

A HISTORY LESSON: REPARATIONS FOR WHAT?

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A major difficulty facing the reparations-for-slavery movement is that to date the movement has focused its litigation strategies and its rhetorical effort upon the institution of slavery. While slavery is the root of modern racism, it suffers many defects as the centerpiece of a reparations litigation strategy. The most important difficulty is temporal. Formal slavery ended in 1865. Thus, the time line of potentially reparable injury extends to well before the period of any person now living. The temporal difficulty arises from the conventional expectations of civil litigation, which require a harmony of identity between the defendants and the plaintiffs. Although the class action format loosens this expectation in important ways, even the most aggressive application of class action theory is rooted in the requirement of a harmonious identification in which the plaintiffs have been specified and the defendant can be identified as the source of the injury.¹ If reparations are to become a successful legal strategy, the fact that slavery ended more than 130 years ago presents formidable obstacles and conceptual challenges that require careful consideration.

The conservative nature of the common law becomes dramatically apparent when common law doctrines that have their roots in private dispute resolution are applied in a dispute such as repara-

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1. There are several important deviations from this norm in tort law. For example, see *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) which applies an alternative causation rule to cases in which there is an indivisible injury and only one of two negligent defendants could have caused the harm. The rule applies when it is not possible to determine which defendant caused the injury. Other examples of diluted identity rules include the application of *res ipsa loquitur* to all members of an operating room team if a healthy part of the patient's body is injured while the plaintiff was unconscious and under the care of several medical defendants, some of who were likely not negligent. See *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944). More recent deviations from the expectation that the defendant be identified with specificity include the statistical substitutes for conventional causation adopted in market-share liability cases such as *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) and *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989).

tions for slavery, where the most responsive norms are unavoidably public in character. As Ernest Weinrib observes, “the common law is a justificatory practice.”² Another way of seeing this limitation is to recognize that the common law is “committed to suggesting a set of underlying principles that can account for at least the . . . prevailing doctrine.”³ The inhospitability of the common law to powerful moral claims of the descendents of slaves can be seen in the correlativity expectation for common law claims. Weinrib defines correlativity as the “central idea of private law”: correlativity is the expectation that there must be a “nexus between two particular parties.”⁴ Remedies theorist Hanoch Dagan tells us that correlativity means that “the plaintiff must be entitled to receive the very sum that the defendant is obligated to pay.”⁵ A further elaboration of this same point is the observation that “this bilateral logic of private law requires correlativity between the defendant’s liability and the plaintiff’s entitlement, as well as between the plaintiff’s entitlement and the remedy.”⁶

The challenge of correlativity for reparations scholars and litigators is substantial. Dagan provides a persuasive explanation for this essentially conservative theory of common law adjudication: “correlativity is crucial for private law because private law adjudication . . . is a coercive mechanism run by unelected officials and therefore must be able . . . to justify to the defendant each and every aspect of its state-mandated power.”⁷ In Dagan’s view correlativity between the two parties is what distinguishes private law from regulation, whereby individuals are penalized for harms committed against society.

I take seriously the conservative structure of common law adjudication. Therefore, I argue in what follows that the project of seeking monetary relief for barbaric racial practices can be most successfully accomplished in litigation if the target of litigation is focused on the more congenial timeline of lynching: 1865-1955.

If reparations-for-slavery is not truly a litigation strategy, in the conventional sense, but is instead a rhetorical device for sparking a

2. ERNEST J. WEINRIB, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES IN L. 1, 5 (1999).

3. HANOCH DAGAN, THE FOURTH PILLAR: THE LAW AND ETHICS OF RESTITUTION (forthcoming 2003) (manuscript of Chapter 7 at 3, on file with author), comparing his approach to that of Weinrib, *supra* note 2, at 3-5.

4. Weinrib, *supra* note 2, at 5.

5. DAGAN, *supra* note 3, at 8 (internal quotations omitted).

6. *Id.*

7. *Id.* at 16.

renewed activism against racial oppression, and is a stimulant for internal cultural repair within the African-American community,⁸ then the traditional measures of success in determining the outcome of a lawsuit should not apply. The trouble with this approach is that it imposes two new burdens at once on the reparations movement. First, the goal of reparations as activism must expand the public understanding of the purpose of seeking a legal remedy in a court of law to include the important non-legal objectives of general public education about the nature of persistent racial damage. Second, this strategy must convince African-Americans that a loss in the judicial forum is not a defeat. It is the second burden that concerns me most. I believe that filing a lawsuit about the pernicious social problem of the broad harms attributable to our legacy of slavery requires care and skill to avoid raising expectations for legal victory that we know, in our professional judgment, have little chance to be met in reality. The litigation-for-reparations strategy suffers from the old problem of using the master's tools to tear down the master's house.⁹

Because I argue that an exclusive focus on slavery is misguided, this Article endorses an alternative. My research on the legacy of lynching convinces me that the problem of lynching and race riots in the period 1865-1955 provides a promising and ultimately more satisfyingly fertile field for undertaking the same project as the reparations-for-slavery movement, with far fewer of the disabilities of the slavery-focused effort. In what follows, I show how lynching and race riots have virtually disappeared from the official record of American racial history. Through a series of accumulating myths, omissions, and distortions, modern Americans have a collective amnesia about the "red record"¹⁰ of human atrocity. If we focus on the pattern of racial atrocity in the relatively recent past, the conventional lawsuit or legislative reparations might serve as an appropriate vehicle for redress.

8. See Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659 (2003).

9. Audre Lorde, *The Master's Tools Will Never Dismantle The Master's House*, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 98-101 (Cherrie Moraga & Gloria Anzaldúa eds., 2d ed. 1983).

10. Ida Wells-Barnett first used this term to describe lynching in her monograph, "The Red Record." See IDA B. WELLS-BARNETT, ON LYNCHINGS: SOUTHERN HORRORS, A RED RECORD, MOB RULE IN NEW ORLEANS (William Loren Katz ed., Ayer Co. 1991) (cataloging the wave of lynching and race riots that developed at the turn of the century).

Communal lynching, like slavery, was a crime against humanity. Unlike slavery, it represented a challenge to the formal rule of law that was adopted for the newly freed slaves. The “new” post-Civil-War Constitution created by the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments form the foundation for civic Constitutional and contractarian claims to freedom. The behavior of individual citizens and entire communities that embraced the savage practices of mutilation and torture are in direct breach of this contractarian expectation. If we focus on lynching, the role of the United States Supreme Court in facilitating the reign of terror can be placed in sharp relief.¹¹

I. THE DEEDS

I, too, belong to this species. I am ashamed not only of my own deeds, not only of my nation’s deeds, but of human deeds as well. I am ashamed to be a man.—Glenn Gray, World War II soldier¹²

The South reached the extraordinary distinction of being the only modern civilized country where human beings were publicly burned alive.—W.E.B. DuBois¹³

There are no words to penetrate the world of sadist and victim, of predator and prey. The moment when one human kills another is both sacred and profane. We can only imagine the fear of both the killer and the killed, intertwined in a fragile moment of death.¹⁴

11. See EMMA COLEMAN JORDAN, *BLOOD AT THE ROOT* 40–43 (forthcoming 2003) (showing how today America’s bifurcated and conflicting racial narratives can be traced to Supreme Court decisions in the racial violence cases. These decisions reversed the constitutional and legislative aims of the Radical Republican Congress to protect freed slaves from mass violence during Reconstruction).

12. DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* 38 (1995).

13. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 700 (Touchstone 1995) (1935) [hereinafter DU BOIS, *BLACK RECONSTRUCTION*].

14. Anthropologist Michael Taussig, quoting the German playwright Bertolt Brecht, illustrates a point about the mutuality of terror nicely:

The shrill voices of those who give orders
Are full of fear like the squeaking of
Piglets awaiting the butcher’s knife, as their fat arses
Sweat with anxiety in their office chairs . . .
Fear rules not only those who are ruled, but the rulers too.

MICHAEL TAUSSIG, *SHAMANISM, COLONIALISM, AND THE WILD MAN: A STUDY IN TERROR AND HEALING* 128–29 (1987), citing Bertolt Brecht, *Die Angst des Regimes*, in BERTOLT BRECHT: *PLAYS, POEMS, AND PROSE* 296–98 (John Willett & Ralph Manheim eds., 1976).

Military historians and psychologists say that there is a “force in man that causes him to strongly resist killing his fellow man.”¹⁵ The American practice of race lynching defies this general assertion. If we accept the general premise that human nature resists killing, lynchers and ethnic rioters present either a complete exception to the rule or a challenge to the definitional boundaries of the word “human.” Both of these options are unattractive. Yet, the contrast between the documented reluctance of Civil War soldiers, both real¹⁶ and fictional,¹⁷ to kill in battle and the documented gleeful killing of blacks by lynch mobs during the same era¹⁸ begs for an explanation.

The obvious answers will not suffice in the long term. As we learn from postmodern philosopher Michel Foucault’s history of French penal culture, “[t]he transition from the public execution, with its spectacular rituals, its art mingled with the ceremony of pain . . . is the transition from one art of punishing to another . . . a ceremonial of torture.”¹⁹ We can begin the search for answers by looking at the power of racist ideology and social acceptance of racial hatred to overcome this claimed innate human resistance to murder.

An axiom of terroristic regimes is the dehumanization of the targets of genocide and other violence,²⁰ but that obvious point of departure will require refinement as we move through this difficult material. A few supplementary hypotheses immediately suggest

15. GROSSMAN, *supra* note 12, at 39.

16. See GROSSMAN, *supra* note 12, at 10–11. The author concludes from a review of the literature on military killing rates that:

[T]he fire of the Napoleonic- and Civil War-era soldier was incredibly ineffective With a potential hit rate of well over 50 percent . . . the killing rate should have been hundreds per minute, instead of one or two. The weak link between the killing potential and the killing capability of these units was the soldier. The simple fact is that when faced with a living, breathing opponent instead of a target, a significant majority of the soldiers revert to a posturing mode in which they fire over their enemy’s heads.

Id.

17. STEPHEN CRANE, *THE RED BADGE OF COURAGE* (1895).

18. See, e.g., STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930* 23 (1995).

19. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 257 (Alan Sheridan trans., Pantheon Books 1977) (1975).

20. DONALD L. HOROWITZ, *THE DEADLY ETHNIC RIOT* 430–33 (2001) (“We know from the infliction of atrocities how important humiliation is to rioters.”) [hereinafter HOROWITZ, *DEADLY ETHNIC RIOT*]; see also ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 38 (1985) (“Over and over, in each stage and step, the torturer’s mime of expanding world-ground depends on a demonstration of the prisoner’s absence of world.”).

themselves. Perhaps the actual “deeds” were done by a small group of psychopathic killers who embraced this opportunity to kill with social approval. Alternately, there may have been a calculated psycho-social strategy to disable individual aversion to murder by dispersing it among a group, as is done in firing squads. We must ask whether all lynchings were the same or whether there were marked differences in the settings, crowd sizes, or killing strategies that describe significant subsets of lynchings. Were these extralegal cruelties a socially approved, informal reversion to the pre-Constitutional²¹ barbarities of the formal legal systems of some European governments in the sixteenth and seventeenth centuries—an American version of peoples’ executions²² or “popular justice”?²³ This last possibility, suggesting the equivalency of lynchings and formal executions, offers a testable hypothesis about the channels of criminal justice in the lynching South.²⁴ Was lynching like seventeenth-century French capital punishment, with the most barbaric practices reserved for the most intensely detested crimes? I examine the hypothesis by comparing a 1934 American race lynching with Foucault’s description of the 1757 French execution of a man who killed his father, a king:

[He was] taken and conveyed in a cart, wearing nothing but a shirt . . . then, in the said cart . . . on a scaffold . . . the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead,

21. The Eighth Amendment of the U.S. Constitution prohibits cruel and unusual punishment. U.S. CONST. amend. VIII.

22. W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930* 40 (1993).

23. TOLNAY & BECK, *supra* note 18, at 87–118. The popular justice explanation accepts relatively uncritically the white community’s justification for lynching—“that black criminal behavior was out of control and exceeding the capacity of the formal justice system.” *See id.* at 86.

24. Southern blacks visited the executioner in truly prodigious numbers during the “lynching era.” Between 1882 and 1930, 1,977 African-Americans were legally executed in the ten southern states included in our study, an average of forty executions a year. During this same period, only 451 whites were legally executed. Clearly, there was a significant racial imbalance in southern lethal sanctioning; 81 percent of the legal executions involved a black offender, and 87 percent of the victims of white mobs were black. When combined, the two forms of lethal sanctioning claimed the lives of 4,291 blacks during the forty-nine-year period. Put differently, an African-American was put to death somewhere in the South on the average of every four days. TOLNAY & BECK, *supra* note 18, at 100.

boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses, and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds. The last operation was very long, because the horses used were not accustomed to drawing . . . they were forced, in order to cut off the wretch's thighs, to sever the sinews and hack at the joints . . .²⁵

The unbounded cruelty displayed in this sixteenth-century capital punishment for an abhorrent crime has many parallels, as well as many differences, with the following description of the world-famous 1934 Florida mob kidnap and torture lynching of Claude Neal.²⁶ Neal had been accused, and signed a written "confession" while in police custody, of raping and killing a white seventeen-year-old neighbor girl:

After taking the nigger to the woods about four miles from Greenwood, they cut off his penis. He was made to eat it. Then they cut off his testicles and made him eat them and say he liked it Then they sliced his sides and stomach with knives and every now and then somebody would cut off a finger or toe. Red hot irons were used on the nigger to burn him from top to bottom. From time to time during the torture a rope would be tied around Neal's neck and he was pulled up over a limb and held there until he almost choked to death when he would be let down and the torture began all over again.²⁷

The thousands unable to attack Neal while alive had to satisfy themselves with watching his dead body being dragged behind a car over a bumpy road. "Several people drove knives into the corpse, reportedly 'tearing the body almost to shreds' The little children, some of them mere tots . . . waited with sharpened sticks for the return of Neal's body . . . [and] drove their weapons deep into the flesh of the dead man."²⁸

Both of these tortures ending in death include capture, transportation to a public place, slow rending and extraction of the victim's flesh, severance of the offending body parts, and use of nonhuman forces to virtually atomize the victim's flesh (horse drawing and quartering in the first case and dragging behind a car in

25. FOUCAULT, *supra* note 19, at 3 (quoting *Pièces originales* and *Gazette d'Amsterdam* (1757)).

26. JAMES R. MCGOVERN, *ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL* 80 (1982).

27. *Id.*

28. *Id.* at 81-82.

the second). Total control of the body is the ultimate act of domination and begins the path to total destruction of both the identity of the despised individual and the community of values that the victim represents.²⁹ The grotesque severity of the two killings suggests that, in both instances, the offenses represented threats to the deepest norms of the community, triggering the punishment. We can deduce that in sixteenth-century France, killing a king who was also a parent offended at once the paramount norms of family and state. The rape/murder in the Neal case must have challenged equally important values in Mariana, Florida, in the 1930's.

Much of the lynch-for-rape value system was built on the dubious factual assertion that black men posed a special threat to white women. Anti-lynching crusader and public intellectual, Ida B. Wells, first countered this assertion:

Nobody in this country believes the old threadbare lie that Negro men rape white women. If Southern white men are not careful, they will over-reach themselves and public sentiment will have a reaction; a conclusion will then be reached which will be very damaging to the moral reputation of their women.³⁰

Martha Hodes notes in her important study of the history of sexual relations between black men and white women:

Whites routinely claimed that the rape of white women was the prime cause . . . [of lynchings], yet this oft-repeated statement was untrue in two senses. Not only was there no postwar wave of such sexual assaults, but rape was not in fact the cause white Southerners recorded most frequently when justifying specific lynchings. In spite of these two facts, white apologists relentlessly named the rape of white women as the reason for murdering black men³¹

There are, however, important differences between the two mentioned executions. Most obviously, the Neal lynching, unlike the capital execution for treason, was not a violation of formal legal rules, even though "Lynch Law" conformed to informal codes of law implemented by Southern majorities. These majorities succeeded in supplanting the *formal* rule of law with informal rules as binding and well-enforced as the formal statutes and common law

29. Robert Cover describes this as "the end of what the victim values, the end of the bonds that constitute the community in which the values are grounded." Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1603 (1986).

