The Criminal Justice Principles of Charles Hamilton Houston: Lessons in Innovation

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THE CRIMINAL JUSTICE PRINCIPLES OF CHARLES HAMILTON HOUSTON: LESSONS IN INNOVATION

Professor José Felipé Anderson†

I. INTRODUCTION

One of the legal giants in American history is Charles Hamilton Houston. To modern lawyers he is still obscure, but some recognition of his extraordinary legal talent came during the nation’s celebration of the fiftieth anniversary of the Supreme Court’s decision in Brown v. Board of Education.¹

Although Houston died over four years before the Supreme Court issued its historic opinion in Brown,² he was widely recognized as the architect of that decision, which banned segregation in public school education.³ Prior to his death, Houston had worked on litigation to eradicate segregation in education since the early 1930’s.⁴ Houston’s first major victory in this effort was in Pearson v. Murray,⁵ when he, along with Thurgood Marshall and William I. Gosnell, successfully challenged the racial exclusion policy at the University of Maryland School of Law.⁶ The Pearson case was also the first major victory in the National Association for the Advancement of Colored People’s (NAACP) legal assault on “Jim Crow.”⁷

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3. 347 U.S. 483, 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).
5. 169 Md. 478, 182 A. 590 (1936).
7. The phrase “Jim Crow,” which originated from a popular minstrel show act and song, became associated with the many laws throughout America designed to separate the races. See C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 n.1 (Oxford Univ. Press 2d ed. 1966). The practical effect was to render African Americans second class citizens. See id.
The legal significance of Houston's civil rights work, however, has obscured his impact on other areas of the law.8 This is particularly true with regard to his impact on the criminal justice system. During his remarkable career that spanned only about a quarter century, Houston engaged in litigation that still affects some of the most important areas of criminal justice in the nation. This article is an effort to identify a few of those major areas and recognize Houston's rightful place among the criminal justice legends of the twentieth century.

His impact on the law of jury selection, capital punishment, right to counsel, police interrogation and mental state defenses have set the standard for the most important criminal justice jurisprudence in the nation's courts. Although he was not the first lawyer to address these important issues, he certainly had as great an impact on their development as he did on the civil rights work which has been the most visible part of his legacy.9

In his brief career his criminal law case choices reflected his profound concern for the criminally accused. Further, his selection of controversial issues, difficult cases and visionary strategies foreshadowed both the modern criminal justice landscape and laid out the battle ground for current criminal justice disputes. Houston's work defies easy categorization. While he was obviously concerned with equal protection under the law involving issues of race he also embraced structures which provided more general fairness in criminal law.

From examining Houston's criminal law work in all criminal cases that either resulted in or were appeals from reported cases, I have concluded that there are several important characteristics that suggest when Houston would invest his time and talent in a criminal case. It was not simply a question of fame or assignment and certainly not money.10


9. Charles Houston's career had several phases. He began working with his father's law firm after he graduated from Harvard with a Doctor of Judicial Science degree, the first awarded to an African American. See McNeil, supra note 2, at 53, 56. He later began a career teaching law which resulted in his being appointed Vice-Dean of Howard University Law School, where he secured accreditation for the school from 1929 to 1934. See id. at 70, 74-75. In 1934, he left the Dean's post at Howard to become the first Special Counsel to the NAACP, where he served until 1940 when he returned to the private practice of law in his father's Washington, D.C. firm until his death. See id. at 90, 155-56. In all phases of his career he was involved in criminal justice issues where his participation included policy study, protest and courtroom advocacy.

10. The financial records of the Houston & Houston law firm reflect that from 1940-1950 only about 9.5% of the firm's cases were criminal in nature. McNeil, supra note 2, at 231.
Rather, Houston selected extremely difficulty criminal cases to test the system and advance important principles of fairness and justice that he determined to be worthwhile. In the same manner that he approached his systematic Jim Crow strategy, he also attacked the criminal justice system with vigor and passion.11

The principles that motivated Houston’s choice of criminal justice issues and cases are when one or more of the following circumstances existed:

(1) Penalty was severe without adequate process;
(2) Panel of the jury included no African-Americans;
(3) Proof of the criminal case without sufficient integrity of the fact finding process;
(4) Police procedures executed without adequate accountability in obtaining confessions; and when the
(5) Purpose of the prosecution lacked adequate structural limitations.12

II. THE CRIMINAL JUSTICE SYSTEM IN CONTEXT FROM 1900-1930

The criminal justice system that was in place in America during Houston’s early years was very different than the one that most people are familiar with today. Although many provisions of the Bill of Rights related to criminal prosecution,13 few of those rights had real substantive meaning for a criminal defendant of any race during this time. Most criminal prosecutions were handled by local authorities in a variety of judicial systems.14 Judges had broad discretion to impose punishment and appeals were expensive.15 Although a defendant had the right to counsel, that still meant that they needed to have the money to hire their own attorney.16 It was not until the Supreme Court examined the right to counsel in the 1930s that it was held that the Federal

12. I call these principles the five “P’s” of Houston’s case commitment strategy: penalty, proof, panel, procedure and purpose.
13. See U.S. CONST. amends. V-VIII.
15. See FRIEDMAN, supra note 14, at 241, 255-56.
Constitution required the state to provide a lawyer in a death penalty case. 17

During the early years of the twentieth century, the court struggled over which provisions of the Bill of Rights it believed were "fundamental" for due process of law to be achieved. 18 There was great uncertainty about how much protection a state believed it was obligated to provide an accused. As one historian cogently observed:

The Fourteenth Amendment said nothing explicit about criminal justice or the Bill of Rights. But it did speak of rights to due process and equal protection . . . . It imposed the "due process" obligation on the states. States, then, had a constitutional duty to run fair trials. But by whose standards? 19

Those standards were both imposed and enforced by state law and administered under the broad discretion of state officials.

Many of the constitutional rights we take for granted today in state court proceedings were not so certain during this period in American legal history. For example, the privilege against self incrimination was not as comprehensive as it is today. In Twining v. New Jersey 20 the Supreme Court of the United States allowed the judge to point out to the jury that two bank directors who were on trial for fraud did not take the stand in their own defense. 21 Prior to 1914, the government could use evidence illegally seized in federal trials until the Supreme Court forbid the practice in Weeks v. United States. 22 States were free to continue to use illegally seized evidence until well into the middle of the twentieth century. 23

The Federal Government also took a greater interest in expanding prosecutorial power in the twentieth century. In 1913, Congress passed the federal income tax law, making it a crime to file "false or fraudulent returns." 24 Congress passed the Dyer Act, popularly known as the National Motor Vehicle Theft Act, 25 which made it a crime to drive a stolen car across state lines. 26

19. FRIEDMAN, supra note 14, at 298.
20. 211 U.S. 78 (1908).
21. Id. at 90, 114.
26. Id. at § 3, 41 Stat. at 325.
Supreme Court upheld the law under the "interstate commerce clause" of the United States Constitution.27

III. PENALTY SEVERE WITHOUT PROCESS

There was also dreadful unfairness in how the criminal law was applied to blacks at this time. One lawyer addressing the Mississippi Bar Association in 1910 noted that it was next to impossible "to convict even upon the strongest evidence any white man of a crime of violence upon the person of a negro . . . . I have even heard attorneys make the appeal to a jury that no white man should be punished for killing a negro."28

In 1919 the NAACP published a report on lynching, covering a thirty year period when the practice was most rampant.29 Between 1889 and 1918 a grand total of 3,224 persons were lynched, of which only 61 were women: 50 were black and 11 were white.30

Lynchings were disproportionately used for blacks who were alleged to have committed rape:

A recent study of Georgia and North Carolina in the years 1882 to 1930 compared blacks who were lynched with those executed for crime. In Georgia, murder accounted for 88 percent of the executions of blacks, and rape only 12 percent; in North Carolina, the figures were 71 percent for murder, 22 percent for rape. The picture was quite different for "execution" by a lynch mob. Rape accounted for 41 percent of the lynch victims in Georgia—more than murder, which accounted for only 34 percent. In North Carolina, equal numbers were lynched for murder and rape (39 percent). The lynch mob, in short, showed an inordinate interest in stiffening the penalty for rape or suspected rape.31

Charles Houston was no doubt influenced in his interest in criminal law by his father, William Lepré Houston, who was considered one of Washington, D.C.’s finest African-American attorneys. The elder Houston was a former high school principal

29. NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918 (1919).
30. id. at 7-8.
from Kentucky who relocated to Washington, D.C. to take a federal job and attend law school at Howard University at night. 32

