

MILESTONES IN HABEAS CORPUS: PART II

LEO FRANK LIVES: UNTANGLING THE HISTORICAL ROOTS OF MEANINGFUL FEDERAL HABEAS CORPUS REVIEW OF STATE CONVICTIONS

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This Article is part of a larger ongoing project that is planned to result in the publication by New York University Press of a book on the history of habeas corpus. That volume will, I hope, benefit from the reactions of other students to the thoughts published here.

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Copies of all of the sources cited in this Article are available on request from the reference desk of the Deane Law Library of Hofstra Law School.

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I. INTRODUCTION

A. *Summary*

Differing interpretations of the relationship between the landmark cases of *Frank v. Magnum*¹ and *Moore v. Dempsey*²—in which seemingly identical facts led to diametrically opposed results³—lie at the heart of the current controversy over the appropriate scope of federal habeas corpus review of state criminal convictions.⁴

In both cases, unpopular defendants were tried in mob-dominated Southern courtrooms in the wake of murders that had

1. 237 U.S. 309 (1915).

2. 261 U.S. 86 (1923).

3. See Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 417, 423-24 (James Acker et al. eds., 1998) (describing cases); Note, *Mob Domination of a Trial as a Violation of the Fourteenth Amendment*, 37 HARV. L. REV. 247, 248 (1924) ("[I]n two cases, separated by a period of nine years, presenting at least strikingly similar circumstances, the Supreme Court has reached opposite results.").

4. See, e.g., Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two)*, 30 U. RICH. L. REV. 303, 358 (1996) (stating that eight years after his dissent in *Frank*, "Holmes's view of habeas corpus became the majority view in *Moore v. Dempsey*. Rigid procedural-default rules cast aside the justice done in *Moore v. Dempsey*, and, together with the other restrictive procedural rulings of the Rehnquist Court, return habeas corpus to the injustice of *Frank v. Magnum*." (footnotes omitted)).

shattered the local community, brought federal habeas corpus petitions,⁵ and urged the Supreme Court to rule that egregious due process violations had been responsible for their convictions and death sentences.⁶ But the outcomes were entirely different. The Court refused to intervene in *Frank* (which ultimately resulted in the lynching of an innocent Jew), but granted relief in *Moore* (which ultimately resulted in freedom for innocent blacks)—asserting, all the while, that there was no inconsistency between the two decisions.⁷

In recent times, those who support broad federal habeas corpus review of the constitutionality of state convictions—those who may loosely be called “liberals”—have generally taken the view that the cases are inconsistent. *Frank*, they say, unjustifiably narrowed the scope of the federal courts’ habeas corpus investigations by mandating deference to states’ procedurally adequate mechanisms for the correction of error in criminal trials no matter how wrong the outcome of the procedures; it was rightly overruled by *Moore*, which called for a searching inquiry into the facts underlying petitioners’ constitutional claims.⁸

5. See 28 U.S.C. § 2254(a) (1994 & Supp. IV 1998) (authorizing federal courts to issue writs of habeas corpus ordering the release of a person “in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States”).

6. Both cases display many of the features frequently present where the death penalty is at issue. See Freedman, *supra* note 3, at 424-25 (observing that, as numerous studies show, cases of capital defendants “are more likely than those of defendants not facing execution to have been infected by distortions arising from racism, the incompetence of defense counsel, their own mental limitations, public passion, political pressures, or jury prejudice or confusion,” all of which results in “a dangerous increase in the risk that the system will make a fatal error.”).

7. See 1 JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.4d, at 61-62 (3d ed. 1998). See also *infra* text accompanying notes 258-61 (evaluating Professor Liebman’s attempt to reconcile the cases).

8. On the Court, this argument was originally made by Justice Brennan for the majority in *Fay v. Noia*, 372 U.S. 391, 420-23, 434 n.42 (1963).

Although the authority of *Fay* was seemingly undermined by the long passage of dicta in *Coleman v. Thompson*, 501 U.S. 722, 749-51 (1991), repudiating its approach to procedural default, see Eric M. Freedman, *Habeas Corpus Cases Rewrote the Doctrine*, NAT’L L.J., Aug. 19, 1991, § 6 n.21 (criticizing this decision), three Justices made clear the following year that they agreed with Justice Brennan’s view of the relationship between *Frank* and *Moore*. See *Wright v. West*, 505 U.S. 277, 299 (1992) (concurring opinion of O’Connor, J., joined by Blackmun and Stevens, JJ.); see also *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (describing the cases as “in large

Those seeking to limit habeas corpus have argued that the cases are consistent and that the Court should adhere to the doctrine that they perceive as governing both. For "conservatives," *Frank* did indeed set forth a rule that federal habeas courts should give heavy deference to state proceedings. In their view, the rule was (and is) correct, and *Moore* applied it—although, because of the extreme inadequacy of the state's review process in that particular case, the result was a victory for the petitioners.⁹

This debate about the past—which intensified¹⁰ in the run-up to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),¹¹ limiting the right of state

part inconsistent with one another").

In the law reviews, the principal support for the Brennan thesis came from Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 646 (1982) (discussed *infra* text accompanying notes 252-54). See generally Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1329 n.53 (1961) ("The opinion of the Court in *Moore* does not state that *Frank v. Magnum* was overruled, but the dissent recognizes the realities."); Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 105 (1959) ("*Frank v. Magnum* was substantially discredited eight years later in *Moore v. Dempsey*").

9. This theory, which appears to have the support of three current Justices, see *Wright*, 505 U.S. at 285-86 (plurality opinion of Thomas, J., joined by Rehnquist, C.J. & Scalia, J.), was previously advanced by Justice Harlan in *Fay*, 372 U.S. at 457-58 (Harlan, J., dissenting) ("*Moore* cannot be taken to have overruled *Frank*; it did not purport to do so, and indeed it was joined by two Justices who had joined in the *Frank* opinion."); see also *infra* note 266 (quoting this latter passage more fully).

Its law review origin is Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 488-89 (1963) (discussed *infra* text accompanying notes 247-51, 257).

10. See, e.g., Avern Cohn, *Active Judiciary Serves Democracy*, DET. NEWS, Dec. 29, 1996, at B2; Susan N. Herman, *Clinton Takes Liberties with the Constitution*, NEWSDAY, Aug. 4, 1996, at A46; Anthony Lewis, *Crime Against Justice*, N.Y. TIMES, July 29, 1991, at A15. All three of these authors (a federal District Judge, a law professor, and a former Supreme Court reporter for the *New York Times*) took the view that the Supreme Court in *Moore* overruled *Frank* and expressed concern that various proposals to limit federal habeas corpus review of state criminal convictions would return the law to its prior unjust state. For a summary of these proposals prior to the Republican capture of Congress in the November, 1994 elections, see Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993).

11. See Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253-55 and adding §§ 2261-66). The background of the statute is canvassed in Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996), and its practical effects are set forth in Association of the Bar of the City of New York, *The Crisis in Capital Representation*, 51 REC. ASSOC. BAR

prisoners (especially Death Row inmates) to obtain federal habeas corpus review of their convictions—is taking place with a sharp eye on the present and near future. One key statutory revision made by AEDPA was to rewrite 28 U.S.C. § 2254(d) to require some increased degree of respect by federal habeas corpus courts for prior state proceedings challenging the same conviction. The Courts of Appeals have been hopelessly split over the precise contours of this requirement, however,¹² and the matter has only been partially clarified by the Supreme Court.¹³

Meanwhile, in the world of historical (as opposed to legal) inquiry, *Frank* and *Moore* have drawn continuing attention not only because both were major national events, but because they encapsulate a swirl of sexual, racial, religious and regional tensions in the context of an urbanizing, industrializing and ethnically diversifying society.¹⁴ But legal scholarship has made little use of the historical work that has been done.¹⁵ Moreover, a

CITY OF N.Y. 169, 192-94 (1996).

12. See *Matteo v. Superintendent*, 171 F.3d 877, 885-91 (3d Cir. 1999) (reviewing Circuits).

13. In *Williams v. Taylor*, 120 S. Ct. 1495 (2000), the Court explicitly rejected the formulations that had previously been applied by the Fourth and Fifth Circuits, see *Williams*, 120 S. Ct. at 1521-22 (opinion of O'Connor, J., speaking for the Court on this point), and inferentially invalidated those of the Seventh and Eleventh Circuits, see *Neeley v. Nagle*, 138 F.3d 917 (11th Cir. 1998); *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *reversed on other grounds*, 521 U.S. 320 (1997). It also provided potent ammunition for the argument that the remaining circuits would need to revisit their positions. This conclusion follows from that fact that although the Justices split 5-4 when discussing the abstract issue of statutory interpretation, they ruled 6-3 in petitioner's favor on the merits—meaning that even the more restrictive test enunciated by Justice O'Connor should as a practical matter increase the availability of federal habeas corpus relief under AEDPA beyond what the lower courts had thought safe to grant.

Indeed, vindicating the predictions of several commentators, see, e.g., Freedman, *supra* note 3, at 428-34; Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4 (1997), *Williams* appears to reinforce the message of the developing jurisprudence under the statute: the Court had shaped habeas corpus law to its liking prior to 1996 and is unwilling to read AEDPA as imposing any significant additional restrictions. See *Williams v. Taylor*, 120 S. Ct. 1479 (2000); *Hohn v. United States*, 524 U.S. 236 (1998); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Felker v. Turpin*, 518 U.S. 651 (1996).

14. See *infra* notes 22 (describing literature on *Frank*), 138 (describing literature on *Moore*).

15. This is not unusual in legal scholarship, particularly legal scholarship on

great deal of previously unmined archival material illuminating the cases exists.¹⁶

This Article seeks to make a contribution to the integration of historical and legal knowledge.

First, using previously unutilized historical materials, it provides the first comprehensive account of the procedural steps in the cases.¹⁷ It then draws on this investigation to reach a novel legal conclusion: The *Frank* and *Moore* cases are consistent, and both require in-depth federal habeas corpus review of state prisoner convictions. The differing outcomes of the cases reflect no more than differing discretionary determinations in specific factual settings.¹⁸

Second, this Article suggests a reconciliation between the historical and legal modes of explaining legal decisions.¹⁹ From a realistic or "historical" perspective, outcomes result from the subjective motivations of individual judges. From a formalistic or "legal" perspective, the outcome of a later case results from the application or non-application of the rule laid down by an earlier case. My claim is that, while the identity and motivation of legal decisionmakers critically affect the outcome of cases at the time they are decided, in the long run, the influence of legal opinions is likely to depend on their intellectual merits. Leo Frank, his lawyers, and the Justices who decided his case are now dead. Their personal traits were important in determining why the Supreme Court ruled as it did during their lifetimes. But

habeas corpus. See Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 451 (1996); Morton J. Horowitz, "Why is Anglo-American Jurisprudence Unhistorical?", 17 OXFORD J. LEGAL STUD. 551, 553-54 (1997). With respect to the subject immediately at hand, there is a promising exception on the horizon in Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. (forthcoming 2000), which discusses both cases in historical context and takes a viewpoint generally similar to my own.

16. See, e.g., *infra* notes 85-87 and accompanying text (describing draft opinion of Circuit Justice Lamar in *Moore* previously unknown to scholars); *infra* notes 150, 185 (describing previously overlooked court papers in *Moore*); *infra* notes 228-30 and accompanying text (presenting first-hand accounts of Supreme Court oral argument in *Moore*).

17. Because, as indicated *supra* note 16, this detailed litigation history is based upon a number of previously unpublished sources, it should be valuable to future scholars regardless of what they may think of my own theses.

18. See *infra* Part V.

19. See *infra* Part VI.

Frank's enduring importance, to history as well as to law, will be doctrinal—and specifically, in my view, in its mandate for the searching federal habeas corpus review of state convictions.

Both aspects of the Article rely heavily on the published and unpublished writings of Justice Holmes—who wrote the dissent in *Frank* and the majority opinion in *Moore* and would, I think, support the conclusions reached here.

B. Outline

Part II describes the legal proceedings leading to the Supreme Court decision in *Frank*, and after Part III sets forth a transitional chronology, Part IV does the same for *Moore*.

Part V, after considering and rejecting the legal explanations that have so far been offered for the outcomes, argues that both decisions relied upon the same quite broad rule. Both cases recognized that federal courts reviewing state convictions on habeas corpus had the power to go behind the record of the state court proceedings and conduct a factual inquiry into the existence of a constitutional violation; they differed only as to whether that power should have been exercised in the situation at hand. This consistency has been obscured by the dramatic facts and manifest injustice of *Frank*—whose real-world outcome was that an innocent man was lynched. But it was in *Frank*, not *Moore*, that the Supreme Court first recognized the legal and practical imperative of a federal habeas corpus review that “look[s] through the form and into the very heart and substance of the matter.”²⁰

Finally, Part VI, noting the obvious importance of the differing identities of the Justices who decided the two cases, offers some thoughts on the utility and limits to us, as lawyers who need to make predictions and as individuals of finite lifespans, of the legal and historical modes of explaining the outcome of cases. My somewhat counter-intuitive suggestion is that the

20. *Frank v. Magnum*, 237 U.S. 309, 332 (1915) (discussed *infra* note 260 and accompanying text). See also *Frank*, 237 U.S. at 331 (quoted and discussed *infra* note 102 and accompanying text).

"historical" perspective has more explanatory power as a short-run matter and the "legal" one more over the longer term.²¹

II. THE LEGAL PROCEEDINGS IN FRANK

At around 3 AM on April 27, 1913, a black night watchman at the National Pencil Factory in Atlanta found the badly abused corpse of 13-year-old Mary Phagan, a white employee.²²

21. See *supra* text accompanying note 19.

22. See LEONARD DINNERSTEIN, *THE LEO FRANK CASE* 1-2 (Notable Trials Library ed. 1991). This work, published in 1987 by Brown Thrasher and in 1968 by Columbia University Press, has not undergone any substantive revision since the research for it was conducted in the mid 1960s, see *id.* at ix-xi, although the 1987 and 1991 editions annex an undesignated appendix containing some important additional documentation first published by the *Nashville Tennessean* on March 2, 1982 (hereinafter *Tenn. App.*) and make the briefest of allusions to the posthumous pardon granted by the Georgia Board of Pardons, see *Georgia Pardons Victim 70 Years After Lynching*, N.Y. TIMES, Mar. 12, 1986, at A16. These developments are integrated into ROBERT SEITZ FREY & NANCY THOMPSON-FREY, *THE SILENT AND THE DAMNED: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK* (1988). In addition, HARRY GOLDEN, *A LITTLE GIRL IS DEAD* (1965) is based on a great deal of primary research.

Nonetheless, Dinnerstein's work remains perhaps the most useful historical account of a case that "led to the rebirth of the Ku Klux Klan and the founding of the Anti-Defamation League of B'nai B'rith," Florence King, *Murky New View of a Southern Tragedy*, NEWSDAY, Feb. 2, 1988, at B9 (reviewing MARY PHAGAN, THE MURDER OF LITTLE MARY PHAGAN (1988)). See generally Nancy MacLean, *The Leo Frank Case Reconsidered: Gender and Sexual Politics in the Making of Reactionary Populism*, 78 J. AM. HIST. 917, 917-18 (1991).

For an overview of publications on the case in various genres, see FREY & THOMPSON-FREY, *supra*, at 137-45.

Since the appearance of this last work, the case has been the subject of a competent sketch, ALBERT S. LINDEMANN, *THE JEW ACCUSED* 235-72 (1991), a novel, DAVID MAMET, *THE OLD RELIGION* (1997), a New York musical, *PARADE*, see *Too Serious to Sing About?*, N.Y. TIMES, Dec. 12, 1998, at B7, and an off-Broadway play, *THE LYNCHING OF LEO FRANK*, see D.J.R. Bruckner, *A Story Still Painful After Repeated Tellings*, N.Y. TIMES, Apr. 20, 2000, at B5. Additionally, Steve Oney, whose forthcoming book on the case should prove to be of great value, has provided an accessible summary in Steve Oney, *Murder and Bigotry in the South: The Story of a Lynching in "Parade"*, N.Y. TIMES, Dec. 13, 1998, Sec. 2, at 7; see also Don Melvin, *Sordid Old Secret Comes to Light, Gives One Pause*, ATLANTA CONST., Oct. 2, 1997, at 1G (previewing Oney's findings).

A useful general account of this period from a Supreme Court perspective is contained in Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881 (1998), which complements many of the themes of this Article. See also Sandra L. Wood et al., *The Supreme Court, 1888-1940: An Empirical Overview*, 22 SOC. SCI. HIST. 201 (1998). See generally GRACE ELIZABETH HALE, *MAKING*

A few days later, the police arrested Leo M. Frank, the plant's superintendent and part owner,²³ a rising member of the Jewish community who had been elected president of the local B'nai B'rith the previous year.²⁴

As the investigation unfolded, it generated new revelations—reliable and unreliable—on a daily basis (including many centering around Jim Conley, a black employee of the plant, who was to become Frank's chief accuser but who was almost certainly the actual killer).²⁵ Sensational newspaper coverage roiled public passions.²⁶ Indeed, "[n]o trial in Georgia's history rivaled Leo Frank's for public interest. . . . For more than four months, the newspapers featured the crime above all other subjects, and outside the state the trial made front page headlines in the largest cities of the South."²⁷

The prosecution team at trial was led by Solicitor Hugh M. Dorsey, who would later be one of the State's counsel in the Supreme Court,²⁸ and, on the strength of his success, he twice elected Governor of Georgia.²⁹ The defense was conducted by prominent local trial lawyers,³⁰ one of whom was Dorsey's

WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940 (1998).

23. See DINNERSTEIN, *supra* note 22, at 2-4; GOLDEN, *supra* note 22, at 23-24.

24. See DINNERSTEIN, *supra* note 22, at 6.

25. See FREY & THOMPSON-FREY, *supra* note 22, at 132; DINNERSTEIN, *supra* note 10, at 125, 127-29, 169-71; Tenn. App., *supra* note 22, at 15-18; GOLDEN, *supra* note 22, at 229-31; see *infra* notes 53, 118 (noting Conley's reported confession to his own lawyer). Conley was eventually sentenced to a year on a chain gang as an accessory after the fact to the murder, on the theory that he had helped Frank dispose of the body; he had several brushes with the law in subsequent years, and died in 1962. See DINNERSTEIN, *supra*, note 22, at 158; GOLDEN, *supra* note 22, at 199.

26. See DINNERSTEIN, *supra* note 22, at 11.

27. *Id.* at 37. Dinnerstein adds that, at this stage, "outside the South few people knew that Leo Frank existed." *Id.*

28. See *infra* text accompanying notes 94-99.

29. See Steven J. Goldfarb, *Framed*, AM. HERITAGE, Oct. 1996, at 108, 113; see also *infra* note 130. After a review of previously unexamined documents, Goldfarb concludes that "Dorsey urged witnesses to embellish their testimony, even lie under oath, to build a case against Frank," thus assuring "that Leo Frank would not receive a fair trial for a crime he almost certainly did not commit." Goldfarb, *supra*, at 113. See also GOLDEN, *supra* note 22, at 65 (describing Dorsey's suppression of exculpatory X-rays); see *infra* note 63 and accompanying text (noting other prosecutorial misconduct).

30. See DINNERSTEIN, *supra* note 22, at 37, 57 (suggesting that defense lawyers "completely misjudged the nature and extent of the public hostility against Frank")

brother-in-law.³¹ Four weeks of testimony, highlighted by the accounts of Conley and Frank himself, were followed by several days of floridly oratorical summations whose progress was monitored by a demonstrative crowd of several thousand gathered inside and outside the courtroom.³²

In this atmosphere, the editors of the three Atlanta papers wrote to the trial judge urging him to take precautions against the possibility of mob violence if Frank should be acquitted; the judge accordingly met with counsel in chambers, and secured an agreement that only Dorsey—and not Frank or any of his lawyers—would be present when the verdict was returned.³³

Within sight of the jury, the judge also discussed security arrangements with the commanding officer of the National Guard and the Police Chief.³⁴

When the jury announced its verdict, an enormous din erupted from the crowd outside; the windows had to be shut so that the juror's responses could be heard when they were polled individually.³⁵

"The day after Frank had been found guilty, Judge Roan secretly convened the principals in the case and sentenced Frank to hang. The proceedings had been arranged quickly and

and that "their trial strategy was not well planned."); GOLDEN, *supra* note 22, at 99-102 (detailing the author's view that lawyers "conduct[ed] as inept a defense of an innocent man as was ever offered in an American courtroom"); Leonard Dinnerstein, *The Fate of Leo Frank*, AM. HERITAGE, Oct. 1996, at 99, 108 (Defense counsel "failed to expose the inaccuracies in Conley's testimony, and they blundered by asking him to discuss occasions when Frank had allegedly entertained young women. . . . The defense attorneys demonstrated their limitations once more by ignoring relevant constitutional questions in their original appeal to the Georgia Supreme Court.").

31. See GOLDEN, *supra* note 22, at 205.

32. See DINNERSTEIN, *supra* note 22, at 40-47, 49-51, 52-55; GOLDEN, *supra* note 22, at 177-94. The legal record on this issue is assembled in Defendant's Motion for New Trial, which is described *infra* at text accompanying notes 39-48 and reprinted in Transcript of Record at 137-43, 181-95, *Frank v. Magnum*, 237 U.S. 309 (1915) (No. 775).

