JURY DISCRIMINATION

THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI

CHRISTOPHER WALDREP

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This series explores the ways in which law has affected the development of the southern United States and in turn the ways the history of the South has affected the development of American law. Volumes in the series focus on a specific aspect of the law, such as slave law or civil rights legislation, or on a broader topic of historical significance to the development of the legal system in the region, such as issues of constitutional history and of law and society, comparative analyses with other legal systems, and biographical studies of influential southern jurists and lawyers.

Jury Discrimination

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Introduction

THE CROSS-EXAMINATION BEGAN WITH the basics. "Your name is P. C. Dowan?" the white lawyer asked. That was not quite right, and Pinkard C. Dowans pointed out that his name ended with an *s*. Pride in his name had brought Dowans to court in the first place. In 1909, when he testified, Dowans had been a grand lecturer of the Colored Knights of the Pythians for four years. Traveling from one Mississippi black fraternal organization to the next, Dowans helped formulate and spread the values that tied black fraternalists together. Dowans not only preached moral values, but he also made the contacts that allowed blacks across Mississippi to form social networks, organize collective identities, and pool resources to counter white efforts to disparage, oppress, and marginalize them.[1]

Dowans was in court because he had been denounced as "unmanly, unchristian, and ungentlemanly . . . unfit to be a member of the Pythian and Calanthian Order" by the *Calanthian Journal*, a newspaper published by a fraternal organization called the Court of Calanthe. Fraternal organizations paid Dowans's speaking fees based on their assessment of his moral character. The *Calanthian Journal* article appeared on November 28, 1908. Thereafter, Dowans's speaking invitations dried up, cutting off his income. Dowans sued its sponsor, the Court of Calanthe.

When questioned by his own lawyer, Dowans had described himself as a fifty-year resident of Vicksburg and a former schoolteacher. He was, in short, a person worthy of respect with a reputation worth money.

Edward N. Scudder represented the Court of Calanthe. Born in 1861, Scudder had not fought in the Civil War, but at the time he confronted Dowans, he was serving in the Sons of Confederate Veterans (SCV) as an assistant judge advocate general. Later he became a division commander and a member of the SCV's executive council. The trial transcript of Dowans's case described him as "Col. Scudder." According to his daughter, he served

as captain (not colonel) in the Issaquena Guards, an all-white militia group most certainly formed to intimidate blacks. At the time of Dowans's trial, Scudder lived north of Vicksburg, in Issaquena County, an area he had once represented in the state senate. He had served only one term, but in that time he made a signal contribution to Mississippi culture. In 1894, he had joined the senate committee organized to design a new state flag for Mississippi. This was four years after whites ousted blacks entirely from jury lists and almost entirely from voting rolls. Scudder celebrated this accomplishment by designing a flag with three broad stripes intended to recall the Confederate Stars and Bars flag. To make his commitment to triumphant white supremacy even clearer, Scudder placed the Confederate battle flag in the new state flag's upper left corner. In 1924, Scudder's daughter, Fayssoux, wrote that her father had told her "that it was a simple matter for him to design the flag because he wanted to perpetuate in a legal and lasting way that dear battle flag under which so many of [Mississippi's] people had so gloriously fought."[2] Now, in 1909, the designer of Mississippi's pro-Confederate state flag confronted the man who may well have been the first black juror in the state after Reconstruction.

Scudder approached his target gingerly. "You have been a school teacher in this County?" he asked.

"Yes sir and served in this court here a long time in juries and bailiff in this court." Dowans must have held this information back to catch Scudder off guard. Now he revealed that court officials had so trusted him that they made him a bailiff and allowed him to sit on juries. Scudder's next question suggested that he could not imagine that any black man could serve on a jury after whites had regained power and passed laws to keep blacks from voting.

"Those were the old black and tan days when they used to have and elect Republican Sheriffs?"

White Southerners derided the period after the Civil War as "the old black and tan days," a brief and, from their point of view, entirely unsuccessful experiment with biracialism when black people and white, or "tan," people voted and sat together in the legislature and on juries. For a white man in 1909, the black and tan days were of historical interest only, a distant memory from a thoroughly discredited time. In those days, as bailiff, Dowans had sometimes selected the bystanders who served on juries. But now Dowans answered that he had been on juries much more recently than during Reconstruction.

"Last year," he said, "I served right here."

Scudder found that hard to believe. He tried to break down Dowans's claim by asking for details: "In which court?"

"This court right here."

Scudder pressed harder. "What case did you get to try?"

Dowans had no trouble answering that question. "Of Mr. Wright; Wright brothers."

