in sociology and statistics.[394] Wilkerson and a research team analyzed a sample of twenty-eight grand- and petit-jury panels over the previous decade and reached startling findings as to who was, and was not, included. The analysis found disparities by profession: "Manual Workers" made up 54.6% of the population in the jurisdiction of SDNY but only 0.7% of the grand jurors, while "Executives" made up 9.9% of the population but 65.3% of the grand jurors.[395] They found even greater disparities based on geography: Manhattan's wealthiest congressional district supplied 51.9% of grand jurors, while the five poorest congressional districts—in Harlem, the Bronx, and the Lower East Side—supplied less than 8% put together.[396] (The American Labor Party, the Communists noted, performed particularly well in these underrepresented areas.[397]) Wilkerson marked each juror's address with a red pin on massive maps, illustrating the

390. *Id.* at 13; Joint Appendix, *supra* note 44, at *2346 (noting the use of Ivy League directories).

391. Brief for Appellants on Jury Challenge, *supra* note 389, at 13.

392. *Id.* at 14.

393. *Id.*

394. *See* Joint Appendix, *supra* note 44, at *626-645 (testimony of Doxey Wilkerson). Interestingly, Wilkerson and Pauli Murray were acquainted as early as 1939. Letter from Pauli Murray to Walter White (Dec. 8, 1939) (on file with Harv. Univ., Radcliffe Inst. for Advanced Study, Schlesinger Library, Pauli Murray Papers [hereinafter Murray Papers], Box 98, Folder 1750) (discussing the Murray-Wilkerson meeting).

395. Brief for Appellants on Jury Challenge, *supra* note 389, at 50 & nn.1-2, 51 & n.3.

396. *Id.* at 53.

397. *Id.* at 63.

improbable concentration of jurors residing in Manhattan's "silk stocking" neighborhoods; he also used census data to determine the average rent paid by residents of each block in New York, thus demonstrating the overrepresentation of "high rent" addresses in the jury pool.[398] Wilkerson could not offer precise figures with respect to the race of jurors, but only a tiny fraction of "qualification notices" were sent to Adam Clayton Powell, Jr.'s 22nd congressional district in Harlem, where 92% of Manhattan's Black residents lived.[399] Women made up 16.7% of the names on the jury list,[400] though, as the Communists pointed out, virtually all of these individuals lived on Park Avenue, Fifth Avenue, or at some similarly exclusive address.[401]

FIGURE 6. DOXEY WILKERSON PREPARING EXHIBITS FOR JURY CHALLENGE WITH LAWYERS[402]

398. *Id.* at 64.

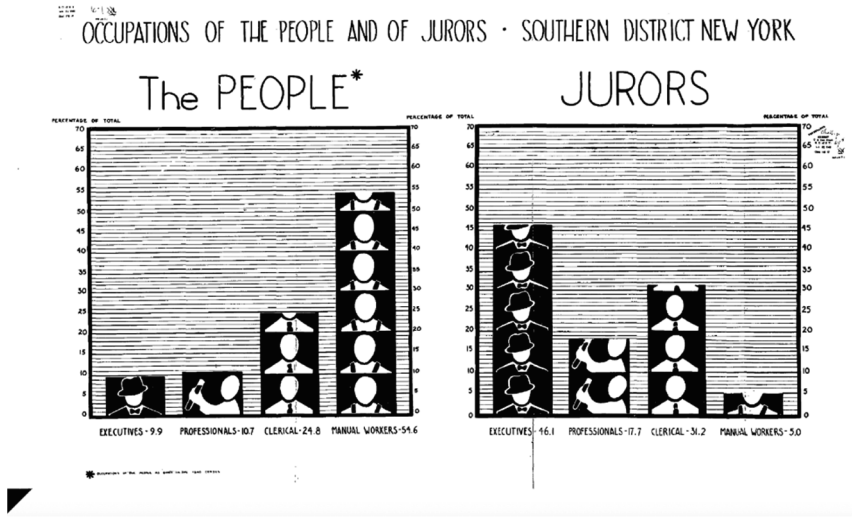
399. *Id.* at 68.

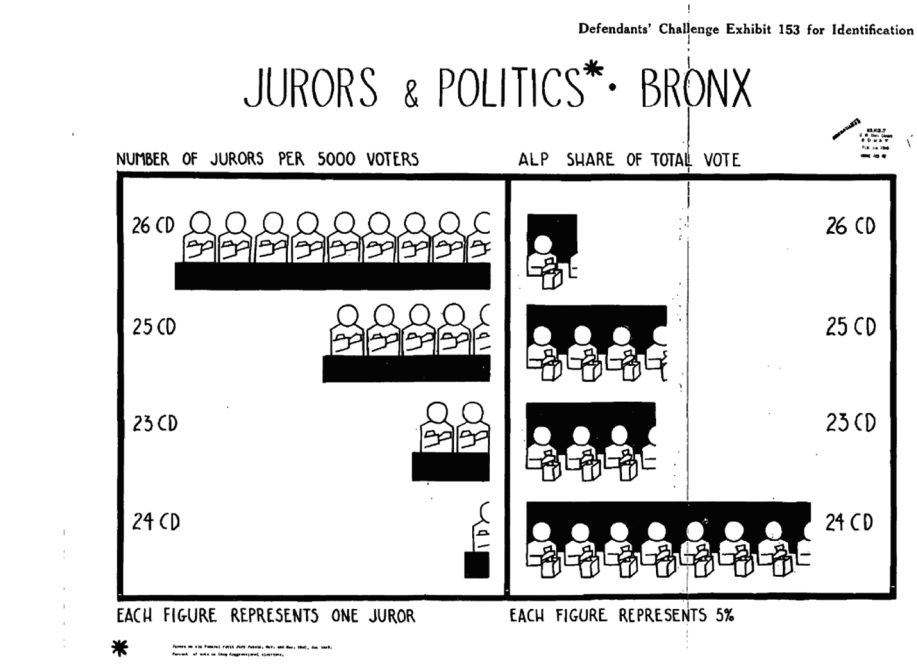
400. Brief for the United States at 288, United States v. Dennis, 183 F.2d 201 (2d Cir. 1950) (No. 21538) (on file with CPUSA Records, *supra* note 76, Box 13, Folder 2).

401. Brief for Appellants on Jury Challenge, *supra* note 389, at 33.

402. Daily Worker (N.Y.C.), Feb. 6, 1949, at 1.

FIGURE 7. JURY CHALLENGE EXHIBIT 67-A (TOP) AND EXHIBIT 153 (BOTTOM)[403]





403. Joint Appendix, *supra* note 44, at *13742, *13816.

In early March, Chief Judge Knox finally took the stand and, unsurprisingly, stridently disavowed any discriminatory or improper purpose in his method of jury selection.[404] In a nod to the democratic shift that had occurred over the past two decades, even Knox claimed he was "anxious to get a cross-section of people"[405] in his jury pools, seeking out "fair and decent citizens, comprising every section of the social and political structure of the country."[406] Tempering this impulse, however, was the necessity of finding intelligent and "high quality" jurors. Knox recalled that during the Depression, he had placed on the jury rolls some unemployed persons at the request of "[t]he people in charge of relief."[407] These jurors had "feelings towards the Government as a whole and towards wealth as a whole and towards society as a whole [that were] not good, and so I then asked that a number of them be eliminated."[408] And in recent public statements he adopted from the witness stand, Knox rejected the suggestion that "all we need" for a jury is a democratic "cross section" of the community in the jury box:

> We have in New York great portions of the population—Negro, immigrant, and what not. Now, among those Negroes and among these others are many people who are competent . . . . But if you went down there with a dragnet and attempted to bring them into a courtroom, you would have a result that no one would wish.[409]

On March 4, surprising no one who observed Judge Medina's increasingly hostile interactions with the defense counsel, Medina issued a lengthy opinion denying the defendants' motions.[410] Medina quibbled with aspects of Wilkerson's methodology and "demeanor,"[411] but he found the overarching shortcoming to be the defendants' failure to prove "wi[l]lful, intentional, and deliberate exclusion" of any of the identified groups.[412] In the absence of such evidence,

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404. *Id.* at *2464-65, *2489.