33. See GOLDEN, *supra* note 22, at 194; DINNERSTEIN, *supra* note 22, at 55.

34. See GOLDEN, *supra* note 22, at 194-95; DINNERSTEIN, *supra* note 22, at 54.

35. See GOLDEN, *supra* note 22, at 195; DINNERSTEIN, *supra* note 22, at 55. For the description of this episode by Frank's counsel as contained in their motion for a new trial, see Transcript of Record at 143, *Frank* (No. 775) (urging that it would be "inconceivable [for] any juror, even if the verdict was not his own, to announce that it was not, in the midst of the turmoil and strife without").

without fanfare because Roan feared the consequences of having Frank appear in public again.³⁶

Frank's lawyers issued a statement saying that, in light of "the temper of the public mind," the proceedings had been "a farce and not in any way a trial" since it "would have required a jury of Stoics, a jury of Spartans to have withstood this situation."³⁷ They announced that they would appeal.³⁸

The first step was a motion for a new trial. The original motion, filed on August 26, 1913 (the day after the verdict and the day of sentencing), contained only a few barebones sentences, but these included assertions that "the verdict is contrary to the evidence" and "against the weight of the evidence,"³⁹ which were sufficient to trigger the judge's review of those issues.⁴⁰ As eventually amended, the motion included over one hundred grounds of error.⁴¹ Most of these related to evidentiary rulings,⁴² particularly ones admitting testimony that Frank had in various instances engaged in sexual activity with other women in the factory;⁴³ some attacked various prosecution arguments

36. DINNERSTEIN, *supra* note 22, at 57.

37. The statement, which was published in the three Atlanta newspapers on August 27, 1913, is reprinted in GOLDEN, *supra* note 22, at 198-99. Frank, who had reportedly been awaiting the verdict confident of an acquittal, is said to have exclaimed on hearing of it, "My God . . . even the jury was influenced by that mob." *Id.* at 197. See also DINNERSTEIN, *supra* note 22, at 55-56.

38. See DINNERSTEIN, *supra* note 22, at 57.

39. Transcript of Record at 44, *Frank* (No. 775).

40. See *Frank v. State*, 80 S.E. 1016, 1034 (Ga. 1914); Transcript of Record, *supra* note 32, at 219; *infra* text accompanying notes 50-51.

41. Compare *Frank v. Magnum*, 237 U.S. 309, 312 (1915) (noting 103 grounds, which accurately reflects the number asserted in the copy of the motion included in the Transcript of Record, *Frank* (No. 775)) with DINNERSTEIN, *supra* note 22, at 77 (reporting 115 grounds). The original new trial motion is reproduced in Transcript of Record at 44, *Frank* (No. 775), and the amended one in *id.* at 45-219. The amended motion argues that the various actions complained of were erroneous and prejudicial but cites no legal authority, state or federal. However, the grounds based on public tumult claim that the result was that the defendant did not have the fair and impartial jury trial guaranteed to him by the state's laws and Constitution, *id.* at 140, 142, 147. The last of these claims, ground of error number 75, is further described *infra* note 48.

42. See, e.g., Transcript of Record at 111-12, 117-18, *Frank* (No. 775) (attacking admission of testimony that Frank, once in jail, refused to see Conley or detectives except in presence or with consent of counsel); cf. *Frank v. State*, 80 S.E. 1019, 1027 (Ga. 1914) (responding to this claim).

43. See, e.g., Transcript of Record at 48-103, 106-08, 118-19, 120-24, 128-29, 135-36, 149-50, *Frank* (No. 775). See also *id.* at 113-15 (complaining that the jury was

as prejudicial;⁴⁴ a few challenged the refusal of particular jury instructions;⁴⁵ and two alleged that specific jurors had formed fixed opinions of Frank's guilt prior to trial.⁴⁶

As to the issues that eventually were before the Supreme Court of the United States in its *Frank* case, the grounds also included "several raising the contention that defendant did not have a fair and impartial trial, because of alleged disorder in and about the court-room including manifestations of public sentiment hostile to the defendant sufficient to influence the jury."⁴⁷

The Supreme Court continued, accurately,

In support of one of these, and to show the state of sentiment as manifested, the motion stated: "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the court, because of the fear of violence that might be done the defendant were he in court when the verdict was rendered.' But the absence of the defendant at the reception of the

allowed to hear insinuation that Frank had made homosexual proposition to a 15-year-old black employee). See generally DINNERSSTEIN, *supra* note 22, at 51; *infra* note 59.

44. See, e.g., Transcript of Record at 144-45, *Frank* (No. 775) (objecting to prosecution's use in argument of defense failure to cross-examine state's witnesses concerning sexual misconduct); *id.* at 166-67 (objecting to prosecution argument: "This man Frank, with Anglo-Saxon blood in his veins, a graduate of Cornell, . . . this man of Anglo-Saxon blood and intelligence, refused to meet this ignorant negro Jim Conley . . . upon the flimsy pretext that his counsel was out of town but when his counsel returned . . . he dared not let him meet him."). See also *id.* at 167-73.

45. See *id.* at 136-37 (challenging failure to give proposed jury instructions concerning circumstantial evidence and one that no inference of wrong-doing should be inferred from failure to cross-examine government's witnesses to collateral misconduct, *cf.* *Frank*, 80 S.E. at 1031 (responding to this claim)); Transcript of Record, *supra* note 32, at 143-44 (attacking failure to give instruction, "although no written request was formally made therefor," that jury should reject unless otherwise corroborated entire testimony of witness who knowingly swears to any falsehood, in light of the fact that, to the extent he swore to aiding Frank in the disposal of the body, Conley "admitted upon the stand that he knew he was lying in the affidavits made by him."). See also *id.* at 173 (attacking failure to give instruction, apparently also not requested at trial, that if jury found Conley to be accomplice, his testimony could not be accepted without corroboration).

The jury charge actually given is reproduced in *id.* at 220-24.

46. See Transcript of Record at 146-47, 173-207, *Frank* (No. 775).

47. *Frank v. Magnum*, 237 U.S. 309, 312 (1915). See Transcript of Record at 109-10, 117, 137-43, 147-48, 181-95, *Frank* (No. 775).

verdict, although thus mentioned, was not specified or relied upon as a ground for a new trial.⁴⁸

The government responded to the new trial motion with affidavits from eleven of the twelve jurors (the twelfth being out of town on business) attesting to their impartiality, asserting that they had made up their minds strictly on the evidence presented, and affirming their continued agreement with the verdict they had reached.⁴⁹

48. *Frank*, 237 U.S. at 312. The passage of the amended new trial motion quoted by the Court is to be found at Transcript of Record, *supra* note 32, at 148 (ground of error number 75). The ground of error, stated in twelve paragraphs, alleges that the defendant "did not have a fair and impartial jury trial, guaranteed to him under the laws of this State, for the following reasons," *id.* at 147.

The listed reasons include the close proximity of the crowd to the jury, *id.* at 181-83, 186, 192 (describing several instances of crowd members directly haranguing the jury during recesses); the court's conference with the chief of police of Atlanta and the colonel of the regiment stationed in Atlanta in the sight of the jury, *see supra* text accompanying note 34; the postponement of the conclusion of the case at the suggestion of the press, *see supra* text accompanying note 33; the disorderly conditions accompanying the reception of the verdict; the defendant's absence from the courtroom (as quoted in text); and the joyous demonstration that greeted Dorsey as he left the courtroom. *See* DINNERSTEIN, *supra* note 22, at 56.

The ground of error concludes: "This defendant contends that the above recital shows that he did not have a fair and impartial jury trial," and refers the court to a number of affidavits detailing the events. Transcript of Record at 148, *Frank* (No. 775).

At a later point, Frank argued in a brief that this assignment of error, "merely relates to the proposition that the trial was not a fair and impartial one. It recounts various episodes attending the trial and incidentally states that the prisoner was not present at the rendition of the verdict, his counsel having waived his presence. It requires no argument to indicate that this was not the presentation of the constitutional question" of whether due process was violated by the rendition of a verdict in his absence. *See Says Frank Verdict Was Legal Nullity*, N.Y. TIMES, Dec. 2, 1914, at 8. The context for this brief is further described *infra* note 77 and accompanying text.

49. *See Frank*, 80 S.E. at 1034-35; DINNERSTEIN, *supra* note 22, at 78. The most detailed description of the contents of these affidavits is to be found in newspaper accounts, *see e.g.*, *Detailed Denial of Every Charge Made by Henslee*, ATLANTA J., Oct. 21, 1913, at 1. The Georgia Supreme Court describes them only generally, and they are not in the Transcript of Record, *supra* note 32, since counsel did not include them in Frank's federal habeas corpus petition. *See Frank*, 237 U.S. at 318.

The State criticized this omission in its brief, *see* Brief of Hugh M Dorsey, Warren Grice [for Appellee] at 16, *Frank v. Magnum* 237 U.S. 309 (1915) (No. 775); *infra* text accompanying note 94, and the Court majority implicitly agreed, *see Frank*, 237 U.S. at 333, 336, 344. Dissenting, Justices Holmes and Hughes asserted that petitioner had no obligation to set forth the State's evidence, *see id.* at 349. *See also infra* note 108 (discussing this issue).

The trial judge denied the new trial motion.⁵⁰ In the course of addressing the assertion that the verdict was against the weight of the evidence, he stated, as Frank's lawyers recounted to the Georgia Supreme Court:

[T]hat the jury had found the defendant guilty; that he, the judge, had thought about this case more than any other he had ever tried; that he was not certain of the defendant's guilt; that with all the thought he had put on this case he was not thoroughly convinced whether Frank was guilty or innocent, but that he did not have to be convinced; that the jury was convinced; that there was no room to doubt that; that he felt it his duty to order that the motion for new trial be overruled.⁵¹

Today at least, the weight of the historical record supports the view that the judge believed that Frank was probably innocent but feared an outbreak of mob violence if he granted a new trial—which would in any event take place while the public was still aroused—and hoped that there would be a reversal in the Georgia Supreme Court,⁵² leading to an eventual new trial in a calmer atmosphere.⁵³

On appeal, Frank's lawyers argued that the judge's remarks showed that he had failed to "sanctify [the] verdict by exercising that discretion which the law demands," but rather had "put forward the discretion of the jury as an excuse for not exercising his own."⁵⁴

50. See *Frank*, 80 S.E. at 1034.

51. *Id.* Dinnerstein and Golden each set forth slightly different versions of these comments. See DINNERSTEIN, *supra* note 22, at 79; GOLDEN, *supra* note 22, at 233.

52. Indeed, one Atlanta newspaper predicted editorially that the judge's expression of doubt would have just this effect. See DINNERSTEIN, *supra* note 22, at 79-80.

53. See *id.* at 80-81; GOLDEN, *supra* note 22, at 232-33. But the evidence for this view—including evidence that "Conley's court-appointed lawyer . . . told the judge that Conley had confessed the murder to him," *id.* at 253—has emerged slowly over time. At least one contemporary courtroom observer thought that the judge's remarks were merely an effort to placate the defense lawyer arguing before him. See DINNERSTEIN, *supra* note 22, at 173-74. See generally Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 316 (1990-91) (describing "general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings").

54. DINNERSTEIN, *supra* note 22, at 163-65 (reprinting excerpt from appellate brief); see *id.* at 81 (reporting that oral argument centered on this issue).

However, the Georgia Supreme Court rejected the argument; it ruled that a trial court's "legal judgment [is] expressed in overruling the motion . . . and, if there is sufficient evidence to support the verdict, this court will not interfere because of the judge's oral expression as to his opinion."⁵⁵

With respect to the manifestations of public hostility, the court wrote that, in light of the conflicting evidentiary presentations of the two sides on the motion, the judge "was authorized to find from the evidence submitted that only two instances occurred within the hearing or knowledge of the jury," and those two, it held, were "insufficient to impugn the fairness of the trial."⁵⁶

The court then turned to the tumult during the polling of the jury:

In order that the occurrence complained of shall have the effect of absolutely nullifying the poll of the jury taken before they dispersed, it must appear that its operation upon the minds of the jury, or some of them, was of such a controlling character that they were prevented, or likely to have been prevented, from giving a truthful answer to the questions of the court. We think that the affidavits of jurors submitted in regard to this occurrence were sufficient to show that there was no likelihood that there was any such result.⁵⁷

Rejecting also the instructional⁵⁸ and evidentiary⁵⁹ arguments on state law grounds, the court affirmed the conviction.⁶⁰

55. *Frank*, 80 S.E. at 1034.

56. *Id.* at 1033-34. See *Frank v. Magnum*, 237 U.S. 309, 313-14 (1915) (accurately summarizing this passage).

57. *Frank*, 80 S.E. at 1033.

58. *Id.* at 1030-31.

59. This aspect of the case, which occupied the bulk of the court's opinion, see *id.* at 1019-30, drew a dissent from two of the six Justices. The dissenters argued at length, see *id.* at 1034-44, that the testimony of Conley and others "tending to show independent acts of lasciviousness on the part of Frank or improper conduct of his with other parties at other times, was inadmissible" and "certainly calculated to prejudice the defendant in the minds of the jurors, and thereby deprive him of a fair trial," *id.* at 1044.

60. One of the consultants assisting on the case was Louis Marshall, the President of the American Jewish Committee, and a prominent constitutional lawyer, who would eventually argue Frank's case in the Supreme Court. See DINERSTEIN, *supra* note 22, at 91. Commenting on this opinion, he observed that he was "satisfied that the man is absolutely innocent" and continued:

While awaiting this decision, which they anticipated would be favorable, Frank's attorneys had been vigorously engaged in further investigation, resulting in a great deal of new evidence supporting their case and undermining the veracity of the prosecution's witnesses.⁶¹

After they presented this in an "extraordinary motion for a new trial" based on newly-discovered evidence,⁶² the prosecution induced some of its recanting witnesses to return to their original accounts and attacked some of the other new evidence as having been obtained by bribery.⁶³ Following an evidentiary hearing, a newly-seated judge denied the motion,⁶⁴ an action that the Georgia Supreme Court in due course routinely affirmed as not constituting an abuse of discretion.⁶⁵

Separate counsel representing Frank also filed a motion to set aside the verdict as a nullity on the theory that the state and federal constitutions had been violated by his absence from the courtroom at the time of its rendition.⁶⁶ This motion was made on April 16, 1914,⁶⁷ at about the same time as the one based on

I was very much disappointed with the decision. It is unsound in law. Unfortunately the court could not pass upon the facts, and was confined to a consideration of the exceptions taken to the rulings of the trial court on the admission and rejection of evidence, and to the charge to the jury.

Letter from Louis Marshall to Siegmund B. Sonneborn (Mar. 13, 1914), *reprinted in* 1 LOUIS MARSHALL: CHAMPION OF LIBERTY 297-98 (Charles Reznikoff ed. 1957).

61. See DINNERSSTEIN, *supra* note 22, at 84-90, 102-05; GOLDEN, *supra* note 22, at 200-03, 228-31, 238-40.

62. See *Frank*, 83 S.E. at 234 (describing procedure), *see also* Governor John M. Slaton's Commutation Order (June 21, 1915), *reprinted in* GOLDEN, *supra* note 22, at 312, 332-34, 341 (discussing evidence presented on this motion and observing that "it is well known that it is almost a practical impossibility to have a verdict set aside by this procedure").

63. See DINNERSSTEIN, *supra* note 22, at 103-05. There is today substantial reason to believe that the prosecution engaged in pervasive misconduct in obtaining this material. See *id.* at 103; GOLDEN, *supra* note 22, at 238-39; *supra* note 29; *see also* Freedman, *supra* note 53, at 316 n.6 (observing that the pressures of capital cases often "lead law enforcement officers to cut constitutional corners").

64. See DINNERSSTEIN, *supra* note 22, at 104-05.

65. *Frank*, 83 S.E. at 233.

66. See *supra* text accompanying note 33. Separate counsel were engaged to pursue this issue because the original trial counsel "had promised Hugh Dorsey that they would not use their client's absence during part of the judicial proceedings as a basis for future appeals . . . [and] felt obliged to honor their pledge," DINNERSSTEIN, *supra* note 22, at 91.

67. See *Frank v. Magnum*, 237 U.S. 309, 315 (1915).

the new evidence.⁶⁸ In demurring, the State argued, among other things, that the challenge should have been included in Frank's original motion for a new trial.⁶⁹ The Georgia Supreme Court, rejecting Frank's claim that its prior decisional law was to the contrary, accepted this argument and held that imposing such a procedural requirement was consistent with the state and federal constitutions.⁷⁰ On November 18, 1914, the Georgia Supreme Court denied Frank a writ of error for the purpose of pursuing the federal issues to the United States Supreme Court.⁷¹

On November 21, 1914, Frank's counsel applied to Justice Lamar, the Circuit Justice for the Fifth Circuit, for a writ of

68. A minor but irritating mystery in the case is the exact date on which the "extraordinary motion" based on newly-discovered evidence, *see supra* text accompanying note 62, was filed. Dorsey, who surely knew the answer, said in his brief to the Supreme Court that the Frank filings had "not disclosed when this extraordinary motion was filed, but it was presumably filed before or certainly at the time the motion to set aside the verdict was filed," Brief of Hugh M. Dorsey, Warren Grice [for Appellee] at 11, *Frank v. Magnum*, 37 U.S. 309 (1915) (No. 775).

The point is of more than pedantic interest, because the interplay between the two motions was the subject of some strategic discussion among defense counsel. The Atlanta lawyers wanted to file the motion based on new evidence first, and feared that its impact would be dissipated by the simultaneous pursuit of a motion based on a purely legal theory. From New York, Marshall "vigorously dissented from their view," DINNERSTEIN, *supra* note 22, at 90.

Marshall argued that the two motions would reinforce each other: A court would be disposed to look more favorably on the newly discovered evidence if the regularity of the underlying proceedings seemed questionable, and the constitutional attack would benefit from the showing that there was substantial doubt as to the justice of the outcome of the trial. On the other hand, if the lawyers waited to file the constitutional challenge until after the new evidence motion had been adversely disposed of, they would appear to be filing successive proceedings for the purpose of delay. *See id.* at 90-91.

Since Dinnerstein quotes Marshall as making these arguments in a letter dated March 25, 1914, the new evidence motion was presumably filed some time after that but not later than April 16, 1914, which is consistent with Dorsey's statement quoted in the first paragraph of this note.

This suggests that the Letter from Louis Marshall to Henry Alexander (May 23, 1914), reprinted in LOUIS MARSHALL: CHAMPION OF LIBERTY, *supra* note 60, at 298, in which Marshall eloquently makes the same arguments *in extenso* to another one of the local counsel, is mis-dated (and was perhaps written on March 23, 1914).

69. *See Frank*, 83 S.E. at 648 (setting forth all eight grounds for the demurrer). The trial court's ruling upheld the State's position in its entirety. *Id.* at 646. Frank's original new trial motion is described *supra* text accompanying notes 39-51.

70. *See id.* at 648-52.

71. *See Frank*, 237 U.S. at 317; Transcript of Record, *supra* note 32, at 7; Brief of Hugh M. Dorsey, Warren Grice [for Appellee] at 5, *Frank* (No. 775).

error granting Supreme Court review.⁷² He denied it on November 23, in a memorandum opinion which stated:

The decision of the Supreme Court of Georgia in this case holds that, under the laws of that State where a motion for a new trial was made and denied, the defendant could not thereafter make a motion to set aside the verdict on the ground that he was not present when it was returned by the jury. That ruling involves a matter of State practice and presents no Federal question. The writ of error is therefore denied.⁷³

Frank then exercised his right to apply for the same relief to Justice Holmes, who denied it on November 25, 1914.⁷⁴ His memorandum opinion stated:

I understand that I am to assume that the allegations in the motion to set aside are true. On those facts I very seriously doubt if the petitioner has had due process of law—not on the ground of his absence when the verdict was rendered so much as because of the trial taking place in the presence of a hostile demonstration and seemingly dangerous crowd, thought by the presiding judge to be ready for violence unless a verdict of guilty was rendered. I should not feel prepared to deny a writ of error if I did not consider that I was bound by the decision of the supreme court of Georgia that the motion to set aside came too late . . . I think I am bound by this decision, even if it reverses a long line of cases and the counsel for petitioner were misled to his detriment, which I do not intimate to be my view of the case. I have the impression that there is a case in which the ground that I rely on as showing want of due process of law was rejected by the court with my dissent, but I have not interrupted discussion with counsel to try to find it, if it exists.⁷⁵

72. See Transcript of Record, *supra* note 32, at 7; Brief of Hugh M. Dorsey, Warren Grice [for Appellee] at 5, *Frank* (No. 775).

73. *Frank v. Georgia*, Transcript of Record, *supra* note 32, at 8, 9 (Lamar, Circuit Justice 1914), reprinted in *Justice to Frank Doubted by Holmes*, N.Y. TIMES, Nov. 27, 1914, at 1.

74. See Transcript of Record, *supra* note 32, at 7; Brief of Hugh M. Dorsey, Warren Grice [for Appellee] at 5, *Frank* (No. 775); *Justice to Frank Doubted by Holmes*, *supra* note 73, at 1.

75. *Frank v. Georgia*, Transcript of Record at 13, *Frank* (No. 775) (Holmes, Circuit Justice 1914), reprinted in *Justice to Frank Doubted by Holmes*, *supra* note 73, at 1. The opinion was also published in *Holmes Denies Motion to Set Aside Verdict*, ATLANTA CONST., Nov. 27, 1914, at 5. I have so far been unable to locate a case such as that which Holmes describes in his final sentence.

According to Holmes, this memorandum was written for any other of our Judges in the case he applied to another as he had a right to. To my surprise the mem. was published and as it seems the case had excited much attention though I never had heard of it the papers talk about it and I get letters from sensitive females crying for mercy. . . . I am somewhat annoyed at the publication as I wrote what was intended only as a suggestion to my brethren if any of them could see a way to giving relief.⁷⁶

At this point, Marshall applied to the full Court.⁷⁷ Justices Holmes and Hughes thought "that the writ ought to be granted,"⁷⁸ but it was denied on December 7, 1914 without recorded dissent.⁷⁹

76. Letter from Oliver Wendell Holmes to Lady Clare Castletown (Nov. 28, 1914); see also *infra* note 114 (quoting additional portions of letter).

This letter, like all the Holmes letters cited in this Article, is to be found in the Oliver Wendell Holmes, Jr., Papers (University Publications of America) (originals in the Library of Congress).

Holmes' relationships with his various female correspondents are discussed in JOHN S. MONAGAN, *THE GRAND PANJANDRUM* 65-94 (1988).

On Holmes' ruling, and the adverse editorial reaction to it, see DINNERSTEIN, *supra* note 22, at 109-110; *As Press Sees Frank Case*, N.Y. TIMES, Dec. 2, 1914, at 8 (quoting sampling of editorial opinions nationally).

