Supreme Court and Congressional acts. This is fortunate because the referendum was soundly defeated by those who would maintain segregated schools. *Brown* presented American society an opportunity for positive change, which has been consistently resisted. This worthy battle has continued into the new millennium with *Meredith v. Jefferson* and *Parents Involved in Community Schools v. Seattle School District, No. 1.* In 2007 the Supreme Court decided when it is legally appropriate to use race as a factor in public school admissions.[220]

Following emancipation, Herculean efforts were made by Blacks to become literate. But a lack of political will, fear of competition, and racial prejudice stymied federal financial support for Black achievement in education. It is a tale retold with great consistency. Commencing with *Roberts*, Blacks have faced numerous obstacles in the struggle to obtain an equal education for their children. Governmental failures, social tradition, entrenched racism, and an uncertain Supreme Court have prevented the realization of *Brown*. For most children of color, the path to education still leads to segregated and under-funded public schools. One is reminded of the Bible verse, "there is no straw given unto thy servants and they say to us, make bricks."[221] People of color must continue the struggle against educational disfranchisement by law and tradition. The education of future generations of children depends upon it.

Source: Browne-Marshall, Gloria J. Race, Law, and American Society: 1607 to Present (Second Edition). New York, NY: Routledge, 2013.

3

Race, Crime, and Injustice

> For a *white* man to defend his friend unto blood is praiseworthy, but for a *black* man to do precisely the same thing is a crime.
>
> **Frederick Douglass (1854)**

> Neither slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.
>
> **Thirteenth Amendment (1865)**

Today, our criminal justice system incarcerates Black men, women, and children in astounding numbers. Blacks comprise 13 percent of the U.S. population, but of America's more than two million incarcerated persons, over half are men and women of color. Twice as many Whites as Blacks are arrested.[1] Yet seven times as many Blacks as Whites are convicted of crimes.[2] Black women represent the fastest growing segment of incarcerated persons.[3] Black juveniles are disproportionately represented at every stage of juvenile justice proceedings.[4]

This chapter examines the monumental challenges facing people of color, especially African-Americans, from the colonial period to the present period, within the criminal justice system. As victims of crime, jurors, witnesses, suspects, and defendants, the struggle for access to justice has been less successful than any other area discussed in this book.

Crimes without Punishment: Africans in the Colonies

As captives, Blacks were victims of kidnapping and torture. Their legal right of self-defense was abrogated. As early as 1639, Virginia enacted a statute that stated: "Act X. All *persons except Negroes* are to be provided with arms and ammunition."[5] In 1669, the Virginia legislature enacted the following statute, titled "An Act about the casual killing of slaves."[6] The law declared that "if any slave resist his master ... and by the extremity of the correction should chance to die, that death shall not be accompted by felony."[7] A slaveholder who failed to beat or mutilate a recalcitrant slave could be fined or even forfeit his slave.[8] Laws protected slaveowners upon the death of their property during a corrective beating. For the enslaved person, these were crimes without punishments.

Criminal laws and punishments were intended to assist in subjugation of Blacks into a labor class benefiting Whites. Thus, slaves and free Blacks were prosecuted without benefit of due-process protections.[9] However, Whites made up the majority of the inmate populations in the Deep South, where slave laborers were too valuable to imprison. For free Blacks accused of a crime, conviction was nearly certain to be followed by punishments of death, banishment, or lengthy incarceration. In states such as Maryland and Virginia, free Blacks represented over one-third of the inmate population.[10] Free Blacks convicted of crimes in 1850s Virginia could be sold into slavery or hanged. A more profitable option involved leasing these Black inmates to work on canals, roads, and bridges. Jails and prisons were segregated. White politicians considered housing Black prisoners with Whites an insult to the White prisoners and bad for morale. Slaves, African or Native American, or Asians or Hispanics could not testify against Whites or legally defend themselves against attacks by Whites. In California, "An Act for the Protection of Foreigners," enacted specifically against the Chinese, required an immigrant to purchase a license in order to bring a legal action in state court.[11]

Rape of Black Women: Celia

The magnitude of these due-process deprivations are evidenced in the case of Celia. In 1855 Celia, an enslaved woman, was hanged for

the murder of her owner, Robert Newsom, a wealthy White farmer in Fulton, Missouri, whom she killed after he attempted to rape her.[12] Newsom's murder was precipitated by years of rape, beginning when she was purchased at the age of 14. On the night of the murder, Celia had warned Newsom to leave her alone. When he entered her room and lunged for her, Celia beat him to death. She cut up his body and burned the pieces in the fireplace. The state of Missouri charged her with murder.[13] Celia admitted she struck Newsom but only to end his sexual attacks; she did not mean to kill him.[14] Under Missouri law, a woman was permitted to protect herself against rape.[15] However, in Celia's case, the law would not apply because a slave had no right of self-defense or grounds upon which she was allowed to resist her master.[16] Missouri law prohibited Blacks from testifying in court against Whites. Thus, Celia could not take the witness stand and testify in her own defense. On October 10, 1855, the jury of White men, four of whom were slaveowners, found Celia guilty of murder; she was sentenced to death by hanging.[17] The execution was delayed until December 21, 1855, long enough for Celia to give birth to Newsom's stillborn child, conceived by rape.

Black women were the victims of sexual assault without recourse in law or society. After slavery ended, laws failed to protect women of color. Statutory rape laws were enacted but applied only to White girls. The case of Recy Taylor in Alabama brought attention to the issue of rape. The matter of Dominique Straus-Kahn raised this issue again. In 2011, Strauss-Kahn was a contender for the presidency of France. He was arrested for allegedly raping Nafissatou Diallo, a maid, originally from Guinea, in the Sofitel Hotel in New York City. Diallo's case was undermined by false statements she gave on immigration forms. Despite evidence of sexual relations, the question of forced or consensual sexual assault was never taken to trial. Manhattan District Attorney, Cyrus R. Vance, Jr., terminated the investigation with a finding that Diallo and her story were less than credible. A civil case was brought by Diallo against Strauss-Kahn, who returned to France where he faced charges of participation in a prostitution enterprise. In 2012, Strauss-Kahn settled the civil action with Diallo for an undisclosed sum. The investigation was terminated with a finding that Diallo and her story were less than credible.

A civil case was brought by Diallo against Strauss-Kahn, who returned to France and now faces charges there of participation in a prostitution enterprise.

Civil Rights Act of 1866

Even after slavery was abolished, the courtroom remained a hostile place for Blacks who sought to defend their rights, testify against Whites, or seek justice. The rule of law offered little for aggrieved Blacks, especially in criminal cases. America had grown accustomed to ignoring the rights of Black, Asian, Native American, and Latino litigants and dismissing witnesses, jurors, attorneys, and spectators. With the passage of the Civil Rights Act of 1866, Congress provided another avenue for Blacks who were denied justice in state courts. Specifically, the act provides, in the pertinent part, that all persons shall have the same right to:

> make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.[18]

The act is triggered by crimes and offenses committed against the provisions of the act

> and of all causes, civil and criminal, *affecting persons* who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act.[19]

The Civil Rights Act of 1866 provides for the removal from state court into federal court any suit or prosecution, civil or criminal, which had been, or might hereafter be, commenced against any such person for any cause whatever.[20]

Congress did not trust the states to fairly adjudicate criminal cases involving Blacks. As the Supreme Court stated in *Blyew v. United States*: "We cannot be expected to be ignorant of the condition of things which existed when the statute was enacted, or of the evils which it was intended to remedy."[21] Historically, the criminal justice system has shown a blatant disregard for protecting the rights of Blacks or providing equal justice under law. Disparate treatment and unfair criminal convictions, as well as the failure to protect Black communities, demonstrate societal efforts to restrict the freedom and economic mobility of people of color.

Fugitive Slave Patrols: *Prigg v. Pennsylvania*

Escape was a crime punishable by beating, torture, or death. States enacted rigid laws to punish slaves who attempted to escape. The harshness of those laws was intended to discourage anyone from considering escape or revolt.[22] Yet slaves faced these risks for the sake of freedom. To reduce escape attempts, slave patrols were used to scrutinize all activities of Blacks, both free and enslaved.[23] The Fugitive Slave Act of 1850 extended criminal punishment to the person escaping as well as to those who assisted an enslaved person with an escape. Bystanders could be implicated as well.[24] A $1,000 fine was imposed on marshals who refused to capture and return runaway slaves.[25]

In *Prigg v. Pennsylvania*, an 1842 case, the U.S. Supreme Court found unconstitutional a Commonwealth of Pennsylvania law criminalizing bounty hunters who captured Blacks to return to slavery.[26] Escaped slave Margaret Morgan and her children were captured by bounty hunters in Pennsylvania and taken to Maryland. Edward Prigg, one of the bounty hunters, was convicted under the Pennsylvania statute. The Court overturned the conviction. Although Morgan's children were born in Pennsylvania, the Court maintained that as children of a "slave for life," they, too, were property of the slaveholder, Margaret Ashmore. The fugitive slave laws enacted by Congress in 1793 were enforcement mechanisms for Article IV of the U.S. Constitution, which provides slaveowners with a right to have escaped persons "delivered up on Claim of the Party to Whom Service or Labour may be due."[27] The rights of slaveowners to regain "property" superseded Pennsylvania's attempt to abolish slavery.

Slave patrols acted with near impunity. Freed Blacks were sold into slavery with little redress. The Fugitive Slave Act was utilized as a mechanism for kidnapping and enslaving free Blacks.[28] There was little legal recourse for them. A White person could kidnap a Black person and claim him as a fugitive slave.[29] The owner need only present an affidavit to a U.S. judge or commissioner. There was no trial by jury. A $10 fee was required if the captured Black person was determined to be a fugitive. A $5 fee had to be paid by the bounty hunter or alleged owner if the captured person was determined to be free. A captured Black person determined by the court to be free had little recourse against the fraudulent owner. Attempts to protect or harbor an escaped slave were deemed criminal acts.[30] The fugitive slave clause of the U.S. Constitution and fugitive slave legislation were promulgated to protect the rights of the slaveowner even after escape to a free state or Canada.[31]

Blacks were deemed nonpersons by the Supreme Court in *Dred Scott v. Sandford*.[32] The Court determined Dred Scott was not a citizen of the United States or a person with legal rights protected by law.[33] Without personhood, a slave was precluded from accessing the courts for justice, based solely on his race. Even after slavery was abolished, Blacks remained outside the halls of justice. Blacks learned how to use the courts to fight laws enacted to intentionally prevent their social, economic, and political mobility. They fought in spite of the hostility and prejudice accorded them by the courts, law enforcement, lawmakers, and American society.

Black Codes: *Bailey v. Alabama*

After slavery, Black Codes were criminal laws enacted by states to maintain the socio-racial hierarchy of slavery. These laws were enacted "to make Negroes slaves in everything but name."[34] Slavery was abolished except as punishment for a crime. In the words of political compromise found in the Thirteenth Amendment, "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[35] This clause invoked freedom and revoked it simultaneously. The legacy of the

criminal component to the Thirteenth Amendment is evident in modern prison populations. Homeless Blacks were subjected to vagrancy laws enacted to criminalize homelessness. The vagrancy laws also restricted the ability of Blacks to travel. As in slavery, Blacks were forced to produce documents, when requested by Whites, to prove that they were viably employed or had a home—or they could be charged with vagrancy or trespassing and jailed. Unable to pay the fine, Blacks became prisoners of a convict labor system.[36] For many Blacks, the criminal justice system was simply a mechanism for re-enslavement.

"Jim Crow" laws and prejudice meant Blacks were more susceptible to imprisonment. Black Codes subjected Blacks to harsher punishments and longer sentences for similar offenses.[37] Without counsel, the right to testify, or Blacks serving on the jury, the Black defendant stood unarmed before a court of law and injustice. The Supreme Court noted that "in many quarters prejudices existed against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of the race was a party accused."[38] Once he was convicted, the state could use the prisoner as free labor. Black defendants were convicted on the most minor infraction of the law and sentenced to hard labor.[39]

The Convict Lease System

Convict lease systems relegated people of color to the status of indentured laborers without rights or protections.[40] The prison or jail officials leased out convict labor to businesses or farms. The profits accrued to prison officials and politicians. Convict work camps were scattered across the South.[41] Convict lessees worked the mines and railroads, as well as the fields.[42] Both people of color and Whites were subject to convict leases. However, the prison conditions for Blacks were consistently worse.[43] Once convicted, inmates were reduced to free labor for any municipality or business owners willing to lease the labor from the correctional facility. They were subjugated, disfranchised, and made to labor for economic profit of the more politically powerful for yet another 100 years. This system of arrest under "Black Codes" and sham trials with sentences of hard labor bore a

remarkable similarity to the gulag labor system of the former Soviet Union.[44]

Black Sharecroppers and Unfair Labor Contracts: *Bailey v. Alabama*

Farm labor contracts placed Blacks and their children back into indentured servitude. Once signed, insidiously worded labor contracts made it a crime for the laborer to refuse or escape.[45] Blacks were tricked or forced into signing land lease contracts that relegated them into involuntary servitude. The property was uninhabitable and the land useless for farming, leaving the lessee in debt and enslaved as was the intent of the diabolical lessor. Sharecropping poor land would then lead to inescapable debt to the general store, landowner, and employer. The occurrence was known as peonage and, simply defined, debt slavery.[46] Once the contract was signed, breaking the agreement became a criminal offense punishable by heavy fines. If the laborer or tenant refused or was unable to pay the fine, then he was imprisoned and forced to "work off" the debt.

The labor required under the contract was arduous work under horrendous conditions. The local courts enforced the contracts. Failure to complete the contract was a criminal offense. A contract may require the signatory to become an "apprentice" in conditions similar to slavery.[47] Blacks under these contracts were denied the right to trial by jury.[48] Defendants were summarily sentenced to hard labor and the convict lease system.

In *Bailey v. Alabama*, Bailey entered into a labor contract that in actuality reduced him to involuntary servitude.[49] The Alabama statute enforced the peonage contract. It provided:

> Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money or paying for such property, refuses or fails to perform such act or service, must, *on conviction*, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one-half of said fine to go to the county and one-half to the party injured.[50]

Refusing to work as a servant or sharecropper and the inability to refund money that may or may not have been given by the employer were considered *prima facie* evidence of the intent to injure or defraud an employer.[51] Bailey refused to be enslaved. Under Alabama law, his refusal to work constituted a criminal act.[52] He was arrested. After a preliminary trial before a justice of the peace, he was imprisoned for obtaining $15 under a contract in writing, with intent to injure or defraud his employer.

Bailey appealed his conviction.[53] He filed a writ of habeas corpus seeking his release. The Supreme Court of Alabama upheld his conviction. Bailey appealed to the U.S. Supreme Court. He argued that Alabama's statute violated his Thirteenth and Fourteenth Amendment rights. He made clear that the statute forced him into involuntary servitude. The U.S. attorney general filed an amicus or friend of the court brief in support of Bailey. Justice Oliver Wendell Holmes, Jr., writing for the majority, upheld the Alabama statute under which Bailey was imprisoned. In the opinion, Justice Holmes briefly referred to the illegitimacy of the statute, but he quickly decided that there were not enough facts upon which the Court could base a decision. Bailey was left without justice and precluded from the basic right of testifying in court regarding his intent.[54]

Murder by Lynch Mob: *United States v. Shipp*

Lynching was the crudest form of resistance to Black progress. This killing by torture became a mechanism of control that involved Black women and children and foreign nationals, as well as Black men.[55] A lynch mob has as its goal subjugating the victim and spreading terror. For Blacks in America, lynching was an attempt to prevent their ascension, thus forcing a perpetual labor class relegated to America's bottom rung socially, politically, and economically.[56] Despite efforts to undermine their success, Blacks pressed forward and sometimes even thrived.

In the South, as Blacks advanced, rural Whites lost economic ground. Between 1900 and 1930, the number of White tenant farmers increased by 61 percent.[57] During that same period, the number of Black tenant farmers increased by only 27 percent. Blacks were the obvious competitors.[58] Given the failure of the criminal justice system, Blacks were made vulnerable targets. Mob violence and terrorism became an outlet for White frustration and jealousy in rural communities.[59] Photographs bear witness to Whites, male and female, children and elders, standing in approval next to the mutilated body of a lynched Black person who forgot his or her "place" at the bottom.[60]

White lynch mobs attacked with impunity.[61] Law enforcement offered little or no protection against the lynching of Black women, men, and children.[62] Too often, law enforcement was implicated in the murders. Federal and state courts offered scant protection. Living with the intimidation produced by White lynch mobs became a way of life in America.[63] Black women who fought against White rapists were lynched.[64] In certain cases, Black women were raped and then lynched.[65]

Murder in Paradise

On January 8, 1932, Joseph Kahahawai was kidnapped and shot to death. It is another tragic twist to a controversial criminal trial on the island of Honolulu, Hawaii. Earlier that fall, Thalia Massie, White, and the wife of Tommie Massie, a White naval officer stationed in Honolulu, left a party, alone. Later that night she was found beaten and, when questioned, accused six Hawaiian men of gang rape.[66] There was little evidence of rape and several credible rumors that a drunken Thalia Massie may have been beaten by her White male lover and quickly invented the gang rape story to explain her bruises. Joseph Kahahawai and the other five defendants pled not guilty.

Racial tensions between Whites and Asians on the island grew worse. The rape trial ended with a hung jury. Despite threats of retaliation by the naval base and sugar plantation owners who controlled the Hawaiian islands and its Hawaiian, Japanese, Chinese, and Filipino workers, the men were freed. Thalia's mother, Grace Fortescue, and husband, Tommie Massie, refused to accept the verdict and sought revenge. They, along with a friend, Edward Lord, kidnapped Joseph Kahahawai, took him to the Massie home, tortured and shot him in cold blood. His naked body was found in the trunk of their car.

Without any real attempt to hide their crime, the three were charged with Kahahawai's murder. Grace Fortescue requested Clarence Darrow, the infamous trial attorney, to defend them. Darrow was known for defending evolution against creationist theory in the Scopes "Monkey Trial." His reputation as the nation's best criminal defense attorney was sealed in 1924 with the trial of century. Clarence Darrow defended Nathan Leopold and Richard Loeb, two wealthy teenagers, who kidnapped and murdered 14-year-old Bobby Franks in hopes of committing the perfect crime. Darrow was 74 years old and past his prime. He argued that the murder of Joseph Kahahawai was an honor killing.[67] He deserved to die. Despite the racial sentiment, the mounting evidence could not be denied. Fortescue, Tommie Massie, and Edward Lord were found guilty of murder and sentenced to ten years. The Governor of Hawaii commuted the sentence to one day. They spent the "sentence" celebrating their victory.

On September 9, 1924, on the Hawaiian island of Kauai, sheriffs at the Filipino strike headquarters in Hanapepe attempted to arrest two Filipino laborers. Gunfire was exchanged. Sixteen Filipino laborers and a deputy were killed. The incident became known as the Hanapepe Massacre. No one was prosecuted. This massacre was forgotten.

White Slave-Traffic Act

Lynching became a social phenomenon.[68] Members of a lynch mob were swept into a vicious hysteria of racism. Whites attacked Blacks arbitrarily or based on vendetta.[69]

White mobs attacked when their boxing champion lost to Jack Johnson, a Black fighter. Prior to 1908, boxing was segregated. White fighters were assumed to be physically superior to Blacks. Johnson challenged the reigning White heavyweight champion, Canadian Tommy Burns. Burns was in search of a lucrative match

and agreed. The fight was held in Australia. Johnson defeated Burns to become the first Black heavyweight champion. White audiences and boxing promoters, assured the victory over Burns was a fluke, persuaded White former champion Jim Jeffries to leave retirement to fight Johnson. In 1910, in Reno, Nevada, Johnson defeated the "Great White Hope" Jeffries. Riots broke out among lower-class Whites.[70] Whites retaliated by attacking Blacks and burning their homes.[71] Scores of Blacks were injured and many were killed. In the midst of rabid racism, Johnson maintained an entourage of White girlfriends.

Three years after his victory over Jeffries, Johnson became the first person convicted under the White Slave-Traffic Act of 1910.[72] It was a racially motivated charge. The White woman at the center of the charge, Belle Schreiber, had been a prostitute for several years before meeting Johnson.[73] To avoid arrest, Johnson fled to Cuba and lost his title. He later returned and spent one year in federal prison. Johnson was the "prototype of the independent black who acted as he pleased and accepted no bar to his conduct. As such ... [he] threatened America's social order."[74] The criminal justice system was used to wreak social vengeance on Johnson. Yet those who harmed Blacks following Johnson's victory against Jeffries were not prosecuted.

Police Powers

Racial interaction was presumed to be so volatile it was placed under a state's police powers. In *Plessy v. Ferguson*, Justice Brown, speaking on behalf of the Court, stated:

> Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within ... [state] police power.[75]

Mobs used lynching as punishment for Blacks who violated the racial divisions sanctioned by *Plessy*. In essence, *Plessy* exonerated the mobs' actions by supporting the notion that Whites hated Blacks too much to control their own actions. Racial animosity was considered a natural response to racial interaction. Thus, law enforcement abdicated its responsibility to stop a mob from assaulting Blacks.

Given this undercurrent of animosity, any minor provocation could cause violence. Racial hatred on the part of Whites was supposedly so strong an emotion that little could prevent the killing of Blacks encountered under civil circumstances. However, violence was presumed necessary for Blacks who left their place of lower rank through achievement, confidence, or refusal to acquiesce to White demand. Torturing an emboldened Black person was intended to send a threatening message to all Blacks to remain obsequious.

Too often, any dispute between Whites and Blacks could result in the forming of a lynch mob. A dispute over back wages between Sam Hose, a Black laborer, and Alfred Cranford, his White employer, led to murder.[76] In this case, Cranford lay dead. Hose fled the scene. A lynch mob tracked him down. They seized him and the torture began. First, his ears were sliced off, followed by his fingers and genitals. The torture and murder of Sam Hose was reported in the *New York Tribune*, April 24, 1899:

> Sam Hose (a Negro who committed two of the basest acts known to crime) was burned at the stake in a public road, one and a half miles from here. Before the torch was applied to the pyre, the Negro was deprived of his ears, fingers and other portions of his body with surprising fortitude. Before the body was cool, it was cut to pieces, the bones were crushed into small bits and even the tree upon which the wretch met his fate was torn up and disposed of as souvenirs. The Negro's heart was cut in several pieces, as was his liver. Those unable to obtain the ghastly relics directly, paid more fortunate possessors extravagant sums for them. Small pieces of bone went for 25 cents and a bit of the liver, crisply cooked, for 10 cents.[77]

No one was prosecuted for murder or abuse of the corpse. Despite these threats, Blacks intensified their challenge to the brutal torture and murder of Blacks by lynch mobs.[78]

Lynching and the Supreme Court: *U.S. v. Shipp*

In *U.S. v. Shipp*, the U.S. Supreme Court tried a sheriff in Tennessee for aiding and abetting the lynching of a prisoner.[79] It is the only case

in U.S. history in which the Court tried an individual for contempt.[80] The facts of this case involve acts of savagery. On January 23, 1906, Nevada Taylor was raped on her way home from work.[81] It was a late night in Chattanooga, Tennessee. Taylor, a White woman, never saw her attacker and could not describe him; she did not know if he was Black or White.[82] On January 25, "Captain" Joseph F. Shipp, sheriff of Chattanooga, arrested a Black man, Ed Johnson, and charged him with the crime.[83] Alibi witnesses placed Johnson across town in another part of the city at the time of the crime. Taylor never identified Johnson or accused him of rape. Johnson argued he was working at the time and had several witnesses to support his alibi.[84] Upon hearing of the arrest, residents of Chattanooga formed a lynch mob and approached the jail.[85] At first, Shipp and three of his deputies guarded Johnson from the mob.