405. *Id.* at *2466.

406. *Id.* at *2486-87.

407. *Id.* at *2492-93.

408. *Id.* at *2493.

409. *Id.* at *2469-70.

410. *Id.* at *13086-147.

411. *Id.* at *13092.

412. *Id.* at *13099. After the trial, Judge Medina made plain that he was personally offended by the suggestion that Chief Judge Knox engaged in "discrimination." *See* Harold R. Medina, *Some Reflections on the Judicial Function: A Personal Viewpoint*, 38 A.B.A. J. 107, 108 (1952) ("[N]ever shall [I] forget the personal attacks that were made on Chief Judge John C. Knox by the Communist lawyers for his extraordinarily fine work in building up the jury system in the

> this challenge comes down to the assertion, contrary to all legal precedent, that those who administer the jury system must by some means produce a jury list which shall have proportional representation of Negroes, manual workers, poor people, and members of various racial and religious groups. Any attempt to such representation would not only result in chaos and confusion but, in my judgment, would inevitably breed the very intolerance which every right-minded person should be vigilant to avoid.[413]

Three days later, the trial, which would eventually lead to the imprisonment of Ben Davis and the rest of the CPUSA's leadership, commenced in earnest.[414] The Civil Rights Congress, the successor to the ILD, resumed "mass defense" efforts to mark the occasion. Several hundred picketers—perhaps as many as 2,500—returned to Foley Square on the first day of the trial, chanting, "Hey Judge, we won't budge until the 12 are free." Many wore armbands protesting "Jim Crow Juries."[415] It was the last large protest of its kind: Congress outlawed the picketing of federal courthouses the following year.[416]

* * *

At the heart of the Foley Square Trial jury challenge was, as Judge Medina's opinion surfaced, a tension in the case law around jury discrimination that had been brewing since 1935. Purposeful exclusion of jurors on the basis of race could certainly violate the Equal Protection Clause. But the Supreme Court and lower courts had also hinted that the "impartial" jury contemplated by the Sixth Amendment—or perhaps guaranteed by the Due Process and Equal Protection Clauses—was necessarily one that was "democratic" and "representative" in the sense of constituting a fair "cross-section of the community." If so, should the discriminatory intent of judges or jury commissioners matter? And what segments of the community were entitled to be "represented" in that cross-section?

[SDNY]. His every effort to eliminate from the general jury panel persons wholly unfit to serve on juries was branded as willful discrimination against the workers and against people of various races and conditions.").

413. Joint Appendix, *supra* note 44, at *13106 (citation omitted).

414. BELKNAP, *supra* note 348, at 73, 77.

415. Harry Raymond, *Truman's Slur Bars Fair Trial, '12' Charge*, DAILY WORKER (N.Y.C.), Mar. 8, 1949, at 1 (estimating 2,500 picketers); Porter, *supra* note 372, at 1 (referencing "several hundred Communists and sympathizers").

416. Internal Security Act of 1950, ch. 1024, § 31(a), 64 Stat. 987, 1018 (codified as amended at 18 U.S.C. § 1507); *see also* Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 492 n.215 (1998) (noting the law's passage in response to demonstrations at prosecutions of Communist Party leaders in the late 1940s).

It is easy to attribute the pro-government opinions generated by the Foley Square Trial, particularly the Supreme Court's First Amendment analysis in *Dennis v. United States*, as aberrational products of Red Scare hysteria.[417] But Chief Judge Hand's 1950 opinion for the Second Circuit affirming Judge Medina's rejection of the Communists' jury challenge reflects a deeper discomfort with the representative jury. Observing that property qualifications for jury service existed at the Founding (and remained on the books in New York at the time), Hand insisted "that the theory that a jury must be a 'cross-section' of the community must be taken with some reserves."[418] New York's sensible, if not salutary, statutory requirement that jurors be "intelligent," of "sound mind and good character," and "well-informed" was likewise incompatible with the "'cross-section' of the community" ideal (at least insofar as critics like the Communists envisioned that ideal as "purely aleatory selection" from the entire polity). For Hand, drawing jurors from wealthier neighborhoods was prudent, too, because "the leisure which comes with relative affluence is likely to result in a larger store of general information than is possible for one to acquire who must work for his daily living."[419] In short, the Second Circuit could find no authority to invalidate "an honest application of the traditional standards" for assembling juries, and no amount of "repetition of the phrase ['cross-section'] upon which the [Communists] rely" would change that.[420]

Others were less sure. In late February 1949, the Communist challenge prompted *The Nation* to publish a thoughtful critique of "the case for securing especially intelligent jurors instead of a representative cross-section."[421] Intellect was a virtue, to be sure, but much of a criminal jury's work involved assessments of credibility and questions of intent; in such circumstances, weren't a juror's conclusions "more inspired by the juror's background and contacts, his likes and prejudices, than by his intellect?"[422] The "ability to free oneself from . . . wishful thinking," or unwarranted favoritism for the party "to which he is emotionally inclined," was not the "exclusive gift of those of intellectual attainments or 'responsible' position."[423] To the contrary, the author posited, "[T]he more 'responsible' members of society may have a greater sense of righteousness than

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417. *See, e.g.*, William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375, 376. *See generally* ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY (1999) (connecting the Supreme Court's jurisprudence to the Red Scare).

418. United States v. Dennis, 183 F.2d 201, 220 (2d Cir. 1950).

419. *Id.* at 221.