77. See Memorandum from Louis Marshall to Chief Justice Edward D. White (Nov. 24, 1914), reprinted in LOUIS MARSHALL: CHAMPION OF LIBERTY, *supra* note 60, at 299. This memorandum summarizes Marshall's arguments to the effect that the right to be present at the reception of a jury verdict is "a part of due process, . . . which cannot be waived" and that the decision of the Georgia Supreme Court changing its rule so as to provide that a challenge on these grounds should be made by a motion for a new trial rather than a motion to set aside the verdict "was a violation of the ex post facto clause" and "in fact an attempt to evade the fundamental constitutional question, which, under the decisions of the Supreme Court of the United States, was incapable of being waived." *Id.* at 302-03. Subsequently, Marshall filed a fuller brief, substantial portions of which were reprinted in *Says Frank Verdict Was Legal Nullity*, *supra* note 48, at 8.

78. They reported this the following April in their opinion in *Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes & Hughes, JJ., dissenting). The reason for Holmes' change of view is not apparent, but it is possible that in the interval since the writing of his memorandum quoted *supra* text accompanying notes 74-75, he had read Marshall's filings described *supra* note 77.

In any event, it appears from the cited passage in *Frank* that these Justices wished to grant the writ of error to consider Frank's claim concerning his absence from the rendition of the verdict, apparently on the theory that this was error correctable by writ of error, but not of constitutional magnitude, and so not cognizable on habeas corpus. See *infra* notes 89, 105.

79. *In re Frank*, 235 U.S. 694 (1914).

On December 17, 1914, Frank applied to the United States District Court for the Northern District of Georgia for a writ of habeas corpus.⁸⁰ The principal contention was that his absence from the courtroom at the rendition of the verdict was, under the circumstances, a denial of due process,⁸¹ but the petition also asserted that the "trial did not proceed in accordance with the orderly processes of the law . . . because [it was] dominated by a mob which was hostile to me, and whose conduct intimidated the Court and jury," in violation of Fourteenth Amendment Due Process and Equal Protection.⁸²

As Marshall had anticipated,⁸³ the District Court denied

80. The full petition is contained in Transcript of Record, *supra* note 32, at 1-9.

81. *See id.* at 8.

82. *Id.*

83. *See* Letter from Louis Marshall to Meier Steinbrink (Dec. 19, 1914), reprinted in LOUIS MARSHALL: CHAMPION OF LIBERTY, *supra* note 60, at 303 (reporting that the application for writ of habeas corpus had been made to the District Court, and "[t]here is every likelihood that that application will be denied.").

Marshall's purpose in writing was to urge the cancellation of a planned rally "for the purpose of protesting against the action of courts and urging Executive clemency." *Id.* One basis for his position was that he wished "to have the court to understand that the responsibility rests upon it, and that it cannot be shifted upon the shoulders of the Governor of Georgia," *id.* at 303-04; *see also* Letter from Louis Marshall to Simon Wolf (Sept. 27, 1913), reprinted in *id.* at 296 (discouraging Wolf from a proposed press campaign).

At other times, Marshall was active in enlisting public support, notably that of *The New York Times*, *see* DINNERSTEIN, *supra* note 22, at 91-94; *see also* Letter from Leo M. Frank to Adolph Ochs (Nov. 20, 1914), reprinted in RICHARD F. SCHEPARD, THE PAPER'S PAPERS 198-99 (1996) (thanking publisher of the *New York Times* for recent supportive editorials; pending post-trial proceeding is not a technicality but "invokes a basic human right," seeking a determination "whether or not an unruly mob, operating in an atmosphere of smoldering violence and prejudice, may, with impunity and the apparent seal of judicial approval, invade our courts and compel verdicts"). *See generally* SUSAN E. TIFFT & ALEX S. JONES, THE TRUST 92-97 (1999) (describing Ochs' involvement).

In light of the enormous public interest in the case, *see* DINNERSTEIN, *supra* note 22, at 114-19 (describing movement to have Frank's sentence commuted that began in fall of 1914 and continued until successful); LINDEMANN, *supra* note 22, at 268 ("Throughout the United States, large numbers of Americans . . . responded as if this was . . . a horrible miscarriage of justice, unthinkable in the United States—or perhaps possible only in the bigoted South. There was an enormous outpouring of letters, over one hundred thousand at final count, . . . urging that Frank's sentence be commuted."), Marshall probably had fairly limited control over the details and timing of the various forms of public agitation. *See* Letter from Louis Marshall to "A Country Law Student" (May 7, 1915), reprinted in LOUIS MARSHALL: CHAMPION OF LIBERTY, *supra* note 60, at 312 ("[Y]our communication [to Governor Slaton of Georgia] is a bungling, mischievous and stupid performance. If

the application.⁸⁴ Frank then applied to Justice Lamar for a certificate of probable cause to appeal. On December 28, 1914, Justice Lamar granted the application.⁸⁵ His printed opinion provided to counsel recited the procedural history and then continued as follows—with the omission of the bracketed phrase, which he had stricken from his typed draft:⁸⁶

[T]he application for the certificate is not to be determined by any views which may be held as to the effect of the final judgment of the State Supreme Court refusing a New Trial, [or by the effect of the Supreme Court of the United States refusing a writ of error to review the judgment refusing to Set Aside the verdict,] but by considering whether the nature of the constitutional right assert-

you had a desire to murder Frank, you could not have accomplished that purpose in a more effective manner. . . . If the letter has not gone forward, I insist, as Frank's counsel, that you withhold it. If it has, . . . telegraph to the Governor to return it to you").

84. If the State filed a written response to the application, it does not appear in Transcript of Record, *supra* note 32.

The District Court's ruling, issued by Judge William T. Newman on December 21, 1914, is reprinted in *id.* at 14-15. The decision reviewed the prior course of proceedings and continued,

If this writ should issue . . . the only thing the Court here could do would be to hear evidence and determine whether this applicant had been denied the equal protection of the laws and due process of law, and consequently should be discharged. It seems to me that this would be the exercise by this Court of supervisory power over the action of the State courts in a manner not warranted by the Constitution or the Laws of the United States. Also the Court would be considering the matter . . . in the face of the decisions of two Justices of the Supreme Court—indeed of the entire Court—to the effect . . . that no Federal question remained for consideration or now exists in the case.

Id. at 15.

85. See Transcript of Record at 229, *Frank* (No. 775) (Lamar, Circuit Justice 1914); see also *id.* at 21 (District Court order denying certificate). The statement in ALEXANDER BICKEL & BENNO C. SCHMIDT, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT*, 1910-21, at 363 (1984) (Volume 9 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States) that Justice Lamar's memorandum "was widely published in the press," is correct, see, e.g., *Lamar Grants Appeal to Frank*, N.Y. TIMES, Dec. 29, 1914, at 1 (reprinting text of opinion). The authors' further statement that the document "is not otherwise preserved," BICKEL & SCHMIDT, *supra*, is not correct. In addition to the printed copy in Transcript of Record, *Frank* (No. 775) there exists the documentation discussed *infra* note 86 and accompanying text.

86. This draft is to be found in case file of *Frank v. Magnum*, 237 U.S. 309 (1915), in the Washington facility of the National Archives and Record Administration, Records Group 267, U.S. Supreme Court Appellate Case file No. 24519, Box 4690. The significance of the deletion is discussed *infra* note 104. The same folder also contains a clean typescript version of the opinion.

ed in the absence of any decision expressly foreclosing the right to an appeal, leaves the matter so far unsettled as to constitute probable cause justifying the allowance of the appeal.

The Supreme Court of the United States has never determined whether, on a trial for murder in a State court, the due process clause of the Federal Constitution guarantees the defendant a right to be present when the verdict is rendered.

Neither has it decided the effect of a final judgment refusing a New Trial in a case where the defendant did not make the fact of his absence when the verdict was returned a ground of the Motion, nor claim that the rendition of the verdict in his absence was the denial of a right guaranteed by the Federal Constitution.

Nor has it passed upon the effect of its own refusal to grant a writ of error in a case where an alleged jurisdictional question was presented in a Motion filed at a time not authorized by the practice of the State where the trial took place. Such questions are all involved in the present case, and since they have never been settled by any authoritative ruling by the full court . . . the appeal [is] allowed.⁸⁷

The parties filed simultaneous briefs on the merits.⁸⁸ While naturally beginning with the disorderly conditions at trial,⁸⁹

87. Transcript of Record, *supra* note 32, at 230. This decision "met with general newspaper acclaim," DINNERSTEIN, *supra* note 22, at 111.

88. See *Frank Brief Filed in Supreme Court*, N.Y. TIMES, Feb. 21, 1915, § 2, at 11; *Answers Frank Brief*, *id.* (reporting on State's brief). The Supreme Court's date stamp records Marshall's brief as having been filed on Feb. 20, 1915, and Dorsey's on February 23.

89. See Appellant's Argument at 3-8, *Frank v. Magnum*, 237 U.S. 309 (1915) (No. 775). The ultimate conclusion of this discussion was that Frank was not tried by a "court" in the legal sense (thus stating a jurisdictional attack cognizable on habeas corpus, Appellant's Argument at 114-31, *Frank* (No. 775). This argument is stated with considerable force and eloquence in *id.* at 82-93, *e.g.*, *id.* at 84:

There was no longer a court or a jury. They were as though they had never been. There ceased to be a trial or a hearing, or an opportunity to be heard. For all practical purposes, the court might as well have handed the appellant over to the tender mercies of the boisterous bystanders who were clamoring for his blood . . .

The argument was much more solid than it might appear at first glance, because—as convincingly detailed in 1 LIEBMAN & HERTZ, *supra* note 7, § 2.4(d)-(e)—a "jurisdictional" attack in the habeas corpus sense is simply one that raises fundamental (including constitutional) issues, as distinguished from a "merely legal" claim that does not implicate basic concerns of procedural or substantive fairness. See, *e.g.*, *infra* note 105 and accompanying text (discussing the Court's treatment of Frank's claim of absence from rendition of verdict); see also *infra* note 104.

Marshall was careful to conclude by assuring the Court that the appropriate relief was retrial, not release.⁹⁰ On the procedural issues, Marshall argued that the District Court had "entirely misconceived"⁹¹ the significance of Frank's recent efforts to obtain a writ of error from the Justices.⁹²

The reason for the denial of a writ of error by this Court, and its several members, was not that a Federal question was not involved in the case, but that the Supreme Court of Georgia put its decision upon two grounds, (1) that the Fourteenth Amendment to the Constitution was not violated, and (2) that in any event it was too late to raise that question. . . .

. . . [Since] each of the grounds was a sufficient basis, . . . this Court held . . . [that] a writ of error . . . would not lie . . . Our hope was, to satisfy the Court that the two grounds stated were not independent of one another, but interdependent, and . . . amounted, in substance, to a determination . . . that, by his non-action or acquiescence [appellant] had waived a constitutional right which, it had been held by this Court, could not be waived expressly. It is evident, however, that the view prevailed here, that the Supreme Court of Georgia, whether right or wrong, had determined that the proper remedy was a motion for a new trial, and not a motion to set aside the verdict.

Our present proceeding, an application for a writ of *habeas corpus*, is . . . based upon the proposition that, because the appellant was . . . deprived of due process of law, . . . the court had lost jurisdiction. That presents a proposition which is not affected by State practice. The case is in the precise situation that it would

All the arguments of Marshall's brief proceeded from record materials or legal authority; it contained no suggestion that an evidentiary hearing was needed. Marshall told the Court on oral argument that this was "a case where there is no dispute as to the facts," see *Frank Case Appeal Arguments Ended*, N.Y. TIMES, Feb. 27, 1915, at 8. Cf. *supra* note 84 (quoting opinion of District Judge that grant of writ would necessarily entail a hearing to determine whether Frank's rights had in fact been violated at trial); *infra* note 96 (describing State's position).

90. See Appellant's Argument at 157-65, *Frank* (No. 775). This was a considered tactical choice, based on Marshall's belief that, as he wrote to Albert D. Lasker (a "Jewish advertising genius from Chicago" who was one of Frank's active supporters, see DINNERSTEIN, *supra* note 22, at 92), "it would be far easier to succeed, if the Court were satisfied that a favorable decision would not finally discharge Frank." Letter from Louis Marshall to Albert D. Lasker (Jan. 30, 1915), quoted in *id.* at 111.

91. Appellant's Argument at 154, *Frank* (No. 775).

92. See *supra* text accompanying notes 72-79.

have been if no timely proceeding had been attempted in the State courts of Georgia . . . In that event, the bare question presented in this proceeding would have been, Did the court possess jurisdiction to pronounce sentence of death? That is the exact condition that now exists. That is the same question which must now be answered . . . [A]ppellant's unavailing attempts in the State court for relief . . . cannot make that a legal judgment which was before a nullity.⁹³

Dorsey argued that, in light of Frank's failure to submit the State's rebuttal affidavits⁹⁴—and the asserted inadmissibility of oral evidence in habeas corpus proceedings to show a lack of jurisdiction in the convicting court⁹⁵—the factual determinations of the State courts should be presumed correct.⁹⁶ Further, inasmuch as Frank had already obtained rulings from the State courts on every issue presented, those rulings should be considered *res judicata*.⁹⁷ Even if not so considered, he continued, the errors alleged were not fundamental enough to justify habeas relief.⁹⁸ This argument in various forms occupied much of the greater part of his brief; the argument that Frank was precluded by the denial of the writ of error was made briefly and awkwardly.⁹⁹

93. Appellant's Argument at 154-57, *Frank* (No. 775). A premise of this argument is that the requirement of "the exhaustion of remedies in the State courts cannot be said to be a jurisdictional condition precedent to the institution of habeas corpus proceedings in the Federal Courts," *id.* at 147, but is rather a discretionary doctrine of comity, *id.* at 131-33. Accordingly, in the section preceding the one from which the quote in text is drawn, *id.* at 131-54, Marshall, seeking the favorable exercise of discretion, argued at length the legal reasonableness under previously-existing State law of "a most strenuous and earnest effort to obtain review," *id.* at 147, that had been made in the Georgia courts, Appellant's Argument at 147-54, *Frank* (No. 775).

94. See Brief of Hugh M. Dorsey at 16, *Frank* (No. 775). See also *supra* note 49 and accompanying text.

95. See Brief of Hugh M. Dorsey at 50-51, *Frank* (No. 775).

96. See *id.* at 16. On oral argument, counsel for the State, challenging Marshall, made every effort to present the facts as being in dispute. See *Frank Case Appeal Arguments Ended*, *supra* note 89.

97. See Brief of Hugh M. Dorsey at 46-49, *Frank* (No. 775).

98. See *id.* at 51-68, 74-81.

99. See *id.* at 71-74. While the topic heading of the brief states the proposition, neither the text nor the cases it cites support the argument, although supportive case law was available. See 1 LIEBMAN & HERTZ, *supra* note 7, § 2.4d, at 54-57 (describing Supreme Court cases in wake of *Ex parte Royall*, 117 U.S. 241 (1886), as establishing after 1892 an increasingly strict rule that constitutional claims of state

The Supreme Court's opinion was delivered on April 19, 1914.¹⁰⁰ By a vote of 7-2, with Justices Holmes and Hughes dissenting, the Court affirmed the denial of the writ.¹⁰¹ The Justices agreed that:

(a) the District Court did have the authority to hold a hearing "to test the jurisdiction of the state court,"¹⁰²

(b) the determinations of the state courts were not *res judicata*,¹⁰³ nor were Frank's claims precluded by his prior unsuccessful applications for a writ of error;¹⁰⁴

prisoners were to be reviewed by writ of error, if meaningfully available, rather than habeas corpus); see also *infra* note 104 and accompanying text (describing the Court's disposition of the argument).

100. The date of April 12, 1914 given in the U.S. Reports, see *Frank v. Magnum*, 237 U.S. 309 (1915), is incorrect, as the Court's Journal shows. See also Letter from Oliver Wendell Holmes to Ellen A. (Mrs. Charles P.) Curtis (Apr. 19, 1915), Oliver Wendell Holmes Papers, Jr. *supra* note 76 ("just going off to Court for a fight in the Frank case"); DINNERSTEIN, *supra* note 22, at 112; GOLDEN, *supra* note 22, at 235 n.*.

101. See *Frank*, 237 U.S. at 345.

102. *Id.* at 331. The passage continues by describing as one of the established rules and principles . . . that it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not. . . ."

Id. See *supra* note 89 (discussing meaning of "jurisdictional").

103. See *id.* at 334.

104. See *supra* text accompanying notes 72-79. While it seems clear enough that Justice Lamar had originally entertained some doubts on this subject, see *supra* text accompanying notes 86-87, the point was rejected without explicit discussion, a course doubtless facilitated by the weakness of Dorsey's brief on the issue, see *supra* note 99 and accompanying text.

Although the Court cited the relevant cases, it silently confined them to their facts, merely observing that

(a) habeas corpus review should ordinarily follow writ of error review, *Frank* 237 U.S. at 328-29; and

(b) the writ of habeas corpus "cannot be employed as a substitute for the writ of error," *id.* at 326, a reiteration of the uncontested and uncontroversial distinction between "[m]ere errors in point of law, however serious," *id.*, which could only be reviewed by writ of error, and the fundamental or "jurisdictional" (particularly constitutional) claims cognizable on habeas corpus, see *id.* at 327; *supra* note 78.

In thus reaffirming its pre-1892 practice, see LIEBMAN & HERTZ, *supra* note 7, § 2.4d, at 49 n.172 (listing Supreme Court cases granting habeas corpus review of claims previously rejected on writ of error); *supra* note 99, the Court sent a significant, albeit silent, message. The decision to review the merits necessarily implied at least that writ of error proceedings would not be preclusive where the Court had found itself unable to reach the federal merits due to an adequate and independent

(c) Frank's challenge to his absence from the verdict did not rise to the level of a constitutional claim;¹⁰⁵

(d) there was no merit to the assertion that the Ex Post Facto Clause was violated by the alleged change of view on the part of the Georgia Supreme Court respecting the appropriate procedure for bringing that claim.¹⁰⁶

Moreover, the Justices also agreed that "if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields . . . there is, in that court, a departure from due process of law."¹⁰⁷ The critical disagreement was what showing a habeas corpus petitioner had to make for a successful invocation of the District Court's conceded authority to determine whether the trial court had "in fact" been intimidated.

The majority wrote that the facts concerning this issue as found by the state court of last resort

must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the

state ground. *Cf. supra* text accompanying note 87 (In granting appeal, Justice Lamar noted that the Court had not previously "passed upon the effect of its own refusal to grant a writ of error in a case where an alleged jurisdictional question was presented in a [m]otion filed at a time not authorized by the practice of the State where the trial took place."); *supra* text accompanying note 93 (setting forth Marshall's argument that because denial of the writ of error had rested upon the existence of an independent state procedural ground supporting the judgment, it posed no barrier to Supreme Court habeas corpus review); *infra* note 225 (discussion of this issue in *Moore*).

More broadly, Professors Liebman and Hertz identify the Court's decision to reach the merits as an important data point in the line of developments by which the writ of error (a writ of right) gradually began to lose importance in favor of the expanding writ of certiorari (a discretionary writ), see LIEBMAN & HERTZ, *supra* note 7, § 2.4d, at 53-55; *infra* note 261 (endorsing this view). Because the Court had justified its preference for writ of error over habeas corpus review in the post-1892 period on the grounds that the former was available as of right, see LIEBMAN & HERTZ, *supra* note 7, § 2.4d, at 54, the erosion of the writ of error "expanded the use and widened the scope of habeas corpus review," *id.* at 54. (original emphasis omitted).

105. See *Frank*, 237 U.S. at 343. As indicated, *supra* note 78, the dissenters wrote that, in their view, the Court ought to have previously granted the writ of error to deal with this point, but continued, "we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States," *Frank*, 237 U.S. at 346 (Holmes & Hughes, JJ., dissenting).

106. See *id.* at 344 (ruling that the Ex Post Facto Clause, "as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts").

107. *Id.* at 335. See *infra* note 259 (quoting passage more fully).

court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and . . . the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination.¹⁰⁸

The dissent began its analysis by elaborating on the Justices' common understanding that the district court did have the power to conduct an independent fact review:

The only question before us is whether the petition shows on its face that the writ of *habeas corpus* should be denied, or whether the District Court should have proceeded to try the facts.

* * *

We have held in a civil case that it is no defence to the assertion of the Federal right in the Federal court that the State has corrective procedure of its own—that still less does such procedure draw to itself the final determination of the Federal question. *Simon v. Southern Ry.*, 236 U.S. 115, 122, 123 [1915]. We see no reason for a less liberal rule in a matter of life and death. When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. *Kansas Southern Ry. v. C.H. Albers Commission Co.*, 233 U.S. 573, 591 [1912].¹⁰⁹ *Nor. & West. Ry. v. Conley*, . . . 236 U.S. 605 [1915].¹¹⁰ Otherwise, the right will be a barren one. It

108. *Id.* at 336. The remainder of the sentence reads, "especially not, where the very evidence upon which the determination was rested is withheld by him who attacks the finding." *Id.*; see *supra* note 49. This aspect of the decision is appropriately criticized as "confused" by J.S. Waterman & E.E. Overton, *Federal Habeas Corpus Statutes and Moore v. Dempsey*, 1 U. CHI. L. REV. 307, 317-18 (1933), reprinted in 6 ARK. L. REV. 8, 16-17 (1952).

109. The cited passage reads,

While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. That this is so is amply shown by our prior rulings.

Kansas S. Ry. v. C.H. Albers Comm'n Co., 233 U.S. 573, 591 (1912).

110. The opinion in this case, which was before the Court on a railroad's writ of

is significant that the argument for the State does not go so far as to say that in no case would it be permissible on application for *habeas corpus* to override the findings of fact by the state courts. . . . If, however, the argument stops short of this, the whole structure built upon the state procedure and decisions falls to the ground.¹¹¹

Observing that the petition showed

the judgment of the expert on the spot, of the judge whose business it was to preserve not only form but substance, to have been that if one jurymen yielded to the reasonable doubt he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd,

the dissent found "the presumption overwhelming that the jury responded to the passions of the mob," and the allegations of the petition of sufficient gravity that the district court should have held a hearing, "whatever the decision of the state court may have been."¹¹²

Justice Holmes was uncharacteristically direct as to *Frank's* effect on him, alluding to the distressing facts of the case in a number of letters,¹¹³ chafing at the conflict between the de-

error from state court litigation challenging the federal constitutionality of legislatively-mandated rates, states:

So far as the findings are concerned, we have in the present case simply a general, or ultimate, conclusion of fact which is set forth in the decree of the state court; and it is necessary for us, in passing upon the Federal right which the plaintiff in error asserted, to analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter.

