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ARE WE NEARING THE END OF IMPUNITY FOR TAKING BLACK LIVES?

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"Deliberately withholding protection against criminality (or conduct that should be deemed criminal) is one of the most destructive forms of oppression that has been visited upon African Americans."[1]

INTRODUCTION

Throughout most of U.S. history, law has provided scant protection of African American lives. But is the centuries old saga of impunity for the murder of blacks and other peoples of color by whites in the United States finally approaching its end? The question may seem strange given the national controversies about decisions not to prosecute the law enforcement officers who killed Michael Brown, [2] Eric Garner,[3] and Tamir Rice.[4] But the public outcry about the death of these boys and men and the insistent demands for police accountability are markedly different from the public indifference and state tolerance of killing black people in the not so distant past.

During America's colonial and antebellum eras, the

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[1] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29 (1997).

[2] Andrew Cohen, *Law and Disorder in Ferguson*, THE MARSHALL PROJECT (Nov. 25, 2014), https://www.themarshallproject.org/2014/11/25/law-and-disorder-in-ferguson#.aumtpbbkh; *Department Of Justice Report Regarding The Criminal Investigation Into The Shooting Death Of Michael Brown By Ferguson, Missouri Police Officer Darren Wilson*, 4–5 (Mar. 4, 2015), www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1. At approximately noon on Saturday, August 9, 2014, Officer Darren Wilson of the Ferguson (Missouri) Police Department shot and killed Michael Brown, an unarmed eighteen-year-old. Neither the Saint Louis County Grand Jury nor the U.S. Department of Justice prosecuted Wilson.

[3] *See* Al Baker & Eli Rosenberg, *Federal Grand Jury Begins Hearing Evidence in Eric Garner Case*, N.Y. TIMES, Feb. 11, 2016, http://www.nytimes.com/2016/02/11/nyregion/federal-grand-jury-begins-hearing-evidence-in-eric-garner-case.html. Eric Garner died while in a chokehold administered by Staten Island Police Officer Daniel Pantaleo on July 17, 2014. On December 3, 2014, the Staten Island Grand Jury issued its decision not to indict Pantaleo. In February 2016, a federal grand jury was empaneled to determine if federal charges should be brought.

[4] Oliver Laughland, Jon Swaine & Daniel McGraw, *Cleveland officer who fatally shot Tamir Rice will not face criminal charges*, THE GUARDIAN, Dec. 28, 2015, http://www.theguardian.com/us-news/2015/dec/28/tamir-rice-shooting-no-charges-cleveland-officer-timothy-loehmann. Twelve-year-old Tamir Rice was shot by a Cleveland police officer on November 22, 2014, when responding to 911 calls reporting that a male was pointing a gun at people in a park. Officer Timothy Loehmann opened fire within seconds of arriving at the park, fatally wounding Rice. The Cayahoga County Grand Jury's decision not to indict Loehmann was announced on December 28, 2015.

killing of black people by white civilians was countenanced in code and judicial decisions.[5] Violent suppression of black resistance was necessary to sustain systems of chattel slavery, white supremacy, and manifest destiny. Lynching and multiple murders of blacks and other non-whites dominated the post-Reconstruction era, but resulted in only a few, primarily unsuccessful, attempts to prosecute the perpetrators of these crimes.[6] Only in the final quarter of the twentieth century did private white citizens incur a serious risk of prosecution and conviction for slaying a black person.[7] However, even this progress is muted when law enforcement officers seem allowed to employ a continuing license to kill unarmed suspects and face little chance of punishment. The disproportionate number of minorities—particularly African Americans—counted among those killed was one of the precipitating factors that gave rise to the Black Lives Matter movement.[8]

This Article will discuss the failure of law to protect black lives throughout the history of the United States. Part I will

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[5] The slave code of the Virginia colony included the following provison; And if any slave resist his master, or owner, or other person, by his or her order, correcting such slave, and shall happen to be killed in such correction, it shall not be accounted felony; but the master, owner, and every such other person so giving correction, shall be free and acquit of all punishment and accusation for the same, as if such incident had never happened…An Act Concerning Servants and Slaves (1705) §XXXIVin COLONIAL AMERICA AND THE ATLANTIC WORLD: A HISTORY IN DOCUMENTS. 114 (2009). For antebellum statute and caselaw *see,* KENNEDY, *supra*, n.1 at 29 referencing North Carolina statute and Mississippi Supreme Court decision.