420. *Id.*

421. Nanette Dembitz, *Twelve Hand-Picked Men and True*, NATION, Feb. 26, 1949, at 238, 240.

422. *Id.*

423. *Id.*

less pretentious folk in finding logical support for, and imposing, their convictions."[424] An abandonment of the "diffused impartiality" accomplished by the cross-section jury injured not only defendants but also "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts."[425]

V. *WHITE V. CROOK*

The Communists' original jury-challenge motion in the Foley Square Trial protested the nonrepresentative character of federal juries along lines of gender, race, class, geography, and more — making it the most ambitious jury challenge to date — but their challenge to the underrepresentation of women vanished on appeal. Pursuing the matter further in 1950 and 1951 almost certainly would have been fruitless. Just three years earlier, in *Fay v. New York*, the Supreme Court had held that it was "almost frivolous" to raise a claim of unlawful "bias" against women when approximately eleven percent of New York's general jury list consisted of women.[426] And, while the Communist defendants were white and Black, working class and professional, they were all men, and the *Fay* Court had questioned whether male defendants had standing to complain of the exclusion of female jurors.[427] In a 1958 survey of ninety federal clerks of court, only twenty-three reported that their lists of prospective jurors included equal numbers of men and women.[428] In the early 1960s, three states — South Carolina, Mississippi, and Alabama — still maintained outright bans on women serving as jurors, and twenty-four more and the District of Columbia had laws providing different treatment for men and women as jurors.[429]

Though the cross-sectional ideal was gaining purchase, there remained profound legal and social resistance to the recognition of women as part of the relevant "community" that a jury should proportionately represent. In 1961, in *Hoyt v. Florida*, the Supreme Court heard the appeal of a woman who was convicted by an all-male jury of murdering her husband.[430] Under Florida law, women

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424. *Id.*

425. *Id.* (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

426. 332 U.S. 261, 266 n.4 (1947).

427. *Id.* at 290 ("Assuming that defendants, not being women, have standing . . . we are unable to sustain their objection.").

428. JUD. CONF. COMM. ON THE OPERATION OF THE JURY SYS., THE JURY SYSTEM IN THE FEDERAL COURTS app. 21-22 (1960).

429. DOROTHY KENYON & PAULI MURRAY, THE CASE FOR EQUALITY IN STATE JURY SERVICE 11-12 (1966).

430. 368 U.S. 57, 68 (1961).

could serve as jurors only if they affirmatively volunteered. The Court unanimously upheld the provision, reasoning that discrimination between men and women in jury service "in no way resembles those [cases] involving race or color."[431] A "woman is still regarded as the center of home and family life," the Court explained, notwithstanding her "entry into many parts of community life formerly considered to be reserved to men."[432] Accordingly, a state could still permissibly "relieve[]" her of "the civic duty of jury service" until such time as "she herself determines that such service is consistent with her own special responsibilities."[433]

Pauli Murray had no trouble seeing the resemblance between jury discrimination based on sex and race. More than just "strikingly parallel" forms of exclusion,[434] Murray understood them to be inextricably entwined, representing "different phases of the fundamental and indivisible issue of human rights."[435] Twenty years earlier, Murray had helped provoke a national debate about race, class, and citizenship while campaigning with the WDL on behalf of Odell Waller. In the early 1960s, as Murray's work turned toward dismantling "Jane Crow," the jury would once again assume a central role in defining citizenship at the intersection of race and sex. Murray's efforts led to a landmark—though largely overlooked—legal victory in *White v. Crook*, which not only helped transform the American jury but also served as a transformative case that brought women as a class within the ambit of the Equal Protection Clause.

* * *

The path to *White v. Crook*, in retrospect, probably began with a 1962 telegram from Eleanor Roosevelt to her old friend Pauli Murray, who was then pursuing a doctorate at Yale Law School. Roosevelt had been appointed to chair President Kennedy's new President's Commission on the Status of Women—made up of twenty-six cabinet officials, members of both houses of Congress, government lawyers, and the heads of several pro-Equal Rights Amendment (ERA) groups—and she recognized that Murray would be a valuable addition, particularly for the Commission's "Committee on Civil and Political Rights."[436] Murray had personally encountered and tenaciously fought sex discrimination

431. *Id.*

432. *Id.* at 62.

433. *Id.*

434. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 233 (1965).

435. *Id.* at 235.

436. ROSENBERG, *supra* note 49, at 242.

her entire life,[437] but the appointment was her first involvement with any organizational effort expressly focused on advancing the rights of women.[438]

In October 1962, Murray gave an audacious presentation to the Commission on "a new and relatively, I think, unexplored area in constitutional history in modern times, and this is: What is the constitutional position of women in the United States."[439] Murray was navigating a fraught topic and a divided audience. Reprising debates that had been raging for more than three decades,[440] the Commission was split between proponents of the ERA and those who feared it would endanger protective legislation (e.g., wage-and-hour laws championed by labor unions) that benefited women specifically.[441] Like many on the left, Murray was skeptical of the push for the ERA, for both ideological and practical reasons.[442] As a lifelong organizer, however, she was also acutely aware of the difficulties and limited reach of state-level legislative efforts to repeal discriminatory statutes.[443] Bridging this gap, Murray suggested there may be a third way, arguing that there might exist "sufficient vitality and flexibility in the [Equal Protection Clause of the] Fourteenth Amendment to apply to discriminations based upon sex alone."[444] She believed that litigation could, and should, be brought strategically, with "concerted, self-conscious direction" by activists "who were well grounded in a certain philosophy and [with] certain goals . . . . This, [she argued], would be the distinctive nature of the cases which go up involving Negroes . . . [but] has not been done in the field of woman's rights."[445] As much as

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437. For example, after graduating at the top of her class at Howard Law School, Murray applied for additional study at Harvard Law School. Murray received a response informing her that she was "not of the sex entitled to be admitted," just as she had been told "members of your race are not admitted" by the University of North Carolina at Chapel Hill in 1938. *Id.* at 137. Murray filed a poignant (but unsuccessful) appeal to the law school's faculty:

> Gentlemen, I would gladly change my sex to meet your requirements but since the way to such change has not been revealed to me, I have no recourse but to appeal to you to change your minds on this subject. Are you to tell me that one is as difficult as the other?

Id. at 174.

438. Transcript of October 2, 1962, Proceedings of the President's Commission on the Status of Women, U.S. Dep't of Lab. 331-32 (1962) (on file with John F. Kennedy Presidential Libr. and Museum, United States President's Commission on the Status of Women Records, No. 400, Box 005); ROSENBERG, *supra* note 49, at 291-92.

439. Transcript of October 2, 1962, Proceedings, *supra* note 438, at 332-33.

440. *See supra* note 111 and accompanying text.

441. *See* ROSENBERG, *supra* note 49, at 249-52, 259-61; MAYERI, *supra* note 48, at 17.

442. *See* ROSENBERG, *supra* note 49, at 250-51; MAYERI, *supra* note 48, at 17.

443. *See* ROSENBERG, *supra* note 49, at 250.

444. Transcript of October 2, 1962, Proceedings, *supra* note 438, at 344.

445. *Id.* at 355.

Murray hoped the equal-protection angle might bridge the divide between ERA partisans like the National Women's Party and "protectionists," she also envisioned a path forward that could "link[] women's rights advocacy to the existing civil-rights agenda, the objective closest to Murray's heart."[446] Murray's blunt rejection of an ERA-focused approach alienated some, but the audience's response was overwhelmingly positive.[447] Anne Draper, the AFL-CIO's representative to the Commission, reacted swiftly: "Most magnificent presentation I ever heard. That is my only comment."[448]

With the Commission's encouragement, Murray spent the next several months developing the presentation into a more formal memorandum,[449] one that would become "a founding document of modern feminist constitutionalism."[450] Part legal analysis and part strategy document, Murray's memorandum parsed the ways in which women did and did not occupy a status comparable to that of a racial minority, and it explored how the Equal Protection Clause might guarantee "equality of opportunity" for women as individuals and "freedom of choice" for women as a class to develop their capacities unburdened by obsolete sex stereotypes.[451] As importantly, Murray's memorandum also noted that the Supreme Court had not engaged in a "full discussion" of the status of women under the Constitution since *Muller v. Oregon* in 1908 and contemplated the most promising avenues for new litigation.[452] She proposed that an important facet of legal challenges should be close collaboration between lawyers and a "group of specialists in other disciplines—history, psychology, sociology, etc." to determine the best constitutional arguments and present to courts new social-science evidence (just as Louis Brandeis had successfully done in *Muller*).[453] Both in the

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446. Mayeri, *supra* note 48, at 19; *see also* Linda K. Kerber, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship 188 (1998) ("Perhaps more than any other single person, Murray linked the civil rights movement with the federal quest for equity for women.").