30. WELLS-BARNETT, *supra* note 10, at 12-13.

31. MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH* 176 (1997).

decisions of judges. Thus, the “law” emerged through norms created by ceremonial repetitions of a racial lynching script, consisting of the communal racial murder of a type characterized by unusually savage mutilation of the sex organs, large crowds, advance notice, sensational news coverage, sale of picture postcards at the scene, and taking of the victim’s body parts for later display.³² These were no designated, state-authorized executioners—indeed, it is unclear who struck the first blow or who delivered the killing blow. There is evidence that not all in the tight circle of kidnappers had the same reaction to the brutal execution. For example, one kidnapper is reported to have thrown up at the sight of the torture, leaving the “most aggressive” participants to take charge of the murder.³³ One fact that emerged in the later accounts indicates that Neal remained conscious long into the ordeal. After a period of substantial torture he is reported to have said, “Kind sirs, do one of you have a cigarette?”³⁴ This is more than likely an apocryphal representation of his sustained period of consciousness.

Children were routinely incorporated into the rituals of lynching. In the mob murder of Neal, for example, children were encouraged to participate, driving their sharpened sticks deep into the flesh of the dead man.³⁵ This is an especially disturbing difference from the noted executions and one with important implications for my central thesis. Integrating children ensured that the underlying narrative of hatred upon which lynching was based would be carried forward to successive generations. As Walter White noted, exposure to “such frequently repeated acts cannot fail to shape young minds in moulds which seem destined later to demand more victims.”³⁶ There are four subcomponents to this hatred instilled in youths. First, participating in communal killing must have deeply psychologically disturbed the children themselves, in a way akin to the most severe forms of child abuse.³⁷ One

32. For further elaboration of the lynching script, see *id.* at 177. See also BRUNDAGE, *supra* note 22, at 39–43.

33. MCGOVERN, *supra* note 26, at 80.

34. See *id.* at 81. This remark seems highly unlikely given the language-destroying power of the severe pain arising from even a small portion of the torture to which he was subjected.

35. *Id.* at 82.

36. WALTER WHITE, ROPE AND FAGGOT: A BIOGRAPHY OF JUDGE LYNCH 5 (Univ. of Notre Dame Press, reprint edition, 2001) (1929).

37. For an interesting study of children’s involvement in lynchings, see Kristina DuRocher, Lynching Lessons: An Education in Race, Gender and Southern Culture for White Children (presented at Lynching and Racial Violence in America: Histories and Legacies conference at Emory University, October 3–6,

can see the effect of what can only be described as pediatric psychological disturbance in this exchange with several Florida children reported by Walter White, a light-skinned, blue-eyed African-American Secretary of the NAACP, who was often mistaken for white:

In Florida some years ago, several lynchings and the burning of a Negro section of the town followed the attempt of a Negro pharmacist to vote in a national election. One morning shortly afterwards I walked along the road which led from the beautiful little town to the spot where five Negroes had been burned. Three shining-eyed, healthy, cleanly children, headed for school, approached me. As I neared them, the eldest, a ruddy-cheeked girl of nine or ten, asked if I was going to the place where "the niggers" had been killed. I told her I might stop and see the spot. Animatedly, almost as joyously as though the memory were of Christmas morning or the circus, she told me, her slightly younger companions interjecting a word here and there or nodding vigorous assent, of "the fun we had burning the niggers."³⁸

Second, both the literal and the symbolic message of this participation would have contaminated those children's ability to interact with black children as equals. Third, it would certainly be impossible for any black caregiver to deal with these children after this experience. Fourth, parents would likely seek to reconcile lynching with their chosen religious or moral beliefs, thereby affecting these other components of their children's lives. These effects constitute an unexplored vertical and horizontal extension of the impact of lynching on individuals, families, and social relations, far beyond the immediate period of the lynching itself. In the context of claims for reparations, the participation of children enhances the likelihood that the actors can be identified and pursued.

Castration has a special place in the lynching ritual. I will explore this central feature later in discussing the symbolism of the repetitive elements of the lynching theatrical "script." Among these indispensable repetitions is the sexual annihilation scenario, such as that imposed on Claude Neal who was required to "eat" his own severed penis and testicles and "say he liked it."³⁹ This latter ele-

2002) (unpublished manuscript, on file with the NYU Annual Survey of American Law).

38. WHITE, *supra* note 36, at 3.

39. MCGOVERN, *supra* note 26, at 80.

ment is the ultimate destruction of the victim's world by using pain as a vehicle of "self-betrayal."⁴⁰

Literary theorist Elaine Scarry offers a point of entry into seeing the meaning of these incomprehensible deeds. Extreme physical pain, she shows, destroys the language of the sufferer.⁴¹ Without language, pain cannot be shared. The person who inflicts pain does not and cannot know the pain experienced by the victim.⁴² Her most telling insight is that the spectacle of torture:

converts what is usually private and incommunicable, contained within the boundaries of the sufferer's body . . . into the wholly illusory but . . . wholly convincing spectacle of power It is, of course, precisely because the reality of that power is so highly contestable, the regime so unstable, that torture is being used Built on these repeated acts of display and *having as its purpose the production of a fantastic illusion of power, torture is a grotesque piece of compensatory drama.*⁴³

I begin with a comparison across cultures and centuries because it may provide an avenue for understanding white Americans, who are utterly unaccustomed to an intense focus on the cruelty of ordinary citizens. But let me be perfectly clear about my ultimate aim. My fundamental concern here is to explore the domestic problem of race riots and lynchings in the period 1865-1955 and to argue that it may provide a more fertile ground for claims for reparation. I will show that the legacy of this period is reflected today in two separate and conflicting historical narratives about the experience of unchecked racial violence—one of popular myth and one of fact. The conflicting narratives are the source of a persistent racial divide that undermines the stability of the rule of law in America today. Legal scholar Randall Kennedy notes what is required to measure the full range of implications for this submerged history of racial violence:

What is needed is a more demanding analysis, one that insures that the questions posed and the passions aroused by atrocities such as the Holocaust, the Gulag, and Apartheid are not limited to outrages committed on foreign soil. Americans no less

40. SCARRY, *supra* note 20, at 47. Scarry describes how the person in pain experiences his own body as the agent of his annihilation.

41. *Id.* at 4 ("Whatever pain achieves, it achieves in part through its unsharability, and it ensures this unsharability through its resistance to language.").

42. *Id.* at 12 ("[T]wo people can be in a room together, the one in pain, the other either partially or wholly unaware of the first person's pain. . . . to the point where he himself inflicts it, and goes on inflicting it.").

43. *Id.* at 27-28 (emphasis added).

than Germans, Russians, and South Africans must confront the standards by which they judge themselves and their history.⁴⁴

My challenge here is to convey in words cruelties that defy description. I cannot know what being at either end of these morbid transactions felt like. Yet, to follow my desire to find the location where race and death were joined, I will pick up the feeble tools that I know. Even as I write in the security of my home, nearly one hundred years after the peak of the lynching epidemic, my heart beats fast. In the deepest recesses of my understanding of the world in which I live, I recognize the fear of sudden death because of my gender and the color of my skin. I wish I didn't.

I have chosen to write about lynching and white race riots because it is an almost impenetrable thicket of feeling, intergenerational fear, psychosis, and racial infamy. Each lynching was a moment of American madness in collective defiance of the Constitution and the laws of humanity. Having lived my entire adult life working to decipher some of the most frustrating puzzles of the laws of race, gender, and economic inequality, in this project I seek to move beyond neat syllogistic reasoning and sterile case citation. I am interested in providing a framework for looking at the connection between the period of active lynching and race riots and the creation of the two conflicting narratives about justice that exist today.

Fear and remembrance of fear will guide our journey to decode the meaning of barbaric racial rituals. We will need to rely on logic and data, but more than these, we each must remember the complete disorientation of our *own* personal fear of death at the hands of another. Until then, the transitory shock of seeing picture after picture of mutilated black men, women, and children hanging from trees or the shock of reading grisly descriptions of torture resemble nothing so much as a prurient peep show.⁴⁵

As Justice Clarence Thomas, who was raised in Pinpoint, Georgia, knows, once we link the word lynching to the emotional

44. Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1631 (1986).

45. For example, an exhibit at the San Francisco Presidio entitled "Torture" fit the "peep show" description. It featured, among other devices, a spiked interrogation chair as well as a ten-foot wooden impaler. See Ray Delgado, *Torture Instruments Get Day in the Sun*, S.F. CHRON., July 7, 2001, 2001 WL 3408393. For an admission fee of \$9, visitors could see more than 100 devices designed to torture human beings. See *id.*

brain's⁴⁶ memory of personal terror, as few as two or three words will be enough to turn the peep show into a mirror reflecting deep within our own souls.⁴⁷ By undertaking that transformation, we will learn more about our shared racial history than years of Presidential conversations about race could ever teach us. This Article is part of my gesture of optimism that we can make the journey together, whatever our skin pigment or hair texture.

II.

THE PREVALENCE OF RITUALS OF WHITENESS⁴⁸

A. *A Catalog of Horrors: The Myths and the Reality*

Anyone who studies the archives of American lynching reaches a point of sheer emotional exhaustion. I can testify that the continued exposure to descriptions of human mutilation, castration, dismemberment, disembowelment, and incineration do take a toll on the researcher. My first encounter with the details of lynching occurred in the Library of Congress' photographic archives. I sat with tears rolling down my cheeks, hand over my mouth, involuntarily drawing in short whiffs of disgust at each new photo. You cannot be productive in this state of emotional distress. In order to continue, a certain functional numbness emerges. I have noticed that most scholarship on lynching tries to break through this profes-

46. This region of the brain is called the amygdala. According to the LeDoux Laboratory at the Center for Neural Science at New York University, "learning and responding to stimuli that warn of danger involves neural pathways that send information about the outside world to the amygdala, which determines the significance of the stimulus and triggers emotional responses, like freezing or fleeing, as well [as] changes in the inner workings of the body's organs and glands." See LE-DOUX LABORATORY, EMOTION, MEMORY & THE BRAIN, at www.cns.nyu.edu/home/ledoux/overview.htm.

47. I argue that Thomas' use of the lynching metaphor galvanized African-Americans, a critical but wavering constituency for his controversial nomination. The image of a black man being lynched called up unthinking emotional reactions to the lynching narrative of injustice that is so deeply imbedded in African-American identity. Emma Coleman Jordan, *The Power of False Uses of Racial History, in GENDER AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS* 37-42 (Anita Faye Hill & Emma Coleman Jordan eds., 1995). See also Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1 (discussing Justice Thomas's remarks at oral argument on the unique symbolic power of the burning cross to intimidate).

48. I borrowed this subtitle from African-American artist Romare Bearden's famous collection of collages, *The Prevalence of Rituals*, which convey the subtle warp and woof of daily African-American life through the small daily rituals of family and community. See, e.g., MYRON SCHWARTZMAN, ROMARE BEARDEN: HIS LIFE & ART (1990).

sional veil of near-clinical detachment by featuring shocking vignettes in the published work. For the uninitiated, these lynching specimens do what the writer hopes: release a current of shock that momentarily takes the breath away. I have learned that these vignettes serve to re-shock the writer, too. For me, they restore that virginal sense of shame and outrage that I experienced at the beginning of the project. Just so you know, what follows is a catalog of horrors that is as much for me, the researcher, as it is for you, the reader. I want to refresh my human sensibility and to be able to ask afresh with you the obvious question: How could this happen in America?

Geographic Location

Myth #1: Lynching was a problem exclusively in the Deep South.⁴⁹

Fact: The largest number of lynchings occurred in the Deep South, but lynchings occurred in every geographic region. Moreover, race riots in the Northeast and Midwest demonstrated a level of racial violence comparable to that occurring in the deep South.

Although the largest number of lynchings occurred in the Deep South, contrary to the common myth that lynchings were confined exclusively to the South, lynching spread to other regions, eventually becoming an American practice without fixed boundaries. In 1920, about 5000 residents of Duluth, Minnesota, hanged three African-Americans who were accused of rape; three others were also captured, but the mob decided that they were innocent and released them.⁵⁰ In Indiana, 15,000 people joined in the lynching of two young men accused of murder.⁵¹ A mob in North Dakota hanged Cleve Culbertson, a convicted murderer, because white citizens were upset that he had not received the death pen-

49. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 5 (Oxford Univ. Press 3d ed. 1974) (1955) ("[T]he fanatical advocates of racism, whose doctrines of total segregation, disfranchisement, and ostracism eventually triumphed over all opposition and became universal practice in the South, were already at work and already beginning to establish dominance over some phases of Southern life.").

50. *Troops Patrol City After Mob Lynches 3 Accused Negroes*, BROOKLYN N.Y. EAGLE, June 16, 1920, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0051 (The Tuskegee Institute).

51. *Sheriff's Fears Permitted Indiana Lynching*, N.Y. WORLD, Aug. 24, 1930, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 226-0249 (The Tuskegee Institute).

alty.⁵² Similarly, Ohio residents in 1904 removed Richard Dickerson, an African-American, from a county jail, hanged him from a pole, and repeatedly shot him.⁵³ In Illinois, whites lynched a black school teacher in 1903; they removed him from his jail cell, dragged him, jumped on him, cut him with knives, hanged him, and burned his body.⁵⁴

Even the southern locations of the Northeast experienced lynchings. In Maryland, 5000 citizens mobbed a city jail, removed an inmate, and hanged and incinerated him.⁵⁵ A New York mob killed two people in 1911.⁵⁶ In Pennsylvania, an African-American accused of murder was burned to death by an angry mob.⁵⁷ In Wilmington, Delaware, hundreds of whites killed a black prisoner, apparently because a local preacher suggested that the man should be lynched.⁵⁸

Myth #2: The Deep South had the highest rate of lynching.⁵⁹

Fact: The border state of Florida had the highest per capita rate of lynching in the United States.

Contrary to popular opinion, the statistical odds of being lynched for black men living in the border southern states of Arkansas, Florida, Kentucky, North Carolina, and Tennessee were actually higher than those for black men living in the deep southern states. Sociologists Tolnay and Beck have computed the “hazards of lynching” per capita, comparing border and deep southern states between 1882 and 1930.⁶⁰ They show that of the three most hazardous states, two are the border states of Florida (ranked first at 79.8 black lynchings per 100,000 black citizens) and Kentucky

52. *North Dakota Mob Hangs Murderer*, MONTGOMERY ADVERTISER, Dec. 18, 1913, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 221-0199 (The Tuskegee Institute).

53. RALPH GINZBURG, 100 YEARS OF LYNCHINGS 65-67 (1962).

54. *Id.* at 48-49.

55. *Negro Lynched by Infuriated Mob*, PRINCESS ANNE NEWS (Maryland), Oct. 21, 1933, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 227-0633 (The Tuskegee Institute).

56. *N.Y. Mobs*, N.Y. AGE, May 25, 1911, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 221-0152 (The Tuskegee Institute).

57. *No Arrests Result from Burning of Negro*, MONTGOMERY ADVERTISER, Aug. 15, 1911, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 221-0148 (The Tuskegee Institute).

58. GINZBURG, *supra* note 53, at 53-55.

59. I adopt here the term “Deep South” as it is sometimes used to refer to the geographical center of the former Confederacy, i.e., Louisiana, Mississippi, Alabama, Georgia, and South Carolina. *See* TOLNAY & BECK, *supra* note 18, at 37-38.