On February 6, Johnson was convicted of the crime.[86] Following a trial before Judge Samuel McReynolds lasting only two days, Johnson was sentenced to death. His execution was scheduled to take place on March 13. No appeal was made on Johnson's behalf by his court-appointed lawyers. It was the judgment of Johnson's counsel that due to the unrest in the community, "the defendant, *even if the wrong man*, could not be saved."[87] Johnson had the option of an appeal, but his lawyers advised him against appealing the sentence.[88] He was told: "An appeal would so inflame the public that the jail would be attacked."[89] Johnson was given two choices: die by lynch mob or be executed "in an orderly manner" by the state of Tennessee.[90] His lawyers stated to the Court: "[T]he defendant, now that he had been convicted by a jury, must die by the judgment of the law, or else, if his case were appealed, he would die by the act of the uprising of the people."[91] Faced with these despicable choices, Johnson surrendered his right of appeal.[92]

Prior to the execution, extra guns were purchased by Shipp to protect the jail against a mob.[93] Johnson was taken to nearby Knoxville to avoid an attempt to lynch him in Chattanooga.[94] Noah Parden, a prominent Black attorney, entered the case.[95] Parden filed an appeal in state court on behalf of Johnson. That appeal was denied. On March 10, 1906, Parden filed an unsuccessful petition for habeas corpus in federal court.[96] He then traveled to Washington,

DC, to file a writ of habeas corpus in federal court alleging that Johnson's Fifth and Sixth Amendment rights to a fair trial before an impartial jury in state court had been denied.[97] Blacks were precluded by law from serving on the jury.[98] He also argued that the lynch mob intimidated jurors as well as the defense counsel, thus tainting the entire trial.[99] Parden met with U.S. Supreme Court Justice Harlan, the lone dissenter in *Plessy v. Ferguson*. Justice Harlan promised to consider Johnson's petition.

On March 19, 1906, Justice Harlan sent a telegram to Shipp staying Johnson's execution.[100] Shipp was informed by Harlan that Johnson was to be protected from harm while the Court reviewed the appeal.[101] Johnson was now a federal prisoner.[102] The local *Chattanooga News* published the telegram, inflaming the crowds.[103] When people read about the stay of execution granted by the Supreme Court, a lynch mob mentality enveloped Chattanooga.[104] Sheriff Shipp was aware of the mob. Johnson received a reprieve from state execution only to have Shipp and a lynch mob determine that he die extrajudicially. Shipp made no effort to call in the militia or alert the governor that reinforcements were needed.[105] Shipp gave no orders for additional deputies to guard the jail.[106] He left only one person, Jeremiah Gibson, in his seventies, to guard Johnson.

The door to the cell was probably left ajar. Upon hearing of the appeal and stay of execution, mobs formed. That night a White lynch mob attacked the jail.[107] They dragged Johnson to a bridge six blocks away.[108] His last words were: "I am not guilty and that is all I have to say. God Bless you all. I am innocent."[109] At the arc of the bridge, Johnson was hung twice (the first time the rope broke) and then shot dozens of times.[110] The murderers left a note to Justice Harlan pinned to Johnson's body: "To Justice Harlan: Come get your nigger now."[111] Shipp and his deputies did nothing to stop the crowd or protect Johnson. The *Chattanooga Times* headline read: "'God Bless You All—I Am Innocent' Ed Johnson's Last Words before Being Shot to Death by a Mob like a Dog."[112]

Justice Marshall Harlan was outraged that Shipp would allow the mob to attack Johnson.[113] The Supreme Court held Shipp and others in contempt for defying their order to stay any execution until a review of the case.[114] Shipp blamed the lynching on the Supreme

Court. He declared the Court an alien intrusion of federal authority on state territory.[115] Shipp argued that had the Court not stayed the execution, Johnson would have died differently. Justice Harlan ordered the first and only criminal trial conducted by the U.S. Supreme Court.[116] The Court found Sheriff Shipp and four others guilty of criminal contempt. Justice Fuller wrote the opinion on behalf of the Court. Fuller noted that, in *Shipp*, "a dangerous portion of the community was seized with the awful thirst for blood which only killing can quench, and that considerations of law and order were swept away in the overwhelming flood."[117] After the lynching, outraged Blacks rioted through the streets of downtown Chattanooga.[118] The *Shipp* defendants were sentenced to a mere 90 days in jail, and set free early for good behavior.[119] Whites in Chattanooga reelected Shipp by a wide majority, although Blacks voted against him.[120] *U.S. v. Shipp* established the practice of the U.S. Supreme Court to intervene in state capital cases when a question of due process arises.

Mob Violence and Riots

Race riots increased against Black communities across the country. In Tulsa, Oklahoma, Chicago, Arkansas, and small villages, Blacks were murdered by lynch mobs and in race riots. A link could be established between the mob violence and the improved social status of Blacks. African-American servicemen who had defended their country overseas were shot, tortured, and mutilated by White American mobs.[121] Blacks were murdered for wearing their military uniforms.[122] Blacks, considered "uppity" for their desire for civil rights and equal treatment, were murdered by lynch mobs. Blacks were lynched for refusing to "stay in their place" as alleged inferiors to Whites.[123] Blacks were lynched while attempting to escape the racial oppression of the South by migrating North.[124] Without equal protection of the laws, the Black community was made vulnerable to these murderous mobs.[125]

Lynching intensified in the North as well as the South. Black women and children were murdered by lynch mobs.[126] Black mothers were killed with their children.[127] A Black woman and her husband were burned at the stake in Doddsville, Mississippi.[128] Lynching of Black women and men took place with little provocation or evidence of wrongdoing.[129] Lethal mob violence for seemingly minor infractions of the caste codes of behavior was a fundamental mechanism for maintaining social control.[130] In Columbus, Mississippi, a Black woman was raped and lynched after the lynch mob could not locate her son to lynch.[131] A Black man was lynched for refusing to dance when ordered to do so by a White man.[132]

On July 28, 1917, thousands of African-Americans participated in a silent march in New York City. That year, Blacks were murdered with impunity by lynch mobs in Waco, Texas, East St. Louis, Illinois, and Memphis, Tennessee. Blacks were made victims of race riots in five other American cities. The silent march protested this national wave of violence against Blacks as well as the abject failure of law enforcement and the courts to provide protection against such lawlessness. As Blacks migrated to the North for better employment opportunities, tensions rose. White immigrant groups fought against the influx of Black competition, resulting in race riots.[133] The red summer of 1919 was named for the numerous race riots across the country; most notable were the riots in St. Louis, Chicago, Washington, and Arkansas.[134] In 1921 the alleged bumping of a White woman in Tulsa, Oklahoma, by a Black man in a crowded elevator led to a riot that ended with the deaths of 150 people, the use of U.S. military bombers, and the destruction of Greenwood, Oklahoma, a prosperous Black community[135] (see the list of race riots in Appendix B).

Anti-Semitic Violence: *Frank v. Mangum*

Although Blacks have long been the targets of lynching, Whites have also been murdered by lynch mobs. In *Frank v. Mangum*, a Jewish defendant, Leo M. Frank, was awaiting retrial in the rape and murder of Mary Phagan, a 13-year-old girl, when he became a victim of lynching.[136] The homicide occurred in 1913.[137] Frank supervised the National Pencil Factory, a manufacturer of pencils, in Atlanta, Georgia, at which Phagan was an employee. Phagan's body was found in the basement of the factory. Angry mobs made anti-Semitic

statements about Frank.[138] During the reading of the verdict, Frank was forced to leave the courthouse for fear an acquittal would lead to mob violence.[139] The jury deliberated for four hours. Leo Frank was convicted and sentenced to death the next day.[140] Frank appealed his conviction, arguing that the disorder in the courtroom during trial and the mobs gathered around the courthouse influenced the jury.[141] The Georgia Supreme Court upheld the verdict.[142]

On appeal, the U.S. Supreme Court affirmed the lower court, allowing the conviction to stand.[143] The Court recognized that mob violence could affect the fairness of a trial, thus causing a due-process violation. However, the Court failed to find any disruption rising to that level in this case. Following the decision affirming the conviction, Governor Frank Slaton commuted Frank's death sentence to life in prison. On August 17, 1915, a mob of 25 men stormed the prison. Frank was recovering in the prison hospital from having his throat cut by a fellow inmate. The mob forced Frank to a car and drove him to Marietta, Georgia, the hometown of Mary Phagan, which was over 100 miles away. There they hanged Frank from a tree near the Phagan home. No one was convicted for this crime. It is believed that Leo Frank is the only known person of Jewish descent to be lynched in America.[144] In 1986 the Georgia Board of Pardons and Parole gave Leo Frank a posthumous pardon.[145]

Elaine Riots: *Moore v. Dempsey*

The threats of a lynch mob played a role in the rush to judgment in a riot case in Elaine, Arkansas, in 1919. On the night of September 30, Black residents of the town of Elaine located in Phillips County, Arkansas, gathered at their church. The farmers had been systematically paid below market prices for their crops by the White brokers in town. They met at the church to discuss joining the Progressive Farmers and Household Union of America and retaining an attorney to represent them in a lawsuit. They believed that membership in the union would allow them to sell crops without going through local White brokers. Whites, angered at the audacity of Blacks, circled the church and attacked. The Blacks defended themselves. A White sheriff was injured and a White railroad worker was killed. Rumor

spread of a Black uprising in Elaine. Whites from other counties and bordering states converged on the town.

Blacks were hunted down and murdered. Clinton Lee, a White man, lost his life. Governor Hillman Brough requested assistance from the U.S. military. The estimated number of Blacks killed has ranged from 80 to over 200. Blacks were blamed for the riot and arrested in the hundreds. A grand jury was convened on which no Blacks were allowed to serve.[146] Little more than a month after the riot, 112 Blacks were charged with murder, conspiracy, and participating in an insurrection. Those who testified against other Blacks were freed. The Black prisoners who refused to confess were tortured. Walter White of the NAACP investigated as well. White, a Black man of very light complexion, freely walked among the White residents of Elaine without being detected. Governor Brough appointed a "Committee of Seven" to investigate and assign guilt.[147] The *Helena World* newspaper published an article titled "Inward Facts about the Negro Insurrection" that presented the results of the committee's investigation.[148]

The newspapers inflamed White anger. The article in the *Helena World* reported that the race riot in Phillips County was "a deliberately planned insurrection of the negroes against the whites, directed by ... Progressive Farmers and Household Union of America, established for the purpose of banding negroes together for the killing of white people."[149] The article was quite lengthy and, among other things, stated that Robert L. Hill, who organized the union, told Black people "to arm themselves in preparation of the day when they should be called upon to attack their white oppressors."[150] At trial, the defendants were represented by the renowned Black attorney Scipio A. Jones.[151] By November, 12 defendants were convicted of murder in the first degree and sentenced to death:[152] "The trial lasted about three quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree."[153]

There were several trials and appeals.[154] In 1923 the U.S. Supreme Court decided *Moore v. Dempsey*.[155] Frank Moore, named petitioner of the group of convicted Black men, argued upon a writ of habeas corpus that they were convicted of murder under pressure of mob violence without any regard for their rights and without due process

of law.[156] The Supreme Court found that "no juryman could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob."[157] The *Moore* defendants were finally pardoned by Governor McRae on January 13, 1925.[158]

Fighting Back: *People v. Ossian Sweet*

Blacks led a continuous fight against lynch mobs and riotous marauders. Dr. Ossian Sweet and his family fought a lynch mob angered by their purchase of a home in an all-White community. The mob of Whites approached Sweet's home, throwing rocks and screaming profanities. Shots were fired from inside the Sweets' home. Two people were struck by gunfire. Leon Breiner, a White neighbor who had joined the lynch mob, was killed.[159] Sweet admitted to firing his weapon into the crowd.[160] Attorney Clarence Darrow defended Sweet's right to protect his family and home from a murderous mob.[161]

An all-White jury returned a verdict of not guilty by reason of self-defense[162] and Sweet was acquitted.[163] Unfortunately, the legal outcome in *People v. Sweet* remains an exception. Efforts undertaken by Blacks to create legal protections against lynching were undermined by all three branches of the federal government. State prosecutors refused to bring cases against Whites involved in these murders. Blacks turned to the international arena and world opinion to put pressure on the United States to provide more than the promise of constitutional protections.

Anti-lynching Bills

In 2005 the United States Senate issued an apology for blocking passage of anti-lynching legislation. In 1900, Black Congressman George White introduced the first anti-lynching bill.[164] It was purposely stalled in the House Judiciary Committee. Then, Congressman Leonidas Dyer, a White Democrat from Missouri, proposed an anti-lynching bill in 1918.[165] After tremendous lobbying on the part

of the NAACP, the Dyer anti-lynching bill was passed by the House of Representatives in 1922.[166] However, it was defeated by a Senate filibuster of Southern Democrats.[167]

A reluctant president, Warren G. Harding, and an avowed Southern patrician, President Woodrow Wilson, refused to take a stand against the Southern Democrats in the Senate.[168] In 1932 Blacks hoped the newly elected president, Franklin D. Roosevelt, would press for anti-lynching legislation. They were disappointed once more. African-Americans developed their own national campaign against lynching. Mary Church Terrell and Ida B. Wells-Barnett were joined by thousands of Black women and a handful of White Southern abolitionists who also opposed lynching and supported passage of federal protections. Senator Charles Sumner, an abolitionist, joined in the protests against lynching and racial discrimination.[169]

In 1935, an anti-lynching bill was proposed by U.S. Senators Edward Costigan and Robert F. Wagner.[170] The Costigan–Wagner Bill was defeated by the Senate.[171] The U.S. Senate refused to pass federal anti-lynching legislation and local anti-lynching laws were never enforced.[172] Riots and lynching continued for decades.[173] Black war veterans received unfettered hostility.[174] In 1946 a Black veteran in Louisiana was partially dismembered, castrated, and burned with a blow-torch for refusing to give a White man a war memento.[175] Eight Black men were murdered while wearing their military uniforms.[176] One Black man "was lynched *because of the fact* that he wore the uniform of a United States soldier"[177] (see Chapter 7).

Rosewood Riots: *Goins v. Florida*

In 1994 Florida paid reparations to Blacks terrorized by White mobs in 1923. In January 1923 a White mob attacked a community of Blacks in the town of Rosewood, Florida.[178] Rosewood was home to over 20 families. The year prior to the attack a White female school teacher had been murdered. Whites accused Blacks of the crime. Two Black men were lynched. A White woman in a nearby town accused a Black man of rape and a White mob began searching for the man. As the mob grew in number, it began to shoot any Blacks

in its path and burn homes.[179] The death toll remains a topic of dispute.[180] Black residents claim 20–30 men, women, and children were murdered that night. Whites claim four Blacks (including a woman and child) and one White male lost their lives that night. It is not disputed that the homes, churches, and farms of Black residents were burned to the ground.[181] After the massacre, a special grand jury was convened by Governor Cary Hardee. However, the grand jury found insufficient evidence to prosecute.

No charges were brought. The community of Rosewood was never rebuilt. Later, it was discovered that the White female accuser has been beaten, not raped, by a White man.[182] Once again, the state and federal government failed to protect Blacks from flagrant criminal behavior perpetrated by Whites. Decades later, in 1994, the victims of the race riot in Rosewood, Florida, presented a claim for damages for $7.5 million. The case of *Arnett Goins, Minnie Lee Langley, et al. v. State of Florida* sought restitution for the losses in 1923.[183] Remedies were sought through the Florida legislature. The legislature came to acknowledge the harm committed in 1923 and the ensuing denial.[184] Congressional remedies were sought because the statute of limitations had expired on the crimes and the criminals involved were destitute or dead. The victims of Rosewood received their reparations for the harm in 1923. However, there has been no such financial recovery for the thousands of other Black victims of the brutality of America's lynch mobs and race riots.[185]

Modern Lynching: James Byrd, Jr.

Unfortunately, these occurrences carry through into recent periods. On June 7, 1998, James Byrd, Jr., age 49, was tied to a pick-up truck and dragged to his death.[186] Byrd's throat was cut before his body was dragged over two miles behind the pick-up truck through the back country roads of Jasper, Texas. His skin, blood, arms, head, genitalia, and other parts of his body were strewn along the highway. His remains were then dumped in front of a cemetery traditionally used for Blacks. Three White men, John William King, aged 23, Shawn Berry, aged 23, and Lawrence Brewer, aged 31, with links to White supremacist groups were convicted of the crime. King and Brewer

were attempting to ingratiate themselves into a White supremacist organization.[187] They received the death penalty. Berry received a sentence of life in prison. This case appears to be one of the few incidents, if not the only incident, in American history where White defendants received the death penalty for the murder of a single Black person.[188] The murder of Byrd led jurisdictions across the country to enact hate-crime legislation. Sadly, James Byrd's grave has been desecrated twice.[189]

Although the U.S. Senate apologized for decades of resisting the passage of anti-lynching legislation, eight senators refused to vote for the apology.[190] Senator Mary Landrieu introduced the apology bill after reading the book *Without Sanctuary*.[191] The official apology recognizes that the Senate was instrumental in blocking over 200 proposed anti-lynching bills.[192] The legislation speaks to generations of loss and acknowledges the "crime of lynching succeeded slavery as the ultimate expression of racism in the United States following Reconstruction."[193] Over 4,740 persons have been murdered by lynching, the majority of whom were Black. Ninety-nine percent of perpetrators escaped punishment by state or local officials. The apology was supported by 89 senators.

From Emmett Till to Trayvon Martin

The myth of the Black rapist of White women has been used to sanction lynching.[194] Ida Wells-Barnett directly confronted the myth of lynching Black men as punishment for the rape of White women. She also addressed the reality of a criminal system that wantonly failed to protect Black women from rape for centuries.[195] Lynching is a murderous act of intimidation and societal evil. To murder by lynch mob takes more than one angry person to hang a person from a tree or burn him alive and sell the ears and testicles as souvenirs.[196] Wells-Barnett said that the "real purpose of these savage demonstrations is to teach the Negro that in the South he had no rights that the law will enforce."[197]

Wells-Barnett gathered research giving rise to the act to refute the rape myth. According to Tuskegee Institute records for the years

1882 to 1951, lynchings were divided into: 41 percent for felonious assault, 19.2 percent for rape, 6.1 percent for attempted rape, 4.9 percent for robbery and theft, 1.8 percent for insult to White persons, and 22.7 percent for miscellaneous offenses or no offense at all.[198] Black men were lynched for disputing a White's man's honesty, attempting to register to vote, unpopularity, self-defense, testifying against a White man, asking a White woman's hand in marriage, and allegedly peeping in a window.

Allegations of rape involving White women and Black men were made in less than one-quarter of lynch murders. Of the 3,693 persons lynched between 1889 and 1930, the rape of a White woman was not given as the motivation.[199] The true motives for lynching were usually economic or political. Prosperous Blacks were lynched by Whites jealous of Black prosperity.[200] Lynching often took place in areas where Whites were mired in economic deprivation and Blacks represented a large numerical majority of the population.[201] Blacks were lynched to inhibit voter turnout or as a means of political intimidation or retribution.[202]

The night of July 19, 1935, Rubin Stacey was lynched in Fort Lauderdale, Florida. Stacey, a Black homeless man, was caught stealing food from the kitchen of a White family. Marion Jones, the wife of the house, screamed when she saw him in her house. She filed a complaint against him. Stacey was arrested. The rumor of rape and attack of a White woman led a lynch mob to search for him. Sheriff's deputies placed Stacey in custody. However, the White lynch mob brazenly broke down the door of the jail and dragged Stacey away. He was beaten and hanged from a tree beside the home of Marion Jones. The photos of Stacey were published in many local newspapers as a warning to Blacks to stay in their place.

One year after *Brown v. Board of Education*, Emmett Till was murdered. On August 28, 1955, the civil rights movement was galvanized by the lynching of 14-year-old Chicago native Emmett Till in Money, Mississippi.[203] The entire facts of the murder are still unknown. Till was visiting relatives in Mississippi. His offense was to speak directly to or whistle at a White woman, Carolyn Bryant, in a country store. The interaction took place during broad daylight. There was no allegation of rape. A few nights later, two White men

abducted Till from the house where he was staying. He was tortured and dumped into the Tallahatchie River.[204] Carolyn Bryant's husband, Roy Bryant, and his half-brother, J. W. Milam, were arrested for the crime. Bryant and Milam were tried by an all-White jury in Sumner, Mississippi, and acquitted after less than two hours of deliberation. Reportedly, there were questions as to the identity of the body.[205] Bryant and Milam have since died.[206] However, new witnesses and additional suspects have been uncovered, leading the federal government to reopen the case in 2004. State criminal charges are still viable. Till's body was exhumed to quell questions of misidentification; he was positively identified on August 26, 2005.

On February 26, 2012, Trayvon Martin, a 17-year-old, unarmed African-American was shot and killed by George Zimmerman, White, 28, and a volunteer for his neighborhood watch group. Zimmerman was carrying a concealed handgun. Zimmerman called 911 to report a suspicious Black teenager in his coveted middle-class gated community. Despite direct instructions by the 911 dispatcher to leave the boy alone, Zimmerman confronted him. A shot was fired.

There are claims the boy pleaded for his life. Zimmerman claims Trayvon provoked the fight and attacked him. A Florida law, "Stand Your Ground," expanded self-defense to include feeling a threat anywhere, any time. Protests around the Trayvon Martin murder overshadowed the sentencing of Deryl Dedmon.

Dedmon, 19, White, was sentenced to life in prison for the racially motivated murder of James C. Anderson, 47, a Black man, in Jackson, Mississippi. Deryl Dedmon did not know Anderson. Dedmon resided in one of Jackson's predominantly White suburbs, Brandon, Mississippi. After a birthday party Deryl Dedmon and his friends, White teenagers, decided to drive their pick-up trucks into the urban core of Jackson with the intention of assaulting Black men for pleasure. They planned to hunt for vulnerable Blacks—drunk, homeless, or alone—and assault them. The boys encountered James Anderson in a motel parking lot, alone. They set upon him yelling "White Power." After beating Anderson bloody, Deryl Dedmon intentionally ran Anderson down with his truck. Then Dedmon backed up the truck, and drove over Anderson again, crushing him to death.