Norfolk & West Ry. Conley, 236 U.S. 605, 609-10 (1915).

111. *Frank*, 237 U.S. at 345, 347-48 (Holmes & Hughes, JJ., dissenting).

112. *Id.* at 349.

113. See Letter from Oliver Wendell Holmes to the Baroness Moncheur (July 6, 1915), Oliver Wendell Holmes, Jr., Papers, *supra* note 76; Letter from Oliver Wendell Holmes to John Henry Wigmore (Apr. 22, 1915) ("I am relieved at not having the worry of the Frank case longer on my mind."), *id.*; Letter from Oliver Wendell Holmes to Ellen A. (Mrs. Charles P.) Curtis (Apr. 19, 1915), *supra* note 100; Letter from Oliver Wendell Holmes to Lady Leslie Scott (Mar. 7, 1915) (describing the question in the case as "whether a trial for murder gave a man due process of law when the hostile mob was so dangerous that the Judge advised the counsel for the prisoner not to have him present or even to be present themselves when the verdict was taken"), Oliver Wendell Holmes, Jr., Papers, *supra* note 76.

mands of law and those of justice,¹¹⁴ and describing his opinion as "a dissent as to which I feel a good deal."¹¹⁵

Once the Court's opinion came down, "defense lawyers immediately began working for executive clemency," co-ordinating a massive legal and press campaign designed to secure a com-

In addition, Holmes must have sent a copy of his *Frank* opinion to Sir Frederick Pollock, as the latter wrote him a insightful paragraph of comment on the outcome. See Letter from Frederick Pollock to Oliver Wendell Holmes (May 19, 1915), reprinted in 1 HOLMES-POLLOCK LETTERS 226 (Mark DeWolfe Howe ed. 1941).

Perhaps relatedly, Holmes was also feeling somewhat "tired and discouraged" at the time, around his 74th birthday on March 8, 1915, remarking on the "impalpable soft approaches of the enemy," death, Letter from Oliver Wendell Holmes to Lady Ellen Askwith, (Mar. 3, 1915), Oliver Wendell Holmes, Jr., Papers, *supra* note 76, and taking comfort in his continuing speed at writing opinions as evidence that he was keeping the enemy at bay, *id.* See Letter from Oliver Wendell Holmes to Lewis Einstein (Apr. 10, 1915), reprinted in THE HOLMES-EINSTEIN LETTERS 112, 113 (1964) (James Bishop Peabody, ed.); Letter from Oliver Wendell Holmes to the Baroness Moncheur (Feb. 28, 1915), Oliver Wendell Holmes, Jr., Papers, *supra* note 76 ("A very well mannered old party, time. . . . [B]y a by he lays a soft paw on your sleeve, so gently. And then slowly, like the dog in Faust's study, he begins to swell, and grow more like a tiger. And the door is locked and one must await his doings."); *cf. infra* text accompanying note 271 (recording Brandeis' comment that Holmes "is disturbed" if his opinions are held up by colleagues' requests for revisions).

Holmes could not "help wondering whether our judicial protection of bills of rights against legislation may not be nearing its end. On the one hand I seem to see and I lament a weakening of the realizing senses that the fundamentals of personal liberty are worth fighting for, and on the other I see great danger" as the "judicial notion of freedom of contract" thwarts economic experimentation. Letter from Oliver Wendell Holmes to Alice Stopford Green (Dec. 18, 1914), Oliver Wendell Holmes, Jr., Papers, *supra* note 76.

114. See Letter from Oliver Wendell Holmes to Lady Clare Castletown (Nov. 28, 1914), Oliver Wendell Holmes, Jr., Papers, *supra* note 76. In this letter, partially quoted *supra* text accompanying note 76, Holmes expressed irritation at the public outcry that he was prepared to let a man be hanged on a seeming technicality, the public "knowing and caring nothing for the constitutional limits to our power."

115. Letter from Oliver Wendell Holmes to Lewis Einstein (Apr. 10, 1915), HOLMES-EINSTEIN LETTERS, *supra* note 113, at 112. Holmes also commented that he thought the opinion "is a composite performance and suffers rhetorically from being the product of two hands," Letter from Oliver Wendell Holmes to Ellen A. (Mrs. Charles P.) Curtis (Apr. 19, 1915), *supra* note 100, and indeed Holmes and Hughes seem to have worked closely together in drafting it, see 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 289-90 (1951).

To some extent, the fact of there being a dissent at all is a measure of the strength of the dissenters' feelings on the matter. At this period, the publication of dissenting opinions was relatively rare; the Term in which *Frank* was decided saw the publication of 273 opinions for the Court and 11 dissents. See WALTER F. PRATT, JR., THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE, 1910-1921, at 131 (1999).

mutation to life imprisonment.¹¹⁶ On June 21, 1915—having first made elaborate arrangements to move Frank secretly to a distant prison for his protection against an outburst of violence¹¹⁷—Governor Slaton issued his commutation order, the bulk of which consisted of a detailed review of the unreliability of the evidence against Frank.¹¹⁸ Outraged, violent anti-Semitic mobs ravaged the state for over a week.¹¹⁹

Shortly afterwards, Frank wrote a warm letter to Justice Holmes: "I feel that you, as Judge, do not look for thanks. Yet, I cannot but feel profoundly gratified, that . . . you, and Justice Hughes diagnosed the situation with rare insight and sagacity."¹²⁰ After recounting the "deplorable" protests that had

116. See DINNERSTEIN, *supra* note 22, at 117; *supra* note 83. Frank would have preferred seeking a complete pardon, but his attorneys convinced him that a commutation request would be more prudent. See DINNERSTEIN, *supra* at 117.

117. See DINNERSTEIN, *supra* note 22, at 126; GOLDEN, *supra* note 22, at 265-66.

118. See Governor John M. Slaton's Commutation Order, *supra* note 62, at 317-38. The Governor also had before him private information received indirectly from Conley's lawyer to the effect that his client was the guilty party. See DINNERSTEIN, *supra* note 22, at 170-71; cf. *supra* note 53 (recounting similar information known to trial judge)

In a public defense of the order, the Governor urged:

Judge Roan charged the jury that if they did not recommend to mercy the defendant, which would carry life imprisonment as a penalty, he, Judge Roan would be compelled to sentence the defendant to be hanged.

This was not the law. Judge Roan overlooked the statute which gave him the discretion in the imposition of alternative penalties when the verdict was founded on circumstantial evidence.

It is inconceivable that where Judge Roan doubted the guilt of the defendant at all he would have failed to impose the life sentence instead of the death sentence if he had remembered his authority to do so. . . .

The imposition of the penalty had passed beyond the trial Judge, because the term of court had passed, and he asked me to prevent an injustice which might occur because of the Judge's oversight, and I exercised my power to correct a mistake when I was the only one who had the power to correct it.

John M. Slaton, *Governor Slaton's Own Defense in the Frank Case*, N.Y. WORLD, July 4, 1915, Editorial Section, at 1. See DINNERSTEIN, *supra* note 22, at 121, 125 (describing judge's letters to pardons board and Governor).

119. See DINNERSTEIN, *supra* note 22, at 130-33; GOLDEN, *supra* note 22, at 268-74. Historians agree that this outburst had a profound effect on the Jewish community and its views on racial matters over the next several decades, although they disagree on what that impact was. See Mark K. Bauman, *Introduction to THE QUIET VOICES: SOUTHERN RABBIS AND BLACK CIVIL RIGHTS, 1880S TO 1990S*, at 2-4 & n.5 (Mark K. Bauman & Berkley Kalin eds., 1997).

For Marshall's reaction to the Governor's decision, see *Marshall Praises Slaton's Courage*, N.Y. TIMES, June 22, 1915, at 7.

120. Letter from Leo M. Frank to Oliver Wendell Holmes (July 10, 1915), Oliver

greeted the news of the commutation—sparked by “these same people, this same crowd, the same shouts and threats, which pervaded the atmosphere of my trial,” thus verifying “that my trial could not have approximated justice”—Frank closed by expressing “confident trust” in his ultimate vindication, and looking forward to the day when, “with liberty & honor restored,” he could have the pleasure of greeting Holmes in person.¹²¹

Writing to a correspondent the day that he received this letter, Holmes observed that it was “very well written, with a surprising moderation of tone” and vowed to keep it.¹²² Less reliably, he is reported to have remarked that “a man who could write to him so sensitively as Frank couldn’t have raped and murdered a girl.”¹²³

A month later, in a well-organized operation led by eminent citizens, Frank was abducted from prison and lynched in Mary Phagan’s hometown.¹²⁴

III. FROM FRANK TO MOORE

Frank plainly aroused strong feelings, in the country at large¹²⁵ and among the Justices.¹²⁶

Louis D. Brandeis, then in private practice, urged Roscoe Pound to write a letter of protest¹²⁷ and later referred to the

Wendell Holmes, Jr., Papers *supra* note 76.

121. *Id.*

122. Letter from Oliver Wendell Holmes to Lady Leslie Scott (July 13, 1915), Oliver Wendell Holmes, Jr., Papers *supra* note 76.

123. Memorandum of Talk [of Mark de Wolfe Howe] with F[elix] F[rankfurter] (Aug. 10, 1964), Oliver Wendell Holmes Papers, Jr. *supra* note 76. Although there is no particular reason to doubt the accuracy of this account, Frankfurter was 81 years old at the time of his conversation with Howe, see Urofsky, *infra* note 267, at 299 n.2, and recounting a conversation with Holmes that would have taken place 49 years earlier.

124. See DINNERSTEIN, *supra* note 22, at 139-42; GOLDEN, *supra* note 22, at 280-89; Michael Dorman, 2 Murders in Georgia, NEWSDAY, Feb. 23, 1999, at A24.

125. See *supra* note 83.

126. See Letter from Oliver Wendell Holmes to Ellen A. (Mrs. Charles P.) Curtis (Apr. 19, 1915) (“just going off to Court for a fight in the Frank case”), *supra* note 100; *supra* text accompanying notes 113-15.

127. Letter from Louis D. Brandeis to Roscoe Pound (Nov. 27, 1914), reprinted in 3 LETTERS OF LOUIS D. BRANDEIS 373 (Melvin W. Urofsky & David W. Levy eds., 1978) (“In talking with Frankfurter this morning about the Frank case and Justice

case as an example of injustice in writing to Senator George Sutherland.¹²⁸ The Executive Committee of the American Bar Association, at a meeting at which William Howard Taft was present,¹²⁹ adopted a resolution condemning Frank's "willful and deliberate murder . . . in a spirit of savage and remorseless cruelty, unworthy of our age and time," as "an act of wanton savagery . . . well calculated to promote lawlessness and anarchy."¹³⁰

The succeeding years saw a number of changes in the composition of the Supreme Court—including the appointments of Brandeis, Sutherland, and Taft—with the following results:¹³¹

Holmes' memorandum [see *supra* text accompanying note 75], he told me that you were convinced that Frank had not had a fair trial, and that he was not guilty, and that this was another Dreyfus case. It seems to me of great importance that you should, in a public letter, give expression to your opinion on this subject. Your standing among the lawyers of America is such that what you say men will heed, and it is important that this protest should be made by a non-Jew."]; see also Letter from Louis D. Brandeis to Alfred Brandeis (Dec. 12, 1914), reprinted in 3 LETTERS OF LOUIS D. BRANDEIS, *supra* at 383 ("The Jews are having a sad time—Frank included.") (editors' footnotes and emendations omitted).

128. See Letter from Louis D. Brandeis to George Sutherland (Nov. 6, 1915), reprinted in 3 LETTERS OF LOUIS D. BRANDEIS, *supra* note 127, at 632 (suggesting that Joseph Hillstrom, the union organizer commonly known as "Joe Hill," had not had a fair trial and continuing: "The occurrences in the Frank case subjected the reputation of the Courts to severe strain; and if Hillstrom should be sentenced without having had a fair trial, that which we must regard as the foundation of law and order will be seriously undermined.").

129. At the time, Taft was a law professor at Yale. He had served as President of the American Bar Association in 1913-1914. See HERBERT S. DUFFY, WILLIAM HOWARD TAFT 303-05 (1930). On Taft's earlier record with regard to racial issues, see Needham David Charles, William Howard Taft, the Negro, and the White South, 1908-1912, at 314-18 (1970) (unpublished Ph.D. dissertation, University of Georgia (Athens)) (available from University Microfilms).

130. Minutes of Meeting of the Executive Committee, American Bar Association (Aug. 18, 1915), William Howard Taft Papers, Library of Congress (Reel 18).

Within Georgia, however, popular opinion supported the lynch mob, not the Governor. See DINNERSTEIN, *supra* note 22, at 129-33, 145-47; Maclean, *supra* note 22, at 946. The prevailing view at the time was "that mob violence protected society from both lawbreakers and a criminal justice system that failed to carry out its mandate." W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930, at 100 (1993). But this attitude broke up with surprising rapidity over the following decade under the influence of a coalition of anti-lynching activists comprising "white businessmen dedicated to economic progress, white reformers animated by a vision of Christian social justice, and black activists committed to color-blind justice." *Id.* at 208-09. Among this group was the Governor, Hugh Dorsey. See ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950, at 57-58 (1980).

131. This table is adapted from RICHARD C. CORTNER, A MOB INTENT ON DEATH

Table 1

The <i>Frank</i> Court (April 19, 1915)	The <i>Moore</i> Court (February 19, 1923)
Edward D. White, C.J.	William Howard Taft, C.J. (Seated October 3, 1921)
Joseph McKenna	Joseph McKenna
Oliver Wendell Holmes	Oliver Wendell Holmes
Willis Van Devanter	Willis Van Devanter
James C. McReynolds	James C. McReynolds
Joseph R. Lamar	Louis D. Brandeis (Seated June 5, 1916)
Charles E. Hughes	George Sutherland (Seated October 2, 1922)
William R. Day	Pierce Butler (Seated January 2, 1923)
Mahlon Pitney	[Vacant]

Thus, four of the eight Justices who would be deciding *Moore* had ascended the bench since *Frank*. But one of these was a replacement for one of the dissenters in that case, and the known views of the new Justices "were not necessarily favorable" to the petitioners.¹³² Possibly, as Brandeis suggested lat-

145 (1988), but has been reorganized to clarify the changes in Court personnel, and supplemented by the addition of the dates in the second column, which are drawn from the prefatory matter to the relevant volumes of the United States Reports. See 260 U.S. iii, nn.5, 6 (1923) (Sutherland, Butler); 257 U.S. iii (1922) (Taft); 241 U.S. iii, n.5 (1916) (Brandeis). The final seat in the second column is listed as vacant because, Justice Pitney was replaced by Edward T. Sanford, who was sworn in on February 19, 1923, the day the *Moore* case was decided, "with the result that the *Moore* case was decided by an eight-person Court." CORTNER, *supra*, at 145 & n.1. For informal sketches of these five Justices and their working environment by a Court page, see Austin Cunningham, *The United States Supreme Court and Me*, SUP. CT. HIST. SOC. Q., Summer 1998, at 6. The departures of their predecessors are discussed in DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* 87-93 (1999).

132. CORTNER, *supra* note 131, at 145. More specifically, the most salient factor influencing the appointments of Taft, Sutherland and Butler was their perceived skepticism regarding the validity of economic regulations under the Due Process Clause, rather than their views on individual rights. See David M. Levitan, *The Effect of the Appointment of a Supreme Court Justice*, 28 U. TOL. L. REV. 37, 74

er,¹³³ the importance of the change was not so much the identity of the appointees as their relative newness to the bench; specifically, it may be that the raw realities of Southern justice would come as a greater shock to the newer Justices than to those who had been seeing similar scenarios regularly presented for (and denied) review.¹³⁴

Perhaps it is of significance that the problem of lynching continued to gnaw at the national conscience. Although lynchings had been declining steadily between 1900 and 1917,

World War I disrupted the status quo. Black men returned from military service far less willing than they had once been to accept quietly the indignities of Jim Crow. Whites met their new asser-

(1996); David P. Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 DUKE L.J. 65, 65. See also DANIEL J. DANIELSKI, A SUPREME COURT JUSTICE IS APPOINTED 181 (1964) (discussing Butler nomination); DAVID H. BURTON, TAFT, HOLMES, AND THE 1920S COURT 112-14 (1998) (describing Taft nomination). See generally Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1491-92 (1998). For an extensive analysis of Sutherland's views, see Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL OF RIGHTS J. 1 (1997).

133. See *infra* text accompanying note 270.

134. As my colleague Richard K. Neumann commented on this passage in draft, one could with equal plausibility adopt the opposite hypothesis—that Justices who had more recently lived outside the ivory tower of the Court would be more familiar with the realities of the world and more cynical about it. Indeed, one of the only two recorded dissenters in *Moore* was George Sutherland, who had recently joined the Court from a litigation practice, see *Justice Clarke Out of Supreme Court; To Work for League*, N.Y. TIMES, Sept. 5, 1922, at 1. And in our own day, it would seem that the increased misgivings over time of Justices Stevens and Blackmun regarding the death penalty were the result of greater and greater exposure to specific instances of injustice coming before them judicially. See *Callins v. Collins*, 127 510 U.S. 1141, 1144 (1994) (mem.) (Blackmun, J., dissenting from denial of certiorari) ("For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. [Footnote citing votes upholding death sentences as Court of Appeals judge omitted]. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.").

Like the issue of the influence of stare decisis, see *infra* note 282, well designed empirical studies could presumably illuminate this question, but to date the interests of those studying the effects of length of Supreme Court service on voting behavior have lain in other areas, see, e.g., Saul Brenner & Timothy M. Hagle, *Opinion Writing and Acclimation Effect*, 18 POL. BEHAV. 235 (1996); Albert P. Melone, *Revisiting the Freshman Effect Hypothesis: the First Two Terms of Justice Anthony Kennedy*, 74 JUDICATURE 6 (1990).

tiveness with increased violence. The number of black lynchings, down to only 36 in 1917, leaped to 76 in 1919.¹³⁵

One response came from the National Association for the Advancement of Colored People ("NAACP"), which launched a high-profile (although ultimately unsuccessful) campaign in Washington between 1919 and 1923 for federal antilynching legislation.¹³⁶ "The agitation for a federal anti-lynching law," a contemporary observed, "may be another symptom of the flux in social consciousness that accounts partially for the development from *Frank v. Magnum* to *Moore v. Dempsey*."¹³⁷

135. MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER* 8 (1987). See DAVID J. GOLDBERG, *DISCONTENTED AMERICA: THE UNITED STATES IN THE 1920S*, at 92-97 (1999); STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930*, at 31 (1995) (noting the upsurge in lynchings "during the few years following World War I, a period also characterized by a resurgence of Klan activity in the South and a rise in nativism in the country as a whole"); See also CHRISTOPHER ROBERT REED, *THE CHICAGO NAACP AND THE RISE OF BLACK PROFESSIONAL LEADERSHIP, 1910-1966*, at 47-48 (1997) (describing Chicago race riot of July, 1919 that resulted in 38 deaths); Steven A. Holmes, *Scholar Takes On His Toughest Study of Race*, N.Y. TIMES, Sept. 28, 1997, at 1 (describing the May, 1921 race riot in "Tulsa when mobs of whites, jealous of the economic success of blacks . . . went on a rampage, killing [more than 100] blacks, pillaging and burning buildings, [and] even dropping dynamite from airplanes"); Brent Staples, *Unearthing a Riot*, N.Y. TIMES MAG., Dec. 19, 1999, at 64, 67 (describing modern aftermath of Tulsa riot and observing that it was "part of a national pattern during the teens and 20's, when city after city exploded in the worst racial conflicts that the country would ever see"); Brent Staples, *Searching for Graves—And Justice—in Tulsa*, N.Y. TIMES, Mar. 20, 1999, at A14; *infra* note 241 (noting that the District Judge who ruled on the habeas corpus petition in *Moore* in the fall of 1921 was from Oklahoma City). See generally LEON F. LITWACK, *TROUBLE IN MIND* 280-319 (1999).

136. See ZANGRANDO, *supra* note 130, at 51-71.

137. Note, *Mob Domination at a Trial as a Violation of the Fourteenth Amendment*, *supra* note 3, at 250. See also CAROLYN WEDIN, *INHERITORS OF THE SPIRIT: MARY WHITE OVINGTON AND THE FOUNDING OF THE NAACP* 197 (1998) (Ovington, who chaired the NAACP Board, "believed that, even though the bill ultimately failed to become federal law, the public notoriety the . . . campaign lent lynching was a prime cause of the drastic drops in these horrible numbers after 1924."); cf. James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 268, 284-85 (1998) (suggesting that "perhaps the most important reason that lynching declined is that it was replaced by a more palatable form of violence," viz., capital punishment).

IV. THE LEGAL PROCEEDINGS IN *MOORE*

Underlying *Moore* is not a single crime, but a massive race riot that took place in the fall of 1919 in Phillips County, Arkansas, near the town of Elaine.¹³⁸ How the outbreak originated was sharply disputed.¹³⁹ The local white establishment called it an "insurrection"¹⁴⁰—the product of an organization of violent radicals¹⁴¹ and the machinations of an unscrupulous char-

138. See CORTNER, *supra* note 131, at 2. This work, based heavily on primary sources, is plainly the best account of the events leading to *Moore*. The author, who believes that *Moore* represented a transformation of due process doctrine that repudiated *Frank*, see CORTNER, *supra*, at 1-2, 154, draws his title from the concluding words of the *Frank* dissent: "[I]t is our duty . . . to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death," *Frank v. Magnum*, 237 U.S. 309, 350 (1915) (Holmes & Hughes, JJ., dissenting).