Initially, Houston's father maintained a general law practice limited only to civil cases. 33 Among the criminal cases he did accept was an appeal he handled during the year his son was completing his legal studies at Harvard. The case involved a defendant named William Laney who was convicted of manslaughter at trial. 34 As the appellate court put it, Laney was charged "with the crime of murder in the first degree, growing out of the killing of one Kenneth Crall, during a race riot in Washington on July 21, 1919." 35 While on his way to the theater with his date, Mattie Burke, he was confronted by a large mob that was yelling "catch the nigger" and "kill the nigger." 36 The men chased Laney from the 600 block of Massachusetts Avenue. 37 Laney stated that he pulled out his gun and the crowd stopped chasing him and while he was trying to fix the safety, his gun went off. 38 Later, as the mob pursued him they fired shots at Laney and he returned fire. 39 A member of the mob died from wounds suffered to his head during the shoot out. 40 William Houston did not succeed on his appeal, 41 despite the obvious racial overtones of the case. Laney reported that as many as 100 or more men were chasing him during the race riot. 42

The race riots of 1919 caused grave concerns for all African-Americans across the nation. 43 William Houston's involvement in the important Laney case in the nation's capital would have no doubt left a lasting impression on his son who was, at the time, finishing his legal studies at Harvard. 44

32. McNEIL, supra note 2, at 21.
33. Id. at 26-27.
34. Laney v. United States, 294 F. 412 (D.C. Cir. 1923).
35. Id. at 413.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id. at 416.
41. Id.
42. Id. at 414.
44. The poignancy of the occasion is unmistakable for a young Charles Houston:

In 1919, the year of the 'Red Summer' more than 100 African Americans were murdered (eighty were lynched) and some one thousand were wounded in twenty-five race riots. Even the nation's capital was the scene of a terrible race riot, one observed first hand by . . . Charles Houston.

Id.
IV. PROOF OF THE CRIMINAL CASE WITHOUT SIGNIFICANT INTEGRITY OF THE FACT FINDING PROCESS

A. Prosecution of Rape

The crimes of rape and attempted rape have always been areas of grave concern for African-Americans. The history of racial disparity in the criminal justice system has always been conspicuous when the crime at issue is rape, particularly when it involves a black man and a white woman. The famous “Scottsboro Boys” case is the most historically significant example. The allegation in that case of gang rape of two white women on a train sparked a national firestorm and subjected the accused in that case to potential execution.

Scottsboro was but one of many examples of how the mere allegation of interracial rape affects the administration of justice in the African-American community. Often, defendants accused of rape were lynched before they could ever stand trial on the rape allegations. If the defendant did stand trial, the odds of his winning were very remote and success on any appeal was even less likely.

45. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 88 (Pantheon Books 1997). It has been noted by one jurist that “any honest chronicler of American legal history must acknowledge that the legal system in its treatment of blacks has been characterized by inequality . . . .” LOIS G. FORER, CRIMINALS AND VICTIMS: A TRIAL JUDGE REFLECTS ON CRIME AND PUNISHMENT 226 (W.W. NORTON & CO. 1980).

46. The series of trials that came to be known as the “Scottsboro Boys” cases focused the country’s attention on discrimination in the criminal justice system, primarily in the South. See Powell v. Alabama, 287 U.S. 45, 49-53 (1932). The incident involved charges of rape against black youths accused by a white woman under prejudicial circumstances. See id. at 49. At the center of the controversy was the racial discrimination in jury selection in the case. See id. at 50. Under questioning at a hearing, prior to jury selection at a retrial of one of the defendants, a Morgan County, Alabama jury commissioner said “he had never met a Negro fit for jury duty.” JAMES E. GOODMAN, STORIES OF SCOTTSBORO 123 (Vintage Books 1994).

47. See GOODMAN, supra note 46, at xi.

48. See, e.g., Harris v. Stephens, 361 F.2d 888, 890 (8th Cir. 1966) (holding rape convictions were not improperly imposed against Negroes and that the imposition of the death penalty on conviction of rape where a life was taken was not a denial of due process).

49. See, e.g., United States v. Shipp, 214 U.S. 386, 403-05 (1909) (stating that the negro defendant in the case awaiting a review of his rape conviction by the U.S. Supreme Court was lynched before it reached the Court).

50. In the fictional book, To Kill a Mockingbird, lawyer Atticus Finch loses his defense of Tom Robinson, a black man accused of raping a white woman, despite the presentation of an overwhelming amount of persuasive exculpatory evidence. HARPER LEE, TO KILL A MOCKINGBIRD 198-221 (Harper & Row 1960). In answering his son’s question as to how the illogical verdict could be given, Finch summarizes the race-influenced nature of justice this way: “I don’t know, but
It is these historical circumstances that make Houston’s contribution to rape jurisprudence so remarkable. In 1943, Houston successfully overturned the conviction of Samuel Legions in the Supreme Court of Virginia.\(^1\) 

Legions, an African-American, was indicted on December 8, 1941 in Loudoun County, Virginia, accused of the rape of Viola Miller, a white woman.\(^2\) He was tried and found guilty by a jury.\(^3\) His conviction was based largely on the testimony of Mrs. Miller and her husband who lived in a section of Leesburg “almost exclusively inhabited by negroes.”\(^4\) The two room house of the alleged victim faced the street\(^5\) and was located “directly across the street from a negro restaurant . . . . [N]ear enough for loud talking in the house to be heard in the restaurant.”\(^6\) 

The complainant and her husband alleged that at about eight o’clock on the evening in question they went to bed and were awakened at about ten o’clock “by the falling of a wind shade,” which they took to mean the presence of an intruder.\(^7\) As it happened, both of them knew Legions when they all had lived in Berryville, Virginia.\(^8\) 

According to the couple, they were sleeping together with their month old child between them.\(^9\) The couple said the accused threatened to kill them although they “saw no weapon of any kind in his hands, nor did he say or pretend that he had any.”\(^10\) In a

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2. Id. at 764.
3. Id.
4. Id.
5. Id. (“The room they occupied as a bedroom on the ground floor had a door and a window looking directly toward the street and opening almost upon it, the bottom of the window being so close to the ground that one could step out of it if the sash were up.”).
6. Id.
7. Id. at 764-65.
8. Id. at 765.
9. Id.
10. Id.
struggle the "husband struck the accused with the window-shade and then pushed him into the window, breaking out the sash."\textsuperscript{61} The defendant allegedly grabbed the victim and attempted to rape her in the bedroom but eventually "pulled her into the kitchen and accomplished his purpose across the table . . . ."\textsuperscript{62}

Houston and his co-counsel, a former student named Oliver W. Hill,\textsuperscript{63} argued that the evidence was insufficient to sustain Legions' conviction for rape and the appellate court agreed. The court concluded that the testimony of the Millers "in the light of the physical surroundings, and the absence of incidents which naturally ensue, is so contrary to human experience and so inherently incredible as to be totally insufficient to justify the verdict of guilt beyond a reasonable doubt."\textsuperscript{64}

The court appeared to challenge the trial jury's verdict for their accepting the story of Mr. Miller. It reasoned:

Miller is forty eight years old — almost in the prime of life. He was regularly engaged in manual labor. He was working on the town dump-truck. When he was asked if he was passing himself off as a weakling, he said he was not. In the presence of a tragedy that could mean nothing but disgrace and humiliation to [his] wife . . . , to himself, and to his children he was as servile as a slave. A few steps would have taken him out of the house and on to the street where he could have given an alarm which would have saved his wife.\textsuperscript{65}

As the court concluded its review of the trial evidence it again stressed its disbelief: "The whole thing does such shocking

\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Oliver Hill recalled that Houston:
was harder on himself than he was on us. But he had to be. He was preparing us for war. He had a soldier's faith that every battle must be fought until it is won and without pause to take account of those stricken in the fray—even if it meant himself.

\textit{Richard Wormser, The Rise and Fall of Jim Crow} 151 (St. Martin's Press 2003). Hill, who was:
a 1933 Howard University Law graduate was fast making a name for himself in Richmond where he practiced law. Hill and Thurgood Marshall had been classmates . . . and both had graduated with honors . . . . By 1940, Hill had become the NAACP's contact in Virginia and part of Houston's new breed of civil rights attorneys in the South.