At his sentencing, Dedmon apologized to Anderson's family, saying he was "young and dumb, ignorant and full of hatred." Anderson's family chose to reject the death penalty, sparing the young man's life. The other defendants pled not guilty. In April 2012, two Oklahoma men, Jacob Carl England, 19, and Alvin Lee Watts, 33, shot five Black people, killing three and wounding two during Easter weekend, in Tulsa. They were both charged with hate crimes and murder. They sought out and intentionally targeted African-Americans.

If the motel's surveillance camera had not captured Dedmon's assault on James Anderson, there would have been scant evidence. The 911 dispatcher recorded the racial epithets and actions of George Zimmerman. A Black president called the killing of Trayvon Martin a tragedy. A Black U.S. Attorney General will investigate Trayvon's murder. Norton N. Bonaparte, Jr. the city manager of Sanford, Florida, is a Black man from New Jersey. This is progress, hard-fought, every inch of it. Yet the murder of Emmett Till continues to haunt this country with each race-based hate crime.

Police Brutality

The criminal cases and controversies are too varied and the lives lost over these centuries are in such heartbreaking numbers one cannot recount them all here. People of color have learned well to fear the police, with good reason.[207] It is not unheard of for police to attempt to save a Black life from lynching or mob violence.[208] However, the attempts are scant when compared to the history of complicity in racial violence and the continued failure of the state courts to render justice.

Robert Hall was arrested on January 23, 1943, for allegedly stealing a tire.[209] He was taken into custody by Screws, the sheriff of Baker County, Georgia. Screws had enlisted Jones, a police officer of the city of Newton, Georgia, and deputized a man named Kelley. All of the officers involved were White. At the time of his arrest, Hall was a 30-year-old Black man in good health. Screws, Jones, and Kelley beat Hall to death that night. The details are as follows:

> As Hall alighted from the car at the court house square, the three petitioners began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to "get" him.[210]

Screws, Jones, and Kelly were indicted and each charged with violating Hall's civil rights[211] and conspiracy to violate his civil rights.[212]

The Fourteenth Amendment needed a criminal component to reach police brutality. Under the amendment, a state could not deprive a person of life, liberty, or property without due process. Screws was employed by the state. Hall was deprived of the right to a trial and, if convicted, a reasonable sentence. However, the amendment did not provide criminal sanctions and offered no punishment for those who, like Screws, violated those protections and then hid behind a state's failure to bring a criminal action. Historically, states had failed to protect Blacks "from the cruelties of bigoted and ruthless authority.... But, where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guarantees are to become atrophied."[213] Thus, Congress enacted a criminal statute to enforce the protections under the Fourteenth Amendment.[214]

Screws and his accomplices were tried under the federal statute in district court.[215] The federal statute provided:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution ... or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race ... shall be fined not more than $1,000, or imprisoned not more than one year, or both. Color of law means

acting under governmental authority or in their official capacity as officers.[216]

Screws, Jones, and Kelley were convicted. They were never charged or tried for murder under state law. Screws and his accomplices appealed their convictions. The officers argued that the federal statute was unconstitutional and it should not apply to them. Screws *et al.* reasoned that the phrase "color of law" only applied to the actions of governmental officials who were behaving appropriately.[217] The murder of Hall, while handcuffed, was inappropriate behavior for law enforcement officers. Thus, they were not acting under color of law and so the statute should not apply to their actions. The federal appellate court upheld the convictions.[218] However, upon appeal to the U.S. Supreme Court, their convictions were overturned.[219]

In *Screws v. United States*, the U.S. Supreme Court rejected the color of law argument.[220] But the Court found that there was no evidence that Screws, Kelley, and Jones intended to kill Hall.[221] The Court overturned the convictions and ordered a new trial. Screws was retried. This time he was found not guilty of the murder of Hall. He later ran for office and was elected to the Georgia State Senate. Repeatedly, Blacks would find little protection from police brutality. The *Screws* requirement of proving intent to do harm while acting under "color of law" would remain an obstacle to justice for many years.[222] However, the civil rights legislation enacted during the post-Civil War era continues to provide the basis for a remedy when state prosecutors refuse to take legal action. Blacks are in an ongoing struggle with those elements in law enforcement who take a position similar to that of the overseer responsible for maintaining racial boundaries.[223]

Unreasonable Search and Seizure: *Mapp v. Ohio*

In *Mapp v. Ohio* (1961), the Supreme Court was presented with a case of unreasonable search and seizure that changed criminal law.[224] Dollree Mapp, a Black single parent, rented a room in her home to a boarder. The man was secretive about his travel and plans. He told her he was leaving for a long trip. Mapp stored his belongings in the basement. On May 23, 1957, three Cleveland, Ohio, police officers arrived at her home.[225] The police wanted information about a person hiding out in her home who was wanted for questioning in connection with a recent bombing. The officers demanded admittance to the home. Mapp telephoned her attorney, who advised against it. Mapp refused the officers admittance to her home. Three hours later the officers returned with additional force.

The officers pried open the screen door, kicked in and broke the glass in the door, and reached in and turned the lock. Mapp demanded to see a search warrant. She was shown a piece of paper and told it was a warrant. At trial, no warrant was produced by the prosecution. Mapp grabbed at the paper and managed to hold on to it long enough to place it in the bosom of her clothing. The officers grabbed Mapp and knocked her to the floor, retrieving the paper from her bosom. They handcuffed her and began a search of her home. The officers dragged her upstairs, where they searched her dresser, closet, suitcases, photo album, and personal papers. Their search led to the basement. While searching a chest in the basement, the officers found pornographic materials. Dollree Mapp was arrested and charged with possession of obscene literature.

Mapp was convicted of possession of pornographic materials. Section 2905.34 of Ohio Revised Code read, in part: "No person shall knowingly ... have in his possession or under his control an obscene, lewd, or lascivious book ... print, [or] picture." The Ohio statute provides a fine of "not less than $200 nor more than $2,000 or imprison[ment] not less than one nor more than seven years, or both."[226] She was sentenced to imprisonment in the Ohio Reformatory for Women for an indeterminate period. The material did not belong to Mapp and she offered evidence to prove that these books and pictures belonged to a man who had rented from her and occupied a room in her home.[227] When she learned he was not going to return or use the room for the balance of the last month for which he had rented it, she decided to use the room for herself and to pack up his belongings and store them until he came for them.

Mapp found the boarder's books and pictures and packed them in a box with his other belongings. She never looked at these books and pictures again before they were seized by the police. Her appeals were denied.[228] The police violated Mapp's Fourth Amendment protection against unreasonable search and seizure. The amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Based on an earlier case, *Weeks v. United States* (1914), federal courts punished officers who obtained evidence in violation of the Fourth Amendment by suppressing that evidence.[229] If evidence had been obtained unconstitutionally, it could be suppressed or excluded from a federal trial. At this time, the exclusionary rule was not mandatory in state courts.[230] Thus, if evidence were obtained unconstitutionally, it would not necessarily be suppressed or excluded from use in a state court trial. The trial court judge determined what, if any, sanction may be given to a police officer who abused his authority in obtaining evidence. In *Mapp*, the trial judge determined that the end, finding the evidence, justified the means. The officers brutalized her during their unlawful search for the boarder. There was little evidence that a search warrant ever existed.[231] Yet the Ohio Supreme court upheld her conviction.[232] This Black woman's defiance led police officers and the state courts to punish her with indefinite imprisonment for possession of lewd materials belonging to her absent male boarder.

The U.S. Supreme Court was shocked by the arrogance of the police and state court. It did not examine whether the material was obscene. Instead, the Court reviewed the manner in which the officers obtained the evidence. The Court had previously decided in *Wolf v. Colorado* that it would not mandate the suppression of evidence in cases of Fourth Amendment violations.[233] However, the times and composition of the Supreme Court had changed since *Wolf* was decided in 1949. Moreover, the states had not made sufficient effort to address the abuse of overzealous officers.

The Supreme Court decided in *Mapp v. Ohio* that a mandatory exclusionary rule must be extended to states. The Court stated: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."[234] The exclusionary rule suppressed the unconstitutionally obtained evidence in Mapp's home and her conviction was overturned.[235] The exclusionary rule acts as a sanction. Without evidence, the prosecution has little support against a defendant.

Mapp v. Ohio was a landmark Supreme Court case and a major victory for Dolree Mapp, a Black woman abused by Ohio police officers. It is rare for a police brutality case to reach the U.S. Supreme Court. Countless cases of abuse by law enforcement remain unreported or are summarily dispatched without a written record.[236] With the availability of videotaping, the offending actions of police officers are now recorded more frequently. Testimony by victims can be supported with videotape evidence. Rapid media response to police brutality cases means greater national attention and in-depth coverage by newspapers, radio, and cable and network television programs. In the more recent past, certain police abuse cases have captured national headlines and had an impact on American society. The cases of Rodney King, Alberta Spruill, and Abner Louima are three distinct examples of police violence against Blacks.

Rodney King

On the evening of March 2, 1991, Rodney King, a Black man, was suspected of driving under the influence. King was beaten by members of the Los Angeles Police Department following a high-speed chase on the Altadena Highway.[237] He pulled the car over in a park area. Upon exiting the car, King initially refused to lie prone on the ground as instructed by the police officers. They used force to get him to lie down. After he was handcuffed and still lying on the ground, the officers beat him with clubs, stomped on him, and shocked him with electric tasers. The excessive force used by police officers against King was captured on an amateur videotape. Officer

Laurence Powell wrote: "I havent [*sic*] beaten anyone this bad in a long time."[238] King was treated for a fractured leg, multiple facial fractures, and numerous bruises and contusions.[239] Officers Stacey Koon, Ted Briseno, Roland Solano, and Powell were charged with assault with a deadly weapon and excessive use of force by a police officer. However, even with the videotape evidence of abuse, a jury comprising 11 Whites and an Asian acquitted the officers.[240]

The acquittals were met with outrage from the Black community. Mass uprisings erupted, resulting in more than $1 billion in property damage, at least 40 fatalities, over 13,000 arrests, and 2,000 people injured.[241] Mayor Tom Bradley activated the California National Guard and President George H. Bush deployed federal troops to Los Angeles.[242] The U.S. Justice Department brought an action in federal court under the Civil Rights Act.[243] Once again, the lack of justice for Blacks in state courts required dependence on the Civil Rights Act in federal courts. In April 1993, after a trial in U.S. District Court for the Central District of California, the verdicts were announced. The jury convicted Koon and Powell, but acquitted Wind and Briseno. There were no riots. Rodney King brought a successful civil action that resulted in a monetary settlement.[244] A commission, chaired by Warren Christopher, was formed to investigate police abuse in Los Angeles.[245] The Christopher Commission found widespread evidence of racism and a failure to reprimand officers who used excessive force.[246]

Officers Koon and Powell were sentenced to 30 months in prison, reduced from a possible 70–87 months.[247] However, the U.S. court of appeals rejected the reduced sentences. Koon and Powell appealed the ruling of the appellate court.[248] The U.S. Supreme Court granted review of the case to determine the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the sentencing guidelines. The U.S. Sentencing Guidelines established ranges of criminal sentences for federal offenses and offenders. In *Koon v. United States*, the Supreme Court held that special circumstances could lower the sentence from the 70–87 months of imprisonment as provided under the guidelines.[249] However, the Court gave a jumble of reasons and rationale in a split decision that ultimately ended with a remand of the decision back to the trial court for resentencing. Rodney King died on June 17, 2012. The videotape of the horrific beating he received, although years later, remains a symbol of police abuse and the trigger for police reform.

Alberta Spruill

Alberta Spruill, age 57, was attacked by the police in her home on May 16, 2003. Spruill was in her apartment in Harlem, New York, preparing to go to work at the Department of Citywide Administrative Services. At 5:50 in the morning, her door was kicked in by members of the New York City Police Department. A stun grenade was thrown into the living room. Twelve police officers searched her apartment looking for drugs. Spruill was handcuffed to a chair. Her complaints of shortness of breath and chest pains were ignored. The officers had been granted a "no-knock" warrant, which allows the police to break into a home or business without notice. But the police had raided the wrong apartment. The raid, based on information from a drug informant, did not uncover any criminal activity. It was the fifth no-knock raid on the wrong home. All of the victims were Black. After a fruitless search of her apartment, Spruill was taken to the hospital. She died two hours later of a heart attack. Police Commissioner Raymond Kelly offered an apology to Spruill's family and ordered an investigation. The City of New York entered into a private settlement with the Spruill family and ceased using the no-knock warrant. However, there was no public admission of racial bias in the execution of no-knock warrants.

Abner Louima

Abner Louima, a Haitian émigré, was a victim of horrendous abuse. On August 9, 1997, Louima was arrested for allegedly participating in a fight at a nightclub in Brooklyn, New York. He was taken in a police car to the 70th precinct in Brooklyn. While handcuffed in a restroom of the precinct, Louima was beaten by police officers and sodomized with a broken wooden handle of a toilet plunger.[250] The officers then pushed the stick into Louima's mouth, breaking several

of his teeth. He was then dragged through the precinct as the officers bragged about having beaten him. Louima was later taken to the hospital with severe damage to his spleen, intestines, and bladder. Police Officer Justin Volpe pleaded guilty and was sentenced to 30 years in prison. Louima brought a civil action against the New York Police Department. The case was settled for $8.75 million. At the time, Louima's award was the largest settlement for a police brutality case in New York history.

Abuse in Prison: *Hudson v. McMillian*

Blacks are disproportionately represented in the prison system. The majority of corrections officers are White. Given the history of racism in the administration of justice, the correctional facility is a combustible arena for discrimination and violence. In *Hudson v. McMillian*, Keith J. Hudson brought an action against White corrections officers Jack McMillian, Marvin Woods, and Arthur Mezo.[251] At the time, Hudson, a Black inmate, was serving his sentence in Angola, a state penitentiary in Louisiana. During the morning of October 30, 1983, Hudson and McMillan became engaged in an argument.[252] Hudson was placed in handcuffs and shackles. McMillian then punched and kicked him in the mouth, eyes, chest, and stomach while Woods held him in place. Mezo, the supervisor on duty, watched the beating and told the officers "not to have too much fun."[253]

As a result of the beating, Hudson suffered bruises and swelling of his face, mouth, and lip. The blows to his face loosened his teeth and cracked his partial dental plate. This type of violence was not an isolated incident.[254] Hudson brought a successful action in federal court, arguing that the officers violated his Eighth Amendment protection against cruel and unusual punishment.[255] The magistrate awarded him damages in the amount of $800.[256] However, the court of appeals reversed the judgment.[257] The appellate court agreed that the officers' use of force was unreasonable, clearly excessive, and a wanton infliction of pain. However, Hudson could not prevail on his Eighth Amendment claim because, according to the court, his injuries were

minor. Upon appeal, the U.S. Supreme Court found in favor of Hudson. The Court recognized that the power over prisoners must have some limit. The intentional infliction of pain does not always result in medical treatment. Moreover, the standard applied to medical necessity in a correctional facility is much lower than that applied to private persons.[258] A corrections officer is not free to harm an inmate without sanction.

As in *Screws v. United States*, too often a case of police brutality ends with the death of a Black or Latino victim at the hands of White officers. Those cases include, but are not limited to, Cornel Young, Jonny Gammage, Anthony Baez, Richard Brown, Patrick Dorismond, Tyisha Miller, Amadou Diallo, Anthony Dwaine Lee, and Prince Jones. As with decades past, all of these cases ended without an indictment of the officers involved or their acquittal. Once again, the victims were forced to pursue justice under the Civil Rights Act. The cases of Amadou Diallo, Tyisha Miller, and Sean Bell are examined here as examples of police brutality with fatal results.

Amadou Diallo

Shortly after midnight on February 4, 1999, four members of New York City's Street Crime Unit knocked on the door of Amadou Diallo's apartment in the Bronx, New York.[259] Diallo was born in Liberia in western Africa to middle-class parents. He moved to New York City from the French-speaking country of Guinea. He was a legal resident of the United States. The officers, all White, were Sean Carroll, Edward McMellon, Richard Murphy, and Kenneth Boss. The officers wanted to question Diallo regarding several rapes, although they had absolutely no evidence against him. Diallo answered the door. Upon seeing the men, he reached inside his jacket to retrieve a wallet for identification. Without any other provocation, the officers began shooting. They shot at Diallo 41 times, riddling his body with 19 bullets. Amadou Diallo, aged 22, died on the vestibule floor outside his apartment. His murder led to protests in New York and news coverage around the world.

Hundreds of protesters demanded justice for Diallo. Politicians and celebrities joined with advocates and concerned citizens in

national protest marches and acts of civil disobedience to demonstrate their anger with the Diallo shooting. The officers were indicted on two counts of murder in the second degree and reckless endangerment in the first degree.[260] Citing negative pretrial publicity, the officers requested a change of venue. They believed it was not possible to receive a fair trial in the Bronx. The request was denied by Patricia Williams, the Black female judge appointed to the case. However, the officers appealed. Their request was granted by the New York Appellate Court. The trial was moved to Albany County in upstate New York. A new judge, Joseph Teresi, a White male, presided. The officers testified that the shooting was an accident. Moreover, they argued that Diallo contributed to his death by not obeying their orders.

The jury of four Black women and seven White men found in favor of the officers. The jury deliberated three days and delivered 24 verdicts of not guilty on the six charges each against the four officers. When asked about the not guilty verdicts, Arlene Taylor, a Black juror in the case, stated, "It has nothing to do with race." A White juror, Helen Harder, said, "Race wasn't even discussed." The family of Diallo filed a civil action against the officers and the City of New York.[261] The case was settled prior to trial. The family agreed to a $3 million settlement. The controversial Street Crime Unit of the New York Police Department was disbanded.[262] Since no criminal liability was found, the police officers were free to resume their roles in law enforcement.[263] Diallo's body was returned to Africa for burial. A commission created to study the incident found the officers had not overreacted.[264] The commission deemed 41 bullets an appropriate response to Diallo's reaching into his pocket.

America's history of racial bias and denigration of Blacks continues to play a role in police brutality cases. In particular, the murder of Amadou Diallo evidences the learned assumptions of race, power, and place. First, there is an assumption that a Black man should have known that the unknown White men in the vestibule of his apartment building in a predominantly Black community must be conducting official business or participating in some illegal enterprise. It matters not. Whatever their business, a Black person is assumed to realize immediately that these White men bring with them the

inherent power of life and death and therefore Blacks bow down and seek the lowest position possible. The appropriate Black behavior, based on slavery and *Plessy*, is to genuflect, presume they are in positions of authority, and show deference. Diallo, an African, did not know to fall to the ground upon seeing White men at his door. A Black man who does not genuflect immediately to White men is presumed to be dangerous. Therefore, the officers feared for their lives when confronted with this slender 22-year-old Black man and shot him 19 times. The New York Police Department initiated cultural training and mandatory race relations courses following the protests.

Tyisha Miller

On December 28, 1998, Tyisha Miller, a Black young woman of 19, was headed home to Rubidoux, a small, predominantly Black town in California, when the tire on her car went flat. She drove to a convenience store in the predominantly White city of Riverside to get air for the tire. However, the air pump at the convenience store was out of order. She tried to drive to a nearby gas station. The tire was quickly losing air. Miller called her friends for help. While waiting in the car for her friends to arrive, she fell asleep. Miller placed a loaded .380 semiautomatic pistol in her lap for protection. It was dark and the neighborhood where she was parked was somewhat dangerous. About an hour later, one of Miller's cousins and a friend arrived to assist her. However, Miller was locked in her car asleep with music playing on the radio. They saw the gun on her lap. But Miller would not respond to the knocks on the window. The cousin and friend thought Miller was foaming at the mouth and needed medical attention. They called 911, reporting Tyisha to be unconscious and in need of a doctor; they also stated that she had a gun.

Four police officers from Riverside arrived, as well as an ambulance. The police were called because of the 911 report of Miller having a gun. Police knocked on the windows of Miller's car. She did not respond. They broke the windows in an effort to retrieve the gun. Two of the officers say Miller reached for her pistol; two said they were not sure whether she reached for the gun. The four Riverside officers—Daniel Hotard, Paul Bugar, Michael Alagna, and

Wayne Stewart—fired 27 shots into the car. Twelve bullets hit and took the life of Miller. All four officers were White. Two officers were still on probation as "rookies" at the time of the shooting.[265] The Riverside police have not released tapes or transcripts of the 911 call or of the radio communication among the officers. However, the City of Riverside released the autopsy report showing that Miller was legally drunk. On May 6, 1999, the Riverside District Attorney's Office stated that it had elected not to prosecute the officers. The officers were terminated after a review by the Riverside Office of Internal Affairs. They appealed the terminations.

Sean Bell

On November 26, 2006, in an incident reminiscent of the Amadou Diallo case, Sean Bell, a 23-year-old Black man, was shot 50 times by undercover police officers and struck four times. Bell was leaving a bachelor party with three friends the night before he was to marry the mother of his two children. Bell was killed and two of his friends in the car were wounded, one critically. Joseph Guzman, aged 31, was seated in the front seat and shot at least 11 times. Trent Benefield, aged 23, was in the back seat and shot three times. One of the officers involved in the shooting fired his weapon 31 times, emptying a full 9 mm magazine and reloading. The officers claim there was an imminent threat. However, the evidence indicates that Bell and the others in the car were unarmed. The officers had been drinking at the bar as well. They were acquitted at trial. Administrative actions were taken within the police department. Under pressure from the public, the New York Police Department initiated a policy to test for drugs and alcohol following a shooting. Such a policy had been established for all other municipal employees.

People of Color Excluded from Juries

Special slave courts adjudicated civil issues involving other slaves and free Blacks. In 1791, free Blacks in South Carolina petitioned the state legislature to repeal provisions of the Negro Act, which deprived free Blacks in South Carolina of

> rights and privileges of citizens by not having it in their power to give testimony on oath in prosecutions on behalf of the state; from which culprits have escaped the punishment due to their atrocious crimes, nor can they give their testimony in recovering debts due to them, or in establishing agreements made by them within the meaning of the Statue of Frauds and Perjuries ... whereby they are subject to great losses and repeated injuries without any means of redress. [T]hey are debarred of the rights of free citizens by being subject to a trial without the benefit of jury.[266]

Legal issues involving people of color were litigated, without them, before state and federal courts. Slave tribunals had no right of appeal.