Dowans was not lying. On April 22, 1907, Warren County's circuit court organized eight panels of thirty potential jurors, one for each week of its term. The circuit clerk wrote each man's name in his big minute book, not identifying any by race. The second name in the first panel was "P. C. Downs." Not all the men called for jury duty actually served. Later in the same term, a black man whom the clerk identified as "Jeff. Prentes" came to court as a potential juror, but there is no evidence that he stayed long or received pay for his jury service. He never sat on a jury. Later, on the same day that Dowans came to court as a potential juror, the court heard the case of *Merchants and Planters Packet Company v. Wright Brothers*, a suit for debt. The jury heard the evidence and arguments and deliberated, but could not reach a verdict. The next day they tried again but still could not agree. The clerk identified the jurors only as "J. E. Whitaker and eleven others," but Dowans had to be one of the eleven others as he claimed because on April 26 the court paid him for five days' jury service and two miles of travel. He received $12.60. The official record validated Dowans's claim.[3]

Defeated, Scudder moved on to other topics, but Dowans won his case. The jury, though entirely white, found in his favor.[4]

Dowans's lawsuit was an obscure litigation over a forgotten man's pride and reputation in a small town deep in the Mississippi Delta. Nonetheless, Dowans's testimony seems to document the impossible. White Southerners kept blacks off juries because they understood that jury service represented rights both political and civil. Dowans and Scudder dueled over jury service as a form of democratic participation in the operations of government, akin to voting. Justice Anthony Kennedy has recently recognized the long-standing link between voting and jury service. Both had long offered a path toward democratic participation in government, he said. "Jury service," he wrote, "is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." Kennedy then went on to say that both Congress and the Supreme Court had recognized this in the nineteenth

century.[5] Scholars look at voting more often than jury service, but it is worth noting that white Southerners guarded their juries more strictly than their voting booths. In every southern state, a handful of blacks managed to vote, but whites tried very hard to keep every last black person off their juries. The import is clear: a few votes did not really matter, but the power to investigate and define crime and determine guilt did.

The impulse to discriminate has been nearly universal throughout American history. Jury discrimination, in fact, has been so common that it is hard to dispute James Oldham, who dismisses the idea of a jury of peers as always "a fairy tale."[6] True, but it would also be accurate to call it an ideal even if it is one not always realized, like all constitutional principles. For defendants from despised groups, trapped in the midst of pervasive prejudice, the power of that ideal determined their chances at something like a fair trial. In some places, at some moments, some judges tried to live up to the ideal. For example, in 1870, a Wyoming territorial judge placed women on a grand jury because, he said, women had been "the victim of the vices, crimes and immoralities of man" tolerated by government for too long. Government should allow women on juries so they could protect themselves, he said.[7] The ideal gave hope to the oppressed. At her 1873 trial for illegal voting, Susan B. Anthony argued that disfranchised women could not get a fair trial from a jury made up entirely of enfranchised male jurors. Such men were not her peers, she said and charged that the state put them on her jury as a device to oppress her, depriving her of jurors who might understand her plight.[8]

Though no book-length examination of how the juries came to be all-white exists, few historians would doubt that the American habit of restricting jury service to white men has played an important role in shaping the nation's racial history.[9] In 1955, defense attorney John Whitten told the jury trying the murderers of Emmett Till, "[I am sure that] every last Anglo-Saxon one of you men on this jury has the courage to set these men free." They did.[10] From the Civil War to the period of the civil rights struggle, numerous trials sustained segregation, lynching, and discrimination. In examining such instances, scholars routinely observe that all-white juries decided the cases without asking how those juries got to be so white. Perhaps the answer seems obvious: they were the result of entrenched local prejudice that the nation could not overcome.[11] The answer, however, is obvious only if we assume that the Supreme Court played no independent role in preserving white dominance. Many historians assume precisely that: in his

great book on Reconstruction, Eric Foner observes that in deciding Reconstruction cases the Supreme Court responded "to the shifting currents of Northern public opinion."[12]