\textsuperscript{64} Id. at 764.
\textsuperscript{65} Id. at 765.
violence to any righteous conception of human conduct as to be unbelievable even to the most credulous and naive.\(^{66}\) Although the court acknowledged that it was "mindful" of the jury's verdict that it was not required to believe the evidence that they relied on in this case.\(^{67}\) The court explained "we are not required to believe that which we know from human experience is inherently incredible. 'What we know as men we are not required to forget as judges.'\(^{68}\) What is remarkable about *Legions* is that Houston and Hill had persuaded a southern court to disbelieve a jury's verdict in a case where a white man and his white wife testified as eyewitnesses against their black client. The result of the case defies all conventional history, tradition and folklore of its time.\(^{69}\) Perhaps it can partially be explained because of the court might have been less sympathetic to whites living among blacks. Often whites who associated with blacks were not treated well.\(^{70}\)

Still, it cannot be overlooked that Houston was able to secure victory for his client by convincing the highest court in Virginia to overturn a local jury and, in effect, call two white people liars and scold the trial jury for believing them.\(^{71}\) Part of Houston's genius

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66. *Id.*
67. *Id.*
68. *Id.* at 92.
69. *See supra* note 51. Harvard Law Professor Randall Kennedy has noted that lynchings put pressure on court proceedings in the South. *See Kennedy, supra* note 46, at 88-90. Professor Kennedy describes one court proceeding that took place in Desoto County, Mississippi in 1934:

> The courthouse where the trial took place was surrounded by barbed wire, machine guns, and more than three hundred National Guards equipped with gas masks and fixed bayonets. At one point during the joint trial of all three men, a mob of several thousand whites attempted to overcome the court's defenses. Against the backdrop of this intimidation, the jury deliberated only six minutes before returning the foreordained guilty verdict. The judge immediately condemned the men to execution by hanging . . . .

*Id.* at 89. Prof. Kennedy has also noted that "[t]he folklore that black men have a dangerous, virtually ungovernable lust for white women was thus elevated into proper evidence cognizable in a court of law." *Id.* at 90.
71. Such results were highly unusual at this time in history. The usual result was characterized in a letter by one lawyer writing in the summer of 1940:

> When the cases involved no such issues (on the race question) but are merely cases, I have noted that cases between Negro and Negro are handled somewhat differently than cases between white and white. I mean a spirit of levity, an expectation of something 'comical' appears to exist. The seriousness in the white vs. Negro case is decidedly lacking. As you know it is a rare case indeed in which a Negro who has murdered a Negro receives the extreme penalty, either death or life imprisonment here, regardless of the
was his skill for persuasion and charm even among Southern whites in the legal system. One scholar has observed of Houston's work in a particular criminal case:

Instead of emphasizing his client's respectability, Houston promoted his own, turning the trial into a demonstration of the progress of the black bar toward the standards of the highest reaches of the profession. . . . He so impressed local authorities with his professionalism that both the trial judge and prosecutor complimented him in open court. The strategy apparently swayed the judge and jury. Although his client was convicted, Crawford received life in prison instead of the expected death sentence. The end of the trial produced so many public statements of mutual respect from the defense, prosecution, and judge that one newspaper headlined its report: Crawford Case Ends in Legal Love Feast. 72

The Legions case is an unmistakable testament to Houston's skill to persuade those who might be reluctant to render a favorable decision for a black defendant, particularly when represented by two black lawyers. 73 This is remarkable in light of the fact that even the allegation of rape alone would often lead even public officials to call for lynching. 74

facts. Only the other day in a local case a Negro who murdered another with robbery as a motive, a charge that would have been as between white and white, or Negro and white victim, good for the electric chair, was disposed of by a jury with a 15 year sentence. The punishment as between Negro and Negro, as distinguished from white vs. white, or Negro vs. white victim, is decidedly different and clearly shows the racial approach to the question. In short the courtroom feeling is that the Negro is entirely inferior, with punishment for crimes by him against his own kind punished with less punishment than when the white man is involved.

ARNOLD ROSE, THE NEGRO IN AMERICA 180 n.8 (Beacon Press 1948).
73. One writer has suggested that there has been, "in interracial . . . sex crimes, a decided tendency toward a longer or more severe sentence where the victim was white . . . ." CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 368 (The Lawbook Exch. 2000) (1940).
74. Professor Kennedy states that:

A constant refrain in countless speeches and editorials was that lynching constituted a brutal necessity to keep the Negro "beast" at bay. "Governor as I am," Ben Tillman of South Carolina confessed in 1892, "I would lead a mob to lynch the negro who ravishes a white woman." U.S. Senator Theodore Bilbo of Mississippi commented that often lynching was the only "immediate and proper and suitable punishment" for blacks who dishonored white womanhood.

KENNEDY, supra note 45, at 45-46 (citations omitted).
B. Prosecution of Murder

In 1947, Houston represented Weldon Jones, Jr., an eighteen year old resident of Maryland’s Eastern Shore, in the murder of I. Rayner Graham.\textsuperscript{75} On January 12, 1945, Graham’s dead body was found in front of his packing house on Deal’s Island.\textsuperscript{76} The keys to the house were in one hand and one of his pockets had been pulled out.\textsuperscript{77} His automobile lights were on and its motor was running.\textsuperscript{78} Footprints at the scene led to the home of Weldon Jones and his younger brother, Holbrook Jones.\textsuperscript{79} After searching the boys more thoroughly back at the station, the police found Graham’s gasoline ration book in Weldon’s possession.\textsuperscript{80}

After keeping the Jones brothers in custody for about 30 minutes in the Salisbury police station, they decided to move them again, this time to the police station in Benson, Harford County, about 100 miles away.\textsuperscript{81}

They arrived in Harford County at about 5:00 a.m. and were then “quizzed by Sergeant Paul J. Randall in the presence of two other police officers and a stenographer.”\textsuperscript{82} The sergeant said to Jones: “Your name has been mentioned in connection with the assault on two white women and the shooting of Mr. Rayner Graham.”\textsuperscript{83} Weldon Jones thereafter confessed.\textsuperscript{84}

On appeal he challenged the voluntariness of his confession contending that the fear of mob violence motivated his inculpatory statements.\textsuperscript{85} Jones stressed that “after he was taken from his

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\item[75] Jones v. State, 188 Md. 263, 266, 52 A.2d 484, 485 (1947).
\item[76] Id.
\item[77] Id.
\item[78] Id.
\item[79] Holbrook was later acquitted at trial. Brief for Appellant at 2, Jones, 188 Md. 263, 52 A.2d 484 (No. 90).
\item[80] Jones, 188 Md. at 267, 52 A.2d at 486.
\item[81] Id.
\item[82] Id.
\item[83] Id.
\item[84] Id.
\item[85] See id. Houston’s brief presented a portion of the facts in this way:

Weldon Jones, Jr. went to the sixth grade in school; he has lived all of his life around his home on the Eastern Shore of Maryland, and at the time of his arrest, was eighteen years of age.

On the night of January 12, 1945, about 10:00 P.M., the dead body of I. Raynor Graham of Deals Island, Maryland, was found in front of the packing house that he owned. Subsequent examination revealed a bullet in his body. The weapon from which the bullet was fired was never found; nor was the exact type of weapon ever determined. An expert on weapons from the Federal Bureau of Investigation testified that the bullet could have been fired from any one of the following weapons: A Remington, Stevens, or Savage Rifle, as well as a Stevens single shot pistol or some foreign weapon
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home at midnight, he was put in the automobile with the father of the girl he was suspected of having assaulted, and that he knew that mobs had lynched Negroes in the past when accused of having assaulted white women.

He asserted that he was a frightened "country boy, who had gone only as far as the sixth grade in school . . ." Nonetheless, the Court of Appeals rejected Jones's claim that his confession was not voluntary and that the evidence was sufficient to establish premeditation for murder.

The Jones case reflects that Houston was concerned about the process of police interrogation. The overtones of possible mob violence and the police tactic of alleging unfounded instances of interracial sexual assault demonstrate the manner in which blacks were subject to unfair prosecution during Houston's time. The attempt to extract confessions in this manner was the very evil for which the Miranda v. Arizona opinion, rendered in the middle 1960's, was designed to address. Houston's concern for the having similar rifling characteristics. Medical testimony was that death was almost instantaneous.

The testimony revealed that earlier on that same day three other unusual events had occurred in the vicinity of Deals Island: (1) a white youth had been shot and slightly wounded by one of two Negro youths; (2) Ada White, a white woman, had been accosted by one of two Negro youths, and (3) Peggy Price, a young white girl, had been molested by a Negro boy whose hand she had bitten. These occurrences had taken place at Chance, Maryland, which is just across the bridge from Deals Island. The Jones brothers were suspected in each of these crimes. There was apprehension, excitement, and activity concerning these occurrences in the community. State police had been summoned and they, in turn, had thrown up a road blockade, summoned additional police, and had begun search for the Jones boys. Wood Jackson, the sheriff, had been looking for the boys. He had been to their home and advised their father of the things that they were suspected of and had sent a colored neighbor to their home to advise surrender. Neighbors had advised the family that a mob was out looking for the boys.

Brief for Appellant at 2-3, Jones, 188 Md. 263, 52 A.2d 484 (No. 90).