Whites had long concluded that people of color were not capable of standing in judgment of Whites. Even after the Thirteenth and Fourteenth Amendments were passed, Blacks were disfranchised from the court system because these rights were sporadically enforced by the Supreme Court. Justice was a brilliant idea on paper that rarely ever manifested in practice. The Court revealed:

> Slavery, when it existed, extended its influence in every direction, depressing and disfranchising the slave and his race in every possible way. Hence, in order to give full effect to the National will in abolishing slavery, it was necessary in some way to counteract these various disabilities and the effects flowing from them. Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race.[267]

In *Strauder v. West Virginia*, the Court held that a law of West Virginia limiting jury selection to White male persons, 21 years of age and citizens of the state, was a discrimination that implied a legal inferiority in civil society, "lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility."[268] The Court could define the problem and elaborate the principle. In *Carter v. Texas*, decided in 1900, the Court stated, with respect to grand juries:

> Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all

> persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied.[269]

Unfortunately, state courts continued to exclude Blacks from juries.

In *Swain v. Alabama* (1908), Robert Swain, a Black man, was indicted in Talladega County, Alabama, for the rape of a 17-year-old White girl, convicted by an all-White jury, and sentenced to death.[270] Swain appealed the conviction, arguing that he was denied equal protection by the state's exercise of peremptory challenges to exclude Blacks from the petit jury.[271] The prosecutor in *Swain* used his peremptory challenges—challenges that may be used to strike potential jurors from the jury pool without indicating any particular cause, to strike the six Black potential jurors. The Alabama courts affirmed the conviction as did the U.S. Supreme Court. According to the Supreme Court, Swain needed to prove purposeful discrimination. The Court noted that the equal-protection clause placed certain limits on the state's exercise of peremptory challenges. Unfortunately, those limitations did not rise to the level of a violation in Swain's case.[272]

The Supreme Court held that a prosecutor may use peremptory strikes to eliminate all members of the accused's race from the jury and said that the fact that "no Negroes had ever served on a petit jury in Talladega County did not show a perversion of a peremptory strike system ... where the record failed to show when, how often, and under what circumstances the prosecutor" excluded the potential jurors.[273] The Court sought a balance between the prosecutor's historical privilege of peremptory challenge free of judicial control and the constitutional prohibition against excluding persons from jury service on account of race.[274] In the end, despite America's history of racial discrimination, the Court chose not to scrutinize the prosecutor's actions.[275] The burden on the defendant to prove intent to discriminate effectively undermined arguments alleging racial discrimination in jury selection.

The Court was forced to grapple with the wholesale exclusion of Blacks from juries by recalcitrant state trial court judges and court officials. When Black defendants challenged the exclusion of Blacks from grand and petit juries, court officials testified to the paucity of qualified Blacks fit to serve on a jury in their counties.[276] In *Norris v. Alabama*, the clerk of the jury commission had been given wide discretion to determine who was a qualified juror.[277] However, no person of color had ever served as a juror during the entire history of Jackson County.[278] The Supreme Court, in *Norris*, noted that the population consisted of "a large number of negroes in the county.... Men of intelligence, some of whom were college graduates ... including many business men, owners of real property and householders."[279] The Court reversed the conviction of Norris and remanded the case back to the trial court for a second trial. Despite numerous decisions of the Supreme Court denouncing exclusion of Blacks from juries, the practice continued.

Modern Jury Exclusion:
Batson v. Kentucky

In *Batson v. Kentucky*, decided in 1985, the Court was once again faced with the exclusion of Blacks from a criminal jury.[280] Blacks have struggled to secure their rightful place on American juries for nearly a century.[281] In *Batson*, the trial court of Jefferson County, Kentucky, allowed the prosecutor to strike all of the Blacks from the jury. James Kirkland Batson, a Black man, was charged with second-degree burglary and receipt of stolen goods. The defense counsel representing Batson and the prosecutor were allowed to strike potential jurors for cause if they demonstrated bias.[282] However, counsel were provided with a mechanism referred to as the peremptory strike, which allowed an attorney in the case to strike a potential juror without cause.[283]

The prosecutor in *Batson* used his peremptory challenges to strike all four Black persons, which resulted in a jury composed only of White persons. Defense counsel moved to discharge the jury, partly on the ground that the prosecutor's actions violated Batson's right to equal protection of the laws under the Fourteenth Amendment. The trial court judge denied the motion. The "judge observed that the parties were entitled to use their peremptory challenges to 'strike anybody they want to.'"[284] Batson was tried and convicted on both

counts. He appealed. The Kentucky appellate courts, relying on *Swain v. Alabama*, affirmed the trial court. Batson had not provided any evidence of purposeful discrimination.

Finally, the U.S. Supreme Court overruled *Swain v. Alabama.*[285] The Court held that the equal-protection clause forbids a prosecutor from using the peremptorily challenge to reject potential jurors solely on account of their race or on the assumption that Black jurors as a group would be unable to consider the prosecution's case against a Black defendant impartially.[286] The Court also stated that a criminal defendant did not have to prove repeated instances of discriminatory conduct. Moreover, once a defendant made a *prima facie* showing, the burden shifted to the prosecution to present a neutral explanation for striking that juror. The Court reaffirmed the principles of *Strauder v. West Virginia.*[287] Despite the ruling in *Batson*, Blacks continue to wrestle with racial discrimination in jury selection.[288]

Black Witnesses: *Blyew v. United States* and *Hamilton v. Alabama*

As with the case of Celia, Blacks were precluded from the witness box during slavery as well as after slavery was abolished. Whites considered themselves beyond the judgment of Blacks or any other race of people. Thus, the testimony of a Black, Asian, or Native American witness could not convict or bind a White party in a legal matter. In *Blyew v. United States*, the U.S. Supreme Court affirmed this position. The Court acknowledged that the crimes in *Blyew v. United States* were atrocious.[289] On the evening of August 29, 1868, two White males, Blyew and Kennard, set out to murder Black people. These murders were committed in response to the passage of the Fourteenth Amendment on July 20, 1868.[290]

Blyew and Kennard arrived at the cabin of Jack Foster, a Black man, and his family.[291] They then took an axe and brutally murdered Foster, his wife, Sallie Foster, their 17-year-old son, Richard Foster, and Sallie Foster's 90-year-old blind mother, Lucy Armstrong.[292] "Lucy Armstrong was wounded in the head, which was cut open. Jack Foster and Sallie, his wife, were cut in several places, almost to pieces."[293] Richard Foster died two days after the attack. While he lay

dying, Foster gave a dying declaration accusing Blyew and Kennard of the crimes. Two young girls, one aged ten years and the other 13, escaped. Laura Foster was a witness.[294]

The state of Kentucky did not allow Blacks to testify against Whites. The Kentucky law stated:

> That a slave, negro, or Indian, shall be a competent witness in the case of the commonwealth for or against a slave, negro, or Indian, or in a civil case to which only negroes or Indians are parties, but in no other case.[295]

The Kentucky statute forbade "the testimony of colored persons either for or against a white person in any civil or criminal cause to which he may be a party."[296] Blyew and Kennard were indicted in Kentucky for the murder of Lucy Armstrong. The case was removed from state court to federal court under authority of the Civil Rights Act. Blyew and Kennard were found guilty of murdering Lucy Armstrong. They appealed, arguing that the Civil Rights Act did not apply and that evidence provided by Lucy Foster was inadmissible under the Kentucky statute.

The Court found that the federal government did not have jurisdiction and removed the case back to the courts of Kentucky. Under the Civil Rights Act, the United States had exclusive control of certain race cases. Specifically, the act is triggered by crimes and offenses committed against the provisions of the act

> and of all causes, civil and criminal, *affecting persons* who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act.[297]

The act then provides for removal into the federal courts of any suit or prosecution, civil or criminal, which had been, or might hereafter be, commenced against any such person for any cause whatever.

The U.S. Supreme Court recognized all of these federal protections. However, the Court narrowly interpreted the statute's language—"affecting persons." In doing so, the Court reasoned that the Civil Rights Act was applicable only to parties because they were directly affected by a crime. Witnesses were not covered within the

"affecting person" provision. Thus, Laura and Richard Foster, as witnesses, were not affected persons within the meaning of the statute. Without an affected person involved in the case, the Civil Rights Act was not applicable. Since the Court determined that the Kentucky law did not violate the Civil Rights Act, the case had to be moved back to Kentucky for trial. However, under the Kentucky law, Laura Foster could not testify against Blyew and Kennard.

The Court decided the deceased victim, Lucy Armstrong, was not an affected person. In fact, the Court stated:

> In no sense can she be said to be affected by the cause. Manifestly the act refers to persons in existence. She was the victim of the frightful outrage which gave rise to the cause, but she is beyond being affected by the cause itself.[298]

Therefore, Laura Foster, the only living witness to the murder of her family, was precluded by state law from testifying because she was Black. Richard Foster's dying declaration was inadmissible evidence under that same law because he was Black. Essentially, the Supreme Court undermined the Civil Rights Act and supported a state's ability to preclude witness testimony based on race. Blyew and Kennard murdered four persons in cold blood and were never punished for the crime. For nearly a century following the *Blyew* case, Blacks remained unable to testify against Whites in state courts across the South.

By the mid-twentieth century, Blacks gained access to the witness stand. However, discriminatory treatment by judges, prosecutors, and court personnel became an obstacle to justice. In *Hamilton v. Alabama* (1963), the Supreme Court was faced with another relic of slavery. Mary Hamilton, a civil rights organizer, was before an Alabama court on criminal charges[299] and took the stand to testify in her own defense. In addressing her, the prosecutor referred to her as "Mary," her first name. The cross examination was as follows:

Cross examination by Solicitor Rayburn:

Q.: What is your name, please?
A.: Miss Mary Hamilton.
Q.: Mary, I believe—you were arrested—who were you arrested by?

A.: My name is Miss Hamilton. Please address me correctly.
Q.: Who were you arrested by, Mary?
A.: I will not answer—
Attorney Amaker: The witness's name is Miss Hamilton.
A.: —your question until I am addressed correctly.
The Court: Answer the question.
The Witness: I will not answer them unless I am addressed correctly.
The Court: You are in contempt of court—
Attorney Conley: Your Honor—your Honor—
The Court: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine.[300]

Mary Hamilton was found in contempt, fined, and jailed. The trial court applied a state law that allowed a finding of contempt if a witness diminished or disrespected a judicial tribunal.[301]

Hamilton filed a writ of habeas corpus to gain her freedom. The Alabama Supreme Court denied her appeal and ignored the attorney's disrespect in calling Hamilton only by her first name. She appealed. The U.S. Supreme Court reversed her conviction for contempt. The Court referred to this disrespect as a relic of slavery. During slavery and segregation, Whites refused to refer to Blacks by their full names or acknowledge their professional titles. Only White witnesses were given the dignity of being called by their first and last names.

Segregated Courtrooms: *Johnson v. Virginia*

Blacks had to attack the blatant disrespect shown them under law and by court officials. Courthouses were segregated places. Spectators were required to sit in the section designated for their race. In 1963, Ford T. Johnson, Jr., a Black man, refused to sit in the "colored section" of the traffic court of Richmond, Virginia.[302] When Johnson arrived at traffic court he sat in the section of the courtroom reserved for Whites only.[303] The bailiff requested him to move to the section of the courtroom designated for him. Instead, Johnson said he preferred to stand and then stood in front of the counsel tables

with his arms folded. The traffic court judge directed Johnson to be seated. He refused. Johnson was found in contempt of court, arrested, and convicted.

Johnson appealed. The Virginia appellate courts upheld the conviction. Johnson appealed to the U.S. Supreme Court. In *Johnson v. Virginia*, the Court stated: "Such a conviction cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities."[304] This 1963 case led to the desegregation of courthouses and other state government facilities. People of color were no longer physically segregated in court. However, discrimination in the treatment of Blacks within the court system continued unabated.

Segregated Prisons—Then and Now: *Lee v. Washington* and *Johnson v. California*

Jails and prisons remain a vestige of government-imposed racial segregation. During slavery, enslaved Blacks convicted of crimes were not imprisoned because their labor was too valuable. Instead, convicted slaves were beaten and returned to their labor.[305] The jail and prison populations comprised White inmates.[306] After slavery was abolished, Blacks were imprisoned in great waves, especially in the South. Prison officials believed that White inmates should not suffer the insult of being housed with Blacks. Moreover, racial segregation was thought essential to preventing Whites from harming Blacks. *Brown v. Board of Education*, the Supreme Court's school desegregation decision of 1954, had little effect on racial segregation in jails and prisons.[307]

In *Lee v. Washington*, the constitutionality of racially segregated prisons was placed before the Supreme Court for the first time.[308] As late as 1968, Alabama's prisons, jails, and medical facilities for male and female inmates were racially segregated. Inmate Caliph Washington brought an action against the prison system.[309] Washington led a class-action alleging that an Alabama statute requiring racial segregation of inmates violated the equal protection clause of the Fourteenth Amendment.[310] Alabama's Commissioner of Corrections

Frank Lee argued that racial tensions in maintaining security, discipline, and order required the separation of the races.[311] On appeal, the Supreme Court ruled in *Lee v. Washington* that Alabama's statute segregating the races in prisons and jails violated the Fourteenth Amendment.[312] The Court ordered that "[a]ll facilities in the minimum and medium security institutions, including Draper Correctional Center and Julia Tutwiler Prison for Women ... [be] completely desegregated within six months."[313] The maximum-security prisons were allowed a more gradual desegregation.

The desegregation process actually took many years. On September 9, 1971, inmates at Attica Correctional Facility in Attica, New York, begin a four-day uprising. Forty people died, including hostages. Racially prejudiced correctional officers, overcrowding, and ill treatment of inmates led to the riot and brought national attention to racial issues within America's prison system.

In 1973 the Court of Appeals for the Eighth Circuit decided the Kansas City, Kansas, prison case of *U.S. v. Wyandotte*.[314] The correctional system in Wyandotte County segregated inmates based on race. Inmates were separated into the West Tank and East Tank areas of the prison facility. Whites were assigned to the West Tank and Blacks to the East Tank.[315] The U.S. Department of Justice brought an action against the facility, calling for the termination of segregation in the prison because it violated the Fourteenth Amendment. The Wyandotte Correctional facility, a state entity, argued that racial segregation was necessary to maintain order in the prison.[316] The appellate court ruled: "We need not labor the point that a State may not constitutionally require segregation of public facilities ... the principle is as applicable to jails as to other public facilities."[317] The Supreme Court rejected the facility's argument and affirmed the decision of the appellate court.[318] Prisons are public places and must be desegregated. The threat of violence between the races does not justify segregating inmates.

Racial segregation in jails and prisons remains a controversial issue. The U.S. Supreme Court addressed the issue as recently as 2005. The California Department of Corrections maintained an unwritten policy of racially segregating male prisoners. The prisoners were placed in double cells for up to 60 days each time they entered a

correctional facility as a new prisoner or a transferee. Garrison Johnson had been incarcerated since 1987 and, during that time, had been housed at a number of California prison facilities.[319] Upon his arrival at Folsom Prison in 1987, and each time he was transferred to a new facility thereafter, Johnson was double-celled with another African-American inmate. Johnson, an African-American inmate in the custody of the California Department of Corrections, brought a pro se race discrimination action in federal court. He alleged that the segregation policy violated his equal-protection rights under the Fourteenth Amendment.[320] After years of attempting to access justice, Johnson's argument was heard and dismissed.[321]

As in prior decades, the California Department of Corrections argued that its racial segregation policy was necessary to prevent violence.[322] The trial court found in favor of the Department of Corrections.[323] Johnson appealed. The appellate court ruled in favor of the correctional facility as well.[324] Johnson then appealed to the U.S. Supreme Court. He argued that the trial court erred in failing to use the strict scrutiny standard. Strict scrutiny is the most rigorous legal test to overcome. It is applied to determine whether the use of race by a governmental entity is constitutional. The trial court in *Johnson v. California* applied a test known as the *Turner* standard.[325] Under *Turner*, the correctional facility needed only to demonstrate that there was no "common-sense connection" between the segregation policy and prison violence. The state appellate court upheld the use of the *Turner* test. However, the Supreme Court rejected the argument of the California Department of Corrections and reversed the decision of the lower court.

The Court ruled that the strict scrutiny test must be applied in *Johnson v. California*.[326] The *Turner* test was appropriate mainly for adjudicating prisoner cases involving issues such as inmate-to-inmate communication, freedom of speech issues, and inmate marriages.[327] However, strict scrutiny is the proper standard of review for cases involving a governmental use of race.[328] Prison officials also argued that deference should be shown to those officials managing the prison; their experience with handling inmate matters and "common sense" judgment placed them in a better position than the Court to know when racial segregation was appropriate.[329] This argument was rejected by the Supreme Court as well because, given America's history of race discrimination, racial segregation by a governmental entity was immediately suspect.[330] However, the Court would not render a decision on the merits of the case.[331] Instead, *Johnson v. California* was remanded back to the trial court for a new trial. The Supreme Court directed the trial court to adjudicate the matter in light of the requirements under the strict scrutiny analysis.

Racial Profiling

Racial profiling and "stop and frisk" are far from a recent phenomenon. During slavery, patrols of deputies and bounty hunters searched for fugitive slaves. Slaves on plantations were watched closely for any signs of escape plans or uprising. State laws limited interaction between free and enslaved Blacks. Laws also restricted the number of enslaved Blacks allowed to legally assemble at any given time. Written permission was required for slaves to travel off the plantation. White overseers and, after slavery, local law enforcement kept watch over Blacks to ensure that they stayed "in their place" (see Chapter 4). Incarceration under discriminatory Black Code laws and even lynching were punishments awaiting Blacks accused of making trouble for Whites.

Stop and Frisk: *Terry v. Ohio*

In the late twentieth century, law enforcement was given inordinate power over Black communities in the form of the "stop and frisk" activity established in *Terry v. Ohio*.[332]

On October 31, 1963, John Terry and Richard Chilton, two Black men, were standing on a corner in downtown Cleveland, Ohio, at 2:30 in the afternoon. McFadden, an undercover police detective, watched Terry and Chilton look into a store window and then confer several times at the corner.[333] They were joined by a third Black man, Katz. McFadden testified later that the men alternately looked into the store window and then returned to the corner approximately a dozen times.[334] McFadden had been a policeman for 39 years and a detective for 35 years.[335] At the time, he had patrolled that vicinity of

downtown Cleveland for 30 years. He was assigned specifically to look for shoplifters and pickpockets. McFadden testified at trial that he had developed a routine habit of observing people in the area. He stated that Terry and Chilton "didn't look right to me at the time."[336] McFadden had never seen these three Black men prior to this encounter.

McFadden suspected the two men of "casing a job, [for] a stick-up."[337] He added that he feared "they may have [had] a gun."[338] McFadden followed Chilton and Terry and saw them join Katz down the street. He approached the three men, identified himself as a police officer, and asked their names.[339] The men had not committed any crime. He had not received any complaints from the store.[340] He was unable to say what drew his eye to them.[341] After McFadden asked their names, the men "mumbled something," at which point McFadden grabbed Terry, spun him around, and patted down his clothing.[342] McFadden felt a pistol. He ultimately removed a .38-caliber revolver from Terry's pocket.

McFadden proceeded to pat down Chilton and Katz. He discovered another revolver in Chilton's overcoat, but no weapons were found on Katz. The men were arrested. Terry and Chilton were charged with carrying a concealed weapon.[343] The trial court judge denied the motion of Terry and Chilton to have the weapons suppressed.[344] Terry and Chilton were convicted and sentenced to three years in prison.[345] Terry appealed his conviction, arguing that McFadden acted without probable cause in violation of the Fourth Amendment,[346] which protects against unreasonable searches and seizures by government officials.[347]

Upon appeal, the Supreme Court affirmed Terry's conviction. Although McFadden did not have probable cause that a crime had been committed, the Court supported his search of Terry. The Court confirmed the conviction using the rationale of fear. As the population of major cities became mainly composed of minorities, they were seen as growing in dangerousness. The Supreme Court stated: "In dealing with the rapidly unfolding and often dangerous situations on city streets, the police are in need of an escalating set of flexible responses."[348]

Based on the *Terry* decision, a person can be stopped and frisked by law enforcement "upon suspicion that he *may* be connected with

criminal activity."[349] Having police officers pat down a Black adult woman, man, and their children is considered by the Court to be "a mere 'minor inconvenience and petty indignity,' which can properly be imposed upon the citizen in the interest of effective law enforcement."[350] The trigger for a "stop and frisk" is merely the police officer's suspicion that he or the public may be in danger of imminent harm.[351] Given the segregated backgrounds of Blacks and Whites in America, a feeling of "reasonable suspicion" may simply be an officer's discomfort with being a minority within the Black community or basic fear of other races and ethnic groups.

With this new-found authority would come police abuse. The Court summarily dismissed arguments that unfettered power to stop and frisk a suspicious-looking person would increase tensions between the Black community and police officers.[352] Humiliating a countless number of Blacks with futile searches meant little to nothing when one such search might produce admissible evidence. Chief Justice Earl Warren, writing on behalf of the Court, stated: "The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial."[353] The Court accepted the premise that Blacks would be harassed as a consequence of granting police authority to stop and frisk.

Police authority to stop and frisk had little to no boundary. An officer needed only to state there was a reasonable suspicion of harm. The evidence found on the suspicious person would not be suppressed. Thus, a mainstay of the Fourth Amendment—the exclusionary rule—was not provided. This rule, long recognized as a deterrent to lawlessness in other cases, no longer applied.[354] Thus, the decision in *Terry v. Ohio* opened the floodgates for racial harassment and profiling. America's history of racism and police bias toward Blacks was ignored.[355] Instead, the *Terry* Court charged the judiciary to devise other remedies to curtail abuses of the stop and frisk procedure.[356]

The reach of *Terry v. Ohio* has been extended.[357] In the Terry case, McFadden asked the men their names. Terry "mumbled something."[358]

Stop and Frisk Policies

Police can now arrest any person who refuses to provide identification upon request by law enforcement.[359] Due to racial discrimination in housing and other economic factors, predominantly Blacks and Latinos live in concentrated areas within America's cities (see Chapter 6). Unfortunately, neighborhood demographics have enabled racial profiling by police. Once a community is labeled a "high crime area," walking or standing is considered suspicious behavior triggering a stop and frisk procedure by police officers.[360] In a "high drug area," the police are free to search the driver, passengers, and entire car even for the slightest traffic violation.[361]

In New York City, the stop, question, and frisk policy of the New York Police Department (NYPD) resulted in the stop and search of over 685,724 people in 2011 alone. Eighty-five percent of those stopped were Blacks and Latinos. A class-action lawsuit was filed on behalf of those persons stopped by police. The city moved to dismiss the lawsuit. However, Federal Court Judge Shira Scheindlin will allow the case to go forward. The suit includes all persons unlawfully stopped and frisked from January 2005 to 2011.