It is the argument here that the great difficulty early twentieth-century Mississippi blacks faced as they agitated for trial by jury and juries of their peers can be accounted for by the U.S. Supreme Court's actions after the Civil War. The justices debated the possibility of deferring to public opinion and, if so, to which kind of public opinion. This opinion would be white, of course—that they did not debate—but even defined as white, opinion took more than one form. One kind was indeed a shifting current, fleeting, transient, poisoned by racial prejudice, but there were more deeply imagined and more permanent values that also came from the public, what historians call "memory." Memory is popular historical consciousness, the lessons ordinary people derive from their past, narratives that legitimize or challenge current practices.[13] The U.S. Supreme Court broached the problem of its power over state jury-selection procedures after centuries of debate over who should be allowed onto juries. This history established a powerful mythology, national in scope: defendants should be tried by a jury of their peers. After the Civil War, when freed people became citizens, this sentiment conflicted with other, white, interests. White people had an economic interest in keeping black laborers under strict and sometimes violent control in ways that could not withstand serious scrutiny by fairly selected juries. Despite its considerable abstract popular appeal, the sentiment had been so contested during the Civil War era that the Court had considerable latitude when making its rules. In choosing interest over sentiment, the Court sided with the supposed wisdom of crowds over memory.[14]

Yet that memory persisted. At the bottom of the Mississippi Delta, a peculiar confluence of cultural, political, social, and constitutional forces converged with small-town politics to produce two lawyers, one black and one white, both determined together to crack Mississippi's all-white jury system. They, and everyone else in their world, worked according to rules set by the Supreme Court. Had the Supreme Court set different evidentiary rules, making it easier to prove discrimination, there might have been tens of thousands of black jurors throughout the nation at the time when whites tried to make and enforce segregation laws. Instead, only a very few served and only for a few months. That a white native of Mississippi could partner with a black civil rights leader to break through Mississippi law and prejudice to get blacks admitted to juries at all suggests that legal

reasoning plausibly founded on constitutional principle could trump even the most stubbornly prejudiced public opinion. Anyone who thinks that the Supreme Court could not possibly overcome racial practices in the South should consider Willis Mollison and Dabney Marshall's success in Mississippi. Why this success was so hard to achieve and so rare and how it could happen at all are the subjects of this book.

CHAPTER ONE

Making the Fairy Tale

THOMAS DABNEY MARSHALL WAS BORN *on his father's plantation November 20, 1860, two weeks after Abraham Lincoln's election to the presidency. The Marshalls did not vote for Lincoln—his name was not on the ballot in Mississippi. There is no surviving record of their vote, but the Marshalls adamantly opposed secession, and most voters in and around Vicksburg voted Whig and then Constitutional Unionist. Dabney Marshall's parents almost certainly supported John Bell, the Constitutional Unionist candidate. Dabney's uncle went to Mississippi's secession convention, on every roll call stubbornly voting not to secede despite heckling and jeers from his fellow delegates and the crowd watching the proceedings. It is tempting to conclude that Marshall's family history of unionism explains—at least in part—his later commitment to blacks' civil rights and his willingness to call on federal authorities to protect them.*[1]

At the University of Mississippi, Marshall's professor L. Q. C. Lamar challenged his commitment to national rights. Lamar, the bête noire of Marshall's uncle at the secession convention, had been a leading congressional opponent of the 1875 Civil Rights Act, which he denounced as an invasion of state sovereignty. Even as a child, Marshall seemed precocious, perhaps brilliant, and Lamar could not shake his commitment to national patriotism. Dabney graduated in 1882 with honors and returned to Vicksburg filled with literary erudition and scholarly knowledge and speaking French. At Vicksburg's Fourth of July celebrations, he made speeches celebrating northern soldiers' valor along with the Southerners'.

Despite Marshall's remarkable commitment to the Union, it is more likely that history—what James Oldham has called "the fairy tale," the popular notion that defendants have a right to be tried by a jury of their peers—hardened

this southern-born white man's ambition to litigate on behalf of black rights. The term "fairy tale" suggests a delusion or a myth in the minds of poorly informed citizens, something no experienced lawyer would take seriously, but it was too real for white Mississippians to entirely ignore. The myth had power for being so old. In medieval English legal treatises, but also in ballads, folktales, and doggerel—the kind of texts written and consumed by ordinary folk—citizens came to expect a jury of their peers as a "right." Against state laws, adverse court decisions, and intractable racial prejudice, Dabney Marshall went into battle armed with nothing more than a fairy tale.

Fortunately, it was a powerful tale; unfortunately for Marshall, it also was one shot through with troubling complications. The state of Mississippi might well cite it to show that the provinces—the states—had long controlled who could sit on juries. In the heroic story of jurors' independence, it was the Crown and the Parliament against whom local jurors fought, not neighborhood prejudice. They proudly brought that independence into court to stand against the central authority. For Dabney Marshall, however, that same independence was not so helpful. He needed to fight against his neighbors' prejudices with national rights enforced by national power.