86. Jones, 188 Md. at 268, 52 A.2d at 487.

87. Id.

88. Id. at 271, 272-73, 52 A.2d at 488, 489.

89. See id., 188 Md. 263, 52 A.2d 484.


91. Indeed, one observer wrote:

[As] all the Miranda decision did was assuage to the uninformed and the poor the same rights that reasonably knowledgeable and prosperous citizens had asserted all along. But bitter and persistent attacks—originated in large measure by policemen and prosecutors who had failed to do their jobs properly in the first place, and then taken up by the right wing as a handy weapon to belabor the "Warren Court" with for a number of its decisions—finally convinced most conservatives and even many moderates that the Court had done something wildly radical.

interpretation of the police evidence collection process in Jones is demonstrated in how he framed the confession issue before the Court. Although the appeal was unsuccessful his approach highlighted the issues which today constitute successful attacks on police interrogation.93

One of the most interesting criminal cases handled by Houston was the murder prosecution by Eugene H. James in the Maryland courts.94 Houston handled the case both at trial and on appeal.95 Also noteworthy in this case were the other remarkable attorneys who participated in the trial. With Houston, as co-counsel, was an African-American attorney named William H. Murphy96 whose family owned and operated the Afro-American Newspaper.97 The prosecutors in the case would also have outstanding legal careers. Anselm Sodaro, the State's Attorney for Baltimore City, would become known as one of the fathers of forensic prosecution.98

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92. Brief for Appellant at 2, Jones, 188 Md. 263, 52 A.2d 484 (No. 90).
93. Miranda was not the first opinion to advance the concept that confessions were subject to constitutional scrutiny. In the late nineteenth century, the Supreme Court held that “[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because [it is] not voluntary, the issue is controlled by that portion of the fifth amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'” Bram v. United States, 168 U.S. 532, 542 (1897) (quoting U.S. CONST. amend. V). However, the Court did not directly rely on Bram’s holding in subsequent cases. In fact, in early 1951, the Court questioned its validity. See United States v. Carignan, 342 U.S. 36, 41 (1951).

By the time the Fifth Amendment was made applicable to the states by the Warren Court in Malloy v. Hogan, the Supreme Court had once again expressly embraced the Bram rule and extended it two years later in Miranda. 378 U.S. 1, 6 (1964); see also Miranda, 384 U.S. at 444-45.

The late Justice William O. Douglas wrote of the Fifth Amendment:

Though torture was long used to solve crimes, experience proved that it was not an honorable way for government to deal with its citizens. . . . But the protection of the Fifth Amendment transcends the use of torture by the police. It outlaws all forms of physical, legal, or moral compulsion utilized to make a man convict himself.

WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 145 (Doubleday & Co. 1958). He reminded us that “[t]hose who would attach a sinister meaning to the invocation of the Fifth Amendment have forgotten that history.” Id. at 146.

95. Id. at 33, 65 A.2d at 888.
96. William H. Murphy, Sr. became one of the first African-American attorneys to open a law office in a downtown Baltimore office tower when the firm Brown, Allen, Watts, Murphy and Russell moved in at One Charles Center. Editorial, William H. Murphy, Sr., BALTIMORE SUN, June 1, 2003, at C4. In 1970 he was elected to the Baltimore City bench. Id.
98. Anselm Sodaro became the Chief Prosecutor of Baltimore City shortly after the James case was decided in 1950 when J. Barnard Wells endorsed him as his successor. Obituary, Anselm Sodaro, 91, City’s Chief Judge and State’s Attorney, BALTIMORE SUN, July 30, 2002, at B5. During his prosecutorial career, Sodaro won many cases that received national attention. Id. It is also noteworthy that he appointed the first African-American prosecutor in Baltimore history,
Alan Hamilton Murrell would later leave criminal prosecution for the defense bar. He would later become known as one of the greatest criminal lawyers of all time. Murrell would, in 1971, become the founding attorney for the Maryland Public Defenders office, one of the first state-wide public defender systems in the nation.

The criminal case against James involved the July 6, 1948 killing of Marsha Brill. The eleven year-old was stabbed to death. There was no evidence of attempted rape or that her killer had ever seen her before. Two of the victim’s friends who were riding their bicycles near where the crime occurred and from their testimony, the Court of Appeals recited the factual finding that a man appeared and “pointed a large knife at Marsha. The man followed and overtook Marsha, who was found lying on the ground, stabbed and crying beside the road.” James, the appellant, was seen by another witness at about noon with a large knife in his hand near the crime scene. The 31 year-old appellant was examined by four psychiatrists and one psychologist in preparation for the trial. One psychiatrist, Dr. Lerner was of the opinion that appellant was “a mental defective belonging to a class of low-grade morons, and may be classified as a defective George H. Rosedom, in 1954. Id. He was appointed to the Circuit Court for Baltimore City in 1956 and served on the bench until 1980. Id.

99. “Murrell, considered by many the greatest criminal defense lawyer in Maryland history, built [Maryland’s Office of the Public Defender] brick by brick on his personal reputation.” Op-Ed., Farewell to Stephen E. Harris, DAILY REC., May 3, 2004, at 1B. When his hand picked successor, Stephen E. Harris, was appointed Chief Public Defender in 1990, Murrell, then a 92 year-old University of Baltimore Law School graduate, had served nearly two decades. See id. Ironically, in the early 1960s, Harris had earlier in his career been hired by William H. Murphy, Sr. as the first white lawyer to work for an all-black law firm in Baltimore where Murphy was a partner. See supra note 96 (referring to the law firm Brown, Allen, Watts, Murphy, and Russell).

100. Farewell to Stephen E. Harris, supra note 99, at 1B. Upon his appointment by Governor Marvin Mandel in 1971, Murrell commented “[t]he person at the bottom is going to get what he is entitled to—competent representation.” Rafael Alvarez, Alan Murrell, Lawyer for the Poor Dies, BALT. SUN, May 5, 1999, at B1. One former colleague of Murrell reported that he took the job reluctantly, but the Governor persuaded him by promising “it would be a meaningful law firm for the disadvantaged.” Id. According to Murrell’s colleague, the Governor felt that Murrell’s appointment to the Office would provide it with “instant recognition and prestige.” Id. Each of the lawyers who came into contact with Houston in the James case went on to outstanding professional accomplishment, perhaps by observing the high standard of legal skill set by Houston even in defeat. See infra note 125 and accompanying text.


102. Id.

103. Id. at 33, 65 A.2d at 888-89.

104. Id. at 34, 65 A.2d at 889.

105. Id.

106. Id.
delinquent. He was determined to have a mental age of about a ten year-old and testing revealed "some schizoid characteristics and evidence of hostility towards the immature female." Another doctor described James as "feebleminded with an estimated I.Q. 60 to 65 ..." Some of the psychiatric evaluations suggested that the defendant was a pathological liar.

On the day of the killing, the defendant was arrested at his house at 10:45 p.m. and taken by two police officers to the station. He was questioned until about 1:30 a.m. He was put into a line-up the next day about 3:30 p.m. and later taken by several detectives to a wooded section of town. They removed him from the cell several times that day. During one of his trips to the crime scene he confessed to the crime. James provided police a signed confession statement.

POLICE DEPARTMENT
City of Baltimore

Statement of Eugene H. James, colored, 3311 Paton Avenue, taken at 8:03 p.m. on July 8, 1948 in the Board room in Police Headquarters, Fourth floor. Interrogated by Inspector James H. Itzel, in the presence of Chief Inspector M. Joseph Wallace; Captain Oscar Lusby and Officers Thomas L. Roche and John D. Lowman of the Northern District, and later on in the presence of Mr. Anselm Sodaro and Mr. Allen Murrell of the State's Attorney's Office.

Q. What is your name?
A. Eugene H. James.
Q. How old are you?
A. Thirty-one.
Q. Are you married or single?
A. Single.
Q. Where do you live?
A. 3311 Paton Avenue.
Q. Who do you live there with?
A. My mother.
Q. And who else is in that house?
A. Two sisters, Esther and Marie.
Q. Are they married or single?
A. All married.
Q. Do they live there with their husbands?
A. Both away.
Q. What kind of work do you do?
A. Janitor.
Q. Where do you work?
A. At the apartment on Denmore Avenue.
Q. Do you know the number?
A. Forty-three or forty-six hundred block.
Q. Do you know the name of the apartment?
A. No, there was a name, but has been rubbed off.
Q. What hours do you work?
A. Three to six P.M.
Q. What kind of work do you do?
A. Burn up trash.
Q. Is that all?
A. That's all.
Q. Do you clean windows or any general work at all?
A. No.
Q. Can you read and write?
A. Yes.
Q. What grade in school?
A. Fifth grade.

Q. Eugene, I am going to ask you some questions in regard to a crime that was committed on Glen Avenue last Tuesday, around noon time, (July 6th, 1948). Do you want to make a statement?
A. I'll make it.
Q. We want to understand each other—we cannot make any promises to you, and anything you say here may be used against you in Court. Is that clear?
A. Yes.
Q. Do you still want to talk to us about this?
A. I'll still talk to you.
Q. Nobody has threatened you up to now?
A. No.
Q. Mistreated you in any way?
A. No, sir.
Q. No promises of any kind have been made to you, have they?
A. No sir.
Q. Do you understand thoroughly what I am talking about?
A. I understand.
Q. On Tuesday, July 6th, 1948 at eleven o'clock, where were you, can you recall?
A. I was down somewhere through Glen Avenue.
Q. Eugene, what took you through that locality at eleven in the morning?
A. Like I told you today, to see a man about a sign, but he was not home.
Q. Explanation: He went to see a man with reference to painting a sign ‘Dogs for Sale’. That was in the vicinity of Falls Road and Chestnut Ridge.