60. TOLNAY & BECK, *supra* note 18, at 37-38.

(ranked third at 45.7 black lynchings per 100,000 black citizens). Mississippi, in the deepest South, ranked second, at 52.8 black lynchings per 100,000 black citizens.⁶¹

The states bordering the South had many lynchings. Arkansas' numerous incidents of mob violence include the 1921 shooting and burning of an African-American man who was accused of assault.⁶² Four hundred Florida men lynched an African-American who was accused of assaulting a white woman.⁶³ In Kentucky, 1000 residents participated in the execution of Leonard Woods, an accused murderer.⁶⁴ In 1930, a North Carolina farmer was accused of attacking two young girls; a mob shot his hanging body until he died.⁶⁵ Tennessee's numerous lynchings include the hanging of Henry Choate, accused of assault, from the Columbia courthouse balcony.⁶⁶ These incidents are a mere sampling of the many lynchings that occurred in these states.

Crowd Size

Myth #3: Lynchings occurred in secret, among small groups of members of hate groups.⁶⁷

Fact: Lynchings were a widely accepted social practice, often drawing crowds in the thousands during their peak in 1890.

The number of people in attendance at lynchings varied, but tended to be high. A few lynchings were carried out in private. Five Tennessee men kidnapped and lynched an African-American who had allegedly slapped a white woman; the lynching was appar-

61. *Id.*

62. *Negro Burned After Mob Shot Him*, N.Y.C. GLOBE, Nov. 19, 1921, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0298 (The Tuskegee Institute).

63. *Young Negro Lynched for Assault on Woman*, ATLANTA CONST., Jan. 29, 1916, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 221-0362 (The Tuskegee Institute).

64. *Kentucky Mob of Lynchers Half Women*, BALTIMORE AFRO-AMERICAN, Dec. 10, 1927, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 225-0138 (The Tuskegee Institute).

65. *North Carolina Mob Kills Negro Farmer*, ATLANTA CONST., Aug. 20, 1930, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 226-0136 (The Tuskegee Institute).

66. *Tennessee Mob Lynches Negro Armistice Day*, ATLANTA INDEP., Nov. 17, 1927, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 225-0129 (The Tuskegee Institute).

67. Steve Kirkwood, *Falwell, Robertson Claims Are Evil and Unpatriotic*, PANTAGRAPH (Bloomington), Sept. 20, 2001 (describing lynchings as "secret" and occurring at the hands of the Ku Klux Klan).

ently done privately.⁶⁸ In contrast, the mob that killed Elwood Higgenbotham, who was standing trial for murder, was composed of “100 to 150 men.”⁶⁹ A mob of 150 was also responsible for the lynching of A. L. McCamy, who was killed for the “alleged touching of a white woman.”⁷⁰ The Columbus, Texas, crowd that killed two young boys numbered “at least 700.”⁷¹ In one of the most infamous incidents in the annals of lynching, a crowd of 15,000 attended the lynching and burning of Jesse Washington, a retarded teenager, in Waco, Texas.⁷² The crowds that watched the lynchings of Broadus Miller,⁷³ John Carter,⁷⁴ Roy Belton,⁷⁵ George Ward,⁷⁶ Dudley Morgan,⁷⁷ and Will Brown⁷⁸ numbered in the thousands. The mob that lynched Rubin Stacy in Florida was composed of “one hundred masked men.”⁷⁹ Many lynchings attracted very large crowds. The killing of Sam Holt⁸⁰ attracted “more than two thousand white Ge-

68. *Negro Slain For Slapping Woman*, MONTGOMERY ADVERTISER, Nov. 5, 1935, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 229-0411 (The Tuskegee Institute).

69. *Elwood Higgenbotham—Hero of Sharecroppers—Victim of Lynch Mob*, N.Y. DAILY WORKER, Sept. 24, 1935, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 229-0398 (The Tuskegee Institute).

70. *Lynching on Rise Again in State*, ATLANTA WORLD, Sept. 9, 1936, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 230-0019 (The Tuskegee Institute).

71. *Sheriff Yields Victims to Mob Without Resistance*, HOUSTON INFORMER, Nov. 16, 1935, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 229-0413 (The Tuskegee Institute).

72. *Negro Burned at Waco, Tex., Before 15,000*, MONTGOMERY ADVERTISER, May 16, 1916, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 221-0362 (The Tuskegee Institute).

73. *Church Goers Take Part in Celebration*, CHICAGO DEFENDER, July 9, 1927, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 225-0126 (The Tuskegee Institute).

74. *Youth Lynched in Ark. By Mob of 1000 Whites*, ST. LOUIS ARGUS, May 6, 1927, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 225-0105 (The Tuskegee Institute).

75. *Rigid Probe into Lynching Ordered*, MONTGOMERY ADVERTISER, Aug. 30, 1920, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 222-0073 (The Tuskegee Institute).

76. GINZBURG, *supra* note 53, at 37.

77. *Id.* at 45.

78. *Id.* at 126–28.

79. JAMES ALLEN ET AL., *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* 185 (2000).

80. Sam Holt’s name was misspelled “Hose” in the first news accounts. The confusion is continued in subsequent histories of this lynching. See, e.g., Crystal Feimster, *Ladies and Lynching: The Gendered Discourse of Mob Violence in the New South, 1880-1930* 131 (2000) (unpublished doctoral dissertation, Princeton University) (on file with author).

orgians” and occasioned the running of an extra train.⁸¹ As word spread about the upcoming lynching of Sam Holt, “hundreds [left] Atlanta . . . by special train to see the fun.”⁸² Thomas Shipp was murdered before a crowd of “ten to fifteen thousand.”⁸³

Some lynchings were treated as holidays. In Georgia, hundreds of citizens “took off a day’s holiday” to attend a lynching.⁸⁴ Some newspaper accounts might have exaggerated the size of mobs, but photographic evidence of certain lynchings makes it clear that they attracted very large numbers of people. For example, the lynching of Jesse Washington mentioned above attracted 15,000 people, and photographs of the crowd confirm its great size.⁸⁵

Presence of Women and Children in Crowds

Myth #4: Lynchings were gruesome affairs restricted to men.

Fact: Women and children were often active participants in lynchings.⁸⁶

Although the most widely used rationale for lynching was to protect the honor and delicacy of white women, women and children were often present in the crowds that witnessed lynchings.⁸⁷ A stronger, more central challenge to the myth of white women as passive beneficiaries of the lynching ritual is the substantial evidence that many white women endorsed the white supremacist norms that supported lynching.⁸⁸ This support often extended to instigating lynchings by making false accusations of rape after being discovered in consensual sexual or intimate non-sexual relations with black men. In addition, white women often actively participated in the mutilation and violence once a lynching was underway.

81. ALLEN, *supra* note 79, at 8; *see also* NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES: 1889-1918*, at 12–13 (Negro Universities Press 1969) (1919).

82. GINZBURG, *supra* note 53, at 20.

83. ALLEN, *supra* note 79, at 176.

84. NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, *BURNING AT STAKE IN THE UNITED STATES* 13 (1919) [hereinafter *BURNING AT STAKE*].

85. ALLEN, *supra* note 79, at 173–74.

86. *See* Feimster, *supra* note 80, at 109. *See generally* DuRocher, *supra* note 37.

87. GRACE ELIZABETH HALE, *MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940* 208 (1998). (A reporter who witnessed the lynching of Henry Smith stated, “[a] ‘populace’ did not mean simply white men The photograph more a picture of the mob than the mob’s victim depicts a mass of spectators including white women and children.”)

88. *See id.* at 234–36.

An important innovation in the historical interpretation of white women's role in lynching was introduced by historian Jacquelyn Dowd Hall. Hall argues that lynching served the dual purpose of controlling black men's social and political power through terroristic violence and constricting white women's role in public life through the shibboleth of the black male rapist. Further, Hall argued that the lynch-for-rape mythology was an indispensable element in controlling white women's sexual freedom to choose black men as sexual partners. As I have argued elsewhere,⁸⁹ the Hall thesis both expands and constricts what we know about the role of white women in the wave of terror embodied in lynching. Hall's powerful challenge to the dominant historical interpretation of lynching as a bipolar struggle between black male power and white male power relies upon two strategies. First, it expands the focus beyond the traditional male-to-male analysis of lynching scholars who preceded her.⁹⁰ Hall's insight that lynching served to control and victimize both black men and white women is now a widely accepted interpretative expansion of the history of lynching.⁹¹ However, her strategy of elevating white women's leadership of the anti-lynching campaigns initiated by Jessie Daniel Ames in the Southern Women's Lynching Campaign (SWAC)⁹² constricts our understanding by fostering the impression, to state it bluntly, that white women were either indirect victims of the violent social control imposed by lynching or heroines of political advocacy to oppose lynching. In this view of history, we are not provided with a sustained account or interpretation of white women's use of their own power to initiate violence and reap the benefits of white supremacy by assuming important roles of violent leadership in a central drama of the post-Reconstruction South.⁹³ Crystal Feimster

89. Emma Coleman Jordan, *Crossing the River of Blood Between Us: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545, 556 (2000) [hereinafter Jordan, *Crossing the River*].

90. JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* xx-xxi (rev. ed. 1993) (1979).

91. See, e.g., Joel Williamson, *Wounds, Not Scars: Lynching, the National Conscience, and the American Historian*, 83 J. AM. HIST. 1221, 1246-49 (1997).

92. HALL, *supra* note 90, at xx-xxi.

93. Jordan, *Crossing the River*, *supra* note 89, at 556 (arguing that "[t]he paradox of feminist history is that lynching was used as a mechanism to control the social behavior and status of white women, and African-Americans—men and women, even as white women benefited from their elevated position in the racial hierarchy built on lynching."); see also Feimster, *supra* note 80, at 119-20. Feimster argues that while Hall's interpretation

provides us with a more nuance[sic] understanding of the rape/lynch complex, it continues to define the discourse of lynching in terms of white male

argues that despite the masculine ideology of lynching that pictured white men as manly protectors, white women's participation was real and presented a direct contradiction to the image of the passive and innocent southern belle. Urging the mob to inflict mutilation and extreme tortures upon their victims, white women fueled the fire of ritual lynching.⁹⁴

About fifty women, including a few students at the University of Missouri, attended the hanging of James T. Scott, a university janitor who allegedly attacked a girl.⁹⁵ When the citizens of Paris, Texas, burned two African-Americans to death, several ministers, the school superintendent, and other prominent citizens brought their families to watch the event.⁹⁶ A Mississippi crowd of 6000 that witnessed the burning of Charley Sheppard, an accused murderer, included women and children, and women spat on his burned body as it cooled.⁹⁷ Half the members of a Kentucky lynch mob were women, and a woman drove the victim to the lynching.⁹⁸ There were numerous women and children at a lynching in Excelsior Springs, Missouri.⁹⁹ "Two hundred men and boys" attended the lynching of Roy Hammonds.¹⁰⁰

Sometimes women and children actively participated in the lynchings. Before hanging Henry Cade, the mob brought the eight-year-old girl he had allegedly attacked before him; "she raised

desires. Historians have either minimized or altogether ignored women's participation or depicted women as playing passive and supporting roles Despite the masculine ideology of lynching that pictured white men as manly protectors, white women's participation presented a direct contradiction to the image of the passive and innocent southern belle.

Id.

94. Feimster, *supra* note 80, at 120.

95. *Co-Eds at Lynching of Negro Blamed by Little Girl*, 14, N.Y.C. WORLD, Apr. 30, 1923, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 223-0312 (The Tuskegee Institute).

96. *Paris Burn Fest Most Horrible Atrocity in Annals of Texas; Leading Citizens Were There*, HOUSTON INFORMER, July 31, 1920, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0060 (The Tuskegee Institute).

97. *Mississippi Cannibals Dance Around Fire as Man Burns*, CHICAGO DEFENDER, Jan. 12, 1929, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 225-0648 (The Tuskegee Institute).

98. *Kentucky Mob of Lynchers Half Women*, *supra* note 64.

99. *Lynched in Missouri*, BOSTON GUARDIAN, Aug. 10, 1925, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 224-0240 (The Tuskegee Institute).

100. *Negro Lynched on Way to Prison*, N.Y.C. TELEGRAM, Apr. 30, 1921, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0320 (The Tuskegee Institute).

her tiny hand and pointing to him, said: 'That is the man.'"¹⁰¹ A Mississippi crowd laughed as at least twenty-five children taunted a man whom the mob had tied to a tree.¹⁰² On another occasion in Mississippi, "the car dragging the [victim's] body halted so that little children using their parents' firearms could pump lead into the inert form."¹⁰³ At an Indiana lynching of a man accused of attacking a woman, women beat the victim with hammers and clawed at him with their fingernails.¹⁰⁴ At another lynching, it was noted that "the children became as frantic as the grown people and struggled forward [to better view the event]."¹⁰⁵ In some instances, mobs searched for their victims by using teams of dogs followed by boys who were made to report on their progress.¹⁰⁶ In 1917, a mob "forced a 10-year-old white lad . . . to take a large butcher knife and unsex [the victim, Bert Smith]" before the actual execution.¹⁰⁷ After Richard Coleman was burned to death by a mob, "children from six to ten years of age . . . kept the fire burning all during the afternoon."¹⁰⁸ Women and children watched and cheered the lynching of George and Ed Silsbee.¹⁰⁹ At one lynching, men and women of all ages "joined hands and danced around while the Negro burned."¹¹⁰

Newspaper Attitudes

Myth #5: Newspapers covered lynchings as neutral observers.

Fact: Newspapers were often a source of sensationalism that incited lynchings and spread the terror to black readers with lurid accounts of the violence. ¹¹¹

101. *300 Men Lynch Negro 20 Miles from Beaumont*, HOUSTON POST, Nov. 27, 1921, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0329 (The Tuskegee Institute).

102. *Mississippi Mob Lynches Innocent Men*, CHICAGO DEFENDER, Apr. 24, 1937, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 230-0445 (The Tuskegee Institute).

103. *Small Children Pump Lead into Lifeless Form of Victim*, DES MOINES BYSTANDER, Dec. 10, 1936, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 230-0019 (The Tuskegee Institute).

104. *Women in Mob Aid Lynching of Indiana Negroes*, N.Y. EVENING WORLD, Aug. 8, 1930, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 226-0132 (The Tuskegee Institute).

105. WELLS-BARNETT, *supra* note 10, at 95.

106. ALLEN, *supra* note 79, at 182.

107. GINZBURG, *supra* note 53, at 113-14.

108. *Id.* at 34.

109. ALLEN, *supra* note 79, at 167.

110. GINZBURG, *supra* note 53, at 153.

111. HALE, *supra* note 87, at 210.

Some newspapers were critical of lynching. The *New Orleans Times Democrat* condemned a lynching in New Orleans, as did the *New Orleans Picayune*.¹¹² Some papers tried to correct the bias and inaccuracies of other publications. For example, after some papers reported that a mob lynched Leroy Smith, an African-American boy, because he had attacked a motorist, the *St. Louis Argus*, a black paper, reported that Leroy was a good boy and had merely been trying to catch a ride into town.¹¹³ An article in the *Baltimore Herald* encouraged Congress to support an anti-lynching law by drawing attention to cases in which white women falsely accused African-Americans of rape.¹¹⁴ When a reporter for one Virginia newspaper spoke out against lynching, the news offices were besieged by angry phone calls and letters from subscribers who wanted to cancel their subscriptions.¹¹⁵ Even those newspapers taking critical positions about particular lynchings often justified their opposition with racist assumptions. For example, an editorial in the *Memphis Commercial-Appeal* criticized lynching for purely economic reasons, arguing that, "The Negro . . . is a very valuable asset. It is not good business to kill them."¹¹⁶

Many newspapers, however, supported lynch mobs. The *Memphis Commercial-Appeal*, which occasionally opposed lynchings, published the following statement after an African-American man was accused of a crime: "[i]f this negro is captured another lynching appears certain."¹¹⁷ Similarly, after the arrest of an African-American, one newspaper commented that "[t]here has not been a legal hanging in Buchanan [C]ounty since March 11, 1904," as if to suggest that Buchanan citizens should take justice into their own hands.¹¹⁸ Such statements seem to have encouraged lynch mobs.