Two works written relatively close to the time of the events by the Dean and an Assistant Professor at the University of Arkansas Law School, who had the benefit of assistance from various local officials, provide careful recountings of the procedural history (as well as a generally sympathetic view of the State's legal position). J.S. Waterman & E.E. Overton, *The Aftermath of Moore v. Dempsey*, 18 ST. LOUIS L. REV. 117 (1933), reprinted in 6 ARK. L. REV. 1 (1952); J.S. Waterman & E.E. Overton, *Federal Habeas Corpus Statutes and Moore v. Dempsey*, *supra* note 108.

139. See *Arkansas Riots Appeal Argued in Highest Court*, WASH. POST, Jan. 10, 1923, at 17 (Blacks' contention is "that they had assembled in their church at Hoop Spur to devise means as tenant farmers to relieve themselves of conditions which they asserted amounted to peonage. While so assembled, the Negroes claimed, armed white men surrounded the church and fired upon them, killing several. On behalf of the state it is asserted the Negroes had assembled in connection with a plot to massacre white men, and that the firing was done by a posse sent to quell a riot."). These two conflicting versions persisted through the subsequent years, see Grif Stockley, *Scipio Africanus Jones*, ARK. DEMOCRAT-GAZETTE, June 8, 1999, at E1; see also Michael Haddigan, *Confronting the Past Conference Seeks to Revisit 1919 Race Riot*, BOSTON GLOBE, Feb. 11, 2000, at A3 (using occasion of academic conference on riots to recount persisting racial divisions in county).

140. This was the conclusion of the Committee of Seven, a committee of prominent local citizens "formed with the approval of Governor [Charles H.] Brough to investigate the riot and determine its cause," CORTNER, *supra* note 131, at 13.

The Committee reported its findings in a document entitled *Inward Facts About Negro Insurrection*. This is to be found at 25-32 of the record annexed to the Petition for Certiorari in *Martineau v. Arkansas*, 257 U.S. 665 (1921) (No. 525), which was filed on Sept. 10, 1921 [hereinafter cited as *Martineau Record*]. This petition and the accompanying papers are discussed more fully *infra* notes 185-86.

141. The Committee of Seven reported:

The present trouble with the negroes in Phillips county is not a race riot. It is a deliberately planned insurrection of the negroes against the white[s], directed by an organization known as the 'Progressive Farmers' and Household

latan who duped blacks into joining¹⁴²—whose object, fortuitously disrupted before it could come to fruition,¹⁴³ was a general massacre of whites by blacks.¹⁴⁴ The NAACP took the view, which is supported by modern scholarship, that the violence was an effort by whites to revenge and deter legal attacks on an entrenched system of peonage.¹⁴⁵ In any event, between

Union of America,' established for the purpose of banding Negroes together for the killing of white people.

Martineau Record, *supra* note 140, at 27. An argument in support of this viewpoint is made by J.W. Butts & Dorothy James, *The Underlying Cause of the Elaine Riot of 1919*, 20 ARK HIST. Q. 95 (1961).

It is worth recalling that, in addition to being a period of "bloody racial riots in both North and South," coinciding with the return of servicemen from World War I, the time of the riot was also that of the "Red Scare"; class-based strife was manifesting itself in violent disputes over working conditions, and in vigorous advocacy—and even more vigorous suppression—of radical political and economic views. See CARL H. MONEYHON, *ARKANSAS AND THE NEW SOUTH, 1874-1929*, at 107-08 (1997) (locating Elaine riot within framework of farmworker attempts to unionize). See generally MELVIN I. UROFSKY, *A MARCH OF LIBERTY* 612-14 (1988); *supra* text accompanying note 135.

As the riot was beginning, a lawyer seeking to meet with the tenant farmers in the neighborhood was seized by vigilantes—who claimed to have taken from him literature of the International Workers of the World ("IWW") as well as the Progressive Farmers Union—and held in jail for a month, partly for his own protection from lynching; he was then released, but, to appease the mob, indicted for barratry (a charge that was dropped the following year). See CORTNER, *supra* note 131, at 39-42; *infra* text accompanying note 198. Afterwards, the Arkansas authorities sought, by complaint to the Post Office and by state court injunction proceedings, to prevent the circulation of newspapers containing "untrue and seditious" accounts of the Elaine riot and other contentious episodes. See CORTNER, *supra* note 131, at 31-32.

142. See Martineau Record, *supra* note 140, at 27-31 (describing series of purported fund-raising schemes by this individual, Robert L. Hill, in which he "simply played upon the ignorance and superstition of a race of children"). The attempts of the authorities to return Hill to Arkansas from Kansas, where he had been arrested, led to a sustained series of well-publicized legal and political maneuverings that ultimately resulted in his being freed rather than extradited. See CORTNER, *supra* note 131, at 55-83. As Professor Eric W. Rise of the Criminal Justice Program of the University of Delaware highlighted in a paper entitled "The NAACP, Civil Rights, and Criminal Extradition," which was presented at the 1998 meeting of the American Society for Legal History and is scheduled to see law review publication as part of a larger joint project with Professor Paul Finkelman of the University of Tulsa Law School, these efforts were part of a sustained political campaign undertaken by the NAACP in the same period as its anti-lynching campaign, see *supra* text accompanying notes 136-37, and doubtless contributed as well to public views of Southern justice.

143. See Inward Facts About Negro Insurrection, *supra* note 140, at 31.

144. See *id.* at 26, 27, 31.

145. See CORTNER, *supra* note 131, at 27-28; FON LOUISE GORDON, *CASTE &*

200 and 250 blacks and at least four whites were killed before order was eventually restored by federal troops.¹⁴⁶ In the wake of the upheaval, 67 blacks were sentenced to prison terms and 12 to death, all for the murder of whites.¹⁴⁷

The death sentences were returned within six weeks of the riot in a series of trials in which jury deliberations lasted less than ten minutes:

CLASS: THE BLACK EXPERIENCE IN ARKANSAS, 1880-1920, at 136-37 (1995); JEANNIE M. WHAYNE, A NEW PLANTATION SOUTH: LAND, LABOR, AND FEDERAL FAVOR IN TWENTIETH-CENTURY ARKANSAS 75-77 (1996); O.A. Rogers, Jr., *The Elaine Race Riots of 1919*, 19 ARK. HIST. Q. 142 (1960); see also *Conference in Arkansas Re-examines 1919 Attack*, N.Y. TIMES, Feb. 13, 2000, at A28. For an excellent summary of the historiography, see Jeannie M. Whayne, *Race and Class in the 1919 Elaine Race Riot*, ARK. DEMOCRAT-GAZETTE, Nov. 7, 1999, at J1.

146. See CORTNER, *supra* note 131, at 15, 30; *infra* Table 2.

147. See CORTNER, *supra* note 131, at 2. "Ultimately 122 blacks were indicted by the grand jury on charges growing out of the riot, seventy-three charged with murder. No whites were indicted." *Id.* at 15 (footnote omitted). See also *infra* text accompanying note 230.

Table 2

The Elaine Riot Capital Cases

	<i>Defendant</i>	<i>Convicted</i>	<i>Victim</i>	<i>Jury Deliberations</i>
W	Ed Ware	Nov. 18	W.D. Adkins	4 minutes
A				
R	Will Wordlow	Nov. 4	W.D. Adkins	9 minutes
E				
	Albert Giles	Nov. 4	James A. Tappan	6 minutes } Joint
				} trial
D	Joe Fox	Nov. 4	James A. Tappan	6 minutes }
E				
F	John Martin	Nov. 4	W.D. Adkins	N/A } Joint
S.				} trial
	Alf Banks, Jr.	Nov. 4	W.D. Adkins	N/A }
M	Frank Hicks	Nov. 2	Clinton Lee	8 minutes
O				
O	Frank Moore	Nov. 2	Clinton Lee	7 minutes }
R	Ed Hicks	Nov. 2	Clinton Lee	7 minutes } Joint
E				
	J.E. Knox	Nov. 2	Clinton Lee	7 minutes } trial
D	Paul Hall	Nov. 2	Clinton Lee	7 minutes }
E				
F	Ed Coleman	Nov. 2	Clinton Lee	7 minutes }
S. ¹⁴⁸				

148. See CORTNER, *supra* note 131, at 16-18, 86; *cf. infra* text accompanying note 200 (allegation in petition of last set of defendants that jury was out two or three minutes); Martineau Record, *supra* note 140, at 14 (same allegation in petition of Frank Hicks).

At a subsequent point in the proceedings, see *infra* text accompanying note 155, the cases were grouped into two sets, *Ware* and *Moore*, as indicated in the left margin of the table.

With respect to the *Moore* set, it was the theory of the prosecution that Frank Hicks (the brother of Ed Hicks) had fired the shots that killed Lee; the remaining defendants were charged as aiders and abettors. The transcript of the trial of Frank Hicks is to be found in the Martineau Record, *supra* note 140, in Exhibit D, at 5-26. See *infra* note 150 (describing Exhibit D). The transcript of the trial of the other *Moore* defendants is to be found in the Transcript of Record at 27-54, *Moore v. Dempsey*, 261 U.S. 86 (1923) (No. 199) (filed October 24, 1921) [hereinafter cited as *Dempsey Transcript*]. See generally Brief for the Appellants at 23, *Moore v. Dempsey*, 261 U.S. 86 (1923) (No. 199) (filed Jan. 8, 1923) (describing brevity of this trial).

The remaining 67 sentences resulted from guilty pleas entered, perhaps prudently, after these trials had taken place.¹⁴⁹

In December, all the defendants filed a motion for a new trial.¹⁵⁰ The primary grounds were:

1. [They are all] negro[es] of the African race, and . . . at the time of the returning of . . . [the] indictment and trial . . . bitterness of feeling among the whites of . . . [the] county, against the negroes, especially against the defendant[s] was . . . at the height of intensity . . . [and] co-extensive with the county; . . . [t]hat during . . . [their] confinement . . . [they] were frequently subjected to torture, for the purpose of extracting from . . . [them] admission[s] of guilt—as were others then also in custody, to force them to testify against defendant[s]; . . . [t]hat while . . . [they were] . . . confined, several hundred white men of said county, assembled at or near the court house and jail, for the purpose of mobbing . . . [them], and were only prevented from doing so . . . by the presence of United States soldiers . . . ; [t]hat the indictment was returned . . . by . . . [a] grand jury composed wholly of white men; . . . [t]hat . . . without ever having been permitte[d] to see or talk with an attorney, or any other person, in reference

149. See CORTNER, *supra* note 131, at 18.

150. See *id.* at 84. The text of this document is preserved, insofar as it relates to the Moore defendants other than Frank Hicks, see *infra* note 189, in the Transcript of Record at 35-40, Moore v. Arkansas, 254 U.S. 630 (1920) (No. 955) (filed May 24, 1920), which is to be found in the Washington facility of the National Archives and Record Administration, Records Group 267, U.S. Supreme Court Appellate Case File No. 27710, Box 6593. This certiorari proceeding was re-designated No. 360 when carried over from the October, 1919 to the October, 1920 Term, when the writ was denied, see Moore v. Arkansas, 254 U.S. 630 (1920); *infra* note 160 and accompanying text.

CORTNER, *supra* note 131, at 84 states that this motion was filed on December 18, 1919. Actually, it appears to have been signed by defendants on that date, and filed on December 20, 1919. See Transcript of Record at 38, Moore (No. 955).

Although previous scholars seem to have been unaware of the fact, the simultaneous new trial motion filed on behalf of Frank Hicks has also been preserved. It is in the Transcript of Record at 55-64, Hicks v. Arkansas, 254 U.S. 630 (1920) (No. 956), which is to be found in the Washington facility of the National Archives and Record Administration, Records Group 267, U.S. Supreme Court Appellate Case File No. 27711, Box 6593. This certiorari proceeding was re-designated No. 361 when carried over from the October, 1919 to the October, 1920 Term, when the writ was denied, see Hicks v. Arkansas, 254 U.S. 630 (1920); *infra* note 160 and accompanying text. Frank Hicks' new trial motion is also to be found in the Martineau Record, *supra* note 140, at 31-37. The transcript of his trial is reproduced in the Martineau Record, *supra*, as 5-26 of Exhibit D.

to . . . [their] defense, . . . [they were] carried from the jail to the Court room and put on trial—the court appointing an attorney for them—before a jury composed wholly of white men; . . . [t]hat the excitement and feeling against the defendant[s] among the whites of said county was such that it was impossible to obtain any unprejudiced jury of white men to try . . . [them]—and that no white jury, . . . [even if] fairly disposed, would have had the courage to acquit . . . [them]; . . . [t]hat the trial proceeded without consultation on . . . [their] part with any attorney, without any witnesses in . . . [their] behalf and without an opportunity on . . . [their] part to obtain witnesses or prepare for defense; . . . [t]hat no evidence was offered in . . . [their] behalf; . . . [t]hat the jury . . . returned . . . within about three to six minutes, with a verdict of guilty against the defendant[s]. . . Defendant[s], therefore, say[] that . . . [they were] convicted and sentenced to death without due process of law.

2. [N]o negro has been appointed a jury commissioner, or selected to serve as a juror, either grand or petit, for more than thirty years; . . . that they are excluded therefrom solely on account of their race and color; . . . that the defendants have thus been . . . deprived of their rights under the Constitution of the United States, and especially the 14th Amendment . . . [and are] denied the equal protection of the law. Defendant[s] further say[] that while it is true, as . . . [they are] now advised, that the proper . . . time to have objected . . . would have been before trial; yet . . . [they] knew nothing of . . . [their] right[] to raise any objection[] . . . and . . . [were] not advised in that regard . . . and that . . . [they], therefore, feel that . . . [their] objection, taken at this time should prevail to the extent of securing them a new trial.¹⁵¹

Annexed as exhibits were two affidavits, both from prisoners under death sentences as a result of the *Ware* trials. One, from Alf Banks, Jr., stated that while confined prior to trial:

I was frequently whipped with great severity, and was also put into an electric chair and shocked, and strangling drugs would be put to my nose to make me tell things against others . . . [They] tortured me so that I finally told them falsely that what they wanted me to say was true and that I would testify to it. . . . As they were taking me to the Courtroom, they told me if I changed my testimony or did not testify as I had said, when they

151. Dempsey Transcript, *supra* note 148, at 55-59.

took me back, they would skin me alive. I testified as I had told them . . . It was not true; it was false. . . . I would never have testified falsely as I did if I had not been made to [d]o it.¹⁵²

The other, from William Wordlow, stated:

[In jail,] I was not permitted to . . . do anything towards preparing any defense. While in custody there, I was frequently taken from the cell, blindfolded, whipped and tortured to make me tell things I did not know, and furnish false information, and testify against others of the negroes. . . . To escape from the torture, I finally said what they wanted me to say All that I said against [defendants] . . . was forced. I do not know of any negro who killed or advised or encouraged the killing of either Mr. Adkins, Mr. Lee, Mr. Tappan or anyone else, and would not have voluntarily testified that I did. As I was taken to the courtroom, I was given to understand that if I did not testify as they had directed, I would be killed.¹⁵³

The motion was summarily denied the day it was argued,¹⁵⁴ and all the defendants appealed from its denial as part of their direct appeals.

On appeal, the Arkansas Supreme Court divided the cases into two groups, as shown in Table 2 above. In one opinion, it reversed the convictions of the *Ware* defendants and remanded for new trials because the juries had simply rendered general guilty verdicts, failing to abide by a state statute requiring them to "find by their verdict whether [the defendant] be guilty of murder in the first or second degree."¹⁵⁵

152. *Id.* at 61-62.

153. *Id.* at 63-64.

154. *See id.* at 67-68.

155. *See Banks v. State*, 219 S.W. 1015, 1016 (Ark. 1920) (quoting *Kirby's Digest* § 2409). According to CORTNER, *supra* note 131, at 86, this issue was raised for the first time on oral argument of the appeal.

With respect to the *Moore* defendants, the court, in another opinion,¹⁵⁶ first ruled that the allegations of racial discrimination in jury selection had come too late.¹⁵⁷ It then continued:

It is now insisted that, because of the incidents developed at the trial and those recited in the motion for new trials, and the excitement and feeling growing out of them, no fair trial was had, or could have been had, and that the trial did not, therefore, constitute due process of law.

It is admitted, however, that eminent counsel was appointed to defend appellants, and no attempt is made to show that a fair and impartial trial was not had, except as an inference from the facts stated above; the insistence being that a fair trial was impossible under the circumstances stated.

We are unable, however, to say that this must necessarily have been the case. The trials were had according to law, the jury was correctly charged . . . and the testimony is legally sufficient to support the verdicts returned. We cannot, therefore, in the face of this affirmative showing, assume that the trial was an empty ceremony, conducted for the purpose only of appearing to comply with the requirements of the law, when they were not in fact being complied with. . . .

We have given these cases the careful consideration which their importance required, but our consideration is necessarily limited to those matters which are properly brought before us for review, and . . . the judgments must be affirmed.¹⁵⁸

156. *Hicks v. State*, 220 S.W. 308 (Ark. 1920).

The factual recitations of this opinion, *Hicks*, 220 S.W. at 309, are inconsistent with the trial record in several respects; the statement that armed pickets guarding the defendants' meeting the night before the Lee shooting fired into a car parked outside "and killed one of the men in it," *id.*, has no support in the trial testimony, and the statement that Moore had said "that some of their members were being attacked, and that they would go and help them fight," *id.*, significantly overstates the trial testimony, "especially in changing Moore's alleged statement from a declaration of what 'he' intended to do to a statement of what 'they' intended to do," Brief for the Appellants, *supra* note 148, at 28. See *infra* note 219.

157. See *Hicks*, 220 S.W. at 309.

158. *Id.* at 309-10.

Purely for exhaustion purposes, but expecting that the real contest would come on federal habeas corpus,¹⁵⁹ counsel filed petitions for certiorari.¹⁶⁰

Meanwhile, the retrials of the *Ware* cases got underway; this time, they were litigated far more aggressively than before. Counsel filed motions seeking:

(a) to remove "the cases to the U.S. district court on the ground that there had been no blacks summoned to serve on either the grand or trial juries and the defendants could not receive the equal protection of the laws in the state court."¹⁶¹

(b) a change of venue. "Apparently because of fear of retaliation, [counsel] could get only four local blacks to testify in support of the motion for a change of venue," which was denied after a hearing lasting an hour and a half.¹⁶²

(c) to quash the indictments and the venire because, in violation of the Equal Protection Clause, no blacks had been included. These motions were also denied.¹⁶³

159. See CORTNER, *supra* note 131, at 89-90 (quoting letter from counsel explaining that although "[we] are not very hopeful of any favorable result on this petition in the Supreme Court of the United States, yet we thought it wise, if not absolutely necessary, to take this course with these cases, in order to exhaust all direct remedies which are, or may be, afforded by law, before applying in the District Court of the United States . . . for writs of habeas corpus").

Counsel were acting prudently in the face of legal uncertainty. Not until *Fay v. Noia*, 372 U.S. 391, 435-36 (1963), could counsel in a capital case have felt genuinely secure in omitting the filing of such a petition entirely.

160. These are the petitions, discussed *supra* note 150, that were denied as *Moore v. Arkansas*, 254 U.S. 630 (1920) (No. 360) and *Hicks v. Arkansas*, 254 U.S. 630 (1920) (No. 361). In neither case did the state bother to file opposition papers.

161. CORTNER, *supra* note 131, at 91. This motion was made under the Act of Mar. 3, 1911, ch. 231, § 31, 36 Stat. 1096, an ancestor of the current 28 U.S.C. § 1443 (1994), which provided,

When any civil suit or criminal prosecution is commenced in any State court . . . against any person who is denied or can not enforce in the judicial tribunals of the State . . . any law providing for the equal civil rights of citizens of the United States . . . such suit or prosecution may [be removed] upon the petition of such defendant.

However, the Supreme Court had long construed the statute as not applying to cases "in which a right is denied by judicial action during the trial," *Neal v. Delaware*, 103 U.S. 370, 386 (1880). In such cases, petitioners had to assert their federal claims in the state system, subject to ultimate Supreme Court review. See *Neal*, 103 U.S. at 387.

162. CORTNER, *supra* note 131, at 91-92.

163. See *Ware v. State*, 225 S.W. 626, 627-28 (Ark. 1920).

In three separate trials, all six *Ware* defendants were convicted once more, notwithstanding the testimony of two of them that they had previously been tortured.¹⁶⁴

On appeal, the Arkansas Supreme Court again reversed and remanded for a new trial.¹⁶⁵ In an opinion issued on December 6, 1920, it held:

(a) that the denial of the removal petition had been proper since no state law prevented blacks from enforcing their civil rights;¹⁶⁶

(b) over one dissent, that the "lower court did not abuse its discretion" in rejecting the motion for a change of venue after hearing the testimony of the witnesses;¹⁶⁷

(c) but that, under controlling federal authority, the defendants had been entitled to present evidence in support of their claims of racial discrimination in jury selection.¹⁶⁸

Meanwhile, on October 11, the United States Supreme Court had denied the certiorari petition of the *Moore* defendants¹⁶⁹—whose identical claim had been rejected because it was made too late.¹⁷⁰

This action led to various lobbying efforts aimed at persuading the Governor to grant or deny clemency.¹⁷¹ Among these was a resolution from the local American Legion Post opposing clemency on the ground that "when the guilty negroes were apprehended, a solemn promise was given by the leading citizens of the community, that if these guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld."¹⁷² Supporting this position, five of the members of the Committee of Seven wrote the Governor:

164. See CORTNER, *supra* note 131, at 92.

165. See *Ware*, 225 S.W. at 632.

166. See *id.* at 628.

167. See *id.* at 628.

168. See *id.* at 629-31. Two of the Justices dissented from this last holding with respect to one of the defendants, who had not made a specific objection. See *id.* at 632.