Q. Did you talk with the lady of the house in reference to painting the sign?
   A. I talked to her, but she said he was not home.

Q. On the way back, you found yourself again on Glen Avenue, is that right?
   A. That’s right.

Q. Can you tell us where you met the boy with a bike first on Glen Avenue?
   A. I met him just as I showed you at that Road.
   (Had pointed out Glen Avenue, just above Merville.)

Mr. Sodaro entered the room at 8:15 P.M. (approximately).

Q. Was it near the culvert we showed you?
   A. Down further.

Q. Did you talk to the boy?
   A. No, I did not say anything.

Q. He was riding a bike?
   A. Yes, sir.

Q. How far away did you see the little girls from the boy?
   A. The girls, they was a good distance away.

Q. How far?
   A. I would say a half a square.

Q. Two girls together?
   A. One was catching up with him.

Q. One was there alone where you were?
   A. She was not exactly where I was at. She caught up with me.

Q. On her bike?
   A. Yes, sir.

Q. Were you walking on the open road, down Glen Avenue, or did you go in the woods?
   A. I did not go in the woods at all.

Q. You walked from where you saw the boy until you caught up with the little girl?
   A. She come past me.

Q. What happened?
   A. This dizzy spell come down on me and I don’t remember nothing.

Q. You had a large knife with you?
   A. I had it in my belt.

Q. When you took this knife out of your belt, did you grab it by the handle?
   A. I had it by three fingers (indicating position of three fingers, using a pencil to demonstrate). All I remember was doing that. (Indicating a jab to the left.)

Q. With this pencil show us how you stabbed the girl.
Jones's family sought to see him on the day in question but could not because the police told them that "nobody could see him but 'the lawyer.'" They later retained counsel.

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A. (Showing a jab into the girl's stomach and indicating a left jab with the right hand holding the knife[].)

Q. Where did you strike her?
A. (Indicating spot below the breast plate and above the naval.)

Q. How many times did you stab her?
A. Once. . .

Q. Did she have on a little shirt with part of her stomach bare?
A. She had on a little middie blouse.

Q. Was some of her body bare, do you recall?
A. Some of it was bare, but I am not sure.

Q. Do you recall whether she fell down?
A. No, I don't recall.

Q. After she fell down, did you run?
A. No, I kept right on walking.

Q. She did get up to run, we believe, and did you run after her?
A. No, I did not even turn around to look.

Q. And when you went, you went up to Berkley Avenue where you took us this afternoon?
A. That's right.

Q. The place where you threw the stick, did you throw the stick there where you showed us, and you kept the knife?
A. That's right.

Q. How long after that did you get home?
A. I buried the knife first.

Q. What way did you go to bury it?
A. The same way, up the same street and over the next street, Oakford Avenue.

Q. You were at Berkley and Oakford. How far is that from Key Avenue and Whitney?
A. Not so far.

Q. Did you walk to the place where you buried the knife?
A. That's right.

Appendix to Brief of Appellant at 1-5, *James*, 193 Md. 31, 65 A.2d 888 (No. 137).

117. *James*, 193 Md. at 37, 65 A.2d at 890.

118. *Id.* Two commentators explain James's behavior this way:

Most suspects quite naturally believed that refusing to talk or insisting upon the presence of an attorney would be a tacit admission of guilt. It follows that such behavior would only intensify police suspicion and investigation. The best course, then, would be to deflect suspicion from oneself by appearing to be cooperative. So in order to avoid detection and punishment, some suspects take the risk of lying or telling less than the whole truth.
Houston argued that, although there was no evidence of physical coercion, the facts of how the police obtained the confession amounted to "psychological torture [that should render] the confession inadmissible." James also argued that the facts of the case suggest that the evidence was not sufficient to convict James of premeditated murder.

The Maryland Court of Appeals rejected both arguments. The Court determined that the confession was voluntary because defendant was not legally insane. The Court opined that it would not "erect a medico-legal pseudo-science of [its] own to exclude this confession." The Court stated that to exclude a confession on the basis asserted by Houston "ha[d] no basis in existing law."

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119. James, 193 Md. at 38, 65 A.2d at 891. Houston's brief described some of the facts as follows:

Eugene James was born in Baltimore, Maryland on April 25, 1917 (App. P. 6). He attended parochial school at St. Peter Claver's to the fourth grade.

The Defendant was examined by Doctors Guttmaeher, Lerner, Cushing and Spear, as well as by Karl F. Schoenrich, a psychologist (see App. P. 6). All agreed that the Defendant was and is in the borderline group of mental defectives and should be classified as a high grade moron. All of the examiners agreed that the Defendant, although 32 years old chronologically, has a mental age between 8 years and 11 years.

James has never had regular employment for any length of time, and was usually employed, if at all, as a handy man or janitor.

On July 6, 1948, at approximately 12 noon, Marsha Brill was stabbed to death while walking west on Glenn Avenue, Baltimore, Maryland. She died shortly thereafter at the University Hospital, same day.

At the time of her death Marsha Brill was in the company of Barbara and Allan Sapperstein, ages 11 and 8 respectively.

Defendant Eugene James was taken into custody by Officers Roche and Lowman about 10:45 P.M., July 6, 1948, and was taken to the Northern District Police Station.

The Defendant was questioned for several hours on the night of his arrest, and also for long intervals of time before the statement was finally taken at 8:45 P.M. on July 8, 1948, some fifty-five hours after he was taken into custody. . . .

The uncontradicted testimony in this case shows that Eugene James was arrested on July 6, 1948, at about 10:45 P.M. Officers Lowman and Roche were the arresting officers who took him to the Northern Police Station where he was booked for investigation and was placed in a regular cell. This cell had only a two plank board as a bed, with an open toilet. . . .

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120. James, 193 Md. at 45, 65 A.2d 888 (No. 137).
121. Id. at 44-45, 65 A.2d at 894.
122. Id. at 45, 65 A.2d at 894.
123. Id.
As far as the sufficiency of the premeditation conviction, Houston’s experts used the “Rorschach test” to show psychological features in an attempt to mitigate James’s punishment.\(^{124}\) Even in defeat, the advocacy of Houston was, in every way, exemplary. Indeed, the trial judge commented in ruling against James that “Mr. Houston, as good counsel as this Court has ever had try cases before it, grasped the importance and significance . . . one can gather from the four corners of all the testimony.”\(^{125}\) This difficult case demonstrates Houston’s interest in the prosecution of the mentally retarded, an issue that would later become relevant in the Supreme Court’s death penalty jurisprudence.\(^{126}\)

Some of the same concerns addressed by Houston in the James case were examined in \textit{Fisher v. United States}\(^{127}\) three years earlier.\(^{128}\) In that case the defendant was charged with the murder of Catherine Reardon in the library building of the Cathedral of Saint Peter and Saint Paul in Washington, D.C. between 8:00 and 9:00 a.m., March 1, 1944.\(^{129}\) Fisher was employed as a maintenance worker in the cathedral and was working at the time of the killing.\(^{130}\) “The victim was the librarian. She had complained to the verger a few days before about [Fisher’s] care of the premises.”\(^{131}\)

Fisher testified that he killed Ms. Reardon “immediately following insulting words from her over his care of the premises.”\(^{132}\) He explained “[a]fter slapping her impulsively,” he struck her with a stick of firewood and then “choked her to silence.”\(^{133}\) When Reardon began screaming later, Fisher “took out his knife and stuck her in the throat,” and then dragged her body “into an adjoining pump pit, where it was found the next morning.”\(^{134}\) The defendant provided a written confession in addition to his inculpatory testimony at trial.\(^{135}\)

\(^{124}\) Brief of Appellant at 9, \textit{James}, 193 Md. 31, 65 A.2d 888 (No. 137).

\(^{125}\) Brief of Appellant at 8-9, \textit{James}, 193 Md. 31, 65 A.2d 888 (No. 137).

\(^{126}\) \textit{See generally Atkins v. Virginia}, 536 U.S. 304, 321 (2002) (“Construing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’ we therefore conclude that [capital] punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life of a mentally retarded offender.’”); \textit{Penry v. Lynaugh}, 492 U.S. 302, 323-25 (1989) (holding that mental retardation may be used by juries as a mitigating factor in deciding whether to impose the death penalty).

\(^{127}\) 328 U.S. 463 (1946).

\(^{128}\) \textit{id.} at 465.

\(^{129}\) \textit{id.} at 464, 465.