112. WELLS-BARNETT, *supra* note 10, at 201.

113. *Colored Boy Is Lynched for No Special Cause*, ST. LOUIS ARGUS, May 27, 1921, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 222-0298 (The Tuskegee Institute).

114. *Fake Rape Charge Against Negroes*, BALTIMORE HERALD, Dec. 22, 1920, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 222-0091 (The Tuskegee Institute).

115. Bruce Crawford, *Bruce Crawford Tells of Hostile Reaction To His Efforts in South*, PITTSBURGH COURIER, Jan. 7, 1927, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 225-0673 (The Tuskegee Institute).

116. See GINZBURG, *supra* note 53, at 82-83.

117. *Negro Is Burned at Stake in Mississippi*, MEMPHIS COMMERCIAL-APPEAL, July 30, 1923, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 223-0307 (The Tuskegee Institute).

118. L. Herbert Henegan, *Newspaper Articles Blamed*, CHICAGO DEFENDER, Dec. 9, 1933, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 227-0641 (The Tuskegee Institute).

The *Associated Press* painted a Mississippi lynch mob in a favorable light by reporting that their victim had “outraged” an eight-year-old girl; the girl was actually eighteen and had been discovered in the victim’s bedroom by her father.¹¹⁹ The *Daily Commercial* responded angrily to a black newspaper’s suggestion that charges of black men raping white women were often fictional.¹²⁰ Some newspapers, such as the *Public Ledger* in Memphis, were given information on impending lynchings but made no effort to stop them or warn authorities.¹²¹

Anonymity

Myth #6: Crowd members were not prosecuted because they could not be identified.¹²²

Fact: Most members of mobs did not hide their identity. They were protected from prosecution because of the pervasive code of silence that provided widespread support for the practice.

The virtual anonymity of the perpetrators of lynchings is a key feature of the entire phenomenon. Individuals who chose to engage in socially approved racially motivated murders were protected by a virtually unbreakable community code protecting the identity of participants. This code of silence emboldened participants to join or lead the crowds committing the crimes without making any attempt to cover their faces or otherwise conceal their identities. Many of the surviving lynching photographs reveal crowd members standing boldly, facing the camera, some even posing next to the victim’s mutilated corpse.¹²³ Thus, although the perpetrators were known to their family and neighbors in the crowd, there are precious few records identifying most crowd members. The code of silence, therefore, thwarted the criminal investigative process in those limited number of cases in which prosecutors might have summoned the political and ethical com-

119. WELLS-BARNETT, *supra* note 10, at 38–39.

120. *Id.* at 13.

121. *Id.* at 129.

122. See GINZBURG, *supra* note 53, at 67 (citing Coroner’s verdict that he was “unable to fix the responsibility for his death”); Coates, *supra* note 59, at 52 (“[W]hite people have rarely been held accountable . . . for crimes against blacks. . . . With lynching, responsibility for the crime is diffuse, spread equally among many faceless mob members, none of whom can really be singled out for punishment any more than those who consumed the ice cream and cheered on the spectacles.”). But see GINZBURG, *supra* note 53, at 74–75 (describing the Governor’s praise for a local politician for leading a lynch mob).

123. ALLEN, *supra* note 79, at 117.

mitment to pursue charges. Without witnesses to identify participants, there could be no formal legal action. The absence of formal criminal records today makes the crowds appear to be anonymous, undifferentiated masses of whites.

In my research, I uncovered only a single instance in an article in which the newspaper reporter revealed the names of those whose pictures it published. As we might expect, the commercial photographers who made money on the spot by selling silverprint postcard photos of lynchings did not publicly identify their photographic subjects.¹²⁴ Therefore, today we have a record of lynchings that is even devoid of the names of those willing to pose for pictures immediately after a lynching had been carried out. The historical anonymity of mob participants is, therefore, properly viewed as being inextricable from the virulently racist social structure that supported this violence. Only when the cultural and political attitudes toward blacks slowly began to change did the identity of violent race haters begin to emerge. One way of marking this progress is to note that in 1955, when Emmitt Till was lynched in Money, Mississippi, the lynchers were quickly identified, arrested, and tried.¹²⁵ Although they were acquitted by a jury that convened for less than one hour and seven minutes,¹²⁶ their trial ironically marks progress in the miserable timeline leading away from wholesale lynching of black citizens to the present.

The code of silence among contemporaries of lynch mob participants (relatives, neighbors, reporters, law enforcement officials) can best be understood in terms of the shared, pervasive racial hatred that produced the lynchings in the first place. What is more troubling than the contemporaneous code of silence that created a virtual cocoon of anonymity to protect the perpetrators is the failure of historians many years later to do what they are best prepared to do: investigate and unearth the facts of identity. I have concluded that the very linguistic formulation of these crimes of racial hatred confers a shield that protects not only the now-long-dead participants, but also their heirs. Today, we speak of lynch mobs as undifferentiated malignant groups without individual identities, but by doing so we extend the narrative of nonaccountability and innocence that is a bedrock of this phenomenon. Today, sincere claims of innocence and ignorance about our national history of lynching made by many who are direct descendants of lynchers are

124. *See generally* ALLEN, *supra* note 79.

125. STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMITT TILL* 21–33 (Johns Hopkins Univ. Press 1991) (1988).

126. *Id.* at 42.

supportable only because we have erased the link of individual accountability. Selected reparations litigation for specific lynchings could at once pierce the veil of white anonymity and shift the time line of racial infamy closer to the present moment.

Historians of America have discovered diaries and letters that provide fascinating and detailed accounts of the life of colonists,¹²⁷ western explorers,¹²⁸ and Civil War soldiers¹²⁹ and their families. However, just as the larger story of lynching and racial violence has been neglected by historians, so too have the micro-histories of individual incidents. The diaries, letters, postcards, and other communications of lynching participants and supporters might be a fertile ground for future historical research that could provide the factual foundation for reparations. This work may be initially painful, precisely because the entire structure of the story of race and racial violence after the Civil War depends upon key elements of depersonalization and anonymity. I am optimistic that enough time has passed for the revelation of the identities of lynchers to stimulate a constructive reconsideration of this painful history, perhaps bringing the two narratives about our shared racial past and its meaning for fairness in the legal system today into closer agreement. As historical investigations by the South African Truth and Reconciliation Commission¹³⁰ and by groups examining the Rosewood and Tulsa race riots¹³¹ have taught us, just setting out the unpleasant facts of distasteful past racial violence can be cathartic, even restorative.¹³²

Though the members of some lynch mobs were unconcerned about detection by law enforcement officers and surprisingly confident in their protection against personal prosecution, others did

127. See, e.g., LYNNE WITHEY, *DEAREST FRIEND: THE LIFE OF ABIGAIL ADAMS* (2001).

128. See, e.g., STEPHEN E. AMBROSE, *UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST* (1996).

129. See, e.g., GEOFFREY C. WARD, *THE CIVIL WAR: AN ILLUSTRATED HISTORY* (1990).

130. TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, *REPORT* (1998).

Not all storytelling heals. Not everyone wanted to tell his or her story. Many, on the other hand, were able to lead towards healing by telling the painful stories of their pasts. [There is a large] healing potential of storytelling, of revealing the truth before a respectful audience and to an official body
Id. at 351.

131. OKLA. COMM'N TO STUDY THE TULSA RACE RIOT OF 1921, *FINAL REPORT* (2001), available at www.ok-history.mus.ok.us/trtc/freport.pdf.

132. MAXINE D. JONES ET AL., *THE ROSEWOOD REPORT* (1993), available at <http://www.tfn.net/doc/rosewood.txt>.

conceal their identities. The prominent citizens who made up the mob that killed Leo Frank were thinly disguised with "goggles and hats pulled down low."¹³³ The mob members who removed their victim from a jail in North Carolina also wore masks to protect their anonymity.¹³⁴ Several masked men boarded a Mississippi train, removed Ben Webster, a suspected murderer, from official custody and lynched him.¹³⁵ Among the 500 members of a Louisville, Mississippi, mob, some wore masks while others did not.¹³⁶ Masked men were involved in the lynchings of Robert Murtore¹³⁷ and Louis Wimberly.¹³⁸ Two hundred masked men lynched Ed Roach, who had allegedly assaulted a white girl.¹³⁹ The men who lynched Ellwood Higgenbotham could not be identified due to the masks they wore.¹⁴⁰ The four men who kidnapped and lynched Richard Hawkins and Ernest Ponder wore paper bags on their heads to conceal their identities.¹⁴¹

Mob members' identities could also be protected through special efforts after the fact. A sheriff in Sardis, Mississippi, attended the town's lynching and spoke with members of the mob for half an hour; afterwards, he claimed that "he was so excited he would be unable to identify any of the guilty parties."¹⁴² After a lynching in Missouri, mob members, apparently afraid of being identified, tried

133. Musarium, *Without Sanctuary*, at http://www.journale.com/withoutsanctuary/pics_30_text.html (last visited Jan. 6, 2003).

134. *North Carolina Mob Kills Negro Farmer*, *supra* note 65.

135. *Mob Enters Train to Get Negro Prisoner*, ATLANTA GEORGIAN, Jan. 4, 1923, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 223-0306 (The Tuskegee Institute).

136. *Mob That Burns Negroes at Stake Goes Unpunished*, ST. LOUIS ARGUS, June 17, 1927, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 225-0117 (The Tuskegee Institute).

137. *Object to Him as Girl's Play Mate*, CHICAGO WHIP, Dec. 10, 1921, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0329 (The Tuskegee Institute).

138. *Negro Lynched by Masked Men*, JACKSON LEDGER (Mississippi), June 21, 1921, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0318 (The Tuskegee Institute).

139. *Riddle Negro's Body*, N.Y.C. WORLD, July 8, 1920, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0067 (The Tuskegee Institute).

140. *Elwood Higgenbotham—Hero of Sharecroppers—Victim of Lynch Mob*, *supra* note 69.

141. *Mob Lynches Two Negroes at State Capital Tuesday*, DELAND DEMOCRAT (Florida), July 23, 1937, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 230-0440 (The Tuskegee Institute).

142. *Mississippi "Off" Again*, KANSAS CITY SUN, Aug. 11, 1923, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 223-0310 (The Tuskegee Institute).

unsuccessfully to find the photographers and journalists who had covered the event.¹⁴³ One of the killers of Jim McIlherron held a gun to a journalist and admonished him not to reveal individuals' identities. The *Springfield Weekly Republican*, in Massachusetts, reported that the identity of the man who poured kerosene on Sam Holt before he was set on fire "is known to those who were with him, but they refuse to divulge it."¹⁴⁴ Several members of a mob wrote an account of the lynching they performed, which was then published in a newspaper; the authors explained that, "For obvious reasons we must withhold our names"¹⁴⁵

Coroner's Inquest

Myth #7: In the few cases where there were official inquiries, most lynch mob members were identified.

Fact: Coroner's juries routinely returned the verdict that the victim "died at the hands of persons unknown."¹⁴⁶

After a lynching, the coroner would often assemble jurors for an inquest. These coroner juries had the limited responsibility of determining the identity of the killers, but they rarely succeeded.¹⁴⁷ After the lynching of Henry Scott, an African-American man accused of insulting a white woman, the jury was unable to identify individuals involved in the lynching, even though the deputy sheriff had spoken face-to-face with members of the mob.¹⁴⁸ A Mississippi jury investigating a murder concluded that the lynched victim received "[d]eath at the hands of unknown parties."¹⁴⁹ A jury in Georgia concluded that John Rushin "came to his death by gunshot wounds at the hands of unknown parties."¹⁵⁰ Another jury con-

143. *Negro Is Lynched as Soldiers Fail*, BIRMINGHAM NEWS (Alabama), Nov. 29, 1933, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 227-0640 (The Tuskegee Institute).

144. GINZBURG, *supra* note 53, at 12.

145. *Id.* at 109.

146. See PHILIP DRAY, DEATH AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA ix (2002).

147. *Id.* at 383. ("[L]ike the state officials before them, the [FBI] soon realized there was no physical evidence linking any person to the crime and no one was willing to divulge information or identity any of the killers.").

148. *White Savages in Florida Lynch Pullman Porter*, NEGRO WORLD, May 29, 1920, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 222-0044 (The Tuskegee Institute).

149. *Miss. Lynching Called "Death by Unknowns,"* NORFOLK J. (Virginia), June 19, 1935, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 229-0397 (The Tuskegee Institute).

150. *Marion Pate, Young White Man, Slain Near Here, Negro Who Confessed to Crime, Seized by a Mob and Killed*, PAVO NEWS (Georgia), May 7, 1936, microformed on

cluded that five men met their "death by strangulation and gunshot wounds at the hands of unknown parties."¹⁵¹ Unknown parties were also responsible for the lynchings of, among others, Rosa Richardson,¹⁵² Sam Nelson,¹⁵³ Ben Webster,¹⁵⁴ and Jim Fox and his



Source: *The Crisis*, January 1935, p.27

The Tuskegee Institute News Clipping File, 1899-1966, 230-0019 (The Tuskegee Institute).

151. *Five Negroes Are Hanged by a Mob in Georgia Town*, LOUISVILLE POST, Jan. 21, 1916, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 221-0362 (The Tuskegee Institute).

152. *Negress Lynched for Killing Child*, ATLANTA CONST., July 13, 1914, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 221-0216 (The Tuskegee Institute).

153. *Lynching Is Staged in Miami*, PITTSBURGH COURIER, Oct. 23, 1906, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 224-0643 (The Tuskegee Institute).

154. *Negro Is Taken from Officers and Lynched*, MEMPHIS COMMERCIAL-APPEAL, Jan. 4, 1923, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 223-0306 (The Tuskegee Institute).

brother.¹⁵⁵ After a mob lynched Joseph Upchurch, an inquest was not even held.¹⁵⁶

Participation of Legal Officials in Lynching

Myth #8: Lynch mobs consisted of mobs of lawless criminals who overpowered law enforcement officers to take their victims.¹⁵⁷

Fact: In many cases, lynchings occurred with the passive and even active support of sheriff and police.

Law enforcement officers' condoning or facilitating lynchings is a critical element in the memory of blacks about this period. When Johnnie Cochran advised the O.J. Simpson jury to disbelieve the testimony of Officer Mark Furhman, whom another witness had testified frequently used the "N word,"¹⁵⁸ he tapped into the long-running narrative among blacks that preserved the extensive history of official complicity in lynching.¹⁵⁹ Legal officials participated in lynchings in varying degrees. In Mississippi, a sheriff allowed two prisoners to be taken from his jail and did nothing to prevent the lynching that ensued.¹⁶⁰ Similarly, in Louisiana, a sheriff virtually gave an inmate to the mob.¹⁶¹ In another case, a mob accompanied police who were hunting for two African-Americans; after the police found the suspects, the mob lynched them.¹⁶² When Roy Hammond was lynched in Missouri, the sheriff's deputies allegedly handed Hammond over to the mob and then assisted in the lynch-

155. *Mob That Burns Negroes at Stake Goes Unpunished*, *supra* note 136.

156. *Mobbers Take Another Toll in Tennessee*, CHICAGO DEFENDER, June 25, 1927, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 225-0127 (The Tuskegee Institute).

157. See GINZBURG, *supra* note 53, at 67 (citing Coroner's verdict that a mob "overpower[ed] authorities" and that he was "unable to fix the responsibility for his death.").

158. Adam Pertman, *Cochran, Focusing on Racism, Urges Simpson Be Cleared*, BOSTON GLOBE, Sept. 29, 1995, 1995 WL 5956198.