169. See *supra* note 160 and accompanying text.

170. See *supra* text accompanying note 157.

171. See CORTNER, *supra* note 131, at 97-99.

172. Dempsey Transcript, *supra* note 148, at 77.

With all the provocation our people refrained from mob violence. The reason they did this was that this Committee gave our citizens their solemn promise that the law would be carried out. This Community can be made a model one so far as resorting to mob violence is concerned, but should the Governor commute any sentence of these Elaine rioters, this would be difficult, if not impossible.¹⁷³

On November 15, the Governor announced that he had decided to deny clemency, in recognition of the fact that the community had "refrained from mob violence" on the basis of "the definite promise to the people of Phillips County [by the Committee of Seven] that the law would be enforced and that there would be no outside influence permitted to interfere. . . ."¹⁷⁴

Eventually, an execution date was set for June 10, 1921.¹⁷⁵ Suddenly, a potentially fatal roadblock appeared in the path to obtaining federal habeas relief: The district judge was out of town until after the scheduled execution date, and "apparently no substitute was available."¹⁷⁶ On June 8, counsel "in desperation . . . filed petitions for writs of habeas corpus in the Pulaski County Chancery Court," consisting essentially of the petitions they had been planning to file in federal court.¹⁷⁷

173. *Id.* at 71.

174. CORTNER, *supra* note 131, at 99-100 (quoting the ARKANSAS GAZETTE, Nov. 16, 1920, at 1).

175. *See id.* at 105. Meanwhile, in May, the Ware defendants had again moved for a change of venue. In reliance upon the affidavits of several black residents of the county, the same trial judge this time granted the motion, setting the retrial in another county for October. *See id.* at 108.

176. *Id.* at 115.

177. *Id.* at 115-16. The federal court petitions are described *infra* text accompanying notes 189-210.

The text of the state petition filed on behalf of Frank Hicks is to be found in the Martineau Record, *supra* note 140, at 6-24. Cf. CORTNER, *supra* note 131, at 217 n.35 (relying on text published in newspaper, probably petitions of other defendants). Frank Hicks' petition, which was "exactly alike as to form and substance" as the one filed on behalf of the other petitioners, *Petition for Certiorari at 2, Martineau v. Arkansas*, 257 U.S. 665 (1921) (No. 525) (filed Sept. 10, 1921), annexed two new affidavits.

In one, sworn to on May 18, 1921, George Green stated that he had testified against Frank Hicks, but

I now state and swear positively, that the testimony was false from beginning to end, and that I testified as I did because I was compelled to do so. . . . I

The chancellor, John E. Martineau, stayed the executions and ordered the warden to produce the prisoners before him on June 10.¹⁷⁸ The Attorney General on June 9 filed an application for a writ of prohibition with the Arkansas Supreme Court, which, over the objections of the Chief Justice,¹⁷⁹ set the matter down for argument on June 13, leaving the stay in place.¹⁸⁰

was not whipped, but a great many of the negroes there in jail with me were whipped. . . . [I]n order to avoid such punishment I finally agreed to testify to anything that they wanted me to say. . . . At the same time I was indicted for the murder of Clinton Lee, and they told me that if I would testify against Frank Hicks and then plead guilty, that they would get the court to make it light on me. I later pled guilty to murder in the second degree and was sentenced to six years in the penitentiary. . . . I was not guilty of having anything to do with the killing of Clinton Lee or anybody else. . . .

Martineau Record, *supra* note 140, at 33-35.

The second affidavit, also sworn to on May 18, 1921, was from John Jefferson. He stated that he had testified in both Moore trials, but had done so falsely because of threats of whipping and execution, and eventually, despite his innocence, pleaded guilty to the second degree murder of Clinton Lee (receiving a five-year sentence) "to save my own life." *Id.* at 36-38.

In a third affidavit of the same date, Walter Ward, arrested for the killing of Clinton Lee, stated that he had been whipped until "they nearly killed me. I was also put in an electric chair, stripped naked and the current turned on to shock and frighten me. They also put up my nose some kind of strangling drugs to further torture and frighten me." As a result, he testified falsely "in the case against Frank Moore and others," and, having been "told that if I did not plead guilty I would be sent to the electric chair and in order to save myself further torture and to save my life I plead guilty to murder in the second degree, and was sentenced to 21 years in the penitentiary. I was not guilty." Dempsey Transcript, *supra* note 148, at 15-16.

Although not attached to Frank Hicks' Chancery Court petition, inasmuch as defense counsel had this affidavit in hand and later filed it in federal court, it was presumably annexed to the Chancery Court petition of the other defendants.

One effect of the state filings was to generate "the most extensive publicity the contentions of the NAACP and the defense counsel had yet received in the white press of Arkansas" and an editorial representing "the first dissenting voice among the ranks of the state's white press on the handling of the Phillips County riot." CORTNER, *supra* note 131, at 116-17.

178. See *State v. Martineau*, 232 S.W. 609, 610 (Ark. 1921); Martineau Record, *supra* note 140, at 53-56 (copies of orders).

179. See CORTNER, *supra* note 131, at 116.

180. See *Martineau*, 232 S.W. at 610. According to CORTNER, *supra* note 131, at 118 (which gives the date of this argument as June 12), when counsel argued on behalf of the condemned men that the state's evidence in the original trials had been secured through torture, in violation of due process, Chief Justice McCulloch stopped him in mid-argument. Such contentions, he said, were irrelevant to the issue of the chancery court's jurisdiction to issue the writs and the injunction.

On June 20, the court issued a unanimous opinion granting prohibition. It held that under state law the chancellor clearly lacked jurisdiction over the proceeding and continued with a discussion of counsel's contention "that the provision of the Constitution with reference to due process of law and the federal statutes prescribing the remedies whereby the constitutional guaranty may be enforced must be read into the state laws so that the prescribed remedies may be afforded in the state courts."¹⁸¹ The court rejected the argument that *Frank* supported this conclusion and held that the federal habeas corpus statute applied only to the federal courts, while the due process clause did not reach the arrangements that a state chose to make for the distribution of judicial business within its own court system.¹⁸²

Since Circuit Justice Van Devanter was unavailable at his vacation home in Canada, counsel were given a choice of Justices in Washington to whom to present an application for a writ of error.¹⁸³ Unsurprisingly, they picked Justice Holmes, who denied the application on August 4.¹⁸⁴

181. *Martineau*, 232 S.W. at 612.

182. See *id.* at 613. While commenting "[w]hat the result would be of an application to a federal court under the statute referred to and upon the facts stated in the petition we need not inquire," *id.*, the court strongly hinted that such an application would be meritless under *Frank*. Contrary to Justice Holmes' later suggestion, see *Moore v. Dempsey*, 261 U.S. 86, 92 (1923), the passage certainly does not appear to be meant as encouragement for the prisoners to pursue federal relief.

183. See Letter from H.C. McKenney, Deputy Clerk, Supreme Court of the United States, to Murphy, McHaney & Dunway, Counsel for Petitioners, (July 15, 1921). This document is to be found among the correspondence described *infra* note 185.

184. See *Dempsey Transcript*, *supra* note 148, at 9. It is a plausible speculation that Holmes considered himself in the same procedural position as he had been in ruling on *Frank's* similar application, see *supra* text accompanying note 75. Whatever might be thought about the petitioners' constitutional allegations, the decision below was fully supportable on the independent state ground that the Chancellor had no jurisdiction.

Counsel then followed up with a certiorari petition.¹⁸⁵ But, quite apart from its dubious probabilities of success,¹⁸⁶ this petition would not operate as a stay.¹⁸⁷ With a new execution

185. Petition for Certiorari, *Martineau v. Arkansas*, 257 U.S. 665 (1921) (No. 525). While, for the reasons described *infra* note 186, this document is not of great legal significance, it has some importance as a historical source.

Located in the Washington facility of the National Archives and Records Administration, Records Group 267, U.S. Supreme Court Appellate Case File No. 28480, Box 6889, it is accompanied by the *Martineau Record*, *supra* note 140, which contains a number of documents not otherwise accessible, and by related procedural correspondence.

186. The petition alleged that the Supreme Court of Arkansas erred . . . in holding as it did, either in express terms, or by necessary implication—

(1) That the . . . Chancellor . . . had no jurisdiction to grant the relief prayed for . . . under Section 1 of the 14th [Amendment].

(2) That the provision of the Constitution of the United States with reference to "due process of law" has no application to the Courts of the State.

(3) [That] the Federal statutes prescribing the remedies whereby the Constitutional guaranty of "due process of law" may be enforced cannot be read [i]nto the state laws so that the prescribed remedies may be afforded in the State Courts.

(4) That the . . . Chancellor . . . had no jurisdiction, under the "due process of law" clause of the 14th Amendment . . . and under the laws of Congress enacted in pursuance thereto to inquire into the jurisdiction of the Phillips Circuit Court [notwithstanding the claim] that said Phillips Circuit Court lost its jurisdiction by virtue of mob domination . . . and that as a result thereof [petitioners] were . . . about to be deprived of their lives without "due process of law."

(5) That the . . . Chancellor . . . in determining the question of the jurisdiction of the Phillips Circuit Court . . . was limited to the regularity of the process on its face.

(6) In issuing the writ of Prohibition . . .

Petition for Certiorari at 4-5, *Martineau* (No. 525).

Particularly in light of the denial of the writ of error by Justice Holmes, *see supra* note 184 and accompanying text, it seems quite safe to speculate that, had this petition not been withdrawn, *see infra* note 188, it would have been denied, since Rulings (1), (3), and (4) were not erroneous; Ruling (2) was not made below and the attack on Ruling (6) added nothing to the petition. The Court could perhaps have chosen to review Ruling (5) and hold it a due process violation for a state court system to fail to provide an adequate system of inquiry into threats of mob domination, but there seems little likelihood that it would have made a discretionary decision to awaken the sleeping dogs of *Frank* at a moment when petitioners still had the federal habeas corpus remedy available.

187. *See* Letter from E.L. McHaney, Counsel for Petitioner, to James D. Maher, Clerk, Supreme Court of the United States, (Sept. 7, 1921) (enclosing petition, and requesting that state officers be notified of its filing "and that the contemplated executions are by virtue of the filing of the petition, automatically stayed"); Letter from William R. Stansbury, Acting Deputy Clerk, Supreme Court of the United

date set for September 23 and the Court in recess until October, "[t]he lives of the condemned men were once again in peril."¹⁸⁸

On September 21, 1921, counsel filed habeas corpus petitions in the United States District Court for the Eastern District of Arkansas.¹⁸⁹ These petitions alleged that on September 30, 1919, while "petitioners and a large number of the members of their race were peaceably and lawfully assembled in their church house at or near Hoop Spur . . . white persons began firing guns . . . for the purpose of breaking up said meeting" and that in the resulting melee W.A. Adkins, one of the raiders, "was killed either by members of his own party or by some other person unknown."¹⁹⁰ News of the killing "spread like wild fire"

States, to Murphy, McHaney & Dunaway, Counsel for Petitioner, (Sept. 10, 1921) (replying, "[a]s requested, I have notified the Governor, the Attorney General, and the Keeper of the Penitentiary of the filing of this petition, but the filing of such a petition does not automatically stay execution, and I have therefore not so stated in my letters to the officers above named."). This correspondence is among that described *supra* note 185. The circumstances of Stansbury's appointment to his position are described in Robert Post, *Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft*, 1998 J. S. CT. HIST. 50, 52-53.

188. CORTNER, *supra* note 131, at 125. The certiorari petition, having been mooted by the federal habeas proceedings described *infra* text accompanying notes 189-210, was voluntarily dismissed by counsel in October. See *Martineau v. Arkansas*, 257 U.S. 665 (1921); Letter from E.L. McHaney, Counsel for Petitioner, to James D. Maher, Clerk, Supreme Court of the United States, (Sept. 27, 1921) (habeas proceedings "will supplant the Petition for Certiorari, and we will kindly ask that you dismiss the Petition for Writ of Certiorari"). This letter is among the correspondence described *supra* note 185.

189. See United States District Court for the Eastern District of Arkansas, Law Docket Book, Book G, at 110-11 (now in the Federal Records Center, Fort Worth). One petition (No. 6247) was filed on behalf of Frank Hicks and one (No. 6246) on behalf of the other five defendants. When the cases reached the Supreme Court, counsel stipulated that only the latter record need be printed, "and that the record in the Frank Hicks case need not be printed. We further agree that these causes may be consolidated and submitted together upon one printed record, as aforesaid, and briefs in said cause." *Dempsey Transcript*, *supra* note 148, at 106. At the time, both cases bore Supreme Court case numbers for the October, 1921 Term, Hicks v. Dempsey being No. 594, and Moore v. Dempsey, No. 595. *Id.* The former was subsequently assigned No. 198 in the October, 1922 Term, and the latter No. 199, see *Moore v. Dempsey*, 261 U.S. 86 (1923).

The record of the Frank Hicks case, although not printed, remains in manuscript form in the Washington facility of the National Archives and Record Administration, where it constitutes United States Supreme Court Appellate Case File No. 28549 in Records Group 267.

190. *Dempsey Transcript*, *supra* note 148, at 1-2.

through the region, and early the next day numerous white men formed themselves into posses and "began the indiscriminate shooting down of Negroes, both men and women, particularly the posse from the State of Mississippi, who shot down in cold blood innocent Negro men and women, many of whom were at the time in the fields picking cotton."¹⁹¹ Clinton Lee, whom petitioners were convicted of killing, was one of these white men, whose activities were supported by public officials and the press as an effort to quell an "uprising of the Negroes' . . . or insurrection."¹⁹² Finally, "a company of soldiers was dispatched to the scene of the trouble who took charge of the situation and finally succeeded in stopping the slaughter."¹⁹³

Having been charged with murder, the petition continued, the petitioners were incarcerated "together with a large number of their race, both men and women."¹⁹⁴ A "committee of seven . . . leading . . . business men and officials . . . was selected for the purpose of probing into the situation."¹⁹⁵ This group examined those incarcerated, and if the prisoners failed to give satisfactory evidence,

[T]hey would be sent out and certain of their keepers would take them to a room in the jail w[h]ich was immediately adjoining, and a part of the Courthouse building where said Committee was sitting, and torture them by beating and whipping them with leather straps with metal in them, cutting the blood at every lick until the victim would agree to testify to anything their torturers demanded of them; . . . [and] to further frighten and torture them, [there was] an electric chair, in which they would be put naked and the current turned on to shock and frighten them into giving damaging statements against themselves and others; also strangling drugs were put up their noses for the same purpose and by these methods and means false evidence was extorted from Negroes to be used and was used against your petitioners.¹⁹⁶

191. *Id.* at 2.

192. *Id.* at 1-2.

193. *Id.* at 2.

194. *Id.*

195. Dempsey Transcript, *supra* note 148, at 2.

196. *Id.* at 2-3.

After the Committee had published its conclusion that the tumult had not been a race riot, but rather "a 'deliberately planned insurrection of the Negroes against the Whites,'" a mob "of hundreds of men . . .

marched to the County jail for the purpose and with the intent of lynching your petitioners . . . and would have done so but for the interference of United States soldiers and the promise of some of said Committee and other leading officials that if the mob would stay its hand they would execute those found guilty in the form of law."¹⁹⁷

The petitioners then recounted how the attorney who had been consulting with them on attacking the share cropping system had been incarcerated for a month and eventually, with the assistance of the same judge who was to try them, spirited out of town "so as to avoid being mobbed."¹⁹⁸

Resuming the main thread of the narrative, the petitioners continued with the allegations "that a grand jury was organized composed wholly of white men, one of whom . . . was a member of the said Committee . . . and many of whom were in the poses"; that the grand jury heard false testimony—extracted by torture—and indicted them for the murder of Clinton Lee, "a man petitioners did not know, and had never, to their knowledge even seen"; and that they were brought into the trial courtroom on November 3, 1919

and were informed that a certain lawyer was appointed to defend them . . . [who] did not consult with them, took no steps to prepare for their defense, asked nothing about their witnesses, though there were many who knew that petitioners had nothing to do with the killing. . . ."¹⁹⁹

After a "joint trial before an exclusively white jury," in which only the state presented evidence—consisting of testimony that "was wholly false" and had been extracted by torture, death threats, and promises of leniency—"the jury retired just long

197. *Id.* at 3.

198. *Id.* at 4. See *supra* note 141. This story may have made a particular impression on Justice Holmes, see *Moore v. Dempsey*, 261 U.S. 86, 88 (1923), because the lawyer involved was the son of one of the lawyers who argued the case in the Supreme Court, where he recounted the tale. See *infra* text accompanying note 230.

199. *Dempsey Transcript*, *supra* note 148, at 4-5.

enough to write a verdict of guilty of murder in the first degree . . . not being out exceeding two or three minutes. . . ."²⁰⁰

All during this trial and those of the other defendants, large crowds of white people bent on petitioners' condemnation and death thronged the courthouse and . . . the attorney appointed to defend them knew that the prejudice against them was such that they could not get a fair and impartial trial . . . yet he filed no petition for a change of venue[;]. . . all, Judge, jury and counsel were dominated by the mob spirit . . . so that if any juror had had the courage to . . . vote for an acquittal, he, himself, would have been the victim of the mob, as would have been the fate of counsel if he had objected to the government's testimony on the grounds that it was extorted by torture.²⁰¹

The court "lost its jurisdiction by virtue of such mob domination," and although "carried through in the apparent form of law, . . . the verdict of the jury was really a mob verdict, . . . returned because no other verdict would have been tolerated."²⁰² Indeed, "the entire trial, verdict and judgment" were simply the implementation of the prior extra-legal investigation and conclusions of the Committee of Seven.²⁰³

After an attack on the all-white jury system,²⁰⁴ the petitioners recounted the protests of the American Legion Post and others²⁰⁵ to "show that the only reason the mob stayed its hand, the only reason they were not lynched was that the leading citizens of the community made a solemn promise to the mob that they should be executed in the form of law"; they added that the setting of their execution date the previous June had been to deter the mob from lynching the *Ware* defendants as they came up for retrial in May²⁰⁶ and charged "that the mob

200. *Id.* at 5.

201. *Id.* at 5-6.

202. *Id.* at 6.

203. *Id.* at 6-7.

204. This was substantially the same as the one set forth *supra* text accompanying note 151, but in place of any explicit mention of the Federal Constitution was the allegation that the failure of counsel to object "was through fear of the mob for petitioners and himself." Dempsey Transcript, *supra* note 148, at 7-8.

205. See *supra* text accompanying notes 172-73.

206. See *supra* note 175; see also CORTNER, *supra* note 131, at 117 (describing newspaper editorial discussing the argument that state officials should have ignored the Chancellor's stay, described *supra* text accompanying note 178, and executed the

spirit, mob domination, is still universally present in Phillips County."²⁰⁷

Thus, petitioners:

were deprived of their rights and are about to be deprived of their lives in violation of Section 1, of the 14th Amendment of the Constitution of the United States and the laws of the United States enacted in pursuance thereto, in that they have been denied the equal protection of the law, and have been convicted, condemned, and are about to be deprived of their lives without due process of law.²⁰⁸

In a significant strengthening of the factual case that petitioners had previously presented,²⁰⁹ the petition annexed the affidavits of two men who had been special agents of the Missouri-Pacific Railroad at the time of the riot, T.K. Jones and H.F. Smiddy (later a local law enforcement officer), who was in the automobile with Clinton Lee when he was killed. Both men had assisted in the Committee in its investigation and they provided detailed accounts of the whippings and other tortures they had personally inflicted, as well as eyewitness corroboration for almost all of the petitioners' other major allegations—including the allegation of actual innocence.²¹⁰

In response to this petition, the State tersely demurred, on the basis "that the said petition does not allege facts sufficient to entitle the petitioner to the relief prayed for" and moved for dismissal.²¹¹ The district court, having heard oral argument,

Moore defendants in order to prevent the lynching of the Ware defendants).

207. Dempsey Transcript, *supra* note 148, at 8-9.

208. *Id.* at 10.

209. See *supra* text accompanying notes 152-53; *supra* note 177.

210. See Dempsey Transcript, *supra* note 148, at 86-99; CORTNER, *supra* note 131, at 121-25; Brief for the Appellants at 12-14, *Moore v. Dempsey*, 261 U.S. 86 (1923) (No. 199). Justice McReynolds later referred to these as "the affidavits of two white men—low villains according to their own admissions," *Moore v. Dempsey*, 261 U.S. 86, 93 (1923) (McReynolds & Sutherland, JJ., dissenting).

211. Dempsey Transcript, *supra* note 148, at 101. In view of the significant consequences of the decision to adopt this course, see *infra* p. 1525; *infra* note 231; see also CORTNER, *supra* note 131, at 131 ("Indeed, the attorney general's response to the habeas corpus petition was a vital factor in the NAACP's ultimate victory in the *Moore* litigation."), it seems worth pausing to wonder why it was made. Quite possibly, the simple answer is that there was no other viable choice. Apart from the reality that any hearing, which would take place under the eyes of a well-informed press, see *supra* note 177, would be at best highly embarrassing to the State, its

granted the motion in an equally terse order and issued a certificate of probable cause to appeal.²¹²

The bulk of appellants' brief to the United States Supreme Court was devoted to a forceful discussion of the facts. Indeed, even the relatively few pages headed "The Law" concluded:

If this Court on reading this petition, these affidavits and this record is not satisfied that if there ever was a case in which *habeas corpus* should be granted this is the case, no argument of counsel will convince them, and we submit with confidence that either *habeas corpus* should be granted in this case or *habeas corpus* is not a practical remedy for such outrages as the evidence in this case discloses.²¹³

The strictly legal discussion consisted primarily of attempts to distinguish *Frank* on various grounds:

(a) "[T]he thing which distinguishes this case from the *Frank* case is that the Supreme Court of Arkansas did not pass on the question whether the allegations in the motion for a new trial . . . were true or not. The court assumed that they were true, and said it did not follow from them that the trial was necessarily unfair."²¹⁴

(b) In *Frank*, those factual allegations of the petitioner which were found by the Georgia Supreme Court to have been supported by the facts—his absence from the verdict and "expressions of feeling by spectators during the trial . . . [which were] promptly repressed by the court"—did not, "in the opinion of the [U.S. Supreme Court] majority, show such mob control of the court as denied the defendant due process of law."²¹⁵ But

counsel surely had every reason to believe that an unbiased federal judge, see *infra* note 242, would find the factual allegations of the petition to be true. Cf. CORTNER, *supra*, note 131, at 173-79 (detailing difficulties petitioners might actually have faced at hearing). Hence, the State's only plausible strategy—and a reasonable one in view of *Frank*—was to attempt to win on the law. For a more legal analysis, see J.S. Waterman & E.E. Overton, *supra* note 108, at 311-13.