Before the Declaration of Independence and the U.S. Constitution, people in the Atlantic world had already discovered through a long and complex process stretching over centuries that trial by jury was a meaningful right only when juries had a measure of independence from centralized governmental power. Jurors could represent the king or their neighbors, but there was a natural tension between the two, between the national and the local. To represent their neighbors, jurors had to at least seem to reflect the diversity of their communities. This truth took root in historical memory, mythology, and stories about the past, narratives that gave Americans tools against which they could measure the Constitution and other formal texts produced by the government.

One common story credits the origins of trial by jury to an aggressive and centralizing monarchy. In 1086, when the king of England decided to inventory his possessions, he dispatched subordinates into the countryside to summon men from throughout the kingdom to represent their communities, rendering verdicts about the value of property in their locales. The resulting Domesday Book recorded the findings of this elaborate inquest. Although the king's inquiry reached into the smallest settlements,

called hundreds and vills, seeking representative men, it hardly transformed Saxon juries into a democratic institution. Such inquiries seemed more a "relentless government prying" than a "bastion of liberty," legal scholar John Baker has observed.[2] In such inquests, it might have appeared to make sense to swear in almost anyone as a juror so as not to miss valuable information. But it was not really sensible because not everyone could be trusted. The simplest solution was to disqualify some classes of people, and at least by 1215 Romano-canonical procedure excluded slaves, children, the insane, the infamous, paupers, and infidels as witnesses. According to the theory, such persons might lie with abandon, while a respectable, propertied juror had something to lose by rendering a mischievous verdict. In practice, though, overburdened judges eager to get on with their work sometimes ignored the rules. Surviving texts do not often document English judges' refusing to allow a witness's testimony, whereas some do show judges proceeding to sentence even when the winning side's witnesses came from despised groups.[3]

Henry II (r. 1154–89) more regularly relied on local men for information and judgment. Twelve lawful men from each hundred and four from each vill should report serious crimes to royal officers, he said. The idea that twelve men should hear controversies quickly spread through the kingdom, with some claiming to see biblical sanction for the holy number. Juries listened to the complaints and rumors about alleged crimes that circulated through their vills and hundreds. Those failing to report crimes faced punishment themselves, a reality that discouraged any feeling of authority or influence, but juries could stop a prosecution in its tracks by announcing they did not believe an accuser.[4]

Juries became still more important after 1215, when the church forbade clerical participation in ordeals. Ordeals required prisoners to perform a painful task, testing their claims of innocence against fire or water on the theory that God would rescue the innocent from torture. Priests determined the outcome by examining prisoners' wounds. With priests no longer available to judge ordeals, juries became still more important; *vox populi* substituted for *vox dei*.[5] In the same year, King John (r. 1199–1216) signed the Magna Carta, which recognized trial by jury:

> 38 In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.

> 39 No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.[6]

Scholars once exaggerated the Magna Carta's force, but it at least contributed to the mythology that a prisoner had a right to "the lawful judgment of his equals." Because the nobles imposed the Magna Carta on their reluctant king, it once seemed to show that juries really were a palladium of liberty, resistant to centralizing authorities. But historians long ago found that the jury system developed very gradually and not in a clap of heroic thunder, so the idea of juries' independence has not been credible for some time. Nonetheless, the Magna Carta became part of jury folklore, perhaps the linchpin of the fairy tale.

Some of the earliest English juries were "mixed," which most often meant geographically diverse. As early as 1101, royal writs required that juries include men from different shires to render a verdict. But a "mixed" jury could also be one that was religiously diverse. In 1190, King Richard (r. 1189–99) required that mixed juries decide cases between Christians and Jews. Juries could also be "mixed" in the sense that judges seated foreigners. A jury of six burgesses and six outsiders decided a 1233 Colchester quarrel. In 1303, Edward I (r. 1272–1307) granted foreign merchants a charter (the Carta Mercatoria) guaranteeing various privileges, including juries with at least some non-English members. Authorities allowed foreigners and even Jews on their juries because they believed people must be judged according to their own laws or customs, rules native to their home community. In 1308, a half-English and half-Welsh jury decided a land dispute in Shropshire. The same logic that allowed Welshmen on juries also permitted Jews on some juries. When members of an alien group came to court, the law took into account the customs and practices of the particular foreign community.[7] This idea became statutory law in 1353, when Parliament enacted the Statute of the Staple, which, in addition to designating certain ports where particular goods could be exported or imported, allowed aliens to serve as jurors. Such charters and laws adopted local procedures that judges had devised with no advice from Parliament or the king. Nationalizing these local practices substituted formalized, national principle for community justice.[8]

Despite concessions to local court practices, Parliament scrambled—unsuccessfully—to control jury membership, trying to keep poorer people