The NYPD defends its tactic as a necessary measure to prevent crime by finding illegal guns. In May 2012 a federal judge ruled that many of the stops were unconstitutional intrusions of individual privacy in violation of the Fourth Amendment. Police are not permitted to search a person's pockets based on a hunch or performance quota. Based on *Terry v. Ohio* and the ensuing cases, an officer may conduct a pat-down search if there is reasonable suspicion of imminent danger, such as a belief a person is carrying an illegal weapon.

To extend their search to inside the pocket, or order a detained person to empty their pockets, requires probable cause that a crime was or is about to be committed. The police often report that the person made "furtive" movements, which is then used as the basis for probable cause to search further. Furtive movements could be back talk, a look, hand movement, or an imagined sense of danger. These searches have found illegal gun possession in less than 1 percent of cases. When pockets are searched it is possession of small amounts of marijuana that has led to arrests. New York Governor Andrew Cuomo has proposed decriminalizing possession of small amounts of marijuana. In June 2012 thousands in New York City participated in a silent march to protest against the NYPD's abuse of stop and frisk. The protest march ended at the home of New York City's mayor, Michael Bloomberg.

Profiling Immigrants: *Arizona v. United States*

Arizona enacted the immigration law S.B. 1070. The law was meant to quell illegal immigration by authorizing local police with immigration powers previously held only by the federal government's Department of Immigration and Naturalization (INS). The United States sued Arizona. In *Arizona v. U.S.* (2012), the U.S. Supreme Court upheld the part of S.B. 1070 that allows police to request documentation to prove the person is in the country legally.[362] Arizona borders Mexico. The challenge of illegal immigration has taxed its public education and health systems while increasing violent drug and property crimes. Arizona argued that the INS had ignored a growing illegal immigration problem. Nationwide, protesters charged that Arizona's law was flagrant profiling of Latinos.

Under Article 1 of the U.S. Constitution, the federal government has power over immigration. The federal government may preempt any state law which overlaps into its area. The supremacy clause gives the federal government a superior position over state and local governments. The U.S. Supreme Court ruled Arizona could allow police to request documentation to prove status only after the person has been stopped for some other reason. The reason for the stop could be a pretext, just to discover immigration status.

Justice Antonin Scalia begged the question, "Why can't a state protect its own borders?" and then wrote of the Framers' intent. Arizona enacted this law for Hispanics. However, illegal immigrants come to the United States from Europe through our Canadian border. Tourists from Asia intentionally overstay their visas. Africans seeking political asylum, a lengthy process, are without legal status awaiting a determination. In a nation of immigrants, local police are now burdened with deciding who looks illegal while fending off

allegations of racial profiling. During oral arguments, Justice Sonia Sotomayor, whose parents are from Puerto Rico, asked about an American citizen, jogging, without a wallet, who has no proof of status. America has no citizen database. A person could be detained for several hours or days attempting to prove he did not commit the crime of entering the country illegally.

Strip Searches: *Florence v. Chosen Freeholders of Burlington County, New Jersey*

Under *Terry v. Ohio*, the U.S. Supreme Court gave law enforcement the authority to stop and frisk. Once detained, *Arizona v. U.S.*, gives local authority to request documentation proving legal entry into the country. Either circumstance could lead to further detainment. If taken to the local jail, the Supreme Court in *Florence v. Freeholders* upheld strip searches of persons detained even on allegations of civil nonviolent reasons.[363] In *Florence*, Albert Florence, African-American, was in the car with his pregnant wife and son when he was stopped by a White New Jersey state trooper. The trooper checked a computer database and found an outstanding bench warrant issued for Florence's arrest for failing to appear at a hearing to enforce a fine. Although Florence showed the official document proving the fine had been paid, he was arrested anyway.

Albert Florence was held for six days. First, he was taken to the Burlington County Detention Center and later to the Essex County Correctional Facility. At the Burlington County jail, Florence was made to shower with a delousing agent, checked for scars, marks, gang tattoos, and contraband. Police made him open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. When he was moved to the second jail, Albert Florence had to remove his clothing while an officer looked for body markings, wounds, and contraband. Then, an officer looked at his ears, nose, mouth, hair, scalp, fingers, hands, armpits, and other body openings. He was forced to shower again, lift his genitals, turn around, and cough while squatting.

On the sixth day of detention, officers discovered Albert Florence had paid the fine. He was set free. Florence filed a 42 U.S.C. §1983 Civil Rights action, alleging Fourth and Fourteenth Amendment violations. He argued that a person arrested for minor offenses cannot be subjected to invasive strip searches unless prison officials have reason to suspect concealment of weapons, drugs, or other contraband. The U.S. Supreme Court ruled against Florence, finding a strip search to be legal when the detained person is being placed within the general jail population. There was no constitutional violation.

Anti-Loitering Laws: *Chicago v. Morales*

In *Chicago v. Morales*, Blacks and Latinos challenged a Chicago "gang congregation" statute that prohibited two or more people from gathering together in any public place.[364] Conviction under this law was punishable by a fine of up to $500, imprisonment for not more than six months, and 120 hours of community service.[365] The law states:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation.[366]

In the statute, loitering was loosely defined as remaining in any one place with no apparent purpose.[367]

However, the city gave no indication of what conduct constituted loitering. During the three years of the statute's enforcement (1992–1995), the police in Chicago issued over 89,000 dispersal orders and arrested 40,000 people.[368] The City of Chicago argued that the statute effectively lowered gang violence.[369] Defendants argued that they should be free to loiter. The Illinois Supreme Court agreed with the defendants. Upon appeal, the U.S. Supreme Court ruled that the vagueness of Chicago's gang congregation statute violated the right to liberty under the due-process clause of the Fourteenth Amendment.[370] Additionally, the statute did not provide sufficient limits on police enforcement.[371] In essence, the law afforded

"too much discretion to the police and too little notice to citizens who wish to use the public streets."[372] The Court apparently recognized that this gang statute, intended for urban communities of color, could potentially be applied to White middle-class communities as well. Of course, the Court noted that interactions anywhere else in the city would be "innocent and harmless."[373] Convictions under the statute were overturned.

Bias Drug Prosecutions: *U.S. v. Armstrong*

Black defendants in California challenged racial profiling in drug prosecutions. In 1996, the Supreme Court decided *United States v. Armstrong*.[374] Christopher Lee Armstrong, a Black man, argued that Blacks in Los Angeles were selectively arrested and charged with drug possession by federal prosecutors.[375] Armstrong challenged his arrest on charges of crack cocaine possession with intent to distribute and other charges.[376] He claimed that more Whites used drugs but more Blacks were targeted for prosecution on drug crimes.[377] Armstrong filed a motion for discovery requesting that the federal government provide him with documents and statistics concerning the race of persons arrested on federal drug offenses in Los Angeles. He relied on the case of *Oyler v. Boles*.[378] In that 1962 decision, the Supreme Court ruled that the government may not prosecute based on race or religion.

The trial court granted Armstrong's request for the information.[379] The government was ordered to provide a list of all cases from the last three years in which the government charged both cocaine and firearms offenses, identify the race of defendants in those cases, and explain its criteria for prosecuting those defendants. The government asked for reconsideration; it was denied.[380] The government then informed the court that it would not comply with the order.[381] The trial court dismissed the case.[382] An *en banc* ruling of the appellate court affirmed the decision to dismiss the case.[383]

Upon appeal, the U.S. Supreme Court reversed the appellate court. The Court ruled that in order to prove a selective-prosecution case based on race, Armstrong must show that the government

declined to prosecute similarly situated suspects of other races.[384] Proof of discrimination need not be made available to the defendants by the prosecutor. The *Armstrong* defendants were defeated by the intransigence of the criminal justice system. The government refused to provide information that would probably demonstrate a failure to prosecute similarly situated suspects of other races. However, the *Armstrong* case brought national attention to one aspect of racial discrimination within the criminal justice system. Blacks continued to challenge unfair criminal laws and procedures.

The Scottsboro Boys

Rape was a capital offense until 1977. However, in rape cases the death penalty was reserved primarily for people of color. For example, in Baton Rouge, Louisiana, from 1907 to 1950, not one White man charged with rape was put to death, "although 29 Negroes charged with rape had been executed in that period."[385]

In *Powell v. Alabama* (1932), nine Black young men were charged with the rape of two White women.[386] As noted, at this time rape was a capital offense.[387] The young men were riding the Southern Railroad freight car from Chattanooga, Tennessee, to Memphis to find work when an altercation began with two White men in the freight car.[388] The Black youths won the fight and forced all but one of the White men off the moving train. One White man and the two White women, Ruby Bates and Victoria Price, were left on the train with the boys. The White men who lost the fight informed the local sheriff, who sent a radio message ahead to stop the train at the next town. When the train arrived in Scottsboro, Alabama, the boys were arrested and charged with gang raping the White women. The rape allegedly occurred on March 25, 1931. The defendants, who came to be known as the "Scottsboro Boys," were indicted in Alabama on March 31.[389]

The Scottsboro Boys were indicted on the very day they were arraigned. The defendants entered pleas of not guilty. They did not have counsel representing them at the arraignment.[390] The trial judge appointed all the members of the bar to represent the defendants at the arraignment. No individual attorneys were appointed.[391] The

defendants were tried in three groups.[392] As each of the three cases was called for trial, each defendant was arraigned and, having the indictment read to him, entered a plea of not guilty.[393] Each of the three trials was completed within a single day. Under the Alabama statute, punishment for rape was decided by the jury, and within its discretion could be from ten years' imprisonment to death. The juries found the defendants guilty and imposed the death penalty upon all of them. The trial court overruled motions for new trials and sentenced the defendants in accordance with the verdicts. The judgments were affirmed by the state supreme court.[394]

Samuel Liebowitz, a New York attorney with the International Labor Defense, took on the case. Liebowitz appealed their convictions to the U.S. Supreme Court. They argued that the trial court had denied them due process of law and the equal protection of the laws under the Fourteenth Amendment, specifically: (1) they were not given a fair, impartial, and deliberate trial; (2) they were denied the right of counsel, particularly the ability to consult with an attorney and opportunity of preparation for trial; and (3) they were tried before juries from which Blacks were excluded. The Supreme Court chose to review only the Sixth Amendment denial of counsel. In clarifying its position regarding the need for counsel in a capital case, the Court provided the following hypothetical situation:

> Let us suppose the extreme case of a prisoner charged with a capital offen[s]e, who is deaf and dumb, illiterate and feeble minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder.[395]

The Supreme Court found the failure to assign counsel in a capital case constituted a violation of the Sixth Amendment and the due-process clause of the Fourteenth Amendment. The Court held that states must appoint counsel to indigent defendants in cases involving a possible death sentence.

Later, Ruby Bates recanted her story about the rape and during the retrial became a witness for the defense.[396] The case was tried again and the Scottsboro defendants were again convicted and sentenced to death. Other legal issues arose involving the defendants. In 1935 the Court decided *Norris v. Alabama*, in which the exclusion of Blacks from the criminal jury was appealed to the U.S. Supreme Court.[397] In that case, the Supreme Court declared: "[T]his long-continued, unvarying, and wholesale exclusion of negroes from jury service ... [has] no justification consistent with the constitutional mandate."[398] The justices reviewed the jury roles and found that the names of Blacks were added much later.[399]

The conviction of Clarence Norris was reversed and the case was remanded for another trial conducted without precluding Blacks from the jury box.[400] In 1937 Norris was retried and again sentenced to death. The other defendants were given sentences ranging from 20 to 75 years. In 1938 Governor Bibb Graves commuted the sentence of Clarence Norris from death to life in prison. It would be nearly 15 years before members of the Scottsboro Boys regained their freedom.

Forced Confession: *Chambers v. Florida*

In *Chambers v. Florida*, decided in 1940, the Supreme Court was faced with four Black men sentenced to death based on forced confessions.[401] On the night of May 13, 1933, Robert Darsey, an elderly White member of the Pompano, Florida, community was robbed and murdered.[402] The Pompano police arrested 25–40 Black men on suspicion of his murder. The community was outraged. Mobs formed. The police transported the men to various towns to avoid lynch mobs.[403] J. T. Williams, a guard, interrogated the group for six days in the death cell of Dade County, Florida, in all-night vigils of torture and threats until confessions were produced from Esel Chambers, Jack Williamson, Charlie Davis, and Walter Woodward.[404] Based on their confession to the crime, the men were convicted and sentenced to death.

On appeal to the state appellate court, the men argued that their confessions should have been excluded. After four appeals to the Florida State Supreme Court, their death sentences were upheld.[405]

That Court opined that a forcibly produced confession, although not approved, was not *ipso facto* illegal.[406]

In 1940 the U.S. Supreme Court overturned the convictions of Williamson, Chambers, Davis, and Woodward, holding that a death sentence could not be based on coerced confessions.[407] In reversing the convictions, the Court acknowledged that forcibly extracting a confession from a detainee was a widespread practice in this country.[408] The practice was frequently used against Blacks. Law enforcement could act with impunity because the state courts did not uphold the constitutional rights of Blacks and other people.

Race and the Death Penalty

Prior to 1972 judges and juries had a great deal of discretion in giving death sentences. Socio-economic position played a major role in who would receive a death sentence. In 1972 the Supreme Court decided *Georgia v. Furman*, in which the state's administration of the death penalty was found to be so arbitrary as to constitute cruel and unusual punishment.[409] Under the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[410] Justice William O. Douglas found the discretion of judges and juries in imposing the death penalty enabled "the penalty to be selectively applied, feeding prejudices against the accused if he is poor and ... a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position."[411] Justice Potter Stewart admonished that the Eighth and Fourteenth Amendments "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[412] The death sentences were commuted to life imprisonment.

However, by 1976 the Supreme Court reinstated the death penalty. In *Gregg v. Georgia*, the Court rejected the "standards of decency" argument and affirmed the death sentence of Troy Gregg.[413] The Court ruled that capital punishment is not cruel and unusual punishment when administered fairly.[414] Methods of execution include lethal injection, firing squad, gas chamber, electrocution, and hanging.[415] The most common method has become lethal injection.

In 2000, George H. Ryan, governor of Illinois, temporarily ceased executions upon finding that 13 death row inmates were innocent. Those exonerated inmates were released based on exculpatory evidence stemming from diligent investigation, scientific advancement in the analysis of DNA evidence, or witness testimony. Questioning the credibility of the state's death penalty statute, Governor Ryan commuted the sentences of the other prisoners from death to life imprisonment.

Blacks have long argued that the administration of the death penalty in America is skewed based on race. In *McClesky v. Kemp* (1987), Warren McClesky, a Black defendant, was convicted of murdering a White police officer during a planned robbery. His case was tried in a Georgia state court. The jury convicted McClesky and found that he should receive the death penalty. McClesky's initial appeals in state court were denied. Then he filed a writ of habeas corpus in federal court, arguing that the death penalty was meted out in a racially discriminatory manner. He presented a study by David C. Baldus that demonstrated that a Black defendant charged in a killing involving a White victim was 4.3 times as likely to receive a death sentence in Georgia as defendants charged with killing Blacks.[416] The district court and court of appeals denied his writ.

The U.S. Supreme Court affirmed the lower courts. The Court held that the racial disparities presented in the Baldus study did not establish that the administration of the death penalty in Georgia constituted a violation of a defendant's Fourteenth or Eighth Amendment rights. Specifically, the Court stated that:

> At most, the Baldus study indicates a discrepancy that appears to correlate with race, but this discrepancy does not constitute a major systemic defect. Any mode for determining guilt or punishment has its weaknesses and the potential for misuse. Despite such imperfections, constitutional guarantees are met when the mode for determining guilt or punishment has been surrounded with safeguards to make it as fair as possible.[417]

The Court required McClesky to present evidence of discriminatory intent on the part of prosecutors who seek the death penalty. The Baldus study and its progeny continue to underscore the role of

race in the administration of the death penalty: "In 82% of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving a death sentence."[418] In *Atkins v. Virginia*, the Supreme Court ruled, in 2002, that the execution of mentally retarded defendants convicted of capital crimes constituted cruel and unusual punishment.[419] However, the Court has yet to fully accept or recognize the role of race in the administration of the death penalty.

On September 21, 2011, Troy Davis was executed for murder. Pope Benedict XVI and former President Jimmy Carter joined the supporters to spare Davis' life. Davis, African-American, was convicted in the 1989 shooting death of Mark MacPhail, a White off-duty officer. Witnesses recanted. No gun was found. Yet Davis' death sentence was upheld by state and federal courts. The U.S. Supreme Court denied Davis' final stay of execution.

That same day, in Texas, White supremacist Larry Brewer, the killer of James Byrd, African-American, was executed. Brewer, who dragged Byrd to death behind his truck, had no regrets about the cold-blooded murder. However, in Davis' case, reasonable doubts remained. Pleading his innocence to the end, Davis said to those preparing his body for death by lethal injection, "May God have mercy on your souls."[420]

Mumia Abu-Jamal

In 2011 the death sentence for Mumia Abu-Jamal (b. 1954) was commuted to life in prison. Mumia Abu-Jamal, African-American, had been convicted in the murder of Daniel Faulkner, a White Philadelphia police officer, on December 9, 1981.[421] Abu-Jamal, a former member of the Black Panther Party, and professional radio journalist, has maintained he did not shoot Faulkner. Officer Faulkner was shot several times. It was 4 a.m. when an altercation took place between Abu-Jamal's brother and Faulkner. Abu-Jamal, born Wesley Cook, saw the altercation and ran toward the scene from his parked taxi across the street. Shots were fired. Police discovered Abu-Jamal wounded by a bullet from Faulkner's gun and Faulkner dead. A .38-caliber revolver registered to Abu-Jamal was found nearby with five spent shell casings.

Convicted in 1982, Abu-Jamal has challenged the biases of the judge, jury, credibility of witnesses as well as the jury instructions which failed to allow the jury an alternative to a death sentence. Writing about his experiences on death row brought international attention to prison conditions and renown to his case.

After decades of appeals, the U.S. Supreme Court upheld his conviction but ordered an examination of the jury instructions which led to the death sentence. In 2011 Philadelphia prosecutors chose not to seek the death penalty. In 2012 Mumia Abu-Jamal was moved from death row. An appeal for a new trial was denied. Instead, Mumia Abu-Jamal will serve a life sentence without possibility of parole.

Juvenile Offenders in Adult Prisons

In 2005 the Court held in the case of *Roper v. Simmons* that the execution of defendants who commit a capital offense while juveniles is a violation of the Eighth Amendment's protection against cruel and unusual punishment.[422] In 2012 the U.S. Supreme Court decided, in *Miller v. Alabama*, juveniles could not be summarily sentenced to life without possibility of parole.[423] In *Miller*, the defendants were 14 years old when they participated in felony homicide. Earlier, in 2010, the Supreme Court decided in *Graham v. Florida* that juveniles convicted of felony non-homicide crimes could not be given life sentences without possibility of parole.[424]

Young people are channeled from a broken educational system into a catastrophically destructive criminal justice system. With over two million incarcerated persons in the United States, this country has more people with criminal records than any other nation. The devastating impact of race-neutral criminal laws is equal in effect to the race-based laws under segregation. Mass incarceration, stop and frisk, and "zero tolerance" policies will affect generations to come. The future leaders of Black, Native American, and Latino communities are being removed from society at earlier ages, for longer periods of time. Intentional or not, the result speaks for itself.

Present-Day Vestiges: Incarceration Rates and Debates

Vestiges of slavery, the anti-American Indian, post-war anti-Asian sentiments, and fears of a growing Latino population are rarely discussed within the context of criminal justice. "Black Codes" were enacted to intentionally discriminate against the newly freed Black citizen and prevent his rise above a labor class. These laws restricted travel and alliances and criminalized their behavior. Under the Black Codes, harsher punishments were meted out for Blacks. Codes and laws were developed for people of color. Although slavery was abolished, the codes were repealed, the prison system was maintained as a mechanism to control people of color, especially Blacks and Latinos. Present-day stop and frisk laws, racial profiling, and warrantless searches bear a remarkable resemblance to the work of fugitive slave patrols, Indian patrols, and overseers. The race to incarcerate young men of color has caused imprisonment to become an all too "normal" urban experience.[425]

Although twice as many Whites as Blacks are arrested, seven times as many Blacks as Whites are convicted.[426] Blacks are almost three times more likely than Hispanics and five times more likely than Whites to be in jail.[427] In capital cases, death sentences for Black defendants are more likely when a White victim is involved.[428] Blacks comprise 13 percent of the U.S. population. However, in 2012, of the more than 3,000 persons on death row in America, nearly 42 percent (1,325) are Black, nearly 42 percent (1,371) are White (a reduction based on ethnic categories), 12.4 percent (393) are Latino, and 2.5 percent (81) are of other races.[429] Black women are now incarcerated at an increased rate.[430] Black, non-Hispanic women are five times more likely than White women to be incarcerated.[431] Black minors represent over half of incarcerated young people.[432] Re-entry into society is filled with obstacles. Formerly incarcerated persons are denied student loans, public housing, voting rights, and employment in many sectors. Prison environments are rife with tuberculosis, second-hand cigarette smoke as well as physical and emotional trauma. Serving a sentence for a conviction can lead to broken health, a bleak future, and further dependence on governmental assistance.

In a capitalistic system, criminal justice is meted out with profit-making possibilities.[433] This is especially relevant as it concerns racial prejudice. The privatization of prisons and the panoply of extant services represent a multibillion dollar business scheme. Companies engaged in building and controlling private prison facilities trade their stock on the markets.[434] As with slavery, peonage, work camps, and prison labor, their profits are contingent upon continued growth in the market (i.e., Black and Latino prisoners). One corporation stated:

> We are a world leader in the privatized development and/or management of correctional facilities. The North American market is growing rapidly, and we are focused on expanding Federal procurement opportunities. The Federal Bureau of Prisons is operating over capacity and Federal law now authorizes longer term contracts than ever before, resulting in more favorable financing alternatives for new privatized development.[435]

After publication, this corporation removed this notice from its website. The "war on drugs" has become a war on the Black and Latino communities. Too many in law enforcement are using this war as a vehicle for police harassment and racial profiling.[436] Possession of crack cocaine as compared to powder cocaine evidences America's continued discriminatory crime policies. In 2010 the federal government reduced the sentencing disparity between crack cocaine and powder cocaine from 100:1 to 18:1. Under the Federal Onmibus Anti-Drug Abuse Act, the minimum sentence of five years was mandated for possession of five ounces of crack cocaine. The same five-year mandated sentence required conviction on possession of 500g of powder cocaine.