212. Dempsey Transcript, *supra* note 148, at 101, 104.

213. Brief for the Appellants at 38, Moore (No. 199).

214. *Id.* at 29. See *id.* at 38 ("The allegations of fact were never considered by the Supreme Court of Arkansas as they were by the Supreme Court of Georgia in the *Frank* case, but the opinions apparently assume that they were true. This distinction between the cases is vital.")

215. *Id.* at 36. Having read this passage, Louis Marshall commented in Letter from Louis Marshall to Walter White (Mar. 19, 1923), NAACP Papers, Library of Congress, Box I-C-69:

the "[v]ery far different . . . facts in this case" do make that showing.²¹⁶

(c) By statute, the appellate jurisdiction of the Supreme Court of Arkansas in criminal cases is limited to matters of law.²¹⁷

In the case at bar, the question whether the circumstances surrounding the trial were such as to render impossible a righteous verdict was primarily a question of fact. Hence the Supreme Court could not, without exceeding its jurisdiction, reverse the action of the circuit court in refusing a new trial.²¹⁸

In *Frank*, the Court decided

that, in a situation like that now presented, a State cannot be said to have deprived an accused person . . . due process of law if it has provided an independent tribunal for the examination of his complaint and this tribunal, sitting in an atmosphere free from the alleged disturbing elements, has held the complaint unfounded.²¹⁹

The facts disclosed [in *Moore*] are shocking, but not more so than those in the *Frank* case. As a matter of fact in that case, as the record showed, the Presiding Judge stated that he did not believe that the guilt of *Frank* had been shown beyond a reasonable doubt, and when he requested *Frank* and his counsel to remain out of court when the jury rendered its verdict he gave as the reason that . . . he could not answer for the life of either *Frank* or his counsel. . . . It thus appeared clearly that the Court abdicated its powers and recognized that the mob was controlling the action of the court. The facts in *Moore v. Dempsey* merely related to the attitude of the general public but did not indicate that the Judge was terrorized, as was the fact in the *Frank* case. . . . [T]he distinction sought to be made between the two cases [by counsel] is scarcely justified by the record.

See also *infra* note 268 (quoting further extract from this letter).

216. Brief for the Appellants at 36, *Moore* (No. 199).

217. *Id.* at 39 (quoting the statute from CRAWFORD & MOSES DIGEST OF THE STATUTES OF ARKANSAS § 3413).

218. *Id.*

219. *Id.* at 40. Two pages earlier, in the paragraph immediately preceding the one quoted at *supra* text accompanying note 214, the brief had remarked, "[F]or the court to say that it cannot assume that the accused necessarily did not have a fair trial shows clearly that the Supreme Court of Arkansas was itself influenced by the same feeling that influenced the leaders of society throughout the region where these tragedies occurred." *Id.* at 38. Similarly, in recounting the factual misstatements discussed at *supra* note 156, the brief added that "the attitude of the court toward the case may be inferred" from their inclusion in the opinion. Brief for Appellants at 28, *Moore* (No. 199).

But the Arkansas statutory scheme "has made no provision of this kind . . .," leaving an applicant for a new trial "nothing but the empty right to have the facts upon which his application is based passed upon by the very judge whose conduct is complained of, and that, too, only at a time when the adverse influences, . . . must still be operative with all their force."²²⁰

The state filed its brief simultaneously.²²¹ In addition to setting out the *Frank* opinion practically verbatim,²²² this brief argued that the issues being presented to the Court had been before it previously on the unsuccessful application to Justice Holmes for a writ of error,²²³ so that "[a]ppellants are merely attempting to use a writ of habeas corpus to review alleged errors of law of the State Courts,"²²⁴ contrary to *Frank's* holding that habeas corpus "cannot be employed as a substitute for the writ of error."²²⁵ Petitioners would be entitled to habeas corpus only if the record were to "show on its face that the trial court was under the influence of mob domination . . . to such an extent that the effect thereof wrought a disillusion [sic] of the court. . . ."²²⁶ In addition, several of the affidavits annexed to the petition had never been before the state courts, and "[t]o sustain appellants' application . . . [on] said affidavits, would open an avenue for every person charged with a crime, to wait until he had exhausted his remedies in the State Courts [and] then open his masked batteries on the State Courts. . . ."²²⁷

220. *Id.* at 40.

221. Both documents bear clerk's file stamps of January 8, 1923. See also Abstract and Brief for Appellee at 1, *Moore v. Dempsey*, 261 U.S. 86 (1923) (No. 199) ("The appellee has not been favored with any abstract or brief on behalf of the appellants").

222. *Id.* at 73-90.

223. See *supra* text accompanying note 184.

224. Abstract and Brief for the Appellee, *supra* note 221, at 72-73.

225. *Id.* at 73 (quoting *Frank v. Magnum*, 237 U.S. 309, 326 (1915)). As indicated *supra* note 104, although *Frank* had been less than explicit in its treatment of the point, there was good reason to doubt that the quoted passage was as helpful to the state as its counsel probably believed when he arrived in Washington to argue the case. See *infra* text accompanying note 229 (describing the Court's response to oral argument of this issue). The Supreme Court's *Moore* opinion treated the question as *Frank* had—by rejecting the argument in silence, simply reiterating the general proposition that "mere mistakes of law in the course of a trial are not to be corrected" by habeas corpus. *Moore*, 261 U.S. at 91; see *infra* text accompanying note 238 (quoting remainder of this passage).

226. Abstract and Brief for the Appellee at 55, *Moore* (No. 199).

227. *Id.* at 91-92. See also *supra* text accompanying notes 209-10. This ground of

Our knowledge of the oral argument has been greatly enhanced by the research of Professor Richard C. Cortner, who uncovered two illuminating letters at the Wisconsin State Historical Society.²²⁸ The first, from an NAACP official to local counsel, summarizing the report of another NAACP official who was present, recounts:

[T]he worthy Attorney General of Arkansas, Mr. Uteley, in his nasal twang, set out . . . to argue the case before the Supreme Court as though he were talking to a petit jury in Phillips County. He started off by telling the court that it could do nothing else than throw out the cases because the attorneys for the appellants had made an error in attempting to bring the cases to that tribunal on a Writ of Habeas Corpus instead of on a Writ of Error. Mr. Justice Holmes sharply reprimanded Attorney General Uteley at that point asking him in amazement if the Attorney General meant to say that since the members of the jury, the presiding judge and every person involved in the original trial had figuratively and almost literally pistols pressed against their breasts demanding conviction of the defendants, the court had no right to enquire into whether or not the men had had a fair trial. All the Attorney General could do was to hastily disclaim any such statement which he did in a very embarrassed manner.

The only comment of any of the justices which savored of unfavorable opinion was that by Mr. Justice McReynolds from Tennessee. He said that undoubtedly the men had not received a fair trial but that he was not at all sure that the attorneys had properly handled the case. The cases lie "on the laps of the gods", but we here feel very optimistic as to the decision. I hope that we shall not be disappointed.²²⁹

complaint received no sympathy from any Justice in the ultimate decision, probably on the theory, strongly implicit in the first paragraph of the dissent, that the timing of the affidavits was—like their sources—simply another factor for the district court's consideration in determining whether to set the matter down for a hearing, rather than being a legal barrier to doing so. See generally *infra* text accompanying notes 240-42.

228. See CORTNER, *supra* note 131, at 152-53. These documents survive today in the form of typescripts made by a previous scholar, Arthur I. Waskow, of originals that are now lost. *Id.* at 201. Newspaper accounts of the argument included *Arkansas Riots Appeal Argued in Highest Court*, WASH. POST., Jan. 10, 1923, at 17; *Negroes Beg Lives of Supreme Court*, N.Y. TIMES, Jan. 10, 1923, at 12.

229. Letter from Walter F. White to Scipio A. Jones (Jan. 12, 1923) (on file with the Waskow Collection, Wisconsin State Historical Society, M76-358, Box 1, § 6 ("Ark-Trial")).

The second is from one of the counsel who argued the case for petitioners to the author of the previous letter:

I feel very hopeful for a reversal. The indications which I observed from the Court's remarks, made me feel that they were convinced of the equity of our plea. The only remark made during the whole proceeding which could be construed as in any way raising a question as to the possible outcome was made by Justice [Mc]Reynolds. He said that it appeared to be a rotten deal and that the only question was as to whether it was in their power to give the relief prayed for. Justice Holmes inquired of the Assistant Attorney General from Arkansas in this manner, "You do not contend that if the whole affair was a mere sham, that however regular the proceedings may have been, this Court would be deprived of the right of going into the case and granting the relief?".

Just as [co-counsel] was concluding, Justice Holmes said to him, "Your contention is that the whole procedure was one dominated by a mob and that the conditions surrounding the trial [were] such as to render the whole trial a nullity, and that under the decisions of this Court in such cases, we have the jurisdiction and it is our duty to give relief?" Judge Taft said to the attorney representing the State, during the argument, "Yes, but you demurred to the petition thereby admitting the allegations of the bill."

From this you will see that the indications were that the Court was not in sympathy with the claim of the State.

. . . In the limited time [allowed for my argument] I endeavored to get a mental picture in the minds of the Court as to the exact conditions in Arkansas. I told the Court that conditions had grown up there that were worse than before the Civil war; that I spoke from my knowledge gained during my 12 years experience as a legal representative of the Department of Justice. I then gave them an insight as to the brutality administered to the prisoners and then wound up with the treatment that was accorded my son, and the conduct of the Judge in getting him away from Helena; all showing that the conditions were such that it was preposterous to have imagined a fair trial was had.

I referred to the fact that wholesale murders on the part of the whites were committed by the killing of some 200 innocent negroes, and that not a single indictment had been returned; that if the influence of those in control of the Court was such as to prevent an indictment, the same influence was sufficient to indict and condemn the negroes that they had marked for execution.

[Co-counsel] told the Court that if the record did not warrant the relief demanded, that that part of the Constitution should be eliminated as it would mean nothing. [He] feels, as I do, very sanguine of success.²³⁰

After argument, Holmes circulated a draft opinion that is substantially similar to the one that was eventually published, having drawn minimal editorial comment from those prepared to join it.²³¹

Justice Van Devanter, who was home ill,²³² wrote to Chief Justice Taft,

I sent the opinion in the Arkansas habeas corpus case to Justice McReynolds. I could not well read the changes suggested, but they were read to me, and I rather doubt that there is enough in them to have any particular trouble about them. As you say, the opinion has been framed on a line which makes it almost impossible to write anything in that is worth while; and the more I think about it the more I am disposed to believe that the opinion will not constitute an unhappy precedent.²³³

Except for Brandeis,²³⁴ no majority Justice ever suggested,

230. Letter from U.S. Bratton to Walter F. White (Jan. 11, 1923), Waskow Collection, *supra* note 229.

231. Taft wrote back, simply, "I like this opinion much," a comment preserved in the copy of the opinion contained in Holmes' bound volumes in the Oliver Wendell Holmes, Jr., Papers, *supra* note 76. But, in a note also preserved in the Oliver Wendell Holmes, Jr., Papers, Brandeis, consistent with Taft's comment at oral argument, *see supra* text accompanying note 230, changed Holmes' reference in the penultimate sentence from "facts that seem incontrovertible" to the published, "facts admitted by the demurrer." *Moore v. Dempsey*, 261 U.S. 86, 92 (1923).

232. The source for this statement is a personal letter from Justice Van Devanter to Chief Justice Taft dated February 13, 1923, and found in the William Howard Taft Papers, *supra* note 130 (Reel 250). It is a separate document from the one bearing the same date that is quoted in the text and cited *infra* note 233.

233. Letter from Willis Van Devanter to William Howard Taft (Feb. 13, 1923), William Howard Taft Papers, *supra* note 130 (Reel 250).

234. *See infra* text accompanying note 270. In a letter on the day the case was decided, Brandeis commented to Frankfurter, *in toto*: "Holmes' Arkansas Case today is a satisfaction." Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 19, 1923), reprinted in *HALF BROTHER, HALF SON: THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER* 136 (Melvin I. Urofsky & David W. Levy eds., 1991). The editors identify the "Arkansas Case" as *Moore*, *id.* at n.2, altering their earlier view, expressed in 3 *LETTERS OF LOUIS D. BRANDEIS*, *supra* note 127, at 88 n.2, that the reference was to *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922). Since the date of the letter matches that of *Moore*, and is two and a half months later than that of *St. Louis Cotton Compress*, the change seems entirely sound.

either on or off the bench, so far as I am aware, that *Moore* represented an alteration in the law of habeas corpus.²³⁵ In particular, Holmes, the central figure in this drama who had freely expressed his distress over *Frank*,²³⁶ said virtually nothing about *Moore* in his correspondence, even while discussing other cases decided at the same time.²³⁷

The editors had previously believed that a reference to "the Frank tragedy" in Letter from Louis D. Brandeis to Felix Frankfurter (June 3, 1924), reprinted in 3 LETTERS OF LOUIS D. BRANDEIS, *supra* note 127, at 131, was to the Leo Frank case, see *id.* at n.6, but they now believe it to have been to Bobby Franks, the victim in the notorious murder case against Leopold and Loeb, see HALF BROTHER, HALF SON, *supra*, at 170 n.4; see also CLARENCE DARROW, THE STORY OF MY LIFE 226-43 (1932) (description of case by defense counsel); GILBERT GEIS & LEIGH B. BIENEN, CRIMES OF THE CENTURY 13-47 (1998) (summarizing case); MICHAEL S. LIEF ET AL., LADIES AND GENTLEMEN OF THE JURY 159-209 (1998) (summary of case followed by text of Darrow's closing argument); see generally Eric Pace, *Elmer Gertz, a Top Lawyer, Is Dead at 93; Won for Leopold, Ruby and Henry Miller*, N.Y. TIMES, Apr. 29, 2000, at C20 (describing prison death of Loeb in 1936 and release of Leopold in 1958). This latter view is far more convincing, both chronologically—as the letter was written at a time when the Leopold and Loeb case was active but nine years after Leo Frank was lynched—and substantively. Brandeis' comment is: "In the Frank tragedy it is, at least, a mercy that the victim was a Jew," HALF BROTHER, HALF SON, *supra*, at 170, which does not fit the facts of *Frank*.

235. In contrast, Justice Clarke, author of the far more obscure case of *Collins v. McDonald*, 258 U.S. 416 (1922) (unanimous), explained at length to Chief Justice Taft that writing an opinion to sustain the lower court's summary dismissal of a writ "gave me a great deal of trouble" because "lower courts treat such applications so very cavalierly now," Letter from John Clarke to William Howard Taft [undated, but March or April, 1922], William Howard Taft Papers, *supra* note 130 (Reel 249).

236. See *supra* text accompanying notes 113-15. For whatever relevance it may have, Holmes appears to have been generally stronger than at the time of *Frank*. See Letter from Louis D. Brandeis to Felix Frankfurter (Jan. 3, 1923), reprinted in HALF BROTHER, HALF SON, *supra* note 234, at 132 ("Holmes J. felt so perky yesterday that he insisted on getting out of the carriage yesterday to walk with me from 12th & H home. And he said today that he felt better for the walk."); Letter from Louis D. Brandeis to Alice Goldmark Brandeis (Feb. 4, 1923), reprinted in 3 LETTERS OF LOUIS D. BRANDEIS, *supra* note 127, at 87 ("Holmes J. . . . has finished for the printer his introduction to John Wigmore's book & read it to me. It is really good . . . and he seems in good form.").

237. Prior to the publication of the case, Holmes mentioned it in Letter from Oliver Wendell Holmes to Mrs. John C. (Nina L.) Gray (Jan. 20, 1923), Oliver Wendell Holmes, Jr., Papers, *supra* note 76 ("[J]ust now I have a case on burning themes, at which the boys have had their whack at the conference and which I must tinker to get by those who are shy and are inclined to kick. I think I can keep nearly all if not perhaps get all but it will need a little diplomatic adjustment."), and in Letter from Oliver Wendell Holmes to Frederick Pollock (Jan. 25, 1923), reprinted in HOLMES-POLLOCK LETTERS, *supra* note 113, at 110 (reporting that a case on "burning themes may go over for one of the JJ. or two, to consider wheth-

In any event, the published *Moore* opinion, representing the views of six Justices, consists principally of a summary of the allegations of the petition and a statement of the procedural history. Virtually the whole of its legal analysis is this:

In *Frank v. Mangum* . . . it was recognized of course that if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law. . . . We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights. . . .

er it shall be swallowed according to the majority or whether, as a child put it, they will swallow up.”).

After the opinion was published, Holmes seems not to have alluded to it in his correspondence, although he did discuss various other contemporary cases. See, e.g., Letter from Oliver Wendell Holmes to Felix Frankfurter (Feb. 14, 1923), reprinted in HOLMES & FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, at 154 (Robert M. Mennel & Christine M. Compston eds., 1996) (“I have just sent round an opinion in a Porto Rico case [*Diaz v. Gonzalez*, 261 U.S. 102 (1923)] that gives me a mild titillation.”); Letter from Alice Stopford Green to Oliver Wendell Holmes (May 6, 1923), Oliver Wendell Holmes, Jr., Papers, *supra* note 76 (thanking Holmes for sending her his dissent in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923)).

Indeed, he did not mention it even when a correspondent gave him an opening by asking for his views on a habeas corpus issue. Compare Letter from Harold J. Laski to Oliver Wendell Holmes (Feb. 11, 1923), reprinted in 1 HOLMES-LASKI LETTERS 482, 483 (Mark DeWolfe Howe ed., 1953) (describing case raising the question of whether habeas corpus follows British flag), with Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 1, 1923), reprinted in *id.* at 485 (replying, “I can say nothing profitable on the *habeas corpus* question.”).

An academic could speculate that Holmes may have believed that there was nothing especially remarkable about *Moore’s* treatment of *Frank* because Holmes entertained a general view that in writing opinions, “even if a judge thinks she is laying down a clear rule to govern future cases, it can really be no better than a prediction that future judges will follow that rule rather than distinguish it away or overturn it,” David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes’s The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1579 (1997).

We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.²³⁸

The dissent, written by Justice McReynolds and joined by Justice Sutherland, said that the "right and wholesome" doctrine of *Frank*, reached "after great consideration," should be applied rather than being put aside in favor of "the views expressed by the minority of the Court in that cause."²³⁹ On reviewing the record—including the low character of the affiants relied upon, the two prior applications to the Court,²⁴⁰ the fact that the American Legion and other protests to the Governor came a year after trial, and the actions of the Arkansas Supreme Court in twice reversing the convictions of the *Ware* defendants — the dissent found itself "unable to say that the District Judge, acquainted with local conditions,"²⁴¹ erred when he held the petition for the writ of *habeas corpus* insufficient. His duty was to consider the whole case and decide whether there appeared to be substantial reason for further proceedings."²⁴²

After the decision, which "produced relatively few editorial comments in the national press,"²⁴³ the momentum behind the Elaine riot cases began to dissipate. The *Ware* defendants were released after a court ruling that the prosecution had delayed too long in bringing them to trial.²⁴⁴ In light of this development and with neither side eager to actually push the federal habeas proceedings to a hearing,²⁴⁵ much less to undergo a

238. *Moore v. Dempsey*, 261 U.S. 86, 90-92 (1923).

239. *Moore*, 261 U.S. at 93 (McReynolds & Sutherland, JJ., dissenting).

240. I.e., the writ of error application to Justice Holmes, see *supra* text accompanying note 184, and the petition for *certiorari* described *supra* notes 185-87 and accompanying text.

241. This statement was factually incorrect. The regular district judge, a former resident of Phillips County, had recused himself on that basis, and the petition had in fact been ruled on by a District Judge from Oklahoma City. See CORTNER, *supra* note 131, at 131.

242. *Moore*, 261 U.S. at 101 (McReynolds & Sutherland, JJ., dissenting).

243. CORTNER, *supra* note 131, at 159.

244. See *Ware v. State*, 252 S.W. 934, 940 (1923); CORTNER, *supra* note 131, at 160-65.

245. On March 1, 1924, an order was entered dismissing the action for want of prosecution. See *Waterman & Overton*, *supra* note 138, at 122; see also Letter from

possible retrial of the underlying charges, a series of negotiated arrangements led to a gubernatorial order commuting the sentences of the *Moore* defendants to twelve years imprisonment and then to another, in January 1925, releasing them.²⁴⁶

V. THE LEGAL EXPLANATION

Legal scholars have long differed irreconcilably in their explanations of the disparate outcomes of *Frank* and *Moore* in the Supreme Court of the United States. There are three leading theories.

Paul M. Bator argues that the *Moore* "case is entirely consistent with *Frank*."²⁴⁷ The argument is that Frank lost because "the prisoner's allegations were considered by the Georgia Supreme Court under conditions which were concededly free from any suggestion of mob domination and found by that court, on independent inquiry, to be groundless,"²⁴⁸ while "in *Moore*, unlike in *Frank*, the state supreme court did not conduct any proceeding or make any inquiry into the truth of the allegations of mob domination, and made no findings with respect to them."²⁴⁹ Thus, *Frank* presented a situation in which the state courts had delivered "reasoned findings rationally reached through fair procedures," resulting in "a reasoned probability that justice was done," while in *Moore* there was "a conclusory and out-of-hand rejection by a state of a claim of violation of federal right, without any process of inquiry being afforded at all, [which] cannot insulate the merits of the question from the habeas corpus court."²⁵⁰

To Bator, then, the cases spoke to the scope of federal habeas corpus review²⁵¹ and were consistent.

Charles F. Cole, Clerk, United States District Court for the Eastern District of Arkansas, to Helen Newman, Librarian, Supreme Court of the United States, (Oct. 26, 1962) (William O. Douglas Papers, Library of Congress, Box 601, *Moore v. Dempsey* Folder).

246. See CORTNER, *supra* note 131, at 166-83. Of the 67 non-capital prisoners, all but eight had been freed by the summer of 1923, see *id.* at 166, and those eight were released by the Governor in December, 1924, see *id.* at 182.