447. Rosenberg, *supra* note 49, at 251 (noting mainly positive reactions to Murray's speech and concluding that "Murray had carried the day").

448. Transcript of October 2, 1962, Proceedings, *supra* note 438, at 359. For Draper's background in the labor and socialist movements, see Alan Johnson, *Equalibertarian Marxism and the Politics of Social Movements*, 11 Hist. Materialism 237, 238 n.4 (2003).

449. Pauli Murray, A Proposal to Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se (Dec. 1, 1962) (on file with Harv. Univ., Radcliffe Inst. for Advanced Study, Schlesinger Library, President's Commission on the Status of Women Records, 1961-1963, Folder 62, Box 8).

450. Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 Yale L.J.F. 512, 516 (2020).

451. Murray, *supra* note 449, at 1, 8-11.

452. *Id.* at 13, 38 (citing Muller v. Oregon, 208 U.S. 412, 418 (1908)).

453. *Id.* at 21, 32.

initial presentation to the Commission and in the memorandum, Murray focused heavily on which fields should be prioritized: while women faced legal challenges in countless arenas—from employment to contract to family law—Murray felt that state laws curtailing women's jury service offered particularly promising targets for attack.[454]

One person who was particularly impressed with Murray's roadmap was Dorothy Kenyon, who joined the board of the ACLU in 1930 and served as the sole woman on the board for many years.[455] Kenyon was not a "Red," but she was deeply embedded in Popular Front activism,[456] and Senator Joseph McCarthy later accused her of working with dozens of radical and Communist front groups in the 1930s and 1940s.[457] In 1950, she became the first witness to testify before the Senate Foreign Relations Subcommittee, where she "forthrightly acknowledged" that she had aligned herself with many left-wing and antifascist causes, although she denied any involvement with Communist fronts.[458] Kenyon had also spent decades fighting for women's jury service. In 1935, she disrupted an off-Broadway play in which male audience members were selected as "mock" jurors by insisting that women be drawn, too.[459] In 1961, a quarter century later, she unsuccessfully argued *Hoyt* for the ACLU before the Supreme Court.[460] When Kenyon got hold of Murray's memorandum, Kenyon excitedly wrote to her that Murray had articulated a powerful framework for "when a better woman juror case comes along than the Hoyt one."[461]

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454. *See* KERBER, *supra* note 446, at 191 ("Jury service was a particularly strategic locus, Murray suggested . . . ."); MAYERI, *supra* note 48, at 29 ("Together with equal employment opportunity, in the mid-1960s, jury service became the centerpiece of Murray's quest to place African American women and what would later be called the 'intersection' between race and sex at the center of feminist legal advocacy.").

455. ROSENBERG, *supra* note 49, at 173, 260; Kate Weigand & Daniel Horowitz, *Dorothy Kenyon: Feminist Organizing 1919-1963*, 14 J. WOMEN'S HIST. 126, 126 (2002); Samantha Barbas, *Dorothy Kenyon and the Making of Modern Legal Feminism*, 5 STAN. J. C.R. & C.L. 423, 424 (2009).

456. *See* WILLIAM F. BUCKLEY & L. BRENT BOZELL, MCCARTHY AND HIS ENEMIES: THE RECORD AND ITS MEANING 76-85, 343-46 (1954) (defending McCarthy and concluding Kenyon was likely a "loyal American" but still "*a security risk*").

457. *See* William S. White, *McCarthy Says Miss Kenyon Helped 28 Red Front Groups*, N.Y. TIMES, Mar. 9, 1950, at 1, 5.

458. *Id.*; KERBER, *supra* note 446, at 169 n.165. Though her defiant performance won her plaudits in many newspapers, she never again served in a public post. *Id.*

459. KERBER, *supra* note 446, at 170.

460. *Id.* at 190.

461. *Id.* at 192; AZARANSKY, *supra* note 49, at 37 (discussing Kenyon and Murray's relationship); *see also* Memorandum from Dorothy Kenyon to Bd. of Dirs., ACLU (Mar. 28, 1963) (on file with Murray Papers, *supra* note 394, Correspondence, 1963-February, Box 60, Item 999) (sharing, with great enthusiasm, Murray's analysis with the ACLU Board).

"[T]he opening" Kenyon and Murray "ha[d] been looking for"[462] arose two years later, when two white civil-rights workers were killed in separate incidents in "Bloody" Lowndes County, Alabama.[463] Viola Liuzzo was shuttling marchers between Montgomery and Selma when she was gunned down by members of the Ku Klux Klan; five months later, a twenty-six-year-old white Episcopal seminarian named Jonathan Daniels was shot and killed in broad daylight just after his release from the county jail.[464] National outrage prompted arrests in both cases, but given the makeup of local juries, the results of the forthcoming trials seemed like foregone conclusions. Though Black residents outnumbered white residents nearly three to one,[465] not a single Black resident was registered to vote on January 1, 1965,[466] nor had any Black men served as jurors since 1916 at the latest,[467] even though eligibility for jury service was not tied to voting.[468] The de facto exclusion of Black men coupled with the de jure exclusion of women, both Black and white, under Alabama law meant that every Lowndes County jury was drawn from a pool of white men that made up just 13.2% of the county's population.[469] These figures, wrote Kenyon, "show[] how greatly the true cross-section of the community, which a jury is supposed to exemplify if it is to be truly 'impartial,' is out of balance—and how far the system of justice in a democracy is askew."[470]

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462. Letter from Pauli Murray to Alma Lutz (Dec. 9, 1965) (on file with Murray Papers, *supra* note 394, Box 97, Folder 1730) ("It is just possible that through court interpretation the Equal Rights Amendment will be written into the Constitution. One clear-cut decision would open the way. The jury mandatory exclusion statute [challenged in *White v. Crook*] just may be the opening we have been looking for.").

463. *See* Hasan Kwame Jeffries, Bloody Lowndes: Civil Rights and Black Power in Alabama's Black Belt 51-53, 81-82 (2009) (describing, respectively, the incidents impacting Viola Liuzzo and Jonathan Daniels).

464. *Id.* Daniels, a Catholic priest who was also injured in the attack, and several other civil-rights workers had just spent a week in the local jail after being arrested while organizing voters. *Id.* at 81-82.

465. Kenyon & Murray, *supra* note 429, at 51.

466. Dorothy Kenyon, *Jane Crow and Lily-White Males*, C.L. (Jan. 1966) (on file with ACLU Papers, *supra* note 181, TS Years of Expansion, 1950-1990: Series 2: Foundation Project Files: Lawyers Constitutional Defense Committee, 1964-1976, Box 651, Folder 9, Item 271).