Crack cocaine is less expensive and thus more readily available to the urban poor. Powder cocaine is more expensive and thus more readily available to suburban America. Of those charged with possession of powder cocaine, 80 percent are White. The Fair Sentencing Act was signed by President Barack Obama on August 3, 2010, reducing the sentences for crack cocaine possession. The U.S. Supreme Court ruled in *Dorsey v. United States* (2012) that the reduced mandatory sentence for a crack cocaine conviction was retroactive to include those arrested but not yet sentenced when the law was enacted.[437]

Too often, criminal punishment depends on race. Despite the mounting increase of crystal methamphetamine use, trafficking, and possession in rural areas, criminal justice resources are focused on urban areas. Whites are consistently charged under a state statute, whereas Blacks and Latinos were charged under the harsher federal statute.[438] In a criminal justice system dependent on plea bargains and guilty pleas, demanding a jury trial would bring the procedure of injustice to a halt and send a strong message that racial profiling is an intolerable act of injustice. During the time of Jim Crow, Blacks were lynched with the explicit or implicit assistance of law enforcement.[439] Today, Blacks and Latinos remain disproportionately victimized by crime and law enforcement. As long as these vestiges of slavery and *Plessy* remain, Blacks, Latinos, Native Americans, and in the northwest, many Asians, must live hypervigilantly, suspecting criminals as well as the criminal justice system.

There are those who would want people of color to regret winning their freedom. The opposition in the struggle for racial justice is great. Those who continue to believe in the subordination of Blacks are present examples of Plessy's intransigence. The strategy of those who oppose freedom for people of color may be surmised from this crude statement. It is a quote from a klansman taken from the U.S. Supreme Court case *Brandenburg v. Ohio* (1969). The case was about free speech. The klansman is speaking at a klan rally. He says, "N-gg-r [*sic*] will have to fight for every inch he gets from now on."[440] The present-day disparities in education, housing, voting rights, and criminal justice speak volumes about injustice, vestiges from Plessy, and the remnants of slavery. We are fighting for every inch. And will continue to do so. An examination of the role race has played in America's past places current issues of affirmative action, "reverse discrimination," busing, integration, housing segregation, redistricting, urban blight, and capital punishment in context.

The systemic challenges could make incarceration appear better, to a relative few, than the obligations and responsibilities freedom requires. To accept this philosophy is to enslave oneself. The fight to be free—body, mind, and soul—is ceaseless, for all people, especially people of color.

4

Civil Liberties and Racial Justice

We must complain. Yes, plain, blunt complaint, ceaseless agitation, unfailing exposure of dishonesty and wrong—this is the ancient, unerring way to liberty, and we must follow it.

W. E. B. DuBois

Somewhere I read the greatness of America was the right to protest for right.

Martin Luther King, Jr. The "Mountaintop" speech (1968)

Protest strategies utilized by civil rights organizations in America have been emulated by disenfranchised groups around the world. However, the planning, determination, brilliance, and self-sacrifice of Blacks, in particular, waged in a life-and-death struggle for human rights remains largely forgotten or ignored. This chapter examines the age-long fight waged for fundamental freedoms and first-class citizenship. This American battle over "free will" began with the colonies, mutating during slavery and manifesting many forms. Slavery ended. Asians immigrated to America, However, the barriers to "Life, Liberty, and the Pursuit of Happiness" required legal challenges, protest marches, sit-ins, and urban uprisings. The 380-year journey through American history bears testimony to human intent to live free despite any law or social dictate. Protests were often joined by people of different races and backgrounds. Yet a similar quest for freedom allowed them to place life and livelihood in jeop-

Public Entities. Initiative Constitutional Amendment. Cal. Const. Art.1, Sec. 31 (a). n1.

199. See *Coalition for Econ. Equity v. Wilson*, 122 F. 3d 692 (9th Cir. 1997).
200. See *Coalition for Econ. Equity v. Wilson*, 122 F. 3d 692, 701 (9th Cir. 1997) cert. denied, 522 U.S. 963 (1997).
201. Joint Center for Political and Economic Studies, *Focus*, 25(4) (May 1997).

> There has been a reported 80 percent drop in admissions of black students to UCLA's law school and a similarly sharp decline at UC Berkeley's law school. At the University of Texas at Austin, black and Hispanic undergraduate enrollments have declined 20 percent from last year. The university law school has also reported that the number of incoming black law students has plummeted from 65 last year to 10.

202. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).
203. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).
204. Ibid., 253–254.
205. *Grutter v. Bollinger*, 539 U.S. 306, 317–318 (2003).
206. Ibid., 334–335.
207. Ibid., 342–343.
208. *University of California Regents v. Bakke*, 438 U.S. 265 (1978).
209. *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).
210. Ibid., 332.
211. Ibid.
212. See, Ira Katznelson, *When Affirmative Action Was White* (New York: W. W. Norton & Co., 2005).
213. Ibid., 171.
214. Ibid., 142–145.
215. *The Civil Rights Cases*, 109 U.S. 3, 61 (1883).
216. See *The Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior*, 1886.
217. Official Report of the Nineteenth Annual Conference of Charities and Correction (1892), 46–59. Reprinted in Richard H. Pratt, "The Advantages of Mingling Indians with Whites," *Americanizing the American Indians: Writings by the "Friends of the Indian" 1880–1900*, Cambridge, MA: Harvard University Press, 1973, 260–271.
218. *In the matter of the Adoption of John Doe v. Heim*, 89 N.M. 606 (1976).
219. Orfield, *Schools More Separate*; Schofield, "Review of Research on School Desegregation's Impact on Elementary and Secondary School Students," 597–617.
220. See *Meredith v. Jefferson Cty Bd. of Educ.*, 05–915 (2007); *Parents Involved in Community Schools v. Seattle School District, No. 1*, 05–908 (2007).
221. Exodus 5:16.

Chapter 3

1. Delores Jones-Brown, *Race, Crime and Punishment* (Philadelphia, PA: Chelsea House Publishers, 2000), 88.
2. Ibid.
3. See Zelma Weston Henriques and Norma Manatu-Rupert, "Living on the Outside: African American Women before, during, and after Imprisonment," *The Prison Journal*, 81(1) (2001): 6–19.
4. Janice Joseph, "Overrepresentation of Minority Youth in the Juvenile Justice System: Discrimination or Disproportionality of Delinquent Acts?" In *The System in Black and White: Exploring the Connections between Race, Crime, and Justice*, Michael W. Markowitz and Delores Jones-Brown, eds. (Westport, CT: Praeger, 2000), 227.
5. A. Leon Higginbotham, *In the Matter of Color, Race & The American Legal Process: The Colonial Period* (New York: Oxford University Press, 1978), 32, quoting William Goodell, *The American Slave Code in Theory and Practice* (1853); reprint. ed. (New York: New American Library, 1969), 17.
6. Hening, Statutes, vol. 2, 270; Higginbotham, *In the Matter of Color*, 36.
7. Ibid.
8. Statutes at Large of South Carolina, vol. 7, 360; Higginbotham, *In the Matter of Color*, 177.
9. Robert B. Shaw, *A Legal History of Slavery in the United States* (Potsdam, NY: Northern Press, 1972), 174.
10. Edward L. Ayers, *Vengeance & Justice: Crime and Punishment in the 19th Century American South* (New York: Oxford University Press, 1984), 61.
11. J. Pfaelzer, *Driven Out: The Forgotten War Against Chinese Americans* (New York: Random House, 2007).
12. Melton McLaurin, *Celia, A Slave: A True Story* (Athens, GA: University of Georgia Press, 1991), 135.
13. *State v. Celia, a Slave*, Celia File No. 4496.
14. McLaurin, *Celia, A* Slave, 135.
15. Missouri Statutes, 1845, Art 2, Sec. 29, 180; see also McLaurin, *Celia, A Slave*, 107.
16. Gloria J. Browne-Marshall, "Denial of Innocence: Black Girls and the Statutory Rape Debate," conference presentation, March 2006.
17. McLaurin, *Celia, A Slave*, 120.
18. Civil Rights Act, 14 Stat. at Large 27 (April 9, 1866).
19. Ibid.
20. Ibid.
21. *Blyew v. United States*, 80 U.S. 581, 593 (1871).
22. See Herbert Aptheker, *American Negro Slave Revolts* (New York: International Publishers, 1943).
23. E. Franklin Frazier, *The Negro in the United States* (New York: Macmillan Company, 1957), 91.
24. Fugitive Slave Act of 1850, Sec. 5 and Sec. 7.

25. Ibid.
26. See *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).
27. Ibid., 626.
28. James Horton and Lois Horton, "A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850," *Chicago-Kent Law Review*, 68 (2003): 1179–1197.
29. Herbert Aptheker, ed., *A Documentary History of the Negro People in the United States: From Colonial Times through the Civil War* (New York: Citadel Press, Inc., 1962), 299.
30. See *Abelman v. Booth*, 62 U.S. 506 (1859).
31. Horton and Horton, "A Federal Assault," 1179; *Norris v. Crocker*, 54 U.S. 429 (1852).
32.

> And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.
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> (*Scott v. Sandford*, 60 U.S. 393, 427)

33. *Scott v. Sandford*, 60 U.S., 413, 427, 454.
34. Sherrilyn A. Ifill, "Creating a Truth and Reconciliation Commission for Lynching," *Law & Inequality Journal*, 21 (2003): 263, 272, citing W. E. B. DuBois, *Black Reconstruction in America* (New York: Russell and Russell, 1962), 678
35. U.S. Const., Am. 13 (1865).
36. Ayers, *Vengeance & Justice*, 185–186.
37. *Blyew v. United States*, 80 U.S. 581, 593 (1871).
38. Ibid.
39. Ifill, "Creating a Truth and Reconciliation Commission for Lynching," 263, 272.
40. See Milfred C. Fierce, *Slavery Revisited: Blacks and the Southern Convict Lease System—1865 to 1933* (New York: Africana Studies Research Center, 1994).
41. Ayers, *Vengeance & Justice: Crime and Punishment in the 19th Century American South* (New York: Oxford University Press, 1984), 186.
42. Ibid., 214–216, 221.
43. *Time on Two Crosses: The Collected Writings of Bayard Rustin*, Devon W. Carbado and Donald Weise, eds. (New York: Cleis Press, 2003), 31–57.
44. See Anne Applebaum, *Gulag: A History* (New York: Doubleday, 2003).
45. Ifill, "Creating a Truth and Reconciliation Commission for Lynching," 263, 272.
46. Fierce, *Slavery Revisited*, 17.

47. Ifill, "Creating a Truth and Reconciliation Commission for Lynching," 263, 272.
48. *Blyew v. United States*, 80 U.S. 581, 593 (1871).
49. *Bailey v. Alabama*, 211 U.S. 452 (1908).
50. Ibid., 452, 456.
51. Ibid.
52. Ala. Gen. Acts 1907, 636, amending the Code of 1896, Sec. 4730.
53. *Bailey v. Alabama*, 211 U.S. 452, 453 (1908).
54. Ibid., 452, 454:

> When coupled with the local rule that the party cannot testify to his actual intent, it is said practically to make a crime out of a mere departure from service, which it is said, and it seems to have been conceded by the Supreme Court of Alabama, could not be done.

55. Ida B. Wells-Barnett, *Crusade for Justice: The Autobiography of Ida B. Wells*, ed. Alfreda M. Duster. (Chicago, IL: University of Chicago Press, 1970), 209; see Lynching, Appendix C.
56. Derrick Bell, *Race, Racism and American Law* (New York: Aspen Publishers, 2000), 59; Oliver Cox, "Lynching and the Status Quo," in *Race, Crime and Justice: A Reader*, S. Gabbidon and H. Greene, eds. (New York: Routledge, 2005), 28–30.
57. Stewart E. Tolnay and E. M. Beck, *A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930* (Chicago, IL: University of Illinois Press, 1995), 69–71.
58. Ibid.
59. Ibid., 19 (discussing lynching as a terroristic means of social control); Ibid, (discussing lynching as a mechanism to maintain White supremacy), 28–29.
60. *Slavery Revisited: Blacks and the Southern Convict Lease System, 1865–1933*, 6.
61. Lynching (to execute a person without due process of law) could include such torture as burning a person alive, castration, mutilation, amputation of limbs, and/or decapitation.
62. Ralph Ginzburg, *100 Years of Lynching* (Baltimore, MD: Black Classic Press, 1962) ("Colored Woman Hanged," *Seattle Times*, March 31, 1914), 90.
63. Lynching of Blacks in 1892 by state:

Alabama	22
Arkansas	25
California	3
Florida	11
Georgia	17
Idaho	8
Illinois	1

Kentucky	9
Louisiana	29
Maryland	1
Mississippi	16
Missouri	6
Montana	4
New York	1
North Carolina	5
North Dakota	1
Ohio	3
Oklahoma	2
South Carolina	5
Tennessee	28
Texas	15
Virginia	7
West Virginia	5
Wyoming	9
Arizona Terr.	3

64. Ginzburg, *100 Years of Lynching*, 90.
65. Ibid. ("Was Powerless to Aid Sister Who Was Raped and Lynched," *New York Age*, April 30, 1914), 90.
66. See T. Wright, *Rape in Paradise* (New York: Mutual Publishing, 2005); D. E. Stannard, *Honor Killing: Race, Rape, and Clarence Darrow's Spectacular Last* (New York: Penguin Books, 2006); Cobey Black, *Hawaiian Scandal* (Waipahu, Hawai'i: Island Heritage Books, 2002).
67. P. *v.* Slingerland, *Something Terrible Has Happened* (New York: Harper & Row, 1966); T. Wright, *Rape in Paradise* (Honolulu: Mutual Publishing, 1966).
68. Tolnay and Beck, *An Analysis of Southern Lynchings, 1882–1930*, 19; Ibid., 28–29.
69. Fierce, *Slavery Revisited*, 6.
70. David J. Langum, *Crossing the Line: Legislating Morality and the Mann Act* (Chicago, IL: University of Chicago Press, 1994), 180.
71. For more information on Jack Johnson, see Geoffrey C. Ward, *Unforgivable Blackness: The Rise and Fall of Jack Johnson* (New York: Knopf, 2004); Jack Johnson, *Jack Johnson Is a Dandy: An Autobiography* (New York: Chelsea House, 1969).
72. The Mann Act, titled after Representative James Robert Mann, was also known as the White Slave-Traffic Act of 1910. The act criminalized the forced transportation of White women across state borders for prostitution. It was passed during a wave of hysteria over an alleged White slave trade. For more information on the Mann Act, see Langum, *Crossing the Line*.
73. Langum, *Crossing the Line*, 182–183.

74. Ibid., 180.
75. *Plessy v. Ferguson*, 163 U.S., 544.
76. Phillip Dray, *At the Hands of Persons Unknown: The Lynching of Black America* (New York: Modern Library, 2000), 7–8.
77. Dray, *At the Hands of Persons Unknown*, 13–14; Deleso Alford Washington, "Exploring the Black Wombman's Sphere and the Anti-Lynching Crusade of the Early Twentieth Century," *The Georgetown Journal of Gender and the Law*, 3 (2002): 895, 901–902.
78. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
79. *U.S. v. Shipp*, 214 U.S. 386 (1909).
80. For more information on this case, see Mark Curriden and Leroy Phillips, Jr., *Contempt of Court: The Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism* (New York: Random House, 1999).
81. *U.S. v. Shipp*, 214 U.S. 386, 406 (1909).
82. Dray, *At the Hands of Persons Unknown*, 151.
83. *U.S. v. Shipp*, 214 U.S. 386, 406 (1909).
84. Dray, *At the Hands of Persons Unknown*, 152.
85. *U.S. v. Shipp*, 214 U.S. 386, 406 (1909).
86. Ibid., 386, 407.
87. Ibid., 386, 407–408.
88. Dray, *At the Hands of Persons Unknown*, 153.
89. *U.S. v. Shipp*, 214 U.S. 386, 407–408 (1909).
90. Dray, *At the Hands of Persons Unknown*, 7, 153.
91. *U.S. v. Shipp*, 214 U.S. 386, 407–408 (1909).
92. Ibid., 386, 408–409.
93. Ibid., 386, 409.
94. Ibid., 386, 408–409.
95. Ibid., 386, 416; see Curriden and Phillips, Jr., *Contempt of Court*.
96. *U.S. v. Shipp*, 214 U.S. 386, 440 (1909). The petition was filed with the U.S. Circuit Court for the Northern Division of the Eastern District of Tennessee.
97. Ibid. The habeas petition states:

> Petitioner had been denied a trial by a fair and impartial jury, and had been denied the aid of counsel in violation of the Fifth and Sixth Amendments to the Federal Constitution, and that said petitioner was also denied rights secured to him under the Fourteenth Amendment to the Federal Constitution.

98. *Chattanooga Times*, "Jury Technicality—The Lawyers Worked Every Point to Save Johnson: Condemned Negro Will Probably Be Brought Back from Nashville at Once as All Danger of Violence Has Disappeared," March 5, 1906.
99. Dray, *At the Hands of Persons Unknown*, 154.

100. Ibid.
101. *U.S. v. Shipp*, 214 U.S. 386 (1909).
102. Ibid., 386, 411.
103. *U.S. v. Shipp*, 214 U.S. 386, 474 (1909). Dray, *At the Hands of Persons Unknown*, 157.
104. Ibid.
105. *U.S. v. Shipp*, 214 U.S. 386, 413 (1909).
106. Ibid., 386, 412.
107. Dray, *At the Hands of Persons Unknown*, 157.
108. *U.S. v. Shipp*, 214 U.S. 386, 413 (1909).
109. Dray, *At the Hands of Persons Unknown*, 157.
110. *U.S. v. Shipp*, 214 U.S. 386, 414 (1909).
111. Dray, *At the Hands of Persons Unknown*, 157–156.
112. *Chattanooga Times*, "'God Bless You All—I Am Innocent' Ed Johnson's Last Words Before Being Shot to Death by a Mob like a Dog: Majesty of Law Outraged by Lynchers—Mandate of the Supreme Court of the United States Disregarded and Red Riot Rampant," March 20, 1906.
113. Ibid.
114. *U.S. v. Shipp*, 214 U.S. 386, 415 (1909). Charges were brought against Sheriff Shipp and Deputies Matthew Gallaway and Geremiah Gibson for aiding and abetting the crime. Nick Nolan, Luther Williams, Bart Justice, Henry Padgett, William Mayse, and Frank Ward were charged as participants in the murder.
115. *U.S. v. Shipp*, 214 U.S. 386, 419 (1909).
116. Dray, *At the Hands of Persons Unknown*, 159.
117. *U.S. v. Shipp*, 214 U.S. 386, 414 (1909).
118. Dray, *At the Hands of Persons Unknown*, 158.
119. Curriden and Phillips, Jr., *Contempt of Court*.
120. Dray, *At the Hands of Persons Unknown*, 158.
121. Robert A. Gibson, "The Negro Holocaust: Lynching and Race Riots in the United States, 1880–1950." www.yale.edu/ynhti/curriculum/units/1979/2/79.02.04.x.html (accessed 1 December 2012).
122. David Levering Lewis, *W. E. B. DuBois: 1869–1919* (New York: Henry Holt, 1993), 579; reporting that 78 Blacks were lynched in 1918 and commenting "in the boasts of white newspapers in the South about the bloody fate in store for any black man daring to come back from the war expecting to be treated like a white man."
123. W. E. B. DuBois, *The Souls of Black Folk* (New York: Signet Books, 1903), 223:

> The Negro of the South who would succeed cannot be frank and outspoken, honest and self-assertive, but rather he is daily tempted to be silent and wary, politic and sly; he must flatter and be pleasant, endure petty insults with a smile, shut his eyes to wrong.

124. See *Black Survival 1776–1976: The Urban League Perspective* (Philadelphia, PA: The Philadelphia Urban League, 1977), 10–12.
125. According to *The American Heritage Dictionary*, 4th edn., lynching means to execute without due process of law. Lynching could include torture such as burning a person alive, castration, mutilation, amputation of limbs, and/or decapitation.
126. Ginzburg, *100 Years of Lynching* ("Mob Lynches Negro Man, Flogs Three Negro Women," *Chicago Record-Herald*, July 2, 1903), ("Woman Pleading Innocence Lynched as Child Poisoner," *Chicago Record-Herald*, July 27, 1903).
127. Tolnay and Beck, *An Analysis of Southern Lynchings, 1882–1930*, 21; see Ginzburg, *100 Years of Lynching* ("Negro Mother and Child Killed," *Montgomery Advertiser*, March 13, 1913).
128. Ginzburg, *100 Years of Lynching* ("Negro and Wife Burned," *New York Press*, February 8, 1904, 62), ("Lynched Negro and Wife Were First Mutilated," *Vicksburg (Mississippi) Evening Post*, February 8, 1904, 63).
129. Tolnay and Beck, *An Analysis of Southern Lynchings, 1882–1930*, 19 (discussing far less serious "offenses" that resulted in death by lynching); Ginzburg, *100 Years of Lynching* ("Negro and Wife Hanged, Suspected of Barn-Burning," *St. Paul Pioneer Press*, November 26, 1914, 92).
130. Tolnay and Beck, *An Analysis of Southern Lynchings, 1882–1930*, 19–25.
131. Ginzburg, *100 Years of Lynching* ("Rape, Lynch Negro Mother," *Chicago Defender*, December 18, 1915, 96).
132. Fierce, *Slavery Revisited*, 34.
133. Lewis, *W. E. B. DuBois 1868–1919: Biography of a Race*, 536.
134. David Levering Lewis, *W. E. B. DuBois: The Fight for Equality and the American Century, 1919–1963* (New York: Henry Holt, 2000), 7–8, 374.
135. See Carl Sandburg, *The Chicago Race Riots, July 1919* (New York: Harcourt, Brace & Howe, 1919). For more information on the Chicago riots, see C. K. Doreski, "From News to History: Robert Abbott and Carl Sandburg Read the 1919 Chicago Riot," *African American Review*, 26 (4) (1992): 637–650; see Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Riot of 1921—Race, Reparations, and Reconciliation* (New York: Oxford University Press, 2002).
136. *Frank v. Mangum*, 237 U.S. 309, 324–325 (1915).
137. *Frank v. Mangum*, 141 Ga. 243 (Ala. 1913).
138. See L. Dinnerstein, *The Leo Frank Case*, New York: Columbia University Press, 1968. For more on the Franks case, see: http://search.cjh.org:1701/primo_library/libweb/action/search.do?ct=facet&fctN=facet_topic&fctV=Frank%2c+Leo%2c+1884-1915&fctN=facet_tlevel&dscnt=0&scp.scps=scope%3A(AJHS)&frbg=&fctV=available&tab=default_tab&dstmp=1355867814694&srt=rank&vl(17144800UI1)=all_items&ct=fac

et&mode=Basic&dum=true&indx=1&vl(freeText0)=leo%20frank&fn=search&vid=ajhs_default. (accessed December 12, 2012).