247. Bator, *supra* note 9, at 489.

248. *Id.* at 485.

249. *Id.* at 488-89.

250. *Id.* at 487, 489.

251. *Id.* at 486 n.119 ("Mr. Justice Pitney makes clear that his entire reasoning

To Gary Peller, in contrast, the two cases dealt with the substantive requirements of due process. In *Frank*, "[b]y allowing a procedurally adequate state appellate hearing to satisfy due process requirements, the Court reduced the constitutional claims available to a state prisoner on direct Supreme Court, or habeas, review."²⁵² In *Moore*, "the due process doctrine of *Frank* was overturned," and the Court held that "regardless of the nature of the state's appellate review," an allegation of a mob-dominated trial stated a claim under the due process clause.²⁵³ Thus, the "dispositive difference between *Frank* and *Moore* was the Court's view of the requirements of the due process clause," with *Moore* returning "due process law to its pre-*Frank* state."²⁵⁴

Criticizing both of these views, Professor James S. Liebman finds that from "*Frank* to *Moore*, it was not habeas corpus or due process that changed, but rather federal question appellate review."²⁵⁵ In *Frank*, the question of mob domination was treated as one of fact and therefore not to be reviewed in a federal appellate court, on direct appeal or habeas corpus, whereas in *Moore* the majority accepted the view that Justice Holmes had articulated in his *Frank* dissent and characterized the issue as a "mixed question"; then, applying in the criminal context a doctrine of appellate review it had already articulated in the realm of economic liberties, it granted de novo review.²⁵⁶

While each of these views captures important thoughts connected to the cases, none of them is fully explanatory. Bator's view fails to come to grips with the fact that, even in *Frank*, it was agreed on all hands that, regardless of the state processes,

is in the context of habeas corpus, which he carefully differentiates from ordinary appeal. . . . Certainly any holding that on direct review the Supreme Court does not have plenary jurisdiction . . . would have been a startling reversal of the law established by *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)". See *supra* note 9 (observing that Bator's theory appears to have the support of three current Justices).

252. Peller, *supra* note 8, at 646.

253. *Id.* at 646-47.

254. *Id.* at 648.

255. James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2081 (1992).

256. See *id.* at 2079-80; see also LIEBMAN & HERTZ, *supra* note 7, at 64-65. Cf. *supra* note 113 (recording Holmes' concern at time of *Frank* that the Court was wrongly valuing economic rights over fundamental civil liberties).

the federal court *could* examine the merits; the disagreement was over whether it *should* do so. Peller, as Liebman points out,²⁵⁷ fails to recognize that all Justices in both cases agreed that actual mob intimidation of a jury was a due process violation, and his additional statement that *Moore* returned due process law to its pre-*Frank* state on this point is unsupported by the authority cited.

Liebman, perhaps misled by Holmes' elaboration for rhetorical reasons in *Frank* of a point on which there was in fact no disagreement,²⁵⁸ fails to recognize that all Justices considered the issue of mob domination to be one of fact.²⁵⁹ Moreover—in the most important holding of *Frank*, whose poor reputation among friends of habeas corpus surely owes more to the drama of the surrounding facts than to the legal doctrine it articulated—all the Justices recognized the power of the district court to conduct an independent investigation of the facts.²⁶⁰ But in neither *Frank* nor *Moore* was the Court engaged in appellate re-

257. See Liebman, *supra* note 255, at 2079.

258. See *supra* text accompanying note 108.

259. See *Frank v. Magnum*, 237 U.S. 309, 335 (1915) ("We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.").

260. Compare *Frank*, 237 U.S. at 332 ("The District Court having considered the case upon the face of the petition, we must do the same, treating it as if demurred to by the sheriff. There is no doubt of the jurisdiction to issue the writ of *habeas corpus*. The question is as to the propriety of issuing it in the present case. . . . Now the obligation resting upon us, as upon the District Court, [is] to look through the form and into the very heart and substance of the matter . . .") with *id.* at 345 (Holmes & Hughes, JJ., dissenting) ("The only question before us is whether the petition shows on its face that the writ of *habeas corpus* should be denied, or whether the District Court should have proceeded to try the facts.").

This decision represents a unanimous rejection of the government's argument, see *supra* note 95 and accompanying text, that habeas corpus could be granted only for jurisdictional defects appearing on the face of the record, and the District Court lacked power to receive oral evidence. See *supra* note 102 and accompanying text.

The Court has subsequently so read *Frank*. See *Peyton v. Rowe*, 391 U.S. 54, 59-60 (1968) (unanimous) ("[A]t least tentatively in *Frank* . . . and more clearly in *Moore* . . . , this Court had recognized that a district court was authorized to look behind the bare record of a trial proceeding and conduct a factual hearing to determine the merits of alleged deprivations of constitutional rights.").

view of lower court findings of fact; in both, it was reviewing the summary dismissal of a petition and deciding whether there should be a hearing—a purely legal question.²⁶¹

And to that purely legal question of when the district court should exercise its conceded power, the answer was frustrating but clear: it depends. More formally, the Court unanimously agreed in *Frank* that the decision to invoke the power to conduct a plenary hearing was a discretionary one. One factor in the exercise of discretion was to be the procedural rigor of the state's appellate process. Another was to be the outcome of that process. For the majority, the completeness of the record supplied by the petitioner was another. Others were left unstated, but plainly existed.²⁶²

The Supreme Court split in *Frank* occurred only when, proceeding on a *de novo* basis,²⁶³ it applied its discretion to the facts at hand. The majority believed that, on balance, a hearing

261. Professor Liebman, *supra* note 255, at 2080 n.503, discerns a difference "between the Court's deferential review of the mob domination issue" and its "*de novo* review" of Frank's claim of absence from the verdict. In truth, both were treated the same way and given the plenary review appropriate to legal issues: In the first instance, "was the petition properly dismissed?" and in the second "does this state a constitutional claim?". All Justices agreed that the answer to this second question was "no," and Justices Holmes and Hughes had wanted to grant Frank's application for a writ of error so as to review it as a non-constitutional legal question. See *supra* note 105.

My discussion is not meant to cast any doubt upon—indeed, I believe it supports—Professor Liebman's broader, and excellently documented, thesis locating *Frank* at the starting point of a period of "reinvigorated habeas corpus review" for state prisoners responsive to the diminishing efficacy of the Court's review of their claims by writ of error. See 1 LIEBMAN & HERTZ, *supra* note 7, § 2.4e, at 72; *supra* note 104.

262. See Comment, *Mob-Domination of State Courts and Federal Review by Habeas Corpus*, 33 YALE L.J. 82, 84 (1923) (suggesting that embarrassment to foreign relations might be an example). Cf. Charles H. Watson, *Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens*, 25 YALE L.J. 561, 578 & n.22 (1916) (reporting Taft's support of such legislation against states' rights objection). See generally Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 576-77 & nn.151-52 (2000) (describing importance of habeas corpus to protection of national diplomatic interests).

263. In the special context of habeas corpus, the Supreme Court had long before *Frank* established the rule that it would examine the evidence and "proceed to do that which the court below ought to have done." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 114 (1807). See Freedman, *supra* note 262, at 566, 572-74.

should not be held; the dissenters believed the opposite. The split was not over the rule, but over its application.

This explanation is consistent with the known facts. It is consistent with the language of *Frank* and with the arguments that counsel made in that case. It is consistent with the state's concession on oral argument in *Moore* that the district court could inquire into the facts.²⁶⁴ It is consistent with both opinions in *Moore*—the majority, which reiterates and applies the rule that a corrective state appellate process is one factor to be considered, but holds that other circumstances had greater weight in the case at hand²⁶⁵—and the dissent, which states that the duty of the district judge “was to consider the whole case and decide whether there appeared to be substantial reason for further proceedings.”²⁶⁶

All the Justices in *Moore* not only stated, but acted as though, they were simply applying the established law. And that phenomenon makes sense if one takes the established law as being that the decision at hand was discretionary.²⁶⁷ Of course, on that view, the *Moore* Court would have been applying the

264. See *supra* text accompanying note 229. As that account indicates, counsel seems to have sensed that this was a concession he had to make—otherwise, he would have stuck to the position in his brief that the only question before the Court was whether the record showed on its face that the trial court was dominated by the mob, see *supra* text accompanying note 226.

265. This is the meaning of the otherwise cryptic sentence: “We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself,” *Moore v. Dempsey*, 261 U.S. 86, 92 (1923).

266. *Moore*, 261 U.S. at 101 (McReynolds & Sutherland, JJ., dissenting). Again, the split was over rule application, and the “doctrine” of the *Frank* case being appealed to was simply the weight to be placed on the various discretionary factors presented.

The argument set forth in the text is consistent with that made by Justice Harlan in *Fay v. Noia*, 372 U.S. 391, 457-58 (1963) (Harlan, J., dissenting) (“[*Moore*] cannot be taken to have overruled *Frank*; it did not purport to do so, and indeed it was joined by two Justices who had joined in the *Frank* opinion. Rather, what the Court appears to have held was that the state appellate court’s perfunctory treatment of the question of mob domination . . . was not in fact acceptable corrective process and federal habeas corpus would therefore lie to consider the merits of the claim.”). See also *supra* note 9.

267. Admittedly, counsel for the *Moore* petitioners, although urging the Court to act on a realistic appraisal of the overall situation, see *supra* text accompanying note 213, seems to have read *Frank* in a way more closely akin to the way Bator does, see *supra* text accompanying notes 214-20.

established law even if every Justice on it would have decided *Frank* the other way. This might suggest as an objection to my argument that the rule it proposes is so broad as to be meaningless. But that is not an objection to the accuracy of the rule—although it certainly does indicate that the standard for decision is one which (like “the level of care customarily exercised by an ordinarily prudent person”) may be less than useful for predictive purposes.

The next Section considers this and related problems.

VI. INTEGRATING LEGAL AND HISTORICAL EXPLANATIONS

The attempt to “explain” the differing results in *Frank* and *Moore* poses concretely the issue of what we are doing in our everyday dealing with cases, and why.

The tension between *Frank* and *Moore* was evident as soon as the latter case was decided,²⁶⁸ which is hardly surprising in view of Justice McReynolds’ dissent. A few months later, Felix Frankfurter asked Justice Brandeis²⁶⁹ how it had come about that the “Frank case was departed from.” The Justice replied, “Well—Pitney was gone, the late Chief was gone, Day was gone—the Court had changed.”²⁷⁰

268. See Letter from Louis Marshall to Walter White (Mar. 12, 1923), reprinted in LOUIS MARSHALL: CHAMPION OF LIBERTY, *supra* note 60, at 316 (commenting, “The stone that the builders rejected has now become the chief of the corner,” [Psalms 118:22]); Letter from Walter White to Louis Marshall (Mar. 13, 1923), NAACP Papers, Library of Congress, Box C-155 (In reply, Assistant Secretary of the NAACP comments “that the Supreme Court has reversed itself in effect in contrasting this decision with that in the case of Leo Frank.”); Letter from Louis Marshall to Walter White (Mar. 19, 1923), *supra* note 215 (continuing, after passage quoted in *id.*, “The fact is that the Supreme Court overruled its former decision, and the great value of the later decision lies in that fact and not in any assumed difference between the two cases.”). See also Note, *supra* note 3, at 248 (describing cases as presenting “strikingly similar circumstances”).

I am grateful to Professor Cortner for assisting me in establishing that White’s letter to Marshall of Mar. 13, 1923, *supra*, is the same one that is erroneously stated in CORTNER, *supra* note 131, at 222 n.14 to be located in Box D-44 of the NAACP Papers.

269. For a sketch of the relationship between Frankfurter and Brandeis, see HALF BROTHER, HALF SON, *supra* note 234, at 3-6.

270. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 316 (conversation of July 3, 1923) (footnotes omitted).

Without recorded pause, he continued with some general ruminations, not seemingly linked to *Moore* in particular:

Pitney had a great sense of justice affected by Presbyterianism but no imagination whatever. And then he was much influenced by his experience & he had had mighty little . . .

The new men—P.B. [Pierce Butler] & Sanford—are still very new. It takes three or four years to find oneself easily in the movements of the [Supreme] Court. Sanford's mind gives one blurs; it does not clearly register. Taft is the worst sinner in wanting to "settle things" by deciding them when we ought not to, as a matter of jurisdiction. He says, 'we will have to decide it sooner or later & better now.' I frequently remind them of *Dred Scott* case—Sutherland also had to be held in check. McR. [McReynolds] cares more about jurisdictional restraints than any of them—Holmes is beginning to see it.

Of course there are all sorts of considerations that affect one in dissenting—there is a limit to the frequency with which you can do it, without exasperating men; then there may not be time, e.g. Holmes shoots them down so quickly & is disturbed if you hold him up;²⁷¹ then you may have a very important case of your own as to which you do not want to antagonize on a less important case etc. etc.

McR. is a very extraordinary personality—what matters most to him are personal relations, the affections. He is a *Naturmensch*—he has very tender affections & correspondingly hates. He treated Pitney like a dog—used to say the cruelest things to him . . . But no one feels more P's sufferings now—not as a matter of remorse but merely a sensitiveness to pain. He is a lonely person, has few real friends, is very dilatory in his work.²⁷²

What is revealing here, of course, is the extent to which Justice Brandeis locates the influences affecting the work of the Court almost everywhere but in legal considerations.²⁷³

271. See also *id.* at 315 ("I wanted to have rule adopted that no case is to go down until eight days after opinion is circulated . . . Holmes was one of [the] seniors against that—he would be miserable for eight days—he's worry all the time. He can't wait after he circulates his opinions, to have them back and "to shoot them off.").

272. *Id.* at 316-17 (footnotes omitted).

273. This is consistent with the views he expressed throughout the conversations, ranging over a number of years of the Court's work. Indeed, two days earlier, he had told Frankfurter, "you must constantly bear in mind the large part played by

In one sense, Brandeis' explanation—with its emphasis on the ephemeral contingencies of quotidian reality—may come closest to capturing as accurately as we can why a particular Court decision turned out as it did.²⁷⁴

Yet the adventitious features of decisions and decisionmakers are just the factors that the rules of legal discourse prohibit from being used as explanatory factors.²⁷⁵ And these rules serve important values: They force legal argument to rest on generally accessible data and facially neutral considerations. Moreover, such a paradigm responds to the powerful instinct—shared by pigeons²⁷⁶ and people alike,²⁷⁷ and doubtless particularly strong in legal actors—to find that the forces exercising power in one's environment are rational, predictable, and perhaps controllable.

personal considerations & inadequacy of consideration." *Id.* at 315 (conversation of July 1, 1923). See PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 364-71 (1984) (describing how Brandeis used this insight to persuade colleagues to his viewpoint).

274. On a different plane, the Court decision itself will freeze past reality in a way that may or may not correspond to anything that ever actually happened. The adjudicated "facts" shape future legal discourse about a case independently of whether any observer other than the decisionmaker would agree that the historical events were as described. Thus, for example, the effect of the decision described *supra* at text accompanying note 56 was to render a good number of real-world happenings, see *supra* note 48, non-existent from a legal point of view.

275. See Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311 (1999) (considering rationale for this prohibition). As Professor Liebman has pointed out to me in reading this Article in draft, a number of those factors would tend to support the conclusion that Moore and Frank were significantly different, notably the shared sense of Frankfurter and Brandeis (not to mention Marshall, see *supra* note 268) that the mere factual distinctions between the cases were insufficient to explain the differing outcomes. One could then read the Moore dissent and Holmes' distress over Frank as indicating the views of the Justices involved that an important doctrinal change was taking place.

276. See B.F. Skinner, "Superstition" in the Pigeon, 38 J. EXPERIMENTAL PSYCHOL. 168, 171-72 (1948).

277. See generally Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-61 (1897). For a historical reconsideration of this much-discussed essay, see David J. Seipp, *Holmes's Path*, 77 B.U. L. REV. 515 (1997). Its jurisprudential contribution was been the subject of several centennial symposia, including one centered around Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353 (1997) and Symposium, *The Path of the Law 100 Years Later: Holmes's Influence on Modern Jurisprudence*, 63 BROOK. L. REV. 1 (1997); see also Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691 (1997) (commenting on the latter symposium).

Perhaps the way to give both the aleatory and rational factors their due is to view the matter from the perspective of the future. As time passes, the force of contingent contemporary pressures fades, and legal rules must prove their merits on other grounds. At the time it is rendered, the immediate personal and political context of any Supreme Court opinion will naturally have primacy in the understandings of contemporary actors. But the individuals involved—the litigants, the lawyers, and even the scholars—will die. And as the passions and memories of the contemporary context fade, they will have less and less influence on the opinion's survival, which will depend increasingly on its intellectual and practical power as a tool of persuasion in the context of new controversies. In short, what is left will be legal argument—although, to be sure, it will hopefully be legal argument enriched by a knowledge of history.²⁷⁸

Thus, to say that one legal theory or another provides a more persuasive explanation for the differing outcomes of *Frank* and *Moore* is to say a good deal, even if one is thinking historically.²⁷⁹ For it is that explanation—and not the one closer to capturing the texture of the contemporary events of the past in the Brandeis sense—that is likely to have the most impact on the future.

278. I sidestep at this point as being tangential to the argument at hand the persisting complaints from historians that history as practiced by lawyers and legal scholars alike is simply a search for scraps of data to support pre-conceived positions, rather than an honest effort to recreate the past. See, e.g., Michael Bellesiles, *Suicide Pact: New Readings of the Second Amendment*, 16 CONST. COMM. 247, 247-250 (1999); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 524-25 (1995); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 934 (1996). Cf. Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 124 (1997) (arguing that "we should recognize that both . . . lawyers' legal history and historians' legal history, are valuable."). See generally Paul Horwitz, *The Past Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459 (1997); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809 (1997).

279. This is particularly the case because one aspect of a legally persuasive argument is accounting for known historical events—including, but not limited to, the outcomes of cases—more persuasively than competing attempts at reconciling the same data.

Intriguingly, recent work in history in fields remote from law is beginning to grapple with the same questions. See PAUL A. COHEN, *HISTORY IN THREE KEYS: THE BOXERS AS EVENT, EXPERIENCE, AND MYTH* 294-95 (1997).

As Holmes recognized,²⁸⁰ however, this insight may be of limited use to legal actors who consider the brevity of their own lifespans, particularly to those legal actors who must put bread on the table through legal practice while awaiting the vindication of history.²⁸¹ Fortunately, even over the shorter term, law is at least an element in outcome of decisions and therefore entitled to some predictive weight. And even the broadest of legal rules gain predictive power as they are applied in decided cases to specific fact patterns and as their underlying principles are explored through legal and public dialogue.

To be sure, no legal actor—not even the judge making the ruling—can know with precision just how decisive an element legal principles are in the decision of cases.²⁸² In the field of

280. See Thomas C. Grey, *Plotting the Path of Law*, 63 BROOK. L. REV. 19, 56 (1997).

281. Cf. James L. Robertson, *From the Bench: Reality on Appeal*, 17 LITIG. 3 (1990) (State Supreme Court Justice urges appellate advocates who want to win to create book containing extensive background information on each judge who will hear case). For similar advice from federal Circuit Court judges, see Myron H. Bright, *How to Succeed on Appeal: A View From the Bench*, 27 TRIAL 67, 67 (1991); Albert J. Engel, *Oral Advocacy at the Appellate Level*, 12 U. TOL. L. REV. 463, 467 (1981).

282. The attempt to quantify, in testable terms, the degree to which Supreme Court votes are determined by precedent as opposed to Justice' policy preferences has recently occupied a good deal of attention among political scientists, see e.g., HAROLD I. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (1999), reviewed by Donald R. Songer, *Book Review*, 93 AM. POL. SCI. REV. 983 (1999). An extensive forum on the subject appeared at 40 AM. J. POL. SCI. 971-1082 (1996), and some of the key debaters subsequently presented their views at book length in LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998), reviewed by Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511 (1998).

For a general overview of the political science research, emphasizing how far it has yet to go to achieve a satisfactory level of explanation for judicial behavior, see LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997); see also Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490, 496 (1996) (noting weakness of public choice theory to explain judicial action); see generally Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2155-58 (1998) (reviewing and critiquing scholarship on extent to which Supreme Court doctrine controls lower court decisionmaking); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998). There is a comprehensive list of references at James F. Sprigg, et al., *Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts*, 61 J. POL. 485, 503-06 (1999).

habeas corpus, it may well be that most accurate way to predict outcomes over the last fifteen years would have been uniformly to place the bet that the petitioner would lose,²⁸³ just as it may be that the most statistically accurate way to predict the outcome of cases in general would be to bet on a victory for the party with the most money.

But, even if entirely true as statistical generalizations, these insights would be of limited use, not just because they would have so little predictive power as applied to individual cases, not just because they would tend to rob the work of legal actors of meaning (and economic reward),²⁸⁴ but because to act on the insights would be to deny the larger truth that—over both the shorter and the longer term—law, as a human creation, changes. And it changes because of the efforts of individuals.²⁸⁵

And that is why, to conclude with Holmes, the law offers all of its acolytes "the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtle [sic] rapture of a postponed power."²⁸⁶

For an initial attempt at locating this body of work within legal norms, see Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999).

283. Cf. *Florida v. Meyers*, 466 U.S. 380, 386 (1984) (per curiam) (Stevens, J., dissenting) ("Since the beginning of the October 1981 Term, the Court has decided in summary fashion 19 cases, including this one, concerning the constitutional rights of persons accused or convicted of crimes. All 19 were decided on the petition of the warden or prosecutor, and in all he was successful in obtaining reversal of a decision upholding a claim of constitutional right.").

284. In this sense, everyone professionally involved in the system shares an interest in the viewpoint that it works in accordance with accessible legal rules.

285. Cf. Eric M. Freedman, *Book Review*, 48 BROOK. L. REV. 391, 394 (1982) (criticizing as "defeatist" liberal critics of the Burger Court who were content to do no more than "to hope that in due course a new majority will render more desirable opinions").

286. O.W. HOLMES, *The Profession of the Law*, in COLLECTED LEGAL PAPERS 29, 32 (1921).