467. *Id.*

468. *See* White v. Crook, 251 F. Supp. 401, 403 (M.D. Ala. 1966) (citing Alabama law requiring jury commissioners to place on jury rolls "the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment").

469. Kenyon & Murray, *supra* note 429, at 51 & n.78 (observing a typographical error in the *White v. Crook* opinion regarding the number of Black women in Lowndes County).

470. Kenyon, *supra* note 466.

But what if Lowndes County juries actually represented Lowndes County? Six days after Daniels's killing, Gardenia White—a thirty-six-year-old Black woman from a politically active family[471]—became the lead plaintiff in an "explosive[]" federal class-action lawsuit before a three-judge panel in the Middle District of Alabama.[472] Kenyon had recruited Murray to the ACLU's board, and with the organization's support, White and a group of fellow activists sued Lowndes County officials over their exclusion from the local jury box.[473]

The ensuing case, *White v. Crook*, was groundbreaking in several respects. First, never before had a jury-discrimination case been initiated by prospective *jurors*. Previous cases had all involved *defendants* challenging the composition of the juries that indicted or convicted them.[474] Second, plaintiffs garnered headlines by immediately seeking a temporary restraining order halting all criminal proceedings in Lowndes County until the jury rolls were updated.[475] (The extraordinary request was denied, and Daniels's killer was acquitted during the lawsuit's pendency, vindicating the plaintiffs' argument that their exclusion from the jury box "seem[ed] to provide a license to kill and assault members of their class and other citizens of the United States, white and Negro, who seek to assist them in obtaining equal civil rights."[476]) Finally, and perhaps most importantly, the lawsuits asked the federal courts to recognize that Alabama's bar on female jurors offended the Equal Protection Clause. Claims of race discrimination were hardly new in 1965, but as a local newspaper put it sardonically, the "dual target" of the lawsuit represented a "bizarre aspect" of "Gardenia's crusade."[477] But as Kenyon saw it, the "novel" argument "could prove revolutionary."[478]

Convincing the panel that Alabama's sex-based classifications offended the Equal Protection Clause when the Supreme Court had just recently affirmed that "woman is still regarded as the center of home and family life" in *Hoyt*[479] would require all the tools Murray had suggested in her memorandum to the

471. ROSENBERG, *supra* note 49, at 294.

472. Ann Lyle, *Jury Duty Asked in Civil Suits*, ALA. J., Aug. 26, 1965, at 13; ROSENBERG, *supra* note 49, at 294.

473. ROSENBERG, *supra* note 49, at 294-95.

474. White v. Crook, 251 F. Supp. 401, 407 (M.D. Ala. 1966).

475. Motion for Temporary Restraining Order or Preliminary Injunction, *White*, 251 F. Supp. 401 (No. 2263-N) (on file with ACLU Papers, *supra* note 181, TS Years of Expansion, 1950-1990: Series 4: Legal Case Files, 1933-1990, Box 1832, Item 230); Barbas, *supra* note 455, at 423-24.

476. Affidavit of Orzell Billingsley, Jr. to Support Motion, *White*, 251 F. Supp. 401 (No. 2263-N) (on file with ACLU Papers, *supra* note 181, TS Years of Expansion, 1950-1990: Series 4: Legal Case Files, 1933-1990, Box 1832, Item 230); Barbas, *supra* note 455, at 423-24.

477. *Dual Target*, MONTGOMERY ADVERTISER, Nov. 4, 1965, at 4.

478. Kenyon, *supra* note 466.

479. Hoyt v. Florida, 368 U.S. 57, 62 (1961).

President's Commission. To help build the analogy between race and sex discrimination, the plaintiffs enlisted Harvard psychiatrist Robert Coles, who testified at length about the psychological effects of Jim Crow generally, jury exclusion in particular, and the "astonishing similarities" in how "Negroes and women have . . . deal[t] with their position of inferiority or confinement whether it be [in] . . . the Negro ghetto or the home."[480] Just as advances in "psychological knowledge" since the time of *Plessy* had helped convince the Supreme Court to chart a new path in *Brown*,[481] so too might they help take down Jane Crow.

Plaintiffs also introduced testimony from pollster John F. Kraft, whose job was to make explicit what had been left implicit by the broad-based challenge in the Foley Square Trial fifteen years earlier. Kraft ran a leading firm for opinion and market research with prominent clients, including several U.S. senators.[482] He was tasked with explaining random-sampling techniques and their indispensability to achieving representative cross-sections of relevant demographics:

> All of our work has required getting representative cross sections of the people with whom a client might be concerned. For example, for Ford, we have sought representative cross sections of purchasers of new Ford automobiles. For Corning Glass, we have had to select representative cross sections of housewives . . . . In the political area, any study we undertake must be based on the proper selection of a cross section of the voting population, whether it be a study in Wyoming or Georgia or New York City.[483]

Kraft testified that the same sampling techniques could be applied "in order to assure that an accurate cross section of the community [was] available for service on juries," too.[484] Given the availability of census data regarding the "sex, age, economic level, race, [and] average rent[]" of a county's population, Kraft explained, it would be a "relatively straightforward and simple operation" to implement a system providing cross-sectional accuracy for juries.[485] A conscientious jury commissioner could attempt to build a representative jury list from his

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480. Plaintiffs' Brief, Vol. II—Appendices, app. A at 37-38, *White*, 251 F. Supp. 401 (No. 2263-N) (on file with ACLU Papers, *supra* note 181, MS Years of Expansion, 1950-1990: Series 4: Legal Case Files, 1933-1990, Box 1833, Item 1142).

481. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

482. Plaintiffs' Brief, *supra* note 480, at 4-5.

483. *Id.* at 5-6.

484. *Id.* at 11.

485. *Id.* at 12, 15.

acquaintances or contacts, but this would simply generate a cross-section of his acquaintances or contacts, so the commissioner "certainly wouldn't be reproducing a cross-section of a total population in an area."[486] "Let me explain it this way," Kraft concluded, "[t]he whole focus of our approach is to remove human discretion from scientific sampling, to remove the possibility of bias in selecting the sample, and . . . it is really the only way to insure selecting a random representative cross-section of a given population and be totally unbiased."[487]

Finally, the plaintiffs' brief included, as an appendix, a prepublication proof of a then-forthcoming law-review article by Pauli Murray and coauthor Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII of the Civil Rights Act*.[488] The article, building off of Murray's 1962 presentation and subsequent memorandum, represented the fullest exposition of her theory of equality for women under the Fourteenth Amendment. Three years earlier, sheepishly standing before the President's Commission as a self-described "Johnny-come-lately" to the field, Murray had bemoaned "almost a complete absence of any definitive law review articles or legal discussions on the status of women."[489] Just in time for *White v. Crook* to be decided, Murray had filled that gap and presented her vision to the courts.