159. See, e.g., MCGOVERN, *supra* note 26, at 12-13.

160. *Brothers Lynched by "Unknown Men" Decision in Miss.*, ST. LOUIS ARGUS, July 6, 1928, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 225-0652 (The Tuskegee Institute).

161. *Relates Horrors of Dixie Justice*, PITTSBURGH COURIER, Feb. 25, 1933, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 227-0690 (The Tuskegee Institute).

162. *Two More Victims of Lynch Law in South*, CHICAGO DEFENDER, Sept. 4, 1915, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 221-0267 (The Tuskegee Institute).

ing.¹⁶³ A South Carolina chief of police assisted in the lynching of Bennie Thompson after Thompson had an argument with a white man.¹⁶⁴ In another case, after a search party found a fugitive African-American, the sheriff was telephoned and asked to pick up the fugitive; the sheriff responded by saying, "I'm busy, just go ahead and lynch him," and the mob followed his advice.¹⁶⁵

In 1911, Governor Blease of South Carolina commended the actions of a recent lynch mob and explained that he would rather have led the mob than use the power of his office to prevent it from "punishing that nigger brute."¹⁶⁶ In 1927, when Governor McLeod, also of South Carolina, was criticized for not actively pursuing members of an Aiken lynch mob, his reluctance was partially explained by the fact that three of his cousins had been members of the mob.¹⁶⁷ In that same incident, the judge who presided over the prosecution of the Lowmans, who were the eventual victims of the mob, "was in league with the Klan."¹⁶⁸

Many victims of lynching were taken from police custody. Unable to break down the jail door, a mob in Arkansas ripped out window bars to get at a murder suspect and then hanged him.¹⁶⁹ Another mob, unable to get keys to the jail, used hammers to break a hole in the brick wall of the jail; they then removed and lynched the prisoner, who was accused of assault.¹⁷⁰ In Maryland, a mob threw bricks and other objects at state troopers who were guarding an inmate; when the security force retreated, the mob hanged the

163. *Charges are Made That Deputy Sheriffs Took Leading Part in Mob*, ST. LOUIS ARGUS, May 6, 1921, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 222-0320 (The Tuskegee Institute).

164. *Chief Opens Prison for Lynchers*, N.Y. DAILY WORKER, Oct. 11, 1933, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 227-0649 (The Tuskegee Institute).

165. *Prominent Race Man is Victim of Ark. Mob*, PITTSBURGH COURIER, June 19, 1927, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 225-0106 (The Tuskegee Institute).

166. *Gov. Blease Would Have Led Lynchers*, MONTGOMERY NEWS, Nov. 13, 1911, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 221-0155 (The Tuskegee Institute).

167. *Says S.C. Governor Had 3 Cousins in Lynching Mob*, CHICAGO DEFENDER, Jan. 15, 1927, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 225-0157 (The Tuskegee Institute).

168. *Id.*

169. *Negro is Lynched by Arkansas Mob*, MONTGOMERY ADVERTISER, Mar. 24, 1912, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 221-0168 (The Tuskegee Institute).

170. *Negro Taken from Jail and Lynched*, COCHRAN J. (Georgia), Aug. 23, 1923, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 223-0304 (The Tuskegee Institute).

inmate.¹⁷¹ A Mississippi sheriff laughed as he handed an inmate over to the mob and said, "You have overpowered me boys."¹⁷²

Victims of lynch mobs were also taken from courthouses while being transported. A mob stormed a Mississippi courthouse and captured Harry Jacobs, who was on trial; they removed him from the courthouse, dragged him to death behind a car, and hanged his corpse from a tree.¹⁷³ In Oklahoma, a mob interrupted a court hearing and hanged the defendant, Oscar Martin, from the balcony of the courthouse.¹⁷⁴ In Tennessee, Henry Choate, suspected of attempted assault, was also hanged from a courthouse balcony.¹⁷⁵ Governor Tyler of Virginia withdrew state troopers from Emporia, even though he knew that doing so would probably result in the lynching of Walter Cotton, a murder suspect; Cotton and a white man who was also suspected of murder were indeed lynched as soon as the troopers left.¹⁷⁶

Innocent Victims

Myth #9: Lynchings imposed people's justice on guilty men.¹⁷⁷

Fact: Many victims were innocent.

The underlying purpose in all these cases is not to violate, but to vindicate, the law It is true that they dispense with any technical trial or formal proof of guilt, but in so doing they are justified by very ancient authority As a mere deterrent to crime, capital punishment, whether inflicted openly or covertly, is probably the best penalty known, and it has also the serious, although now generally underrated, advantage of affording a legitimate outlet for the instinctive hostility of the race towards its natural enemies. When a man of ordinary conscience and feeling hears of a gross violation of right, he feels a strong itching to "get at" the perpetrator, and if lawyers or politicians or humanitarians, or all three combined, balk him of a

171. *Negro Lynched by Infuriated Mob*, *supra* note 55.

172. *Mississippi Mob Lynches Innocent Men*, *supra* note 102.

173. *Negro Is Dragged from Court Room and Put to Death*, ATLANTA CONST., Nov. 24, 1920, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0069 (The Tuskegee Institute).

174. *Mob Seizes Negro in Court and Hangs Him to Porch*, N.Y.C. WORLD, Apr. 4, 1916, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 221-0362 (The Tuskegee Institute).

175. *Tennessee Mob Lynches Negro Armistice Day*, *supra* note 66.

176. *Criticising Tyler*, BALT. HERALD, Mar. 26, 1900, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 221-0053 (The Tuskegee Institute).

177. Charles J. Bonaparte, *Lynch Law and Its Remedy*, 8 YALE L. J. 335, 337, 340 (1899).

reasonable satisfaction to this craving within the limits of the law, he will soon be found loading up his shot gun with slugs or invoking the jurisdiction of Judge Lynch.¹⁷⁸

Some stark cases of innocent people being lynched revolve around men who were found innocent by a jury only to be later taken from their homes and lynched for the same offense.¹⁷⁹ Another type of innocent victim was the African-American who received death by the mob after committing a crime for which a white person would have been punished lightly. Dave Jackson, "a colored man who had beaten his wife," was hanged by a mob at a time when wife-beating by a white man usually resulted in a fine.¹⁸⁰ Many African-Americans were lynched for offenses that were clearly noncriminal. In 1912, Tom Miles was lynched for "writing insulting notes to a white girl," even though it was not proven that he had written any such notes.¹⁸¹ Similarly, while a white man would spend 90 days in jail for theft, a black thief would be in danger of death at the hands of the mob.¹⁸² A mob lynched Leslie Legget, who was thought to be an African-American, though he was probably Hispanic; Legget's alleged crime was "associating with white women."¹⁸³

Unhampered by legal requirements of proof, many mobs made lethal mistakes. After a mob lynched Henry Patterson for assault, the alleged victim of the assault admitted to her friends that she had "merely [been] frightened at the Negro's presence," and that he had not actually assaulted her.¹⁸⁴ A North Carolina mob is also known to have killed the wrong man.¹⁸⁵ While hunting for the murderer of Silas Turner, mobs killed at least three African-Ameri-

178. *Id.* at 336-37, 340.

179. WELLS-BARNETT, *supra* note 10, at 102.

180. *Id.* at 110-11.

181. *Negro Writes Insulting Notes; Hanged to Tree*, ILL. FORUM, Apr. 20, 1912, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 221-0167 (The Tuskegee Institute).

182. William Melville Sutton, *Nagging de Niggah*, N.Y. DAILY WORLD, May 4, 1921, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 225-0182 (The Tuskegee Institute).

183. *Lynched for Alleged Association with White Women*, ST. LOUIS ARGUS, Jan. 12, 1923, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 223-0305 (The Tuskegee Institute).

184. *Truth Revealed After Negro is Lynched*, WASH. TRIB., May 14, 1926, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 224-0645 (The Tuskegee Institute).

185. *Negro Lynched At Roxboro Was Wrong Man, Employer Says Ed Roach Was Innocent Man*, RALEIGH INDEP., July 17, 1920, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0073 (The Tuskegee Institute).

cans who were probably innocent.¹⁸⁶ Sometimes, a frustrated mob, unable to find an alleged criminal, would kill a relative of the criminal. When the crowd could not find the intended target, the intended victim's brother,¹⁸⁷ father,¹⁸⁸ stepson,¹⁸⁹ and other relatives were killed as fungible substitutes.

Torture

Myth #10: Lynchings were hangings without a trial.¹⁹⁰

Fact: Lynchings often included ritual sexual mutilation and burning.

Slowly roasting living humans over fires fed with combustible debris—and the hatred of the human heart—became a preferred method of torture in many lynchings. The citizens who burned Charley Sheppard to death poured gasoline on his legs before setting him on fire—wanting him to suffer, they burned his extremities before burning his vitals.¹⁹¹ They also cut off Sheppard's ears and then stuffed mud into his nose and mouth, so that he would not die from gasoline fumes before he suffered death by fire.¹⁹² While Philip Gathers burned to death, unidentified citizens shot him repeatedly.¹⁹³ The group that murdered Lloyd Clay agreed

186. *3 Negroes Were Killed in Clash at Round Oak*, ATLANTA CONST., July 7, 1915, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 221-0267 (The Tuskegee Institute).

187. WELLS-BARNETT, *supra* note 10, at 98.

188. *Lynchers, on Foray, Slay Farm Hands*, CHICAGO DEFENDER, July 16, 1921, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 222-0316 (The Tuskegee Institute).

189. WELLS-BARNETT, *supra* note 10, at 101.

190. "Hanging is associated with lynching, with frontier justice, and with our ugly, nasty, and best-forgotten history of bodies swinging from the trees or exhibited in public places. To many Americans, judicial hangings call forth the brutal images of Southern justice. . . ." *Campbell v. Wood*, 18 F.3d 662, 701 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting). See also Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA WOMEN'S L. J. 1, 5 (1993) ("Lynching was the extralegal capture of a person accused of committing a crime, where the accused was thereafter murdered by hanging or burning alive.").

191. *Mob Robs All Filling Stations Of Gasoline*, BALTIMORE AFRO-AMERICAN, Jan. 12, 1929, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 225-0648 (The Tuskegee Institute).

192. *Mississippi Cannibals Dance Around Fire as Man Burns*, *supra* note 97.

193. *Negro Breaks Chain to Die by Bullets*, MONTGOMERY ADVERTISER, June 22, 1920, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 222-0056 (The Tuskegee Institute).

not to shoot him as he burned, because they wanted him to suffer as long as possible.¹⁹⁴

Mutilation served as an indispensable ingredient in many lynchings—inflicting pain by slow dismemberment and disfigurement became an oft-repeated signature of spectacle lynchings. The extent of the cruelty of the ordinary citizens who participated in these events seemed to know no bounds, as illustrated in the torture of a husband and wife in Vicksburg, Mississippi, in 1904, as reported by the local newspaper:

When the two Negroes were captured, they were tied to trees and while the funeral pyres were being prepared they were forced to suffer the most fiendish tortures. The blacks were forced to hold out their hands while one finger at a time was chopped off. The fingers were distributed as souvenirs. The ears of the murderer were cut off. Holbert was beaten severely, his skull was fractured, and one of his eyes knocked out with a stick, hung by a shred from the socket . . . The most excruciating form of punishment consisted in the use of a large corkscrew in the hands of some of the mob. This instrument was bored into the flesh of the man and woman, in the arms, legs and body, and then pulled out, spiral tearing out big pieces of raw, quivering flesh every time it was withdrawn.¹⁹⁵

We don't know the individual identities of the townspeople who cut off the hands and feet of Dr. J. Smith, who had been jailed for his involvement in a car accident.¹⁹⁶ After the dismemberment, the crowd burned down the jail with the doctor locked inside.¹⁹⁷ In another incident, Tom Shipp, an alleged murderer, tried to defend himself from the mob and so was beaten and stabbed before being hanged.¹⁹⁸ Robert McDaniel was horsewhipped before a Mississippi mob shot him to death.¹⁹⁹ William Turner was dragged behind a car at high speeds.²⁰⁰ Two African-American men suspected of a minor infraction were castrated and beaten, and one of the

194. BURNING AT STAKE, *supra* note 84, at 6.

195. WHITE, *supra* note 36, at 35 (quoting BENJAMIN BRAWLEY, A SOCIAL HISTORY OF THE AMERICAN NEGRO (1921)).

196. *Colored Physician Jail Fire Victim; Met Terrible Death*, THE HOUSTON INFORMER, Jan. 13, 1923, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 223-0316 (The Tuskegee Institute).

197. *Id.*

198. *Sheriff's Fears Permitted Indiana Lynching*, *supra* note 51.

199. *Mississippi Mob Lynches Innocent Men*, *supra* note 102.

200. *Boy is Dragged Through Streets Alive and Burned*, ST. LOUIS ARGUS, Nov. 25, 1921, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0298 (The Tuskegee Institute).

men was burned by a hot liquid that was poured in his mouth and over his head; although the men were tossed into a swamp and left for dead, they miraculously survived this attempted lynching.²⁰¹

The dominant rhetoric justifying lynchings was the protection of women. However, concern for the delicacy of women did not apply when black women became the targets of lynchers. In the annals of lynching, the torture of Mary Turner, eight months pregnant, is particularly depraved:

[N]ot finding the Negro suspected of the murder, mobs began to kill every Negro who could even remotely be connected with the victim and the alleged slayer. One of these was a man named Hayes Turner, whose offense was that he knew the alleged slayer . . . [;] both men worked for the dead farmer. To Turner's wife, within one month of accouchement, was brought the news of her husband's death. She cried out in her sorrow . . . threat[ening] to swear out warrants for the arrest of her husband's murderers . . . "We'll teach the damn' nigger wench some sense," was their answer, as they began to seek her. Fearful, her friends secreted the sorrowing woman on an obscure farm, miles away . . . [but] they found her. Securely they bound her ankles together and, by them, hanged her to a tree. Gasoline and motor oil were thrown upon her dangling clothes; a match wrapped her in sudden flames. Mocking, ribald laughter from her tormentors answered the helpless woman's screams of pain and terror. "Mister, you ought to've heard the nigger wench howl!" a member of the mob boasted to me a few days later . . . The clothes burned from her crisply toasted body, in which, unfortunately, life still lingered, a man stepped towards the woman and, with his knife, ripped open the abdomen in a crude Caesarean operation. Out tumbled the prematurely born child. Two feeble cries it gave—and received for answer the heel of a stalwart man, as life was ground out of the tiny form. Under the tree of death was scooped a shallow hole. The rope about Mary Turner's charred ankles was cut, and swiftly her body tumbled into its grave. Not without a sense of humor or of appropriateness was some member of the mob. An empty whisky-bottle, quart size, was given for headstone. Into its neck was stuck a half-smoked ci-

201. *Hot Liquid Poured on Victims*, PITTSBURGH COURIER, Sept. 26, 1925, microformed on The Tuskegee Institute News Clipping File, 1899-1966, 224-0609-10 (The Tuskegee Institute).

gar, which had saved the delicate nostrils of one member of the mob from the stench of burning human flesh.²⁰²

Trophy and Souvenir Taking

Myth #11: When a lynching ended, participants, fearful of criminal prosecution, hid their participation.