\(^{130}\) \textit{See id.} at 465.

\(^{131}\) \textit{id.}

\(^{132}\) \textit{id.}

\(^{133}\) \textit{id.}

\(^{134}\) \textit{id.}

\(^{135}\) \textit{id.} at 466.
Houston presented evidence that suggested that because of Fisher's mental abnormalities "[t]here was evidence that petitioner was unable by reason of a deranged mental condition to resist the impulse to kill Miss Reardon."\textsuperscript{136} Despite Houston's efforts, Fisher lost the criminal trial and his conviction was affirmed by the U.S. Court of Appeals for the District of Columbia.\textsuperscript{137}

In the Supreme Court Houston urged "that mental deficiency which does not show legal irresponsibility should be declared by this Court to be a reluctant factor in determining whether an accused is guilty of murder in the first or second degree . . . ."\textsuperscript{138} The Supreme Court, while acknowledging that no doubt "there are more possible classifications of mentality than the sane and insane,"\textsuperscript{139} rejected making what it called "a radical departure from common law concepts [which is] more properly a subject for the exercise of legislative power . . . ."\textsuperscript{140}

In a dissenting opinion, Houston's former Harvard professor, Justice Felix Frankfurter, observed that "[a] shocking crime puts law to its severest test."\textsuperscript{141} Recognizing that the trial may not have been entirely fair, Frankfurter said that an execution should not be authorized by society "without the most careful observance of its own safeguards against the misuse of capital punishment."\textsuperscript{142} Unlike the majority's veiled reference to "insulting words,"\textsuperscript{143} Frankfurter pointed out that Ms. Reardon was actually alleged to have called Fisher a "black nigger."\textsuperscript{144} After describing in greater detail Fisher's erratic behavior that day, Frankfurter concluded that the facts as presented at trial did not warrant a finding of premeditation.\textsuperscript{145} He complained that the evidence of premeditation "was so tenuous that the jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon."\textsuperscript{146}

Rather, the jury should have been given clear guidance through proper jury instructions directing their attention to defendant's mental state defense.\textsuperscript{147} The Justice suggested that men "ought not to go to their doom because this Court thinks that conflicting legal

\textsuperscript{136} Id. at 467.
\textsuperscript{137} Fisher v. United States, 149 F.2d 28, 29, 30 (D.C. Cir. 1945).
\textsuperscript{138} Fisher v. United States, 328 U.S. 463, 473 (1946).
\textsuperscript{139} Id. at 475.
\textsuperscript{140} Id. at 476.
\textsuperscript{141} Id. at 477 (Frankfurter, J., dissenting).
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 465 (majority opinion).
\textsuperscript{144} Id. at 480 (Frankfurter, J., dissenting).
\textsuperscript{145} Id. at 486.
\textsuperscript{146} Id. at 487.
\textsuperscript{147} Id. at 487-88.
conclusions of an abstract nature seemed to have been ‘nicely balanced’ by the Court of Appeals for the District of Columbia."148

In another dissenting opinion, Justice Murphy wrote that “there are persons who, while not totally insane, possess such low mental powers as to be incapable of the deliberation and premeditation requisite to statutory first degree murder.”149 Justice Murphy believed that the majority’s conclusion required a jury to condemn persons of “low mental powers” to death “on the false premise that they possess the mental requirements of a first degree murderer or free them completely from criminal responsibility . . . . Common sense and logic recoil at such a rule . . . .”150

Justice Rutledge, in a third dissent, observed that “a revolting crime . . . requires unusual circumspection for its trial, so that dispassionate judgment may have sway over the inevitable tendency of the facts to introduce prejudice or passion into the judgment.”151 He believed an instruction that would have provided Fisher his mental state defense was warranted.152 He explained “[a] trial for a capital offense which falls short of that standard . . . does not give [Fisher] his due.”153

Houston’s strategy in the Fisher case was a remarkable prelude to the modern treatment of mental state defenses in the nation’s criminal courts.154 The Supreme Court is still examining the same innovative issues Houston was attempting to establish in Fisher.155 There can be no doubt that the intricacies of the Fisher case will stand as the measure of the most critical mental state defense opinions for the foreseeable future.156

V. PANEL OF THE JURY INCLUDES NO AFRICAN-AMERICANS

Key to Charles Houston’s criminal justice decision making was the fact that during most of his career defendants were subject to criminal conviction by all-white juries.157 He represented

148. Id. at 489.
149. Id. at 492 (Murphy, J., dissenting).
150. Id.
151. Id. at 494 (Rutledge, J., dissenting).
152. Id. at 495.
153. Id. at 494.
156. Siegel, supra note 154, at 317-18.
157. “Although most northern blacks gained access to the regular court system by the middle of the nineteenth century, their testimony, when permitted against a white
defendants in the two key Supreme Court cases in an effort to correct that injustice. In *Hollins v. Oklahoma*, Houston, along with his father, William Houston attacked the conviction of an Oklahoma man charged with rape in Okmulgee County. Because Negroes were excluded from jury pools in that county for a long period of time solely on account of their race, the Supreme Court reversed the defendant’s death sentence on the grounds of discrimination.

Three years later, in *Hale v. Kentucky*, Houston represented Joe Hale, a Negro who was convicted by an all-white jury in McCracken County, Kentucky. He claimed he was denied equal protection because the jury commissioners excluded all African-Americans from the jury pool. Both of these cases reflect the decades-long battle to convert jury selection practices in the United States. Prior to the Civil War, blacks rarely served on juries in America. During Reconstruction, however, “juries invariably consisted of white and black Republicans, with blacks sometimes outnumbering whites. Southern Democrats interpreted the racial and political composition of federal juries as incontrovertible evidence of political persecution through judicial injustice.”

As Reconstruction ended, so did the participation of African-Americans in the nation’s juries, particularly in the South. For example, in some southern counties “[n]o Negro had served on either a grand jury or a trial jury in 30 years,” even though some of those counties had thousands of voting age African-Americans.

person, was rendered virtually meaningless by all-white juries.” Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 7 (1990).

158. 295 U.S. 394 (1935) (per curiam).
159. *Id.* at 395.
160. *Id.*
161. 303 U.S. 613 (1938) (per curiam).
162. *Id.* at 614.
163. *Id.* The *Hale* case was tried in a county where “no Negro had served as a juror in more than fifty years. . . . [Y]et there were 8,000 Negroes in the county, of whom 700 fully qualified under Kentucky law for jury service . . . .” KLUGER, *supra* note 6, at 204.
164. See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 370; KENNEDY, *supra* note 45, at 169 (“Prior to the Civil War, only one state, Massachusetts, permitted blacks to serve on juries.”).
Closely connected to the problem of jury exclusion was the related practice of denying blacks the right to vote. Often, the panels were selected from the voting rolls of the county in question.\(^{168}\) States often imposed poll taxes,\(^{169}\) "voter registration literacy tests,"\(^{170}\) and other obstructions by Government officials to deny blacks political power. One Morgan County, Alabama jury commissioner even testified at one trial that "he had never met a Negro fit for jury duty."\(^{171}\)

One of Houston's efforts to attack the problem was his participation in the Supreme Court case \textit{Nixon v. Condon}.\(^{172}\) In that case, Houston helped convince the Supreme Court to invalidate the Texas Democratic party's practice of excluding Negroes from their primary elections.\(^{173}\) In an opinion authored by Justice Benjamin Cardozo, the Court explained "[w]hile that mandate was in force, the negro was shut out from a share in primary elections, not in obedience to the will of the party . . . , but by the command of the state itself, speaking by the voice of its chosen representatives."\(^{174}\) Twelve years later, Thurgood Marshall, relying on Houston's precedent in \textit{Nixon v. Condon}, successfully argued \textit{Smith v. Allwright}\(^{175}\) where the Supreme Court finally did away with the "white primary."\(^{176}\) The Court again reiterated that the organic law of the United States grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.\(^{177}\)

This important foundation, which prohibited both discrimination from jury panels and suppression of the black voter rolls, helped lay the foundation for other important jury trial rights recognized by the Supreme Court several decades after Houston's death.


\(^{171}\) GOODMAN, supra note 46, at 123.

\(^{172}\) 286 U.S. 73 (1932).

\(^{173}\) \textit{id.} at 81, 89.

\(^{174}\) \textit{id.} at 81.

\(^{175}\) 321 U.S. 649 (1944).

\(^{176}\) \textit{id.} at 664.