On February 7, 1966, the three-judge panel issued a unanimous opinion. Evidence of systematic exclusion of Black jurors by race was overwhelming, and this clear violation of the Fourteenth Amendment necessitated robust remedial measures.[490] Specifically, the court issued "an injunction requiring immediate affirmative action" by Lowndes County to scrap their current jury lists and begin anew. If the jury commissioners could not create a new jury list that achieved a nondiscriminatory "full cross-section of the county," a special master would step in and take over that responsibility.[491]

Because White was a Black *woman*, however, the court still had to consider the constitutionality of Alabama's prohibition on female jurors. The panel ultimately rejected Alabama's argument that the Equal Protection Clause was not "historically intended to require the states to make women eligible for jury service" as a "misconception of the function of the Constitution and this Court's obligation in interpreting it."[492] The Constitution "embod[ies] general principles meant to govern society and the institutions of government as they evolve

486. *Id.* at 18.

487. *Id.* at 19-20.

488. *Id.* at app. C; *see also* Murray & Eastwood, *supra* note 434 (presenting the published work).

489. Transcript of October 2, 1962, Proceedings, *supra* note 438, at 331, 357-58.

490. White v. Crook, 251 F. Supp. 401, 405-07, 409 (M.D. Ala. 1966).

491. *Id.* at 409-10.

492. *Id.* at 408.

through time" and should be applied "as a living document" to legal disputes arising in "contemporary society."[493] Jury service was "a form of participation in the processes of government," and "in view of modern political, social and economic conditions," it was both a privilege and duty that "should be shared by all citizens, regardless of sex"; by denying women the right to serve as jurors, Alabama "den[ied] to any person within its jurisdiction the equal protection of the laws" and violated the Fourteenth Amendment.[494] For Gardenia White, the decision signaled not only recognition of her dignity and citizenship but also her *power*: "It gives me quite a great feeling of security . . . . Power is one of the greatest things we can have."[495]

White v. Crook was not only an important case in the history of the American jury but also a historic victory for the feminist legal movement. It was the first time any federal court held that the Equal Protection Clause prohibited a classification on the basis of sex.[496] "Other victories will follow," Kenyon wrote, "[b]ut this one turned the key in the lock. Like the Civil Rights Boys when the *Brown* decision was handed down in 1954, 'I could cry.'"[497] Murray similarly likened *White v. Crook* to "the *Brown v. Board of Education* for women in this country."[498] It was also a proof of concept: *White v. Crook* showed that "[i]t is just possible that through court interpretation the Equal Rights Amendment will be written into the Constitution."[499] To the chagrin of many feminists, Alabama made the surprise move of not appealing to the U.S. Supreme Court, so the occurrence Murray imagined would need to wait.[500] But five years later, when Ruth Bader Ginsburg submitted her Supreme Court brief in *Reed v. Reed*, she made a point

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493. *Id.*; *cf.* Murray & Eastwood, *supra* note 434, at 237 ("The genius of the American Constitution is its capacity, through judicial interpretation, for growth and adaptation to changing conditions and human values.").

494. *White*, 251 F. Supp. at 408 (quoting U.S. CONST. amend. XIV, § 1).

495. Rex Thomas, *Negro's Voice Heard*, BIRMINGHAM POST-HERALD, Feb. 28, 1966, at 5. White's emphasis on "power" is unlikely to be an accident. Organizing during the summer of 1965 in Lowndes County gave rise to the Lowndes County Freedom Organization, an incipient political party that took the black panther as its symbol. *See* JEFFRIES, *supra* note 463, at 1-6. The first extension of the Equal Protection Clause to women, it is worth noting, occurred at *precisely* the same place and time as the birth of Black Power. *Id.*

496. Letter from Ernest Angell & John de J. Pemberton, Jr. to John Bertram Oakes, Editor, N.Y. Times (Feb. 15, 1966) (on file with ACLU Papers, *supra* note 181, TS Years of Expansion, 1950-1990: Series 4: Legal Case Files, 1933-1990, Box 1832, Item 230).

497. MAYERI, *supra* note 48, at 28.

498. ROSENBERG, *supra* note 49, at 296.

499. *Id.*

500. MAYERI, *supra* note 48, at 29; ROSENBERG, *supra* note 49, at 296-97.

of giving credit where credit was due: Ginsburg listed both Pauli Murray and Dorothy Kenyon as coauthors of her work.[501]

CONCLUSION

By the late 1960s, a radically different model of the jury had migrated from the political margins into the mainstream of American law and culture. In 1968, Congress overwhelmingly approved the Jury Selection and Service Act, which established uniform, inclusive, and nondiscriminatory methods of assembling jury lists in federal courts.[502] The Act prohibited special eligibility requirements for jurors[503] and required courts to implement a "[p]lan for random jury selection."[504] In establishing these procedures and declaring that "the policy of the United States [is] that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community,"[505] Congress echoed—and, in some sense, vindicated—the position advanced unsuccessfully by the CPUSA defendants in the Foley Square Trial less than two decades earlier. One of the bill's key Senate supporters, while downplaying the Act's racial-justice impetus, insisted that the new regime simply codified what juries were always meant to be: it "makes a reality of what everybody has thought is our historic tradition—that a jury represents a cross-section of the community and not just the rich and well educated."[506] (This Article has sought to demonstrate the historical amnesia, or strategic distortion, underlying such a claim.) Seven years later, the Supreme Court extended this principle to state courts in *Taylor v. Louisiana*, holding that the Sixth Amendment's "impartial jury" clause necessarily contemplates a jury drawn from a "fair cross section of the community."[507]

One striking and ironic feature of this historical arc is how often this Article's protagonists lost. Individual litigants were often defeated in the most immediate

501. ROSENBERG, *supra* note 49, at 343.

502. For a thorough account of the lead-up to and passage of the Act, see HALE, *supra* note 9, at 217-248; and VAN DYKE, *supra* note 9, at 14-19.

503. Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53, 58 (codified at 28 U.S.C. § 1865).

504. *Id.* at 54 (codified at 28 U.S.C. §§ 1862-63) (prohibiting discrimination on account of race, color, religion, sex, national origin, or economic status).

505. *Id.* (codified at 28 U.S.C. § 1861).

506. Fred P. Graham, *Random Selection of U.S. Juries Voted; Random Selection of Jurors in Federal Courts Voted in Senate*, N.Y. TIMES, Mar. 16, 1968, at 1, 13 (noting that Sen. Joseph D. Tydings "did not stress the fact that the law would put more Negroes on juries, and it was supported by a number of Southern Senators as well as by President Johnson").

507. 419 U.S. 522, 536 (1975).

and tragic sense: Euel Lee and Odell Waller were executed, while other defendants spent years imprisoned. On a broader level, Popular Frontism, the social movement and political tendency that bridged the episodes in this Article, was partly repressed and partly absorbed, ultimately being diminished to "a chastened junior partner in the post-war order."[508] But litigation loss may have "productive, radiating effects," particularly in contexts where "lawyers use a number of tactics aimed at a variety of audiences across multiple institutional domains at different levels of government."[509] The story of the representative jury's rise illustrates a broader historical dynamic at play: as Stuart Hall and Michael Denning have argued—drawing on the political thought of Antonio Gramsci—social forces that lose in one era "do not thereby disappear from the terrain of struggle."[510] If "history progresses by failure rather than [by] success,"[511] then the representative-jury requirement of the late twentieth century might be read as a refracted expression of the democratic aspirations of an earlier moment—a contingent rebalancing of our culture's "relations of force," still unstable and subject to ongoing contestation.[512]

A perspective attentive to these dynamics—and wary of hagiography—helps us recognize that even as the "representative jury" triumphed as a cultural ideal and a formal commitment of constitutional law, its victory was partial. There are, of course, a host of reasons why juries today remain less than representative and why the jury box may not stand out as the same locus of democratic

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508. DENNING, *supra* note 52, at 464 ("One part [of the social movement, the Popular Front]—the Communists and their 'fellow travelers'—was repressed and expelled from public culture; it became a beleaguered subculture whose emblems were the Weavers, the Rosenbergs, and Paul Robeson. Another part—the social democrats that made up the purged CIO as well as the Cold War cultural fronts like the Congress for Cultural Freedom—was incorporated as a chastened junior partner in the post-war order, pledging allegiance to the anti-Communist crusade in the unions and universities of the United States as well as in the cities and jungles of Vietnam.").

509. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 947 (2011); *see also* Douglas NeJaime, *Before Losing*, 135 YALE L.J.F. 63, 65 (2025) ("The concept of winning through losing only makes sense within a less court-centered and more multidimensional approach to law and social change.").

510. DENNING, *supra* note 52, at 464 (quoting Stuart Hall, *Gramsci's Relevance for the Study of Race and Ethnicity*, *in* STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 411, 423 (David Morley & Kuan-Hsing Chen eds., 1996)).

511. *Id.* at 465 (quoting FREDERIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM 209 (1991)).

512. Stuart Hall, *Gramsci's Relevance for the Study of Race and Ethnicity*, *in* STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES 411, 423 (David Morley & Kuan-Hsing Chen eds., 1996) ("[T]he idea of the 'absolute' and total victory of the bourgeoisie over the working class or the total incorporation of the working class in the bourgeois project are totally foreign to Gramsci's definition of hegemony . . . . It is always the tendential balance in the relations of force which matters.").

contestation that it once did.[513] But taking the longer historical view displayed by this Article, the Supreme Court's landmark decision in *Taylor v. Louisiana* in 1975 appears less like the starting point of the fair-cross-section doctrine and more like the high-water mark for the federal courts' ambivalent embrace of the representative jury. For in the same breath that the Court recognized a defendant's Sixth Amendment right to a jury *drawn* from a fair cross-section of the community—seemingly echoing the demands of radical pamphlets a half century earlier—it also reaffirmed that no analogous requirement applies to the petit jury itself.[514] As a result, even if peremptory strikes,[515] "death qualification,"[516] or other challenges for cause[517] drastically skew the demographics of a particular

513. *But see Fatal Flaws: Revealing the Racial and Religious Gerrymandering of the Capital Jury*, AM. C.L. UNION 3-4 (June 2025), https://assets.aclu.org/live/uploads/2025/06/Fatal-Flaws-Revealing-the-Racial-and-Religious-Gerrymandering-of-the-Capital-Jury-1.pdf [https://perma.cc/R685-2MC2] (documenting the disproportionate exclusion of "Black people, especially Black women, other people of color, women, and followers of certain religions" through "death qualification" of juries and "demand[ing] that any decision to apply the death penalty is made by a jury that truly represents the community and its values"); Nick Chrastil, *Jury Trials in New Orleans Criminal Court Halted Through February*, LENS (Jan. 23, 2023), https://thelensnola.org/2023/01/23/jury-trials-put-on-hold-in-new-orleans-criminal-court-until-march-due-to-questions-over-exclusion-of-jurors-with-felony-convictions [https://perma.cc/CSJ2-4U7K] (discussing the pause on jury trials due to the unlawful failure to summon jurors with felony convictions and advocacy by an organization of formerly incarcerated individuals); *Transcript: Jury System on Trial*, MSNBC (Mar. 12, 2021, 1:56 PM EST), https://www.msnbc.com/podcast/transcript-jury-system-trial-n1260970 [https://perma.cc/W6R3-6ZHR] (discussing the work of an advocacy organization promoting Black jury service).

514. Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").

515. Holland v. Illinois, 493 U.S. 474, 481 (1990) ("But to say that the Sixth Amendment deprives the State of the ability to 'stack the deck' in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side. Any theory of the Sixth Amendment leading to that result is implausible.").

516. *Fatal Flaws*, *supra* note 513, at 5 (discussing and critiquing the disparate racial and religious impacts of "death qualification," the exclusion of jurors whose opposition to the death penalty would substantially impact their willingness to impose it); *see also* Kevin Z. Yang, Comment, *Deference Spillover: The End of* Witherspoon *in Capital Appeals*, 135 YALE L.J. 346, 348-50 (2025) (discussing how the phenomenon of "deference spillover" has undermined "[m]eaningful appellate oversight of the death-qualification process," thereby depriving capital defendants of the "chance to demand that [their] jur[ies] represent a fair cross section of [their] communit[ies], including those who are opposed to the death penalty").

517. Lockhart v. McCree, 476 U.S. 162, 173 (1986) ("We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.").

seated jury—or do so systematically in case after case[518]—no constitutional injury is recognized. The practical result is that American juries in many cases still look very different than those envisioned by the radicals who, beginning a century ago, first insisted that a "jury of one's peers" meant a jury that represented a "cross-section of the community."

The Supreme Court's most famous modern case on jury selection, the landmark 1986 decision in *Batson v. Kentucky*, also appears diminished when viewed through this broader historical lens. As briefed and argued before the Court, James Batson's core claim was that the government's use of race-based peremptory strikes was unconstitutional *not* because it violated the Equal Protection Clause or was motivated by invidious intent,[519] but because it denied him a jury that represented a fair cross-section of the community under the Sixth Amendment's right to an "impartial jury."[520] Recent cases like *Taylor v. Louisiana* had foreclosed the argument that the petit jury *itself* had to be representative, but at the time, Batson contended that race-based peremptory strikes skewed the jury pool and thus impermissibly burdened his constitutional right to a representative jury.[521] In framing his argument around the fair-cross-section principle, Batson echoed and expanded upon the calls for a representative jury made in

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518. *See* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich. L. Rev. 785, 785, 798 (2020) (demonstrating that challenges for cause regularly skew the demographics of seated petit juries and, in many cases, are more responsible than peremptory strikes for producing all-white juries).

519. Indeed, at oral argument, Batson's attorney emphasized that he was *not* making such a claim, much to the chagrin of several Justices. Thomas Ward Frampton, *How* Batson *Was Decided*, 21 Ohio St. J. Crim. L. 23, 29 (2025).

520. *Id.* at 28-31.