Fact: In many communities, participation in a lynching was a mark of racial pride embodied in taking and displaying body parts from the victim as personal trophies.²⁰³

Members of lynch mobs often fought over the body parts of the victims. The fingers, ears, toes, and sexual organs were especially prized. When the Georgia crowd finished the lynching carnival that took the life of Sam Holt,²⁰⁴ who was accused of killing his employer in a dispute about wages, *The New York Tribune* reported that:

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 into 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 into several pieces, as was also his liver. Those unable to obtain ghastly relics directly, paid more fortunate possessors extravagant sums for them. Small pieces of bone went for 25 cents and a bit of liver, crisply cooked, for 10 cents.²⁰⁵

In addition to the human remains taken as trophies, the physical objects associated with a lynching were often prized mementos of crowd participation. Young people who attended a Maryland lynching collected pieces of tear gas canisters that had been used by police to fight the mob, as well as pieces of the rope with which their victim had been hanged.²⁰⁶ Souvenir collectors took pieces of the hospital cot on which Zachariah Walker was transported from a Pennsylvania hospital to the place where a mob burned him to

202. WHITE, *supra* note 36, at 27–29.

203. GINZBURG, *supra* note 53, at 74 (describing the Governor's praise for a local politician for leading a lynch mob).

204. Sam Holt is often misidentified as Sam Hose because of typographical error in early newspaper accounts.

205. TOLNAY & BECK, *supra* note 18, at 23 (citing NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918, at 13 (Arno Press 1969) (1919)).

206. *People of Town Laugh as They Discuss Horror*, PITTSBURGH COURIER, Oct. 28, 1933, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 227-0691 (The Tuskegee Institute).

death.²⁰⁷ A Columbus, Texas, drug store attracted attention by displaying nooses that a mob had used to hang two boys.²⁰⁸ Pieces of rope from another hanging were highly valued souvenirs.²⁰⁹ In Indiana, souvenir collectors ripped the bark from the bottom seven feet of the tree on which the mob had hanged its victims.²¹⁰

Because they were a form of entertainment, lynchings became commercialized. Photographs of lynchings were often made into postcards or trading cards.²¹¹ One spectator at a lynching sent a lynching postcard on which he had written, in part, "This is a token of a great day we had in Dallas, March 3, a [N]egro was hung for an assault on a three year old girl. I saw this on my noon hour."²¹² Clever journalists in Memphis obtained the names and addresses of members of a lynch mob by promising to send them copies of the photos they took of the lynching.²¹³

Display of the Body as Warning

Myth #12: The primary purpose of lynching was to carry out informal justice against criminals.²¹⁴

Fact: The ritual, festival lynchings were terroristic performances designed to secure the subordination of entire communities of blacks.

Lynchings were often made to serve a symbolic purpose, as a warning to African-Americans. After David Gregory, an alleged murderer, was killed by a mob, his body was dragged to the African-American section of the town of Kountze, where the body was burned for all to see.²¹⁵ Members of a Texas mob tied the burned bodies of two victims to the back of a car and dragged them

207. *No Arrests Result from Burning of Negro*, *supra* note 57.

208. *Sheriff Yields Victims to Mob Without Resistance*, *supra* note 71.

209. *BURNING AT STAKE*, *supra* note 84, at 7.

210. *Sheriff's Fears Permitted Indiana Lynching*, *supra* note 51.

211. ALLEN, *supra* note 79, at 11.

212. *Id.* at 169.

213. *Two Reporters Risk Life to Cover Miss. Lynching*, BALTIMORE AFRO-AMERICAN, Apr. 6, 1935, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 229-0385 (The Tuskegee Institute).

214. Linn Washington, Jr., *O.J. Case Compared to a 'Traditional American Lynching'*, PHILA. TRIB., Feb. 11, 1997, at 2A (describing a traditional American lynching as "occur[ing] when enraged white folks felt their justice system was not dealing swiftly enough" with a suspected Black criminal accused of committing some wrong against whites).

215. *Body of Lynch Victim Mutilated, Dragged Through Streets*, CHI. DEFENDER, Dec. 16, 1933, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 227-0683 (The Tuskegee Institute).

through the city as they yelled, "Here are the barbecued Niggers, all you Niggers come out and see them and take warning."²¹⁶ The body of J. B. Grant was displayed in the public square of Laurel, Mississippi, as a member of the mob said, "This is an example of what happens to darkies who forget their places."²¹⁷ A lynch mob left the naked body of John Rushin lying dead in "the yard of a [N]egro schoolhouse."²¹⁸

Lynchers sometimes used signs or notes to warn African-Americans. One man was shot approximately fifty times and dumped alongside a road with a note that read, "This is what you get for insulting a white woman."²¹⁹ In 1909, Will James was lynched and burned before a large crowd in Cairo, Illinois. Picture postcards displaying the scene were sold to the citizens who had assembled to see the event.²²⁰

Rape Accusations

Myth #13: Black men were only lynched because they raped white women.²²¹

216. NAACP, Letter to the Editor, HOUSTON OBSERVER, Sep. 4, 1920, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0063 (The Tuskegee Institute).

217. *Small Children Pump Lead into Lifeless Form of Victim*, *supra* note 103.

218. *Thomas County Mob Lynches Negro Man*, ATLANTA CONST., May 4, 1936, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 230-0005 (The Tuskegee Institute).

219. *Mr. Scott, A Prominent Elk Who Was Cowardly Lynched in Florida, Leaves a Black Mark on Its Walls*, WASH. BEE, May 15, 1920, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 222-0044 (The Tuskegee Institute).

220. *See, e.g.*, ALLEN, *supra* note 79, Plate 46.

221. Two fictional treatments of Reconstruction contributed greatly to the popular myth that black men once freed from the constraints of slavery became insatiable sexual beasts ravaging white women. *See, e.g.*, THOMAS DIXON, *THE CLANSMEN* (1905). Dixon's piece was popularized by the D.W. Griffith film, *Birth of a Nation*. In the film, two families experience the Civil War and Reconstruction. Through these families' stories, Griffith addresses the devastation wrought by the Civil War (especially in the South) and the social disruptions caused by Reconstruction. Griffith, a Southerner and the son of a Confederate War cavalry officer who returned from the war a broken man, blamed Reconstructionists and Southern blacks for his own misfortunes. This film reflects that resentment by depicting radical Republicans and African-Americans as the cause of all social, political, and economic problems since the Civil War. *See* BIRTH OF A NATION (1915).

Using his personal friendship with Woodrow Wilson, Dixon arranged, early in 1915, for *Birth of a Nation* to be viewed by the President, his cabinet and their families in the East Room of the White House. Afterward, President Wilson made the . . . remark that the film "was like writing history with lightning." Unfortunately, he added his opinion that "it is all so terribly true." On the very next evening, Dixon set up a special showing for the justices of the Su-

Fact: Actual rape was rarely the reason for lynching.

When asked why two lynched African-Americans had been falsely accused of rape, one southern man replied that, "Folks won't do anything about [the lynching] if we tell 'em that the nigger raped a white woman."²²² Accusations of rape were often a pretext for lynching an African-American. In one such case, the *Philadelphia Tribune* published a picture of a wrinkled, elderly woman whose claims of rape had led to a lynching and advised readers to look at the photo and decide "whether or not a healthy male of any race could even desire to have illicit relationship with the dear old lady."²²³ The article went on to claim that "99 per cent of all the rape accusations are fairy tales—lies."²²⁴

Rape charges often sprang out of self-interest or prejudice. Occasionally, a woman would have consensual sexual relations with an African-American and then, out of fear of being caught or getting pregnant, accuse the African-American of rape.²²⁵ After an apparent act of arson in Alabama, people concluded that rape must have been involved, saying that "brutal lust was the incentive, and as there are nearly 200 Negroes living . . . [near] the place the conclusion was inevitable that some of them were the perpetrators."²²⁶ It is beyond the scope of this project to consider the social-psychological mechanism that led to the acceptance of an expansive definition of rape that included any non-sexual social contact between a black man and a white woman as well as consensual sexual intercourse. Needless to say, it would not take much to conclude that real rape, false accusations of rape, and lynching have become so intertwined in the mythology of lynching that today we seldom remember that rape was given as a justification in fewer than one-

preme Court and invited members of Congress, Chief Justice Edward Douglass White having been a Klansmen in his youth. The film had been under heavy fire for its racist content, but with these seeming endorsements arranged by Dixon it entered a very vigorous early life.

JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 176 (1984). Rebecca Felton, a prominent white journalist from Georgia, made the infamous declaration that "if it takes lynching to protect women's dearest possession from drunken, ravening beasts, then I say lynch a thousand a week." HALE, *supra* note 87, at 234.

222. Walter F. White, *Exploits of a Colored Investigator of Race Riots and Lynchings*, N.Y.C. POST, Apr. 8, 1922, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 223-0050 (The Tuskegee Institute).

223. *The Question of Rape*, PHILA. TRIB., Oct. 26, 1933, *microformed on* The Tuskegee Institute News Clipping File, 1899-1966, 227-0694 (The Tuskegee Institute).

224. *Id.*

225. WELLS-BARNETT, *supra* note 10, at 17-18.

226. *Id.* at 48.

third of the cases where any justification was recorded.²²⁷ Even by the distorted, racist record-keeping of that era, rape was not the primary reason for lynching.

III. THE STATISTICS

A. *Lynching*

The Tuskegee Institute's Lynching Archives records 4743 lynchings nationwide between 1882 and 1968. Of this number, 3446 of the victims (73 percent) were black. Sociologists Tolnay and Beck have provided a reconfiguration of this basic data limited to ten border and Deep South states in the most intense period of lynching, 1882-1930.²²⁸ Tolnay and Beck found that there were 2805 lynching victims, and of this number 2462 (88 percent) were black.²²⁹ The geographic distribution of lynchings show that in Mississippi, the state with the highest total number of black victims, there were 52.8 black victims per 100,000 black citizens in the period 1882-1930. By comparison, in Florida, considered a border state, 79.8 blacks per 100,000 black citizens were lynched.²³⁰ With these statistics, Tolnay and Beck show that, contrary to popular understanding of the lynching phenomenon, "blacks living in Florida actually bore the highest 'per capita hazard' of being victimized by mob violence"²³¹

Statistical reports provide a helpful, if banal, portrait of this evil.²³² The cumulative data has recently been standardized, mak-

227. TOLNAY & BECK, *supra* note 18, at 92; *see also* HALE, *supra* note 87, at 234.

228. These states were Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. TOLNAY & BECK, *supra* note 18, at 269.

229. *Id.*

230. *Id.* at 38.

231. *Id.* at 37.

232. *See* HANNAH ARENDT, *ON VIOLENCE* (1970). Arendt's eloquent commentary on the barbarities of the Holocaust did not extend to the domestic problem of race lynchings and riots in America. There is some evidence that she argued, instead, that school desegregation was a matter in the private social sphere and should not, therefore, be the focus of civil rights agitation. Her views were shaped by her focus on totalitarian regimes. *See* David L. Chappell, *Going Slow*, WASH. POST, July 22, 2001, at T9 (reviewing CAROL POLSGROVE, *DIVIDED MINDS: INTELLECTUALS AND THE CIVIL RIGHTS MOVEMENT* (2001)).

Far from taking up the cause of black protesters, as one would expect, Arendt objected to desegregation of schools. . . . Arendt thought the cure could be worse than the disease. The 'totalitarian' experience had taught her that political violation of the social sphere injured our humanity, which depended on the insulation of some of its realms from politics. Arendt thought that action

ing it possible to have some confidence in the accuracy of the numbers of lynchings during the largest part of the period in question for the areas where lynching was most intense. There was no contemporaneous central state or governmental repository for collecting data on lynching.²³³ Therefore, newspapers of the day are the primary source of information about the number of lynchings and their details. The Tuskegee Institute, the NAACP, and the *Chicago Tribune* are the three principal modern repositories of data about lynchings in the period 1882-1930.²³⁴ Tolnay and Beck provide comprehensive standardized totals of lynching victims in *A Festival of Violence*.²³⁵ The figures given in the book were all verified by comparing the Tuskegee, *Chicago Tribune*, and NAACP newspaper-based records with individual newspaper accounts.²³⁶ Tolnay and Beck's analysis is indispensable for making accurate generalizations about lynching trends in the heart of the Deep South, where most lynching was concentrated. However, the only fully national survey of lynching can be found in the Tuskegee Archives-based work of Librarian Daniel Williams.²³⁷

Even this important upgrading of the data available to compare the incidence, distribution, and reasons for lynching leaves two critical deficiencies. First, there are no reliable statistics for the racial violence that lynching scholars agree took place between the end of the Civil War and 1880. Second, there are no comprehensive national or regional data on the race riot death totals.²³⁸ Research on race riots is still in its infancy, by comparison to the study of lynchings, and this vacuum contributes to the erroneous perception that the number of black deaths caused by racial violence in the period 1865-1882 is lower per capita than it was in reality.

was better aimed at public laws, such as state prohibitions of interracial marriage and miscegenation. Most civil rights leaders, however, believed that focus on these laws would distort the public's sense of the movement's goals and justify the emotional backlash of white Southerners.

Id.

233. TOLNAY & BECK, *supra* note 18, at 259-63.

234. *Id.*

235. *Id.*

236. *Id.* at 260.

237. GUIDE TO THE MICROFILM EDITION OF THE TUSKEGEE INSTITUTE NEWS CLIPPINGS FILE (John Kitchens ed., 1978).

238. . See, e.g., Jan Voogd, Red Summer, 1919, at 2-3 (Oct. 7, 2002) (unpublished manuscript, on file with the *NYU Annual Survey of American Law*) (discussing the absence of readily-available data on the numbers of riots, and deaths and injuries caused by the riots, during the Red Summer of 1919).

1. The Missing Years, 1865-1882: The Role of the Press

The absence of lynching data for the period 1865-1882 is a noteworthy example of the way in which the apparently neutral act of collecting data for an event as momentous as a racial murder often masks deeper social and political frictions. Our national experience with the manipulation of body counts during the era of the Vietnam War should remind us of the temptation to under- or over-count deaths or casualties to political advantage.²³⁹ In modern-day Rwanda,²⁴⁰ Serbia,²⁴¹ and Latin America, the manipulation of body counts continues to be a standard tool of diminishing the historical record of atrocity and war.²⁴²

Historian Vernon Wharton believed that racial violence was so ubiquitous and approved of during this period that the press ignored lynchings and other forms of racial violence, and records reflect that from 1865 to 1890 violence and lynching of black people was largely seen as an expected, largely invisible institution in society. "Such matters attracted little or no attention in the press. When reported at all [lynching and murder] were generally given a line or two in very small type in the 'Mississippi Brevities' or 'Miscellaneous Items' columns of the papers."²⁴³ One Mississippi newspaper of the era, *The Clarion*, mentioned in passing the unprovoked murder of two Negroes and the lynching of two others, while the *Gazette* "managed to get five lynchings into one line of type which was almost too small to be read: 'Four Negroes were lynched at Grenada last week; also one in Oxford.'"²⁴⁴

There is some evidence of inconsistent and somewhat unpredictable shifts in newspaper editorial attitudes toward lynching in the period from immediately after the Civil War through Reconstruction. Wharton documented a gradual shift in the attention paid by Mississippi newspapers to racial violence beginning with the Carrollton Massacre in 1886. Three popular newspapers of the period actually condemned white violence against blacks.²⁴⁵ Wharton

239. HOROWITZ, DEADLY ETHNIC RIOT, *supra* note 20, at 10.

240. Sam Kiley, *With Nobody Left to Kill, the Militias Are Bored*, TIMES (London), May 16, 1994, 1994 WL 9145924.

241. Vanessa Pupovac, *Disputes Over War Casualties in Former Yugoslavia*, 69 RADICAL STATISTICS, Autumn 1998, at <http://www.radstats.org.uk/no069/article3.htm>.

242. See Kathleen McGraw, *Manipulating Public Opinion with Moral Justification*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 129 (1998).

243. Vernon Lane Wharton, *The Negro in Mississippi 1865-1890*, in STUDIES IN HISTORY AND POLITICAL SCIENCE 224 (A. R. Newsome ed., 1947).

244. *Id.*

245. *Id.* at 223.

attributed this shift, in part, to the fact that southern Democrats were firmly in power and the violence designed to destabilize Reconstruction-era governments was no longer politically necessary. Wharton found an 1890 *Clarion* article actually condemning a mob of young men for the killing of an “inoffensive Negro on the main street of Jackson.”²⁴⁶ This condemnation was especially noteworthy because the same paper had praised similar violence in overthrowing the Republican municipal government just two years before.