\(^{177}\) \textit{id.}
When *Batson v. Kentucky*\(^{178}\) was decided it sent shock waves through the criminal justice community.\(^{179}\) The case held that the process of removing jurors through the use of "peremptory challenges"\(^{180}\) was not an unlimited right but that a defendant, under some circumstances, might be able to inquire about a pattern of challenges that appear to be based on race.\(^{181}\) Although the standard for making such a challenge is still difficult to achieve, it was nothing compared to the "crippling burden of proof"\(^{182}\) required to make a similar challenge under the doctrine of *Swain v. Alabama*.\(^{183}\) This doctrine placed the obligation on the defendant to show racial discrimination when a prosecutor repeatedly struck jurors on account of their race.\(^{184}\)

Houston's career-long emphasis on jury inclusion and election participation demonstrates that these were important values in his pursuit of criminal justice reform.\(^{185}\)

**VI. PURPOSE OF THE PROSECUTION LACKED ADEQUATE STRUCTURAL LIMITATIONS**

Toward the end of his extraordinary legal career, Houston became heavily involved in matters related to the accusations that some Americans were involved in the activities of the Communist Party.\(^{186}\) Such allegations against citizens were not a new

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\(^{178}\) 476 U.S. 79 (1986).

\(^{179}\) *See* Jere W. Morehead, *When a Peremptory Challenge is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 625-26 & n.6 (1994).

\(^{180}\) *Batson*, 476 U.S. at 82.

\(^{181}\) *Id.* at 96 (holding that "a defendant may establish a prima facie case of purposeful discrimination in selection of a petit jury" if the defendant shows that: "he is a member of a cognizable racial group" and that the prosecution challenged a member of the defendant's race, the peremptory challenges creates a jury capable of discrimination, and the prosecutor used the challenges to exclude jurors based on race).

\(^{182}\) *Id.* at 92.

\(^{183}\) 380 U.S. 202 (1965).

\(^{184}\) *Id.* at 91, 92.

\(^{185}\) *See* McNEIL, *supra* note 2, at 133 ("[Houston] advised and directed black lawyers throughout the nation about their local campaigns against discrimination in education, transportation, jury exclusion, and denial of the vote.") (emphasis added).

\(^{186}\) University of Chicago historian Genna Rae McNeil notes:

Charles Houston had an impressive record of support of the civil liberties of citizens who criticized the government of the United States. Houston and Abraham Isserman for the National Federation for Constitutional Liberties had filed in 1941 an amicus curiae brief urging that "in the interest of protecting democratic rights as guaranteed in the first, fourth and fifth amendments of the Constitution, the indictments against Albert Blumberg, Thomas O' DEA and Philip Frankel, Communist Party officials charged with contempt of the Dies Committee, be dismissed. The concern in *United States v. Albert Blumberg* was "the protection of . . .
encounter for Houston. Since the early days of his legal career, the Communist Party’s involvement with issues that concerned African-Americans had confronted Houston and affected his legal strategies. Although he had never been a member of the Communist Party, Houston did represent a Communist attorney in a disbarment proceeding in Maryland. His efforts, however, did not go without controversy. After an adverse ruling for his client, Houston was criticized for his legal strategy in that case. He also was severely attacked by the Party when he sought a compromise for Crawford in the Virginia case where Houston’s efforts had avoided a death penalty for his client.

Through his work with attorneys at the National Lawyers Guild he became involved with the defense of several Hollywood screen writers who had come to the attention of the House Un-American Activities Committee (HUAC). In 1947, the HUAC began to bring forward these screen writers and other citizens to ask them questions about their political associations. This endeavor was part of the HUAC’s investigation of the alleged Communist infiltration of the motion picture industry.

John Howard Lawson and Dalton Trumbo were both tried and sentenced for refusing to answer questions of a congressional constitutional rights whenever and wherever they are properly asserted.” The denial of constitutional liberties was the issue when Charles Houston, in 1943, volunteered his services to William Pickens and Mary McLeod Bethune in defense against Dies Committee’s charges of subversive activities and worked particularly in Mrs. Bethune’s behalf. He insisted, “One should not have to denounce the Communist Party just to clear [oneself] of unfounded charges ... because we cannot deny that the Communists have done us great service.”

McNeil, supra note 2, at 203 (citations omitted).

187. The Communist Party’s involvement in the Scottsboro case caught the attention of Charles Houston. McNeil, supra note 2, at 108. Houston once observed that:

Communists are offering Negroes full and complete brotherhood without condition of race, creed or previous condition of servitude. They are the first to fire the masses with a sense of their raw potential power and the first to openly preach the doctrine of mass resistance and mass struggle. ... The Communists have made it impossible for any aspirant to Negro leadership to advocate anything less than full economic, social and political equality.

Wormser, supra note 63, at 198-99.

189. McNeil, supra note 2, at 98.
190. Id. at 102.
191. Houston was a member of the National Lawyers Guild during the 1940s and, in 1949, succeeded William H. Hastie, Jr. as Vice-President of the organization. Id. at 194.
192. Id. at 204.
194. Id. at 1678-83.
committee. "Pursuant to two validly issued subpoenas, Lawson and Trumbo, both prominent writers in the motion picture industry, appeared before a subcommittee [of HUAC] .... Both testified under oath." Trumbo refused to answer the question "whether or not he was or had ever been a member of the Communist Party." He received an additional criminal charge for refusing to say "whether or not he was a member of the Screen Writers Guild." Both men were convicted and their cases were consolidated for appeal.

A brief filed by Houston, Martin Popper and several other Los Angeles attorneys participating pro hac vice asserted that the "[a]ppellants strongly urge at the outset that they are protected under specified Amendments to the Constitution from being compelled to disclose their private beliefs and associations ...." Houston and the other attorneys asserted that "the Bill of Rights protects all individuals against being compelled to disclose their private beliefs and associations regardless of what those beliefs and associations may be, that the right of privacy of an individual is absolute, and that an individual may not be punished for remaining silent as to those beliefs and associations." The appeals court rejected Houston's arguments, reasoning that "the right of free speech is not absolute but must yield to national interests justifiably thought to be of larger importance." The court explained that "[n]o one can doubt in these chaotic times that the destiny of all nations hangs in [sic] balance in the current ideological struggle between communistic-thinking and democratic-thinking peoples of the world." The court further concluded that since the motion picture industry plays a critical role "which may influence the minds of millions of American people .... [T]he right to ask men who, by their authorship of the scripts, vitally influence the ultimate production of motion pictures" are not permitted to be questioned. Subsequent petitions to the United States Supreme Court filed by Houston were denied. Although this appeal was lost, the next ten years would see the end to the

196. Id.
197. Id. at 50-51.
198. Id.
199. Id. at 51.
200. Id. at 49, 51.
201. Id. at 51.
202. Id. at 52.
203. Id. at 53.
204. Id.
House Committee's heavy-handed inquiries.206 Houston's vision and commitment to this issue and others related to free speech and association helped lay the foundation for the free exchange of ideas in America. Congress’ wide ranging investigation into Communist activities aided by the Federal Bureau of Investigation has found its place among America’s greatest examples of government invading the private lives of its citizens.207

VII. CONCLUSION

Charles Hamilton Houston is deserving of all the honors and accolades that he has received over the years,208 particularly in the area of civil rights, for which he is best known. His most famous student, and late Supreme Court Justice, Thurgood Marshall, commented that when it came to the strategy of Brown v. Board of Education,209 "[Charles Houston] was the engineer of all of it."210

The bright glare of Brown and its importance in American history often eclipses the importance of Houston’s other important contributions. This is particularly true in the area of criminal

208. Both Clemson and Harvard Universities have named research centers to honor Houston's accomplishments. The Charles H. Houston Center, http://www.clemson.edu/houston/quick_links/Charles_H_Houston.htm; Charles Hamilton Houston Institute for Race & Justice, http://www.law.harvard.edu/programs/houstoninstitute/mission.html. Harvard and North Carolina Central law schools have designated faculty chairs in his name. See http: www.law.harvard.edu/faculty/directory/facdir.php?id=112 and http://www.nccu.edu/publicrelations/new/248.htm. Howard University has named its main law school building for Houston. Our Campus, http://www.howardlaw.org/index.php?id=288. The University of Baltimore School of Law awards an annual lifetime award for litigation excellence in Houston's name. Press Release, Univ. of Balt., Law School's Legacy of Excellence in Litigation Event March 12 (March 1, 2005), available at http:// www.ubalt.edu/glance/ur_releases/2005/3_1_05_lit.html. The first recipient of that award was William H. Murphy, Jr., the son of the lawyer who tried the James case with Houston in the 1940s. Id. Present at the award ceremony was Charles Hamilton Houston, Jr., who is a member of the history department at Morgan State University, and M. Peter Moser, an attorney whose father had so richly complemented Houston's lawyering skill four decades earlier when he was the presiding judge in the James case.
justice where Houston accomplished many important benchmarks. Although many of his cases in the area of criminal procedure generated mixed results, viewed as a collection, those cases represent a body of important and visionary work in American law. Several of the principles that he established through successful litigation still have a permanent impact. His ground-breaking work in jury selection from the 1930s laid the foundation for the "Batson doctrine,"\(^{211}\) which now controls not only the criminal justice system, but also the civil litigation landscape.\(^{212}\) His detailed record building from voter lists and tax records, along with demonstrations of how these sources could be used to discriminate has led to modern jury selection reform. His work has resulted in the use of motor vehicle registration lists to make jury pools more inclusive.\(^{213}\) His emphasis on the fairness of an inclusive jury over seventy years ago still provides the strategy for establishing that right today.