139. *Frank v. Mangum*, 141 Ga. 243, 253 (Ala. 1913).
140. *Frank v. Mangum*, 237 U.S. 309, 312 (1915).
141. Ibid.
142. *Frank v. Mangum*, 141 Ga. 243, 284 (Ala. 1913). Leo Frank requested a new trial twice, moved to set aside the verdict as a nullity, and appealed to the Georgia Supreme Court three times prior to a review of this case by the U.S. Supreme Court. See *Frank v. Mangum*, 237 U.S. 309, 344 (1915).
143. *Frank v. Mangum*, 237 U.S. 309, 345 (1915).
144. See Robert S. Frey and N. Thompson-Frey, *The Silent and the Damned: The Murder of Mary Phagan and the Lynching of Leo Frank*, Lanham, MD: Madison Books, 1987. See Wells-Barnett, *Crusade for Justice*, 209–212.
145. Frey and Thompson-Frey, *The Silent and the Damned*.
146. *Ware v. State*, 146 Ark. 321, 327 (1920).
147. Ibid., 321, 350. The Committee of Seven consisted of members of the "Business Men's League of Helena, the sheriff, the county judge, the mayor of the city of Helena, and other prominent citizens."
148. *Ware v. State*, 146 Ark. 321, 324–325 (1920).
149. Ibid.
150. Ibid., 321, 325.
151. Scipio Africanus Jones was born into slavery in rural Arkansas in 1863. Around 1881, Jones moved to Little Rock, Arkansas, where he attended Philander Smith College and Shorter College, graduating with a bachelor's degree. He worked as a teacher while also studying law in a law office. Jones passed the bar examination in 1889 and proceeded to practice law in Little Rock for over 50 years. He was known as an excellent attorney, political insider, and champion of civil rights for Blacks. However, Jones is best remembered for representing the defendants convicted of murder in the Elaine Race Riot case. Jones became the lead attorney in the case after George Murphy, his White chief counsel, died suddenly. Jones wrote the briefs in the appeal to the U.S. Supreme Court. For more on the life and time of Scipio Jones, see Judith Kilpatrick, "(Extra) Ordinary Men: African-American Lawyers and Civil Rights in Arkansas before 1950," *Arkansas Law Review* 53 (2000): 299, 345–390.
152. *Ware v. State*, 146 Ark. 321, 324 (1920).
153. *Moore v. Dempsey*, 261 U.S. 86, 89 (1923).
154. Ibid. 86, 101. See *Banks v. State*, 143 Ark. 154 (1920) (new trials granted to Elaine defendants Alf Banks, Jr., and John Martin convicted of murder); *Ware v. State*, 146 Ark. 321 (1920) (Blacks excluded from jury. New trials granted to Elaine defendants Ed Ware, Will Wordlow, Albert Giles, Joe Fox, John Martin, and Alf Banks, Jr. The cases were consolidated for purposes of appeal.)

155. Dempsey was the warden of the Arkansas State Penitentiary.
156. *Moore v. Dempsey*, 261 U.S. 86, 87 (1923).
157. Ibid., 86, 89–90.
158. Kilpatrick, "(Extra) Ordinary Men," 299, 368.
159. Kevin Boyle, *Arc of Justice: A Saga of Race, Civil Rights, and Murder in the Jazz Age* (New York: Henry Holt, 2004), 170.
160. Ibid., 178.
161. Ibid., 244.
162. Ibid., 336; Phyllis Vine, *One Man's Castle: Clarence Darrow in Defense of the American Dream* (New York: HarperCollins, 2004), 259.
163. Boyle, *Arc of Justice*, 336; Vine, *One Man's Castle*, 259–260.
164. 56 Cong. Rec. 2, 151 (1900).
165. Senate Reports (7951), 67th Congress, 2nd session, 1921–1922, Vol. 2, 33–34.
166. Ibid.: Anti-lynching bill:

> APRIL 20 (calendar day, JULY 28), 1922.—Ordered to be printed.
>
> AN ACT To assure to persons within the jurisdiction of every State the equal protection of the laws, and to punish the crime of lynching.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the phrase "mob or riotous assemblage," when used in this act, shall mean an assemblage composed of three or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offense.
>
> SEC. 2. That if any State or governmental subdivision thereof fails, neglects, or refuses to provide and maintain protection to the life of any person within its jurisdiction against a mob or riotous assemblage, such State shall by reason of such failure, neglect, or refusal be deemed to have denied to such person the equal protection of the laws of the State, and to the end that such protection as is guaranteed to the citizens of the United States by its Constitution may be secured it is provided:
>
> SEC. 3. That any State or municipal officer charged with the duty or who possesses the power or authority as such officer to protect the life of any person that may be put to death by any mob or riotous assemblage, or who has any such person in his charge as a prisoner, who fails, neglects, or refuses to make all reasonable efforts to prevent such person from being so put to death, or any State or municipal officer charged with the duty of apprehending or prosecuting any person participating in such mob or riotous assemblage who fails, neglects, or refuses to make all reasonable efforts to perform his duty in apprehending or prosecuting to final judgment under the laws of such State all persons so participating except such, if any, as are to have been held to answer for

such participation in any district court of the United States, as herein provided, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment not exceeding five years or by a fine of not exceeding $5,000, or by both such fine and imprisonment.

Any State or municipal officer, acting as such officer under authority of State law, having in his custody or control a prisoner, who shall conspire, combine, or confederate with any person to put such prisoner to death without authority of law as a punishment for some alleged public offense, or who shall conspire, combine, or confederate with any person to suffer such prisoner to be taken or obtained from his custody or control for the purpose of being put to death without authority of law as a punishment for an alleged public offense, shall be guilty of a felony, and those who so conspire, combine, or confederate with such officer shall likewise be guilty of a felony. On conviction the parties participating therein shall be punished by imprisonment for life or not less than five years.

SEC. 4. That the district court of the judicial district wherein a person is put to death by a mob or riotous assemblage shall have jurisdiction to try and punish, in accordance with the laws of the State where the homicide is committed, those who participate therein: *Provided*, That it shall be charged in the indictment that by reason of the failure, neglect, or refusal of the officers of the State charged with the duty of prosecuting such offense under the laws of the State to proceed with due diligence to apprehend and prosecute such participants the State has denied to its citizens the equal protection of the laws. It shall not be necessary that the jurisdictional allegations herein required shall be proven beyond a reasonable doubt, and it shall be sufficient if such allegations are sustained by a preponderance of the evidence.

SEC. 5. That any county in which a person is put to death by a mob or riotous assemblage shall, if it is alleged and proven that the officers of the State charged with the duty of prosecuting criminally such offense under the laws of the State have failed, neglected, or refused to proceed with due diligence to apprehend and prosecute the participants in the mob or riotous assemblage, forfeit $10,000, which sum may be recovered by an action therefor in the name of the United States against any such county for the use of the family, if any, of the person so put to death; if he had no family, then to his dependent parents, if any; otherwise for the use of the United States. Such action shall be brought and prosecuted by the district attorney of the United States of the district in which such county is situated in any court of the United States having jurisdiction therein. If such forfeiture is not paid upon recovery of a judgment therefor, such court shall have jurisdiction to enforce payment thereof by levy of execution upon any property of the county, or may compel the levy and collection of a tax, therefor, or may otherwise compel payment thereof by mandamus or other appropriate process; and any officer of such county or other person who disobeys or fails to comply with any lawful order of the court in the premises shall be liable to punishment as for contempt and to any other penalty provided by law therefor.

SEC. 6. That in the event that any person so put to death shall have been transported by such mob or riotous assemblage from one county to another county during the time intervening between his capture and putting to death, the county in which he is seized and the county in which he is put to death shall be jointly and severally liable to pay the forfeiture herein provided.

SEC. 7. That any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country, which act constitutes a crime under the laws of such State or Territory, shall constitute a like crime against the peace and dignity of the United States, punishable in like manner as in the courts of said State or Territory, and within the period limited by the laws of such State or Territory, and may be prosecuted in the courts of the United States, and upon conviction the sentence executed in like manner as sentences upon convictions for crimes under the laws of the United States.

SEC. 8. That in construing and applying this act the District of Columbia shall be deemed a county, as shall also each of the parishes of the State of Louisiana.

That if any section or provision of this act shall be held by any court to be invalid, the balance of the act shall not for that reason be held invalid.

167. In 2005 the Senate passed a resolution presenting a formal apology for failing to pass anti-lynching legislation.
168. Lewis, *W. E. B. DuBois 1868–1919: Biography of a Race*, 509–511.
169. J. McPherson, *The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction* (Princeton, NJ: Princeton University Press, 1964), 230.
170. Costigan–Wagner Bill, 73rd Congress, 2nd Session (3rd January, 1935):

> A bill to assure to persons within the jurisdiction of every State the equal protection of the laws, and punish the crime of lynching.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purposes of this Act, the phrase "mob or riotous assemblage," when used in this Act, shall mean an assemblage composed of three or more persons acting in concert, without authority of law [for the purpose of depriving any person of his life, or doing him physical injury], to kill or

injure any person in the custody of any peace officer, with the purpose or consequence of depriving such person of due process of law or the equal protection of the laws.

Sec. 2. If any state or governmental, subdivision thereof fails, neglects, or refuses to provide and maintain protection to the life or person of any individual within its jurisdiction against a mob or riotous assemblage, whether by way of preventing or punishing the acts thereof, such State shall by reason of such failure, neglect, or refusal be deemed to have denied to such person due process of law and the equal protection of the laws of the State, and to the end that the protection guaranteed to persons within the jurisdiction of the United States, may be secured, the provisions of this Act are enacted.

Sec. 3. (a) Any officer or employee of any State or governmental subdivision thereof who is charged with the duty or who possesses the power or authority as such officer or employee to protect the life or person of any individual injured or put to death by any mob or riotous assemblage or any officer or employee of any State or governmental subdivision thereof having any such individual in his [charge as a prisoner] custody, who fails, neglects, or refuses to make all diligent efforts to protect such individual from being so injured or being put to death, or any officer or employee of any State or governmental subdivision thereof charged with the duty of apprehending, keeping in custody, or prosecuting any person participating in such mob or riotous assemblage who fails, neglects, or refuses to make all diligent efforts to perform his duty in apprehending, keeping in custody, or prosecuting to final judgment under the laws of such State all persons so participating, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding five years, or by both such fine and imprisonment.

(b) Any officer or employee of any state or governmental subdivision thereof, acting as such officer or employee under authority of State law, having in his custody or control a prisoner, who shall conspire, combine, or confederate with any person who is a member of a mob or riotous assemblage to injure or put such prisoner to death without authority of law, or who shall conspire, combine, or confederate with any person to suffer such prisoner to be taken or obtained from his custody or control [for the purpose of being] to be injured or put to death [without authority of law] by a mob or riotous assemblage shall be guilty of a felony, and those who so conspire, combine, or confederate with such officer or employee shall likewise be guilty of a felony. On conviction the parties participating therein shall be punished by imprisonment of not less than five years or [for life] not more than twenty-five years.

Sec. 4. The District Court of the United States judicial district wherein the person is injured or put to death by a mob or riotous assemblage shall have jurisdiction to try and to punish, in accordance with the laws of the State where the injury is inflicted or the homicide is committed, any and all persons who participate therein: Provided, That it is first made to appear to such court (1) that the officers of the State charged with the duty of apprehending, prosecuting, and punishing such offenders under the laws of the State shall have failed, neglected, or refused to apprehend, prosecute, or punish such offenders; or (2) that the jurors obtainable for service in the State court having jurisdiction of the offense are so strongly opposed to such punishment that there is [no] probability that those guilty of the offense [can be] will not be punished in such State court. A failure for more than thirty days after the commission of such an offense to apprehend or to indict the persons guilty thereof, or a failure diligently to prosecute such persons, shall be sufficient to constitute prima facie evidence of the failure, neglect, or refusal described in the above proviso.

Sec. 5. Any county in which a person is seriously injured or put to death by a mob or riotous assemblage shall [forfeit $10,000, which sum may be recovered by suit therefore in the name of the United States against such county for the use of the family, if any, of the person so put to death; if he had no family then of his dependent parents, if any; otherwise for the use of the United States] be liable to the injured person or the legal representatives of such person for a sum of not less than $2,000 nor more than $10,000 as liquidated damages, which sum may be recovered in a civil action against such county in the United States District Court of the judicial district wherein such person is put to the injury or death. Such action shall be brought and prosecuted by the United States district attorney [of the United States] of the district in the United States District Court for such district. If such [forfeiture] amount awarded be not paid upon recovery of a judgment thereof, such court shall have jurisdiction to enforce payment thereof by levy of execution upon any property of the county, or may otherwise compel payment thereof by mandamus or other appropriate process; and any officer of such county or other person who disobeys or fails to comply with any lawful order of the court in the premises shall be liable to punishment as for contempt and to any other penalty provided by law therefor. The amount recovered shall be exempt from all claims by creditors of the deceased. The amount recovered upon such judgment shall be paid to the injured person, or where death resulted, distributed in accordance with the laws governing the distribution of an intestate decedent's assets then in effect in the State wherein such death occurred.

Sec. 6. In the event that any person so put to death shall have been transported by such mob or riotous assemblage from one county to another county during the time intervening between his seizure and

putting to death, the county in which he is seized and the county in which he is put to death shall be jointly and severally liable to pay the forfeiture herein provided. Any district judge of the United States District Court of the judicial district wherein any suit or prosecution is instituted under the provisions of this Act, may by order district that such suit or prosecution be tried in any place in such district as he may designate in such order.

Sec. 7. Any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country, which act constitute a like crime against the peace and dignity of the United States, punishable in a like manner in its courts as in the courts of said State or Territory, and able in a like manner in its courts as in the courts of said State or Territory, and may be prosecuted in the courts of the United States, and upon conviction the sentence executed in like manner as sentences upon convictions for crimes under the laws of the United States.

Sec. 8. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

171. Ibid.
172. In 2005 the Senate passed a resolution presenting a formal apology for failing to pass anti-lynching legislation.
173. See Hilton Als, Jon Lewis, Leon F. Litwack, and James Allen, *Without Sanctuary: Lynching Photography in America* (Santa Fe, NM: Twin Palms Publisher, 2000); see J. Madison, *A Lynching in the Heartland: Race and Memory in America* (New York: Palgrave Macmillan, 2001).
174. Bell, *Race, Racism and American Law*, 59; Cox, "Lynching and the Status Quo," 28–30.
175. Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (Cambridge: Cambridge University Press, 2003), 58.
176. Gibson, "The Negro Holocaust: Lynching and Race Riots in the United States, 1880–1950."
177. See James Weldon Johnson, *Along This Way: The Autobiography of James Weldon Johnson* (New York: Penguin Press, 1933).
178. See Roy L. Brooks, ed., *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York: New York University Press, 1999).
179. See Michael D'Orso, *Like Judgment Day: The Ruin and Redemption of a Town Called Rosewood* (New York: G.P. Putnam's Sons, 1996).
180. "Last Negro Homes Razed in Rosewood," *New York Times*, January 8, 1923.

181. See D'Orso, *Like Judgment Day.*
182. Ibid.
183. Florida House Bill 591 was introduced by Representatives De Grandy and Lawson. *The Claim of Arnett Goins, Minnie Lee Langley et al. v. State of Florida* includes a finding of fact and claim seeking $7.2 million for damages resulting from the 1923 destruction of Rosewood, Florida.
184. See Florida House Bill HR 591, 1994 Compensation for Victims of Rosewood Massacre and Florida Senate Bill SB 1774, 1994 Compensation for the Victims of Rosewood Massacre.
185. See Brophy, *Reconstructing the Dreamland.*
186. Sue Ann Pressley, "Three Held in Black Man's Dragging Death," *The Times Picayune*, 162 (138), June 10, 1998.
187. Ashley Craddock, "The Jaspar Myth," Salon.com, October 25, 1999.
188. Whites have received the death penalty for serial murders that include Black victims, but this is the only case of White defendants receiving the death penalty for the murder of one Black person.
189. Steve Barnes, "Grave Desecrated a Second Time," *New York Times*, May 8, 2004.
190. Title: Apologizing to the victims of lynching and the descendants of those victims for the failure of the Senate to enact anti-lynching legislation" Cong. 109, 1st Sess., S. Res. 39, June 13, 2005.
191. James Allen and Hilton Als, *Without Sanctuary: Lynching Photography in America* (Santa Fe, NM: Twin Palms Publishers, 2000).
192. Cong. 109, 1st Sess., S. Res. 39, June 13, 2005.
193. Ibid.
194. See Dray, *At the Hands of Persons Unknown.*
195. See Sandra Gunning, *Race, Rape, and Lynching: The Red Record of American Literature, 1890–1912* (New York: Oxford University Press, 1996); see also Browne-Marshall, "Denial of Innocence."
196. See James Elbert Cutler, *Lynch Law: An Investigation into the History of Lynching in the United States* (New York: Negro Universities Press, 1969).
197. Wells-Barnett, I. 16 Lynch Law in Georgia, Daniel A. P. Murray Pamphlets 12 (1899); Daniel A. P. Murray Pamphlet Collection includes the pamphlet drafted by Ida B. Wells-Barnett titled "Lynch law in Georgia." It is a "six-weeks' record in the center of southern civilization, as faithfully chronicled by the *Atlanta Journal* and the *Atlanta Constitution*; also the full report of Louis P. Le Vin, the Chicago detective sent to investigate the burning of Samuel Hose, the torture and hanging of Elijah Strickland, the colored preacher, and the lynching of nine men for alleged arson." http://memory.loc.gov/ammem/aap/aaphome.html (accessed December 16, 2012); see also Washington, "Exploring the Black Womb-man's Sphere and the Anti-Lynching Crusade of the Early Twentieth Century," 902.

198. Gibson, "The Negro Holocaust: Lynching and Race Riots in the United States, 1880–1950."
199. Arthur F. Raper, *The Tragedy of Lynching* (Montclair, NJ: Patterson Smith, 1969), 1.
200. Nancy F. Cott, ed., *History of Women in the United States: Social and Moral Reform* (New Providence: K. G. Saur, 1994), 527. Ida B. Wells exposed the economic motivation behind the lynching of three Black businessmen in Memphis.
201. Tolnay and Beck, *An Analysis of Southern Lynchings, 1882–1930*, 43.
202. See, generally, Raper, *The Tragedy of Lynching*, 1.
203. See Richard Rubin, "The Ghosts of Emmett Till," *New York Times Magazine*, July 31, 2005.
204. *New York Times*, September 23, 1955, "Mississippi Jury Acquits Two in Youth's Killing," 38.
205. The jury's position was that Emmett Till was so disfigured to be unidentifiable. The Tallahatchie River had been used in a number of murders of Black men in Mississippi. The body could have been that of another Black person.
206. Rubin, "The Ghosts of Emmett Till," 55–56.
207. See John Patterson, ed., *We Claim Genocide* (New York: Civil Rights Congress, 1951), 58–66.
208. See Allen and Als, *Without Sanctuary* (discussing the lynching of Rubin Stacey); Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: First Vintage Books, 1998); Morton Sosna, *In Search of the Silent South: Southern Liberals and the Race Issue* (New York: Columbia University Press, 1977).
209. *Screws v. U.S.*, 325 U.S. 91, 92 (1945).
210. Ibid., 91, 92–93.
211. Criminal Code, 18 U.S.C. 52, Sec. 20.
212. Criminal Code, 18 U.S.C. 88, Sec. 20.
213. *Screws v. U.S.*, 325 U.S. 91, 138 (1945) (quoting from the dissent of Justice Murphy).
214. See Cong. Globe, 41st Cong., 2d Sess., 3807, 3808, 3881. Flack, *The Adoption of the Fourteenth Amendment* (Johns Hopkins, 1908), 19–54, 219, 223, 227.
215. Since they were tried under a federal statute, the case was tried in federal district court.
216. Criminal Code, 18 U.S.C. 52, Sec. 20.
217. *Screws v. U.S.*, 325 U.S. 91, 112–113 (1945).
218. *Screws v. United States*, 140 F. 2d 662 (5th Cir. 1944).
219. See *Screws v. U.S.*, 325 U.S. 91 (1945).
220. Ibid., 91, 110–113.
221. Ibid., 91, 113.
222. Bell, *Race, Racism and American Law*, 464–471, 475–479.

223. Ibid., 477–481; Liyah Kaprice Brown, "Colloquium: Relearning Brown: Applying the Lessons of Brown to the Challenges of the Twenty-First Century: Officer or Overseer? Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities," *New York University Review of Law and Social Change*, 29 (2005): 757; Jones-Brown, *Race, Crime and Punishment*.
224. *Mapp v. Ohio*, 367 U.S. 643 (1961).
225. *Mapp v. Ohio*, 367 U.S. 643, 645.
226. Section 2905.34, Ohio Revised Code.
227. *Mapp v. Ohio*, 170 Ohio St. 427, 429 (1960).
228. Ibid., 427, 429.
229. *Weeks v. United States*, 232 U.S. 383 (1914).
230. *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).
231. *Mapp v. Ohio*, 170 Ohio St. 427, 430 (1960).
232. Ibid., 434.
233. See *Wolf v. Colorado*, 338 U.S. 25 (1949).
234. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).
235. Ibid., 643, 660.
236. For further information on police brutality, see, generally, Delores D. Jones-Brown and Karen J. Terry, *Policing and Minority Communities: Bridging the Gap* (Upper Saddle River, NJ: Pearson Education, 2004).
237. See *Koon v. United States*, 518 U.S. 81 (1996).
238. Ibid., 87.
239. Ibid., 81, 87.
240. On April 29, 1992, protests against the acquittal were immediate and spread across the country. Flames engulfed Los Angeles as homes and businesses were burned down during six days of mass rioting. For further discussion of Rodney King, see Michael W. Markowitz and Delores Jones-Brown, *The System in Black and White*, 86–91; *Koon v. United States*, 518 U.S. 81 (1996) (one count resulted in a hung jury).
241. *Koon v. United States*, 518 U.S. 81 (1996).
242. Rick DelVecchio and Suzanne Espinosa, "Bradley Ready to Lift Curfew: He Says L.A. Is 'Under Control,'" *San Francisco Chronicle*, May 4, 1992, A1.
243. On August 4, 1992, a federal grand jury indicted the four officers under 18 U.S.C. § 242, charging them with violating King's constitutional rights under color of law. Powell, Briseno, and Wind were charged with willful use of unreasonable force in arresting King. Koon was charged with willfully permitting the other officers to use unreasonable force during the arrest.
244. King received $3.8 million in a settlement with the city of Los Angeles.
245. See Report of the Independent Commission on the Los Angeles Police Department (Christopher Commission Report), July 9, 1991; Jones-Brown and Terry, *Policing and Minority Communities*, 169.