Before I discuss it further, let me mention a few conceptual problems with this data that are not often discussed. Counting lynchings is not like counting widgets. The numerical representation of the scope and scale of this subcategory of racial violence requires a choice fraught with subjectivity and political implications. By this I mean that the numbers are the product of subjective frameworks that affect what counts as a lynching. Some lynchings were deemed so unimportant in the social context in which they occurred that there are no written reports at all.²⁴⁷ Others were recorded as suicides or death “at the hands of unknown parties.”²⁴⁸ Furthermore, when anti-lynching legislation was threatened, but never passed, in the 1920’s and 1930’s, the typical location of these murders moved from the carnivalesque, bloody Greco-Roman arenas of the center city square to more surreptitious spots. Therefore, deciding what to count as a lynching draws upon social conditioning as to what qualifies as death outside the law and whether we can have confidence that there was a social and legal framework that would have viewed the event as significant enough to record. When the dominant social attitude in post-Civil War America was that “[n]iggers jest [sic] supposed to die,”²⁴⁹ recording killings of blacks as lynchings was an intensely negotiated process contributing to a contested racial history.

Therefore, as we will see, there is no systematic data about racial violence during what I have called the “missing years.” This void is the product of the very racism under discussion. The absence of a database of occurrences of racial violence for the period 1865-1882 limits the options for historical interpretation in important ways. By necessity, these missing years have not been given the

246. *Id.* at 224 (citing WEEKLY CLARION (Jackson), Jan. 1, 1891 (“No more mercy should be shown the genteel rough than the loud-mouthed hoodlum. Each should be made to understand that he must stop his devilment.”)).

247. LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 295 (1998) [hereinafter LITWACK, TROUBLE IN MIND].

248. *Id.*

249. *Id.* at 284.

detailed numerical review for patterns and trends that is available for the period 1882-1930.

Lacking the systematic death and injury statistics that would normally be available through the court records of arrest, prosecution, and conviction, historians of lynching have, for the most part, been confined to providing anecdotal evidence²⁵⁰ in support of their assertions of the prevalence of racial violence during the period immediately following the Civil War.²⁵¹ For example, distinguished historian Eric Foner describes the problem of racial violence in the immediate aftermath of the Civil War as follows:

Violence had been endemic in large parts of the South since 1865. But the advent of Radical Reconstruction stimulated its expansion. By 1870 the Ku Klux Klan and kindred organizations like the Knights of the White Camelia and the White Brotherhood were deeply entrenched in nearly every Southern state In effect, the Klan was a military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy It aimed to destroy the Republican party's infrastructure, undermine the Reconstruction state, reestablish control of the black labor force, and restore racial subordination in every aspect of Southern life.²⁵²

In Meridian, Mississippi:

[T]hree black leaders were arrested in March 1871 on charges of delivering "incendiary" speeches. Firing broke out at their court hearing, the Republican judge and two defendants were killed, and a day of rioting followed, which saw perhaps 30 blacks murdered in cold blood, including "all the leading colored men of the town with one or two exceptions."²⁵³

Historians working with this material cannot be faulted for the largely anecdotal character of their reports. The absence of system-

250. See DAVIS LEVERING LEWIS, W.E.B. DU BOIS: BIOGRAPHY OF A RACE, 1868-1919 (1993); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979); LITWACK, TROUBLE IN MIND, *supra* note 247.

251. See EDWARD L. AYERS, VENGEANCE & JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH (1984). Ayers notes that:

Race riots erupted as early as 1865 in Charleston and Norfolk, recorded their highest fatalities in 1866 in Memphis and New Orleans, and continued to erupt in cities throughout the South for years after the Civil War. Race riots, long a feature of Northern cities, were new to the South.

Id. at 161.

252. ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863-1877, at 184 (1990) [hereinafter FONER, SHORT HISTORY].

253. *Id.* at 185.

atic records of the toll of widespread racial violence is a byproduct of the very social and political circumstances immediately after the Civil War that determined which data was deemed worthy of collection.

It is at this basic level of data collection that official history began to be erased and the divided memory of this period was born. The official record adopted a voluntary amnesia—but the heirs of victims of racial violence during this period have forgotten nothing. A statistically reliable official database is not required to confirm the family stories: the rules for survival in a foreign land and the expressive arts of language, visual image, and music bear an accurate narrative of the black lynching experience.²⁵⁴ As David Blight observes that “[m]ob violence and eventually lynching were so deeply embedded in black folk memory that virtually every major African-American writer since emancipation has made these subjects central to his or her work in poetry and prose.”²⁵⁵ Ultimately, such history cannot be erased. The imprint of this profound suffering lay upon the land, the people, the institutions, and the futures of all those who experienced it, and it has not been erased. The imprint of oppression exists in the “blues” culture of African-Americans for all to hear.²⁵⁶ But I believe that the imprint of this history is also faintly visible on the palimpsest of white American culture and folkways. Even when this record is erased, we can see the impress of racial violence and the denial of that violence in the very culture and identity of America today. Nobel Laureate Toni Morrison makes this point in her carefully argued lecture *Playing in the Dark: Whiteness and the Literary Imagination*:

As for the culture, the imaginative and historical terrain upon which early American writers journeyed is in large measure shaped by the presence of the racial other. Statements to the contrary, insisting on the meaninglessness of race to the American identity are themselves full of meaning. The world does not become raceless or will not become unracialized by asser-

254. TRUDIER HARRIS, EXORCISING BLACKNESS: HISTORICAL AND LITERARY LYNCHING AND BURNING RITUALS 2-3 (1984) (language); THELMA GOLDEN, BLACK MALE: REPRESENTATIONS OF MASCULINITY IN CONTEMPORARY AMERICAN ART (1994) (visual image); DAVID MARGOLICK, STRANGE FRUIT: BILLIE HOLIDAY, CAFÉ SOCIETY, AND AN EARLY CRY FOR CIVIL RIGHTS 17 (2000) (music); see also DONALD CLARKE, WISHING ON THE MOON: THE LIFE AND TIMES OF BILLIE HOLIDAY 163, 418-19 (1994).

255. DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 109 (2001).

256. See LEROI JONES, BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA (Greenwood Press 1980) (1963).

tion. The act of enforcing racelessness in literary discourse is itself a racial act. Pouring rhetorical acid on the fingers of a black hand may indeed destroy the prints, but not the hand. Besides, what happens in that violent, self-serving act of erasure to the hands, the fingers, the fingerprints of the one who does the pouring? Do they remain acid-free? The literature itself suggests otherwise.²⁵⁷

The period immediately after the Civil War was a period of widespread racial violence. Confederate veterans returning home after the decimating military, economic, social, and political destruction of the world they had known before the war were thrust into a life of complete uncertainty. They believed in their hearts that the cause of the Confederacy was just. Blacks who were slaves when they had left were now impudent freedmen with even fewer economic resources than the former soldier had. The combination of a large population of former subordinates and a devastated economy proved to be a bitter, even indigestible, pill. The antipathy to the Yankees who had returned to the North after the war was replaced by a hatred of the closest target for frustration: the newly freed slaves.

General Sherman's order on January 16, 1865, set aside the Sea Islands and part of the fertile rice-growing region of the southern coast below Charleston, South Carolina, for the freedman. Each newly freed family would receive forty acres, and the army would loan the families mules.²⁵⁸ As Reconstruction historian Eric Foner tells us, within six months of this order, the entire South witnessed the tangible presence of 40,000 freedmen "settled on 400,000 acres of 'Sherman land' . . . [This was] a transformation of Southern society more radical even than the end of slavery."²⁵⁹ White southern anger was fueled by a lethal combination of affairs. As white rice growers saw their homes, farms, and hopes for the future fall under the pillage of Sherman's army, they also witnessed the exhilaration of blacks with not only their new-found physical freedom, but also the tangible fruits of the war—title to land that had once belonged to whites. The fulfilled expectation of forty acres and a mule actually realized by a small group of 40,000 freedmen off the coast of South Carolina and Georgia became the underpinning of a concrete expectation for the rest. The anticipated

257. TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 46 (1992).

258. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 70 (1988) [hereinafter FONER, *UNFINISHED REVOLUTION*].

259. *Id.* at 71.

“forty acres and a mule”²⁶⁰ still resonates today in political and artistic rhetoric as a broken white promise.²⁶¹

The Civil War had turned African-Americans’ world upside down. They were promised land and political and social equality, and a real down payment on these promises was delivered to the freedmen in General Sherman’s order, just six months before the war formally ended. By the time Lee surrendered at Appomattox, the combustible ingredients of hatred, defeat, and social and economic redistribution were already in place. With no prospect of lashing back at the militarily victorious North, the former masters of the antebellum South turned their attention to exacting a price for the war from those who would always be social and political “slaves” in their eyes. Exacerbating this bleak landscape of federal power, Lincoln promised black voting rights for the first time.²⁶² Just four days later, on April 15, 1865, Lincoln was assassinated, without having set forth a policy to rehabilitate the South.²⁶³

Reconstruction began without a formal federal plan for the economic revival of the vanquished Americans in the South, and the installation of blacks in high government office by radical Republicans in Congress rubbed salt in the wounds of a culture that was neither truly a part of the Union, nor separate. The vestiges of the defiance expressed in blood during the Civil War became the core of the opposition to Reconstruction, and the heart of the inchoate goal was to recapture free labor by any means necessary.²⁶⁴

The news of freedom came slowly to the slaves in Texas,²⁶⁵ but many whites in the South never got the word. To white southerners, military defeat and true freedom for the former slaves were two different things. Ubiquitous interpersonal white violence against freedmen was the opening bid on the table in the new South. Violence was the southern reply to the Constitutional

260. *Id.*

261. Spike Lee’s production company is called “40 Acres and a Mule Productions.” See *Jaguar Hoping Spike Lee Will Open Some New Doors*, ORLANDO SENTINEL, May 4, 2000, at F2.

262. FONER, UNFINISHED REVOLUTION, *supra* note 258, at 74.

263. See generally, FONER, SHORT HISTORY, *supra* note 252, at 33 (“Lincoln had judged the time not yet ripe for ‘the statement of a settled reconstruction policy.’”).

264. LITWACK, TROUBLE IN MIND, *supra* note 247, at 117–22.

265. Juneteenth is a contemporary celebration of the June 19, 1865, the day the slaves of Texas got word of Emancipation, eighteen months after the rest of the country. See, e.g., *History of Juneteenth*, at <http://www.juneteenth.com/history.htm> (last visited Jan. 6, 2003).

Amendments²⁶⁶ and the Civil Rights statutes²⁶⁷ bearing news of freedom which were passed by a post-war Congress filled with radical Republicans.²⁶⁸

The first effort to name and quantify the violence emerged in a northern newspaper, *The Chicago Tribune*. In 1882, the paper began to publish a total of the previous year's lynchings at the beginning of each new year.²⁶⁹ This simple choice to collect and publish the data on racial violence marked a tremendously important shift in the public construction of racial violence. First, collecting the data rendered the problem visible for both the domestic and international readership of the paper. Second, the publication of the statistics put a political and social magnifying glass on the practice. Contrast this treatment with the "Mississippi Brevities" reports mentioned earlier, in which five deaths were squeezed into a single line of type. Third, the introduction of the *Chicago Tribune* data collection and publication project coincided with the period of most intense lynching. There were 113 lynchings nationwide in 1882, increasing to 130, then 211, in successive years, and reaching an all time high of 230 in 1893, which was also a year of a major national depression, the Panic of 1893. The reporting of this running tally also coincided with the Supreme Court dismantlement of key elements of post-Reconstruction Civil Rights legislation. In October, 1883, the Supreme Court decided the *Civil Rights Cases*,²⁷⁰ which invalidated the Civil Rights Act of 1875, a centerpiece of post-Civil War antiterrorism legislation. Thus, the *Chicago Tribune* lynching data collection project was opportunely timed to define and spotlight the previously undefined and invisible racial murders sweeping the country.

In 1892, amidst what was still largely undifferentiated carnage, twenty-three-year-old Ida B. Wells served as editor and half-owner of the *Memphis Free Speech* when three black businessmen were lynched by a mob stirred up by their economic competitors.²⁷¹ Wells, who later married and became known as Ida B. Wells-Barnett, took this moment to launch her historic public crusade against lynching.

266. U.S. CONST. amends. XIII, XIV, XV.

267. Civil Rights Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) (reenacted by Enforcement Act of 1870, ch. 114, sec. 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981-1982 (1987)); Civil Rights Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 §§ 1-2 (1875).

268. FONER, SHORT HISTORY, *supra* note 252, at 184.

269. TOLNAY & BECK, *supra* note 18, at 259.

270. 109 U.S. 3 (1883).

271. CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 47-52 (Alfreda M. Duster ed., 1970).

Her passionate editorial response to this lynching marked the beginning of more scrupulous attention being paid to the counting of lynch victims.²⁷² She launched a second salvo in the form of a campaign against contested racial memory. It was the following Wells editorial in the *Free Speech* on May 21, 1892, that unleashed a storm of white reaction that almost led to Wells's own lynching:

Eight Negroes lynched since last issue of the *Free Speech*. Three were charged with killing white men and five with raping white women. Nobody in this section of the country believes the old thread-bare lie that Negro men assault white women. If Southern white men are not careful, they will over-reach themselves and a conclusion will be reached which will be very damaging to the moral reputation of their women.²⁷³

Wells soon found out that publicly contesting recent racial memory was an especially dangerous sport. This reply appeared in the *Daily Commercial* four days later:

Those Negroes who are attempting to make the lynching of individuals of their race a means for arousing the worst passions of their kind are playing with a dangerous sentiment A negro organ printed in this city, in a recent issue publishes the following atrocious paragraph: 'Nobody in this section of the country believes the old thread-bare lie that Negro men rape white women. If Southern men are not careful they will over-reach themselves, and public sentiment will have a reaction and a conclusion will be reached which will be very damaging to the moral reputation of their women.' The fact that a black scoundrel is allowed to live and utter such loathsome and repulsive calumnies is a volume of evidence as to the wonderful patience of Southern whites. But we have had enough of it. There are some things that the Southern white man will not tolerate, and the obscene intimations of the foregoing have brought the writer to the very utmost limit of public patience. We hope we have said enough.²⁷⁴

The Evening Scimitar, not to be outdone, ran this editorial: Patience under such circumstances is not a virtue. If the Negroes themselves do not apply the remedy without delay it will be the duty of those who he has attacked to tie the wretch who utters these calumnies to a stake at the intersection of Main and Madison Sts., brand him in the forehead with a hot iron

272. WELLS-BARNETT, *supra* note 10, at 69–78.

273. CRUSADE FOR JUSTICE, *supra* note 271, at 65–66.

274. WELLS-BARNETT, *supra* note 10, at 13–14.

and perform upon him a surgical operation with a pair of tailor's shears.²⁷⁵

On the same evening this counter-editorial appeared, the community business leaders met in the Cotton Exchange Building and talked of lynching the editorial writers. Wells was forced to flee a mob and was ordered not to return. While on "vacation" in New York, Wells received threats of violence. She reported that "[c]reditors took possession of the office and sold it." She eventually settled in Chicago where she married a lawyer who supported her work. From Chicago, she took up a lifelong commitment to expose the structure and effect of lynching.²⁷⁶

Wells, more than any other single individual, should be credited with revolutionizing the statistical portrait of lynching. Although she was not trained as a social scientist, she wrote three long pamphlets: *Southern Horrors*, *A Red Record*, and *Mob Rule in New Orleans on Lynchings*.²⁷⁷ These publications created a detailed statistical and anecdotal record of lynchings that serve as an important starting point for engaging in lynching research today. Her work also provides the model for most sophisticated works on lynching today: statistics combined with gruesome individual vignettes. The cumulative data packs the powerful punch of numeration, while the individual stories carry the moral authority of human torture and cast a spotlight on the size of the mobs and their willingness to engage in the most depraved atrocity.