Houston's early work on capital punishment with the NAACP demonstrates an insight into unfair punishment which still guides the contemporary capital punishment debate. Concepts like the arbitrariness\(^{214}\) of the punishment and the absence of guided discretion\(^ {215}\) are a direct result of the impact of cases like \textit{Crawford}\(^ {216}\) where very serious allegations subjected a black defendant to a harsh criminal justice system with little tolerance or mercy. His concern for fair trials and his disdain for violence visited against blacks by lynch mobs while they were awaiting trial made his work on difficult murder and rape cases a career-long pursuit.\(^ {217}\)

In \textit{James}, Houston used the latest procedures from psychiatry in order to demonstrate that a "feeble minded" low-I.Q. defendant

\(^{211}\) Batson v. Kentucky, 476 U.S. 79, 89 (1986) (forbidding prosecutors from challenging "potential jurors solely on account of their race . . . ."). Prior to \textit{Batson}, blacks were challenged and removed from juries in some jurisdictions at an alarmingly high rate. \textit{See}, e.g., United States v. Carter, 528 F.2d 844, 848 (8th Cir. 1975) (discussing that, in 15 criminal trials in 1974, 81% of black jurors were struck in cases involving black defendants).


\(^{214}\) \textit{See} Furman v. Georgia, 408 U.S. 238, 293-95 (1972) (per curiam) (Brennan, J., concurring).


\(^{216}\) \textit{See} Mack, \textit{supra} note 72, at 296.

\(^{217}\) Note that \textit{Crawford} was early in his career and \textit{James} was towards the end.
made an unreliable statement, which was coerced by the police.\(^\text{218}\) In another Maryland case, *Jones v. State*, Houston tested the boundaries of what makes a confession voluntary. The circumstances of removing a defendant to a distant location and questioning him in a manner which suggested that officials would turn him over to a mob where the crime had occurred\(^\text{219}\) demonstrates his concern for the integrity of police investigative practices.

The eighteen-year-old Jones and his fourteen-year-old brother were handled in a manner inconsistent with the interrogation practices that are approved by courts today.\(^\text{220}\) Both the *James* and *Jones* cases raised concerns hauntingly familiar to those finally addressed by the Supreme Court in *Miranda v. Arizona*, which now sets the standard for voluntary confessions throughout the nation.\(^\text{221}\) It is clear that by focusing attention on the practices of the local police in obtaining statements from the defendants, Houston was attempting to draw attention to the problem of intimidation of suspects by local authorities who desired to obtain confessions. Houston also emphasized the absence of legal counsel during the ordeals in each of these cases as a factor making the confessions questionable.\(^\text{222}\) It would be almost a quarter century later that the Supreme Court would adopt Houston’s suggestion that counsel is critical in these circumstances. In 1963, the Supreme Court announced its opinion in *Gideon v. Wainwright*, which established the right to counsel for nearly all criminally accused.\(^\text{223}\) Later in the 1960’s and 1970’s the Court expanded those rights to the early stages of the criminal investigation process.\(^\text{224}\)

In his most controversial criminal case in the Supreme Court of the United States, Houston represented Julius Fisher who killed a librarian in the Washington Cathedral.\(^\text{225}\) Such shocking facts might have resulted in an uninspired criminal defense. Such was


\(^{219}\) Jones v. State, 188 Md. 263, 268-70, 52 A.2d 484, 486-87 (1947).

\(^{220}\) For a recent Maryland case discussing the contours of police interrogation, see Blake v. State, 381 Md. 218, 230-36, 849 A.2d 410, 416-20 (2004).

\(^{221}\) 384 U.S. 436, 467-68 (1966).

\(^{222}\) See *James*, 193 Md. at 44, 65 A.2d at 894; *Jones*, 188 Md. at 268, 52 A.2d at 486. Furthermore, the alleged police abuses in *Jones* and *James* were similar to those complained about by blacks across the nation. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 at 50 (1994) ("In 1939 and 1940 NAACP lawyers persuaded the Supreme Court to reverse three convictions on the ground that confessions had been coerced.").


\(^{224}\) See United States v. Ash, 413 U.S. 300, 309-13 (1973) (discussing the historical background and developments that led the Court to recognize that assistance of counsel is not limited to only the trial).

not the case for Houston. The complex psychiatric defense he
developed at trial and advanced through each stage of the appeal
was an innovation for its time.226 Houston convincingly argued
that Fisher was suffering from a complex mental disorder that,
although not rising to the level of insanity, still warranted a
mitigating effect on his criminal responsibility.227 Where this type
of defense is still controversial under the modern headings of
“diminished capacity” or mental “syndrome” defenses, it has
become the modern trend in many courts around the country.228

Up until the last days of his life Houston engaged in extensive
litigation for those considered at the time subversive and radical.
In the case of Lawson v. United States, Houston mounted an attack
on the power of Congress or any government entity to punish
thought, speech, or political preference.229 His representation of
those accused of being communists at such a critical stage in
American history reflected his great insight into a true danger
against American democracy: the suppression of dissent.230

Although he would die before the abuses of Senator Joseph
McCarthy and the House Un-American Activities Committee
would reach its height, history must recognize that Houston’s
commitment to challenge their activities was also appropriate. His
effort to remove from the criminal realm the punishment of
association or political ideology was both correct and justified.231

In short, every criminal justice issue in which Houston invested
time and energy and that resulted in a reported decision is now
considered the “best practice” in the criminal justice system.232

226. Siegel, supra note 154, at 332.
227. Id. at 354.
228. Id. at 354, 371; see also WAYNE R. LAFAVE, CRIMINAL LAW 451-59 (4th ed.
2003); D. Michael Rissinge, Navigating Expert Reliability: Are Criminal
Standards of Certainty Being Left on the Dock?, 64 ALB. L. REV. 99, 112-22
(2000) (discussing the categories of “syndrome” evidence including Rape
Trauma Syndrome, Battered Woman’s Syndrome, and Child Sexual Abuse
Accommodation Syndrome).
229. 176 F.2d 49, 50-51 (1949); see also McNeil, supra note 2, at 204-05.
230. See United States v. Hall, 176 F.2d 163 (2d Cir. 1949), cert. denied, 338 U.S.
851; In re Ades, 6 F. Supp. 467 (D. Md. 1934); see also McNeil, supra note 2, at
215.
231. McNeil, supra note 2, at 203-06, 215; see also ARTHUR M. SCHLESINGER, JR.,
THE VITAL CENTER: THE POLITICS OF FREEDOM 189 (1949) (“The preservation of
freedom requires a positive and continuing commitment. Specifically the
maintenance of the United States as a free society confronts the American people
with an immediate responsibility in two areas in particular: civil rights and civil
liberties.”).
232. See, e.g., Fisher v. United States, 328 U.S. 463 (1946) (appealing a criminal
conviction for murder on grounds of mental deficiencies that prevented the
defendant’s ability to deliberate murder); Hollins v. Oklahoma, 295 U.S. 394
(1935) (successfully challenging the exclusion of African-Americans from jury
service based solely on their race); James v. State, 193 Md. 31, 65 A.2d 888
(1949) (Houston introduced psychological factors to indicate that the defendant
Like his visionary work in *Brown v. Board of Education*, which he could not see to its completion because of his untimely death in April 1950, his criminal justice career reflects the same precision, diligence and reason that supported his *Brown* strategy.\(^{233}\)

Although his work in *Brown* will likely never be overshadowed, it is clear that his work in criminal justice deserves a place of honor as one of the great litigation careers of all time.\(^{234}\) All who care about a criminal justice system that is fair, accurate and operates under the “rule of law” owe Houston a considerable debt.

\(^{233}\) Thurgood Marshall summed it up precisely when he stated:

> You have a large number of people who have never heard of Charlie Houston. But you’re going to hear about him, because he left us such important items . . . . When *Brown* against the Board of Education was being argued in the Supreme Court . . . [t]here were some two dozen lawyers on the side of the Negroes fighting for their schools . . . . [O]f those . . . lawyers . . . only two hadn’t been touched by Charlie Houston . . . . [T]hat man was the engineer of all of it . . . . I can tell you this . . . if you do it legally, Charlie Houston made it possible . . . . This is what I think . . . Charlie Houston means to us.

\(^{234}\) As the war ended, Charles Houston, whose health was failing, was pleased. The court was headed in the direction he had anticipated, the NAACP was growing in number, civil rights was now a national issue, and black voter registration was starting to climb . . . . Houston’s strategy had transformed the legal culture within this country. *Wormser, supra* note 63, at 163.