246. Jones-Brown and Terry, *Policing and Minority Communities*, 169.
247. Under the sentencing guidelines, Koon and Powell could have been sentenced to 70–87 months of imprisonment. However,

> the District Court (1) granted the officers a downward departure under the Guidelines of five offense levels on the basis of a finding that the suspect's misconduct—which included driving while intoxicated, fleeing from the police, refusing to obey the officers' commands, and attempting to escape from police custody—had provoked the officers' offensive behavior; and (2) granted an additional three level downward departure on the basis of the combination of the officers' (a) unusual susceptibility to abuse in prison, (b) job loss and preclusion from law enforcement employment, (c) burdens of successive state and federal prosecutions, and (d) low risk of recidivism; and (3) having thus reduced the sentencing range to 30–37 months, sentenced each officer to 30 months in prison
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> (*Koon v. United States*, 518 U.S. 81, 89–90 (1996))

248. See *Koon v. United States*, 518 U.S. 81 (1996).
249. Ibid., 81, 89.
250. Jones-Brown and Terry, *Policing and Minority Communities*, 183.
251. *Hudson v. McMillian*, 929 F. 2d 1014 (5th Cir. 1990); *Hudson v. McMillan*, 503 U.S. 1 (1992).
252. *Hudson v. McMillian*, 503 U.S. 1, 4 (1992).
253. Ibid.
254. Ibid., 1, 12.
255. Ibid., 1, 4–5.
256. Ibid., 1, 4.
257. Ibid., 1, 5.
258. See *Estelle v. Gamble*, 429 U.S. 97 (1976).
259. See Kadiatou Diallo, *My Heart Will Cross This Ocean: My Story, My Son, Amadou* (New York: One World/Ballantine, 2004).
260. Bronx, New York. Grand Jury #: 40894/99 (dated March 25, 1999).
261. Civil complaint filed December 17, 1999. A civil action was brought against the individual police officers as well as the city of New York. The civil lawsuit alleged that the individual officers acted in a reckless, wanton, and grossly negligent manner and in complete disregard for the rights and safety of Diallo in approaching him without reasonable suspicion that he had committed a crime and without any lawful justification, and in firing 41 bullets at him without any justification and otherwise acting in a reckless, wanton, and grossly negligent manner. The lawsuit accused the city of New York and the individual defendants of racial profiling. The suit alleged that New York was negligent in the training and supervision of the defendants and in assigning them to the Street Crimes Unit without adequate training and supervision.

262. *New York Post*, "NYPD to Scuttle Diallo Cop Unit," April 10, 2002, 7.
263. *New York Post*, "Diallo Cop Ruling Draws Hostile Fire," April 29, 2001, 16.
264. *New York Post*, "NYPD Clears Diallo Cops—with Retraining," April 26, 2001, 6.
265. *Jet Magazine*, "Riverside, CA, Officers Who Shot Tyisha Miller Fired from Force," July 5, 1999.
266. Manuscript in Slavery File No. 1, Free Persons of Colour, Historical Commission of South Carolina, Columbia.
267. See *Blyew v. United States*, 80 U.S. 581 (1871).
268. *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880).
269. *Carter v. Texas*, 177 U.S. 442, 447 (1900).
270. *Swain v. Alabama*, 275 Ala. 508, 509 (1963).
271. *Swain v. Alabama*, 380 U.S. 202, 209–210 (1965).
272. Ibid., 202, 222–224.
273. Ibid. Additionally, the Court held that Swain was not constitutionally entitled to a proportionate number of his race on the jury that tried him.
274. *Swain v. Alabama*, 380 U.S. 202, 214–220 (1965).
275. Ibid., 202, 221–222.
276. *Norris v. Alabama*, 294 U.S. 587, 591, 592 (1935).
277. Ibid., 587, 591–594.
278. Ibid., 587, 591.
279. Ibid., 587, 596.
280. *Batson v. Kentucky*, 476 U.S. 79 (1986).
281. See, for example, *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex Parte Virginia*, 100 U.S. 339 (1880); *Neal v. Delaware*, 103 U.S. 370 (1881); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Franklin v. South Carolina*, 218 U.S. 161 (1910); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Norris v. Alabama*, 294 U.S. 587 (1935); *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (*per curiam*); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Avery v. Georgia*, 345 U.S. 559 (1953); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Jones v. Georgia*, 389 U.S. 24 (1967) (*per curiam*); *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Rose v. Mitchell*, 443 U.S. 545 (1979); *Vasquez v. Hillery*, 474 U.S. 254 (1986).
282. *Batson v. Kentucky*, 476 U.S. 79 (1986).
283. The Kentucky Rules of Criminal Procedure authorize the trial court to permit counsel to conduct *voir dire* examination or to conduct the examination itself (Ky. Rule Crim. Proc. 9.38). After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to

the number to be seated plus the number of allowable peremptory challenges (Rule 9.36). Since the offense charged in this case was a felony and an alternate juror was called, the prosecutor was entitled to six peremptory challenges and defense counsel to nine (Rule 9.40). See *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

284. *Batson v. Kentucky*, 476 U.S. 79, 83 (1986).
285. Ibid., 79, 100. To the extent that anything in *Swain v. Alabama*, 380 U.S. 202 (1965) is contrary to the principles we articulate today, that decision is overruled.
286. *Batson v. Kentucky*, 476 U.S. 79 (1986).
287. Ibid., 79, 84–89.
288. *Miller-El v. Dretke*, 125 U.S. 2317 (2005).
289. *Blyew v. U.S.*, 80 U.S. 581, 584 (1871).
290. Ibid., 581, 583.
291. Ibid., 581, 584.
292. Ibid., 581, 584–585.
293. Ibid., 581, 586.
294. Ibid., 581, 585.
295. Revised Statutes of Kentucky, section 1, chapter 107, vol. 2, 470 (1860).
296. *Blyew v. U.S.*, 80 U.S. 581, 592 (1871).
297. Civil Rights Act, 14 Stat. at Large 27 (April 9, 1866).
298. *Blyew v. U.S.*, 80 U.S. 581, 595 (1871).
299.

> [Mary Hamilton] had been the only female Field Secretary (organizer) for the Congress of Racial Equality (CORE). She was only the third woman to have the job: Genevieve Hughes was the first, Frederika Teer the second, but they had not been allowed to work in the South. Mary Hamilton was the first female CORE organizer allowed to work in the South.
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> (Archive of Sheila Michaels, civil rights activist: CORE 1961–1963 SNCC 1962–1964. www.crmvet.org/nars/sheila.htm; accessed June 13, 2006)

300. *Ex parte Mary Hamilton*, 275 Ala. 574 (1963) reversed by *Hamilton v. Alabama*, 376 U.S. 650 (1964). Incident of abuse of witness based on race is cited by Court as a vestige of slavery in the sit-in case of *Bell v. Maryland*, 378 U.S. 226, 248 (1964).
301. Alabama Code, Tit. 13, Sec. 2.
302. *Johnson v. Virginia*, 373 U.S. 61 (1963).
303. Ibid., 61, 61–62.
304. Ibid.
305. Randall Kennedy, *Race, Crime and the Law* (New York: Pantheon Books, 1997), 128.
306. See Ayers, *Vengeance and Justice*.
307. *Brown v. Board of Education*, 347 U.S. 483 (1964); see James Jacobs, *New Perspectives on Prisons and Imprisonment* (Ithaca, NY: Cornell University Press, 1983), 80–81 (discussing limits of racial desegregation's application to prisons).

308. *Lee, Commissioner of Corrections of Alabama v. Washington*, 390 U.S. 333 (1968).
309. *Lee v. Washington*, 263 F. Supp. 327 (MD. AL. 1966).
310. The Alabama statutes requiring segregation of the races in the prisons and jails of Alabama are §§ 4, 52, 121, 122, 123, 172, and 183 of Title 45, Code of Alabama, recompiled 1958.
311. *Lee, Commissioner of Corrections of Alabama v. Washington*, 390 U.S. 333, 334 (1968).
312. Ibid., 333. The Supreme Court upheld the ruling of a three-judge federal court.
313. *Lee v. Washington*, 263 F. Supp. 327, 332 (MD. AL. 1966).
314. *U.S. v. Wyandotte*, 480 F. 2d 969 (10th Cir. 1973).
315. Ibid., 969, 970.
316. Ibid., 969, 970–971.
317. Ibid., 969, 970 (citing *Lee v. Washington*, 390 U.S. 333, 1968).
318. *United States v. Wyandotte County, Kansas*, 480 F. 2d 969 (10th Cir. 1973) *cert. denied* 414 U.S. 1068 (1973).
319. *Johnson v. California*, 543 U.S. 499, 503 (2005) (Fourth Amended Complaint 3, Record, Doc. No. 78).
320. Ibid., 499, 503–504.
321. Ibid., 499, 504–505.
322. Ibid., 499, 503 (Fourth Amended Complaint 3, Record, Doc. No. 78).
323. The Court of Appeals for the Ninth Circuit affirmed the trial court's grant of summary judgment in favor of the California Department of Corrections (*Johnson v. U.S.*, 21 F. 3d 791, 9th Cir. 2003).
324. Ibid.
325. See *Johnson v. California*, 543 U.S. 499 (2005).
326. Ibid., 499, 509.
327. *Turner v. Safley*, 482 U.S. 78 (1987).
328. *Johnson v. California*, 543 U.S. 499, 509 (2005). For more on strict scrutiny, see Chapter 2, affirmative action section, in this book. See also Bell, *Race, Racism and American Law*.
329. *Johnson v. California*, 543 U.S. 499, 512 (2005). For a discussion of California's common sense argument, see James E. Robertson, "Foreword: 'Separate but Equal' in Prison: John v. California and Common Sense Racism," *Journal of Criminal Law and Criminology* 96 (3) (2006): 795–848.
330. *Johnson v. California*, 543 U.S. 499, 509 (2005).
331. Ibid., 499, 515.
332. *Terry v. Ohio*, 392 U.S. 1, 5 (1968).
333. Ibid., 1, 5–6.
334. Ibid., 1, 6.

335. Ibid., 1, 5.
336. Ibid.
337. Ibid., 1, 6.
338. Ibid.
339. Ibid., 1, 7–8.
340. Ibid., 1, 7.
341. Ibid., 1, 5.
342. Ibid., 1, 7.
343. Ohio Rev. Code Sec. 2923.01 (1953) provides in part that "no person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person."
344. *Terry v. Ohio*, 392 U.S. 1, 5 (1968).
345. Ibid., 1, 7.
346. Chilton died during the appeal process (*Terry v. Ohio*, 392 U.S. 1, 5 note 2, 1968).
347. U.S. Const., 4th Am.
348. *Terry v. Ohio*, 392 U.S. 1, 10 (1968).
349. Ibid.
350. Ibid., 1, 10–11.
351. *Terry v. Ohio*, 392 U.S. 1, 10 (1968). Although McFadden had decades of police experience to support his "reasonable suspicion" of criminal activity, the Court failed to require any particular level of experience or training to support a police officer's suspicion.
352. See *Terry v. Ohio*, 392 U.S. 1, 15–16 (1968), quoting L. Tiffany, D. McIntyre, and D. Rotenberg, *Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment* (Boston, MA: Little, Brown, 1967), 47–48:

> [I]t cannot help but be a severely exacerbating factor in police–community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."

353. *Terry v. Ohio*, 392 U.S. 1, 14–15 (1968).
354. See *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961).
355. See Adina Schwartz, "'Just Take Away Their Guns': The Hidden Racism of Terry v. Ohio," *Fordham Urban Law Journal*, 23 (1996): 2.
356. *Terry v. Ohio*, 392 U.S. 1, 15 (1968).
357. Ibid., 1, 5.
358. Ibid., 1, 7.
359. See *Hiibel v. Nevada*, 542 U.S. 177 (2004) and *Brown v. Texas*, 443 U.S. 47 (1979).

360. See *Illinois v. William aka Sam Wardlow*, 528 U.S. 119 (1999).
361. See *Whren v. United States*, 517 U.S. 806 (1996).
362. *Arizona v. United States*, 566 U.S. (2012).
363. *Florence v. Chosen Freeholders of Burlington County, New Jersey*, 566 U.S. (2012).
364. See *City of Chicago v. Jose Morales et al.*, 177 Ill. 2d 440 (1997) (consolidated cases); *Chicago v. Morales*, 527 U.S. 41 (1999).
365. *Chicago v. Morales*, 527 U.S. 41, 47 (1999).
366. Chicago Municipal Code Sec. 8-4-015 (added June 17, 1992), reprinted in App. To Pet. For Cer. 61a–63a; *Chicago v. Morales*, 527 U.S. 41, 47 (1999).
367. Chicago Municipal Code Sec. 8-4-015 (added June 17, 1992), reprinted in App. To Pet. For Cer. 61a–63a.
368. *Chicago v. Morales*, 527 U.S. 41, 49 (1999).
369. Ibid., 41, 63–64.
370. Ibid., 41, 53 (1999). The freedom to loiter for innocent purposes is part of the liberty protected by the due-process clause of the Fourteenth Amendment.
371. *Chicago v. Morales*, 527 U.S. 41, 64 (1999).
372. Ibid.
373. Ibid., 41, 63–64.
374. See *United States v. Armstrong*, 517 U.S. 456 (1996).
375. Ibid., 456, 459–460.
376. Ibid., 456, 458–460.
377. Ibid., 456, 460–461.
378. *Oyler v. Boles*, 368 U.S. 448 (1962).
379. *United States v. Armstrong*, 517 U.S. 456, 459 (1996).
380. Ibid., 456, 459–460.
381. Ibid., 456, 461.
382. Ibid., 456, 460.
383. *United States v. Armstrong*, 48 F. 3d 1508, 1516 (1995).
384. *United States v. Armstrong*, 517 U.S. 456, 470–471 (1996).
385. Patterson, *We Charge Genocide*, 150.
386. *Powell v. Alabama*, 287 U.S. 45 (1932).
387. The crime of rape remained a capital offense—punishable by death—in America until 1977. See *Coker v. Georgia*, 433 U.S. 584 (1977).
388. Kwando Kinshasa, *The Man from Scottsboro—Clarence Norris in His Own Words* (Jefferson, NC: McFarland & Co., 1997), 197.
389. *Powell v. Alabama*, 287 U.S. 45, 49 (1932).
390. Ibid. "But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed."

391. *Powell v. Alabama*, 287 U.S. 45, 49 (1932).
392. *Ozie Powell, Willie Roberson, Andy Wright, and Olen Montgomery v. Alabama*; *Haywood Patterson v. Alabama*; *Charley Weems and Clarence Norris v. Alabama*, 287 U.S. 45 (1932).
393. *Powell v. Alabama*, 287 U.S. 45, 49–50 (1932).
394. Chief Justice Anderson believed the defendants had not been accorded a fair trial and strongly dissented (*Powell v. Alabama*, 224 Ala. 524; *id.* 531; *id.* 540; 141 So. 215, 195, 201).
395. *Powell v. Alabama*, 287 U.S. 45, 72 (1932).
396. www.law.umkc.edu/faculty/projects/FTrials/scottsboro/SB_BBates.html (accessed December 15, 2012).
397. See *Norris v. Alabama*, 294 U.S. 587 (1935).
398. Ibid., 587, 597.
399. Ibid., 587, 592–593.
400. Ibid., 587, 599.
401. See *Chambers v. Florida*, 309 U.S. 227 (1940).
402. Ibid., 227, 229.
403. Ibid., 227, 229–230.
404. *Chambers v. Florida*, 136 Fla. 568, 570–572 (1939).
405. Ibid., 568, 569.
406. Ibid., 568, 572.
407. *Chambers v. Florida*, 309 U.S. 227, 241.
408. Ibid., 227, 240 (note 15).
409. *Georgia v. Furman*, 408 U.S. 238 (1972).
410. U.S. Const., Am. 13.
411. *Georgia v. Furman*, 408 U.S. 238, 255 (1972).
412. Ibid., 238, 310.
413. *Gregg v. Georgia*, 428 U.S. 153, 180–182 (1976).
414. Ibid., 153.
415. Bureau of Justice Statistics, Capital Punishment, 1996; Methods of execution by State. http://www.deathpenaltyinfo.org/methods-execution#state (accessed December 14, 2012).
416. The study was conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth. The Baldus study is based on more than 2,000 murder cases in Georgia from 1973 to 1978 and involves data relating to the victim's race and the defendant's race. See David C. Baldus *et al.*, "Monitoring and Evaluating Temporary Death Sentencing Systems: Lessons From Georgia," *UC Davis Law Review*, 18 (1985): 1375; David C. Baldus *et al.*, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology*, 74 (1983): 661.
417. *McClesky v. Kemp*, 481 U.S. 279, 312–313 (1987).
418. U.S. General Accounting Office, "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities" (1990), 5. http://www.gao.gov/assets/220/212180.pdf (accessed November 30, 2012)

419. See *Atkins v. Virginia*, 536 U.S. 304 (2002).
420. Originally printed in *Bay State Banner* newspaper, dated January 7, 2012.
421. M. Abu-Jamal and J. E. Wideman, *Live From Death Row* (New York: Harper Perennial, 1996).
422. See *Roper v. Simmons*, 543 U.S. 551 (2005).
423. *Miller v. Alabama*, 560 U.S. (2012).
424. *Graham v. Florida*, 130 S. Ct. 2011 (2010).
425. Ellis Cose, *The Envy of the World: On Being a Black Man in America* (New York: Washington Square Press Publication, 2002), 100–118.
426. Jones-Brown, *Race, Crime and Punishment*, 88.
427. Bureau of Justice Statistics Correctional Surveys (The National Probation Data Survey, National Prisoner Statistics, Survey of Jails, Census of Jail Inmates, and the National Parole Data Survey) as presented in Correctional Populations in the United States, 1997, and Prison and Jail Inmates at Midyear, 2005.
428. U.S. General Accounting Office, "Death Penalty Sentencing," (1990); see Richard C. Deiter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides* (Washington, DC: Death Penalty Information Center, 1998).
429. www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#deathrowpop (retrieved July 19, 2012); www.deathpenaltyinfo.org/article.php?scid=5&did=184 (retrieved June 7, 2006).
430. See Henriques and Manatu-Rupert, "Living on the Outside," 6–19; Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2001, 5 (2002).
431. Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2001, 5, 12 (2002); Gloria J. Browne-Marshall, "To Be Female, Black, Incarcerated, and Infected with HIV/AIDS: A Socio-Legal Analysis," *Criminal Law Bulletin*, 41 (1) (2005): 48.
432. Joseph, "Overrepresentation of Minority Youth in the Juvenile Justice System," 227.
433. John A. Davis, "Blacks, Crime, and American Culture," *Crime and Justice in America, 1776–1976* (Philadelphia, PA: American Academy of Political and Social Science), 91.
434. See Wackenhut Corrections Corporation (New York Stock Exchange ticker: WHC)

> Wackenhut Corrections Corporation: The Group's principal activity is to offer correctional and related institutional services to federal, state, local and overseas government agencies. Correctional services include the management of a broad spectrum of facilities, including male and female adult facilities, juvenile facilities, community corrections, work programs, prison

industries, substance abuse treatment facilities and mental health, geriatric and other special needs institutions.

(www.business.com/directory/government_and_trade/by_country/united_states/correctional_facilities/wackenhut_corrections_corporation/profile (retrieved June 10, 2006))

435. See official website of the GEO Group, Inc., a division of Wackenhut Corrections Corporation. The GEO Group, Inc. (New York Stock Exchange ticker: GGI); Press release of the GEO Group, Inc., "Launches Offering of 3.0 Million Shares of Common Stock," dated May 25, 2006.

GEO announced today that it plans to offer 3,000,000 shares of its common stock in an underwritten public offering pursuant to a shelf registration statement previously filed with the Securities and Exchange Commission. GEO also plans to grant the underwriters a 30-day option to purchase up to an aggregate of 450,000 additional shares of common stock.

(www.wcc-corrections.com/whatwedo.asp (retrieved June 10, 2006))

436. Jill Nelson, ed., *Police Brutality* (New York: W. W. Norton, 2000), 96.
437. *Dorsey v. United States*, 567 U.S. (2012).
438. Jones-Brown, *Race, Crime and Punishment*, 87–91.
439. Nelson, *Police Brutality*, 92.
440. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Chapter 4

1. *Bolling v. Sharp*, 347 U.S. 497, 499 (1954).
2. U.S. Const., 1st Am.
3. *Bailey v. Poindexter*, 55 Va. 132 (1858).
4. Ibid.
5. Ibid., 45–46.
6. Ibid.
7. Statutes at Large of South Carolina, vol. 7, 353.
8. Va. Stat. 1682. Act III; Hening, Stat., Vol. 2, 18; A. Leon Higginbotham, *In the Matter of Color* (New York: Oxford University Press, 1978), 40.
9. See Peter M. Bergman, *The Chronological History of the Negro in America* (New York: Harper and Row, 1969).
10. For more information, see the Race and Slavery Petitions Project. Founded in 1991, this project was designed to locate, collect, organize, and publish virtually all surviving legislative petitions and a large selected group of county court petitions concerning slavery in the South. The project covers the period from the beginnings of statehood to the end of slavery (1770s to 1860s). Department of History, University of North Carolina-Greensboro, Greensboro, North Carolina. http://library.uncg.edu/slavery_petitions/about.asp (accessed July 1, 2006).
11. Herbert Aptheker, ed., *A Documentary History of the Negro People in the United States: From Colonial Times through the Civil War* (New York: Citadel Press, Inc., 1951), 20.
12. Ibid.
13. Ibid.
14. Manuscript in Slavery File No. 1, Free Persons of Colour, Historical Commission of South Carolina, Columbia.
15. *The Liberator*, June 28, 1844.
16. Aptheker, *A Documentary History of the Negro People in the United States*, 92.
17. Ibid.
18. Ibid., 93. The full title of Walker's appeal is Walker's Appeal, in Four Articles: Together with a Preamble, to the Coloured Citizens of the World, but in Particular, and very Expressly, to Those of the United States of America, Written in Boston, State of Massachusetts, September 28, 1829.
19. See *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).
20. Ibid.
21. Aptheker, *A Documentary History of the Negro People in the United States*, 299.
22. Ibid., 305.
23. Statutes at Large of South Carolina, vol. 7, 357, 359–360; Higginbotham, *In the Matter of Color*, 177.
24. Statutes at Large of South Carolina, vol. 7, 360; Higginbotham, *In the Matter of Color*, 177.
25. Aptheker, *A Documentary History of the Negro People in the United States*, 194.
26. Ibid., 194–195.
27. Franklin E. Frazier, *The Negro in the United States* (New York: Macmillan Company, 1957), 88.
28. For more information on Toussaint L'Ouverture, see C. L. R. James, *The Black Jacobins: Toussaint L'Ouverture and the San Domingo Revolution* (New York: Vintage Books, 1963).
29. Frazier, *The Negro in the United States*, 88.
30. See John Killens, ed., *The Trial Record of Denmark Vesey* (Boston, MA: Beacon Press, 1970); Herbert Aptheker, *American Slave Revolts* (New York: International Publishers, 1993).
31. Frazier, *The Negro in the United States*, 88.
32. See Killens, *The Trial Record of Denmark Vesey*; Aptheker, *American Slave Revolts*.