Wells' work staked out another position in the development of the African-American perspective on the fairness of courts. Her critique of the judiciary gave public voice to the then-emerging African-American narrative and divided memory about justice.²⁷⁸ A black defendant was found not guilty of the crime of murder by an all-white jury near Roseland, Louisiana, in 1894. However, a mob gathered near his home a few nights after the verdict was rendered. The newly acquitted defendant went to the door of his home, not suspecting the fate that awaited him. He was grabbed by the mob, taken to a nearby location, and hanged. After this lynching, Wells-Barnett argued,

The entire system of the judiciary of this country is in the hands of white people. To this add the fact of the inherent prejudice against colored people, and it will clearly be seen

275. WELLS-BARNETT, *supra* note 10, at 15.

276. Paula Giddings, *Woman Warrior: Ida B. Wells, Crusader-Journalist*, ESSENCE, Feb. 1988, at 146.

277. WELLS-BARNETT, *supra* note 10.

278. *Id.* at 56-57.

that a white jury is certain to find a Negro prisoner guilty, if there is the least evidence to warrant such a finding.²⁷⁹

This argument anticipates the findings of Harvard sociologist Lawrence Bobo that 75 percent of African-Americans distrust the fairness of the criminal justice system for African-American defendants.²⁸⁰ Wells could have been a celebrity commentator at the O.J. Simpson and Rodney King trials. The conviction among many African-Americans that the judicial system cannot deliver impartial justice has deep roots in the rhetoric and research of Wells' anti-lynching campaign.

B. Riots

The definitional problems for lynchings discussed above are multiplied exponentially when we turn our attention to race riots. In what follows, I have adopted legal scholar Donald Horowitz's well-developed conceptual definition of the deadly ethnic riot: "[It] is an intense, sudden, though not necessarily wholly unplanned, lethal attack by civilian members of one ethnic group on civilian members of another ethnic group, the victims chosen because of their group membership."²⁸¹ In general, scholars of sociology, political science, and social psychology, have struggled in vain to create useful narrative frames and predictive models for violent collective behavior.²⁸² Most of these models have failed to establish theories of aggression that account for the racial atrocities that characterized race riots in America.²⁸³ Horowitz' recent work enhances the literature by addressing the prevalence of mutilation and sadistic violence in race riots.²⁸⁴

The difficulties inherent in the early effort by sociologists to analyze race riots can be seen in the following example. As recently as 1969, Lieberman and Silverman constructed a sociological definition of race riot, but it failed to recognize the racial component of riot causation when applied to an apparently simple case:

Riots, as distinguished from lynchings and other forms of collective violence, involve an assault on persons and property simply because they are part of a given subgroup of the com-

279. *Id.* at 102.

280. Lawrence D. Bobo et al., *Enduring Two-ness*, 12 PUBLIC PERSPECTIVE 15 (2001).

281. HOROWITZ, DEADLY ETHNIC RIOT, *supra* note 20, at 1.

282. *Id.* at 34-42.

283. Donald L. Horowitz, *Racial Violence in the United States*, in ETHNIC PLURALISM AND PUBLIC POLICY 187-88 (Nathan Glazer & Ken Young eds., 1983).

284. *See generally* HOROWITZ, DEADLY ETHNIC RIOT, *supra* note 20.

munity. In contrast, lynchings and other types of violence are directed toward a particular individual as a collective response to some specific act. In practice, this distinction is sometimes difficult to apply, particularly in deciding when a localized racial incident has become a riot. *We have excluded some of the housing "riots" from our analysis because they were directed specifically at Negroes attempting to move into an area rather than at Negroes per se.*²⁸⁵

This baffling introduction to the analysis of race riots reflects the difficulties researchers encountered in attempting to create useful models for collecting and analyzing data on race riots. Some of the analytical problems can be attributed to bad or missing data, as in the case of lynchings discussed above. But some of the conceptual problems are self-inflicted. Try as I might, I cannot understand the analytical difference between riots that are directed at "Negroes *per se*" and riots that were sparked by Negroes attempting to move into an area. My test of causation here would be to determine whether white, Hispanic, or other citizens moving into the area caused riots. If not, then I would be willing to classify riots triggered by blacks exercising constitutionally protected rights to be free of housing discrimination as race riots. The Lieberman and Silverman analysis is a largely sympathetic treatment of the socially disruptive problem of race riots. Unfortunately, the uncritical application of the muddled sociological framework renders the results largely useless for determining the incidence, scope, and reasons for race riots.

Horowitz appreciates the complexity of the definitional task and provides a more nuanced approach:

A study of ethnic riots requires conceptual clarity about ethnicity and about riots. By conceptual clarity, I mean something beyond mere definitions of terms—a starting sense of what the two phenomena are and where they begin and end. It is altogether too easy to take both as perfectly bounded, reified entities, hard substances, as it were, that can be diced and sliced without spilling out their contents. In the case of the two phenomena, this is far from true, and it is *best to understand their fluidity, internal and external, before dissection begins.*²⁸⁶

285. Stanley Lieberman and Arnold R. Silverman, *The Precipitants and Underlying Conditions of Race Riots*, in RACIAL VIOLENCE IN THE UNITED STATES 354 (Allen D. Grimshaw ed., 1969) (emphasis added).

286. HOROWITZ, DEADLY ETHNIC RIOT, *supra* note 20, at 43 (emphasis added).

In contrast to Lieberman and Silverman, NAACP attorney, later Supreme Court Justice, Thurgood Marshall, writing for the NAACP's *Crisis* magazine, had no difficulty identifying the racial causation for the riot sparked by blacks seeking to enter their own homes in the Sojourner Truth public housing project in 1942:

Riots are usually the result of many underlying causes, yet no single factor is more important than the attitude and efficiency of the police Much of the blood spilled in the Detroit riot is on the hands of the Detroit police department [A] mob of white persons armed with rocks, sticks and other weapons attacked Negro tenants who were attempting to move into the project. Police were called to the scene. Instead of dispersing the mob which was unlawfully on property belonging to the federal government and leased to Negroes, they directed their efforts toward dispersing the Negroes who were attempting to get into their own homes. All Negroes approaching the project were searched and their automobiles likewise searched. White people were neither searched nor disarmed by the police. This incident is typical of the one-sided law enforcement practiced by Detroit police. White hoodlums were justified in their belief that the police would act the same way in any further disturbances.²⁸⁷

The problem with riot statistics is twofold. First, death totals from riots did not receive the same systematic attention as those for lynching, setting aside for a moment the problem of the missing years. Second, when sociologists and political scientists turned to the classification of various forms of collective violence, the definitional models they initially used were wildly imperfect.²⁸⁸ Because riots are collective events, they have a spontaneity and fluidity that make it difficult to create reliable models for classifying the different types of riots and the causation and trajectory of a particular riot. Prediction of the conditions which might lead to future race riots has been an elusive goal for both sociologists and political scientists concerned with the social, economic, and political instability associated with riots. As discussed above, creating viable models of causation for all forms of collective violence, including race riots, proved equally frustrating.

Anti-lynching crusader Ida B. Wells contributed to the early narrative for understanding riots. She wrote:

287. Thurgood Marshall, *The Gestapo in Detroit*, in RACIAL VIOLENCE IN THE UNITED STATES, *supra* note 285, at 140.

288. HOROWITZ, DEADLY ETHNIC RIOT, *supra* note 20, at 34–42.

The first excuse given to the civilized world for the murder of unoffending Negroes was the necessity of the white man to repress and stamp out alleged "race riots." For years immediately succeeding the war there was an appalling slaughter of colored people, and the wires usually conveyed to northern people and the world the intelligence, first, that an insurrection was being planned by Negroe[s] It was always a remarkable feature of these insurrections and riots that only Negroes were killed during the rioting, and that all the white men escaped unharmed. From 1865-1872, *hundreds* of colored men and women were mercilessly murdered and the almost invariable reason assigned was that they met their death by being alleged participants in an insurrection or riot. But this story at last wore itself out. No insurrection ever materialized; no Negro rioter was ever apprehended and proven guilty, and no dynamite ever recorded the black man's protest against oppression and wrong.²⁸⁹

W.E.B. Du Bois also noted the one-sided losses in the so-called riots: "Armed guerilla warfare killed thousands of Negroes; political riots were staged; their causes or occasions were always obscure, their results always certain: ten to one hundred times as many Negroes were killed as whites."²⁹⁰ Social economist Gunnar Myrdal also objected to the term "riots" to describe these racial pogroms. He preferred to call this phenomenon "a terrorization or massacre . . . a magnified, or mass, lynching."²⁹¹

As Wells and Du Bois noted, "riot" was often a pretextual euphemism for "nigger hunt," and trumped-up fears of insurrection became the pretext for routing entire black communities.²⁹² These riot death totals did not capture public attention because the "riot" label repositioned whites as acting in self-defense, which is not a crime. Thus the victims of the "riot" became marauders, killed within lawful defenses to murder charges. Pretext, euphemism, and calculated mischaracterization were central features of the public discourse throughout the era of the most intense racial violence. These strategies make many of the news accounts and eyewitness reports of reasons for racial violence highly unreliable. More importantly, there are simply no records at all for many "riots." These

289. WELLS-BARNETT, *supra* note 10, at 57-58 (emphasis added.)

290. DU BOIS, BLACK RECONSTRUCTION, *supra* note 13, at 674.

291. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 566 (1944).

292. DU BOIS, BLACK RECONSTRUCTION, *supra* note 13, at 674; WELLS-BARNETT, *supra* note 10, at 57-58.

events have been erased from the record of the total racial carnage then underway.

In the summer of 1919, there were twenty-three race riots,²⁹³ primarily in northern cities. James Weldon Johnson called this the “Red Summer” because riots had become such a predictable feature of urban life.²⁹⁴ That summer, the country, North and South, was immersed in the most intense period of racial violence this nation has ever experienced. There were twenty-six race riots in northern cities such as Chicago, Illinois; Omaha, Nebraska; and Washington, D.C.; as well as in southern cities such as Elaine, Arkansas; Charleston, South Carolina; Knoxville and Nashville, Tennessee; and Longview, Texas. Although mortality totals are not reliable, some estimates put the death toll at more than 100 blacks killed in that summer’s riots. Moreover, thousands were injured in the violence and/or burned out of their homes.

Northern politicians leapt into the fray with legislative proposals that assumed the riots were bilateral conflicts and that black and white leaders would agree that racial segregation was the only solution to the problem. A Chicago city council resolution sought to enforce racial segregation for the explicit purpose of avoiding riots. *The Chicago Daily Tribune* reported the following piece:

Segregation—in other words, the establishment of residential racial zones for white people and colored people—was put forward in the city council yesterday as the one real and permanent solution to Chicago’s racial problems In the preamble, the resolution asserts that it is the belief of the leaders of both races that the riots might have been avoided if certain elements had not stirred up racial prejudice for their own “personal and political benefit.”²⁹⁵

Linguistic subterfuge, when added to the distorted counting strategies discussed above, became an important element of the denial and erasure that led to the dichotomous racial narratives we see today. If a nigger hunt is a “riot” and a lynching is not counted,

293. A central problem in this important group of riots has been quantifying the exact numbers of riots that took place. An excellent analysis of the reasons for this quantification problem, and an effort to quantify the numbers of riots that took place, can be found in Jan Voogd’s paper, *Red Summer, 1919*, which was presented at the recent conference entitled “Lynching and Racial Violence in America: Histories and Legacies,” held at Emory University in October of 2002. See Voogd, *supra* note 238.

294. JAMES WELDON JOHNSON, *BLACK MANHATTAN* 236 (Da Capo Press 1991) (1930).

295. *Segregation To Prevent Race Riots Is Urged*, CHICAGO DAILY TRIB., Aug. 11, 1919, www.lib.uchicago.edu/ecuip/diglib/social/chi1919/aine/a5/19a5d5.html.

then the public representation of the systematic violence experienced by blacks will be severely diminished. These sins of omission and commission accumulate to create an unreliable faux history justifying public decisions based on race. One far-reaching consequence of the distortion of the public counting of the victims of racial violence is that the complex consequences of the aftermath of slavery have been reduced and marginalized in the popular imagination. The public debate concerning critical decisions of criminal justice enforcement standards, affirmative action in education and employment, fair housing remedies, welfare, and the need for protection from racist hate speech in the academic community has become the captive of what Hegelian philosopher Richard Gaskins has called "argument-from-ignorance."²⁹⁶

In this context, an illustrative argument-from-ignorance can be found in a statement concerning lynching made by National Book Critics Circle award-winner Benjamin Schwarz. Schwarz, in a lengthy review of the book of picture postcards from the lynching exhibit *Without Sanctuary*, argues that both blacks and whites engaged in lynching as a method of social control, implying equal motivation and frequency. He writes that:

Racist attitudes undeniably played a central role in Southern lynchings but they weren't in themselves a sufficient cause. After all, whites throughout the South were "racist," yet lynchings were far more likely to occur in some areas of the region than in others and not necessarily in the most racist places . . . And, although racism surely existed in the South of the 1860's, '70s and '80s, lynching didn't sweep through the region then. If . . . lynching was merely a device to assert "white supremacy," why did white supremacists *wait more than a decade* after the end of Reconstruction to start their sanguinary campaign? What, in short, accounts for lynching's strange career?²⁹⁷

296. RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* 217 (1992). Gaskin observes that, "We know that competing schools of thought emerge within every discipline and for every public problem; we observe them struggling for dominance. . . . And we cannot miss the adversarial overtones that increasingly turn discussions into futile contests of public assertion in which there can be no real winners." *Id.* at xiii-xiv. "The argument-from-ignorance is widely distributed across the rhetorical landscape. Its general pattern is an affirmative inference from the lack of knowledge. In order to work as an argument, it requires some kind of decision rule (usually unstated) about how the parties to a discussion should proceed in the face of uncertainty or indeterminacy." *Id.* at xv.

297. Benjamin Schwarz, *The Killing Fields*, L.A. TIMES, Feb. 13, 2000, at 1 (reviewing JAMES ALLEN, *WITHOUT SANCTUARY* (2000)) (emphasis added).

In the absence of information about the missing years, Schwarz concludes that lynching did not begin until 1882, the date of the *Chicago Tribune's* first annual lynching tally.²⁹⁸ He deduces from the combination of this time lapse and the presence of a (comparatively small) number of same-race lynchings by black mobs that racism cannot be shown to have a causal relationship to lynching. He then offers an alternative cause, namely black male criminality and vagrancy.²⁹⁹ This argument fails for many reasons, but central among these reasons is the author's exclusive reliance on the incomplete statistical data for lynching during the missing years and the author's overlooking the large body of evidence compiled by distinguished historians from narrative and anecdote that the period immediately after the Civil War contained some of America's bloodiest "race riots," "nigger hunts," and lynchings—all unrelated to black crime. Thus, the existence of an incomplete lynching database, shaped by the forces I have discussed above, has become the basis for the mistaken argument that:

[t]he relationship between black criminality and lynching in the South has been both exaggerated and avoided Many modern historians have chosen to ignore the rise of black crime in the South altogether It was only in the late 1880s that this crime and its punishment commanded a new and tremendously magnified attention.³⁰⁰

The framework of this fallacious argument is further supported by shifting the burden of proof³⁰¹ to the advocate claiming the historical existence of racial violence, including lynching, in the period 1865-1880. Ironically, the claim that the period following the Civil War was one marked by widespread racial atrocities is an argument "from ignorance" only because the slanted newspaper coverage and racist obfuscation of the day now conspire to protect the perpetrators by erasing the proof of their misdeeds from history.

298. *Id.*

299. *Id.*

300. *Id.*

301. See GASKINS, *supra* note 296, at xv.

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