521. *Id.*; Brief for Petitioner at 4, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263) ("This brief is premised on the belief that the concept of the jury as a fair cross-section of the community announced in *Taylor v. Louisiana*, 419 U.S. 522 (1975), was designed to secure a trial jury that is representative of the community and not simply to create a representative panel or venire from which the prosecutor can exclude groups of people by means of peremptory challenges."). In so arguing, Batson was following the lead of several state supreme courts and one federal court that had prohibited race-based peremptory strikes. *See* People v. Wheeler, 583 P.2d 748, 758 (Cal. 1978) ("The American system requires an impartial jury drawn from a cross-section of the entire community and recognition must be given to the fact that eligible jurors are to be found in every stratum of society." (quoting People v. White, 278 P.2d 9, 18 (Cal. 1954))); *Wheeler*, 583 P.2d at 762 ("[A] party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits."); Commonwealth v. Soares, 387 N.E.2d 499, 515 (Mass. 1979) (holding that race-based peremptory strikes, if permitted, "would leave the right to a jury drawn from a representative cross-section of the community wholly susceptible to nullification through the intentional use of peremptory challenges to exclude identifiable segments of that community"); McCray v. Abrams, 750 F.2d 1113, 1129-31 (2d Cir. 1984) (holding that race-based peremptory strikes, even if permissible under Equal Protection Clause, could violate a defendant's Sixth Amendment right to the "possibility of a cross-sectional petit jury").

decades past by radical activists, who rarely cabined their claims to the Equal Protection Clause and knew all too well the difficulties of proving discriminatory intent to the satisfaction of skeptical judges.[522] But that doctrinal path alarmed the Court's moderates, who feared it could extend to "Polish carpenters born in Laramie, Wyoming or, less facetiously, to gays or blue collar workers."[523] They fretted that the fair-cross-section principle announced in *Taylor v. Louisiana* was a "loose cannon[] on the deck of th[e] Court's criminal jurisprudence [driven by] a rationale [that] knows no limits."[524] Only by championing the narrower equal-protection approach were the Court's liberals able to assemble a majority in *Batson*.[525] Justice Marshall remained unconvinced. In a concurring opinion — echoing the brief filed by Euel Lee's Communist lawyer, whom Marshall had represented fifty-three years earlier[526] — he warned of the futility of the majority's newly announced framework.[527] When Justice Brennan privately asked him to soften his tone, Justice Marshall responded bluntly: "I continue to believe that the majority's approach will by its nature be ineffective . . . . I see no reason to be

522. With the exception of Pauli Murray's efforts in *White v. Crook* — which, quite deliberately, emphasized expanding the Equal Protection Clause to sex-based classifications — none of the activists discussed in this Article seemed particularly focused on specific constitutional clauses as the source of the right to a representative jury. Odell Waller, for example, who argued that the Equal Protection Clause prohibited wealth-based classifications, *see supra* Part III, also framed his argument as a deprivation of life and liberty without "due process of law," *see* Petition for Writ of Habeas Corpus at 13, Waller v. Youell, 316 U.S. 712 (1942) (No. 1097) (on file with NAACP Papers, *supra* note 250, Part VIII: Discrimination in the Criminal Justice System, 1910-1955, Series B: Legal Department and Central Office Records, 1940-1955, Folder: Odell Waller Murder Case in Gretna, Virginia). Rather, this Article's protagonists invoked "due process of law," "equal protection of the laws," the right to an "impartial jury," and (extraconstitutional) notions like "a jury of one's peers" to serve as cumulative hooks for the fair-cross-section requirement they invented. *See* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. Rev. 1309, 1310-11 (2017) (explaining the structure of cumulative-constitutional-rights cases). Batson also feared, mistakenly it turns out, that *Swain v. Alabama*, 380 U.S. 202 (1965), precluded arguments based on the Equal Protection Clause. *See* Frampton, *supra* note 519, at 34 n.79.

523. Frampton, *supra* note 519, at 28 (quoting a passage from a clerk's bench memo to Justice O'Connor).

524. *Id.*

525. *Id.* at 28-31.

526. *Compare Batson*, 476 U.S. at 106 (Marshall, J., concurring) (emphasizing the possibility "that an attorney may lie to himself" and the possibility that an attorney's "seat-of-the-pants instincts" may mask "unconscious racism"), *with supra* notes 163-164 and accompanying text (quoting Bernard Ades's prefiguration of implicit bias on the part of judges who select jurors from among their acquaintances).

527. *See Batson*, 476 U.S. at 103 (Marshall, J., concurring).

gentle in pointing that out, and I doubt that pulling my punches would make the situation any better."[528]

Appeals to "history and tradition" have become increasingly salient—and contested—in the adjudication of constitutional-rights claims in recent years.[529] This Article leaves to others the question of how such methodologies—or the specific historical narrative recounted here—should inform contemporary constitutional meaning. Those seeking to bolster Justice Thomas's view that the modern fair-cross-section doctrine is "difficult to square with the Sixth Amendment's text and history"[530] will likely find much support in scholarship that emphasizes the representative jury's relatively recent vintage. But legal claims on the past often "conceal, rather than constrain, the expression of judicial values," and more capacious approaches to the use of history and tradition are available.[531] Scholars like Joy Milligan and Bertrall L. Ross II, who emphasize the Constitution's "serious democratic deficits," particularly prior to 1965, have advocated for an "ameliorative" approach—one that considers rights claims at "a [higher] level of generality . . . that accounts for America's exclusionary past"[532] and "broaden[s] the sources of 'history and tradition'" to include marginalized voices largely omitted from standard historical accounts.[533] The effective erasure of the history presented in this Article from canonical accounts of the American jury illustrates the dangers of the selective curation of "history and tradition" that, among others, Milligan and Ross critique.[534]

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528. Frampton, *supra* note 519, at 39 (quoting Memorandum from Justice Brennan to Justice Marshall 1, Batson v. Kentucky, No. 84-6263 (Feb. 28, 1986) (on file with Libr. Of Cong., Thurgood Marshall Papers, Supreme Court File, Box 396)).

529. *See* Rachel Bayefsky, *Tradition and Feminism in Constitutional Rights Adjudication*, 112 VA. L. REV. (forthcoming 2026) (manuscript at 3, 4 & nn.10-12), https://ssrn.com/abstract=5270735 [https://perma.cc/XV6L-9BSZ] (surveying the literature).

530. Berghuis v. Smith, 559 U.S. 314, 334 (2010) (Thomas, J., concurring).

531. Reva B. Siegel, *Democratizing Constitutional Memory*, 123 MICH. L. REV. 1011, 1011 (2025).

532. Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 307-08, 359 (2023).

533. *Id.* at 364; *see also* Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 606-07 (2024) (arguing that "[f]idelity to the nation's history and traditions," when "understood in granular particularity," can cement the norms of the existing power hierarchy and limit the scope of rights that allow for the equal participation of historically marginalized people).

534. *See* Milligan & Ross, *supra* note 532, at 362-64; *see also* Siegel, *supra* note 531, at 1016 ("Law stories can misrepresent—or *selectively represent*—facts of national experience, opening gaps between constitutional memory and constitutional history.").

"[T]raditions of resistance," Rachel Bayefsky has argued, are "also part of the network of American tradition."[535] Certainly that perspective would have resonated with this Article's protagonists. Their efforts to democratize the jury did not merely invoke the Constitution; rather, they sought to redefine its meaning through sustained political and legal struggle, both inside and outside of judicial settings. Whatever we make of that history moving forward, this Article has sought to show how it fundamentally reshaped Americans' understanding of the relationship between the jury and the Constitution over much of the past century. On this view, the representative jury's radical roots have a place in our constitutional tradition as well.

535. Bayefsky, *supra* note 529 (manuscript at 40) (referring specifically to women's resistance of subordination); *see also* Siegel, *supra* note 531, at 1024 ("Just as advocates making claims on constitutional memory can look beyond lawmakers to include those whose struggles were responsible for making our law, advocates can look beyond the text of statutes for expressions of the nation's commitments.").