[6] *See Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUSTICE INITIATIVE 4-5, 10, 18 (2015), http://www.eji.org/files/Lynching_in_America_2d_Ed_Summary.pdf; John Johnson Jr., *How Los Angeles Covered Up the Massacre of 17 Chinese*, LA WEEKLY, Mar. 10, 2011, http://www.laweekly.com/news/how-los-angeles-covered-up-the-massacre-of-17-chinese-2169478; William D. Carrigan & Clive Webb, *When Americans Lynched Mexicans*, N.Y. TIMES, Feb. 20, 2015, http://www.nytimes.com/2015/02/20/opinion/when-americans-lynched-mexicans.html?_r=0. Native Americans were subjected to massacres by civilians and military forces in numbers that resulted in genocide. William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 19 (2002).

[7] *See* Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1226-27, 1252 (2003).

[8] Alex Altman, *Black Lives Matter: A new civil rights movement is turning a protest cry into a political force*, TIME, Dec. 21, 2015, http://time.com/time-person-of-the-year-2015-runner-up-black-lives-matter/.

examine how some statutes negated common law liability for homicide, while others promised limited protection but were rarely enforced. Part II presents an overview of how lynching and other forms of vigilantism directed at blacks defied the rule of law in southern states for seven decades following the Reconstruction. Part III looks at how the civil rights era ushered in new norms of holding white civilians who killed blacks legally responsible. Part IV discusses contemporary movements to hold law enforcement officers, the last bastion of impunity for killing African Americans, accountable by criminal prosecution.

I. LEGAL PROTECTIONS (OR A LACK THEREOF) FOR THE LIVES OF SLAVES

A. African Bondage

Sub-Saharan Africans were targets for conquest and conversion in the eyes of Muslim and Christian rulers of the second millennium.[9] Muslims engaged in wars with Africans, pushing Islam more deeply into Africa with every victory.[10] Portuguese armies captured Africans on the Guinea coast and enslaved them—originally for bondage in Portugal, then then to exchange for gold and, in about 1560, for export to Brazil.[11] Slaves were also obtained from the interior of Africa through trade with African natives. When Africans sold other Africans to the trans-Mediterranean or transatlantic slave traders they generally did not sell their kinsmen, but their

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[9] In Islam slavery was used as a means of converting non-Muslims. PAUL E. LOVEJOY, TRANSFORMATIONS IN SLAVERY: A HISTORY OF SLAVERY IN AFRICA 40 (1983). Spanish monarchs imported non-Muslim sub-Sarharan Africans to the West Indies to protect recently converted Christian Amerindians from exposure to Muslims. Carl Wise and David Wheat, *African Laboreres for a New Empire, Iberia, Slvery and the Atlantic World: The Spanish and New World Slavery*. Low Country Digital History Initiative http://ldhi.library.cofc.edu/exhibits/show/african_laborers_for_a_new_emp/the_spanish_and_new_world_slav.

[10] LOVEJOY, TRANSFORMATIONS IN SLAVERY at 28-29.

[11] Carl Wise and David Wheat, *African Laborers for a New Empire, Iberia, Slavery and the Atlantic World: Slavery in Iberia before the Trans-Atlantic Trade*. Low Country Digital History Initiative. http://ldhi.library.cofc.edu/exhibits/show/african_laborers_for_a_new_emp/slavery_in_iberia_before_the_t; LOVEJOY, TRANSFORMATIONS IN SLAVERY at 61; David Eltis, *A Brief Overview of the Trans-Atlantic Slave Trad; Early Slaving Voyages* (2007) http://www.slavevoyages.org/resources/ assessments/essays

enemies.[12] Writes Thomas C. Holt: ". . .in most African societies, misfortune might reduce members of one's own group to slavery, but normally one's own people were not sold abroad. . . .Capturing and selling slaves to Europeans may be regarded as an extension of a preexisting set of social relations and institutions, but it also reflected the growing power of European partners to turn the trading relation to their own needs and ends over time."[13]

The primary source of African slaves sent to North America were captured in religious and tribal wars, kidnapped in village raids, or paid as tribute.[14] In the eighteenth century the west-central region of Africa experienced political and social instability due to civil war, European slave raiding and native warlords.[15] No central authority exisited to enforce law and order or to punish the persons who cost thousands of Africans their freedom or their lives.[16]

It is estimated that half of those captured died in transit to the slave ports, and over two million more Africans died in the overseas transit component of the transatlantic slave trade.[17] The deaths of captives were treated as property

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[12] *Id.*

[13] THOMAS C. HOLT, CHILDREN OF FIRE: A HISTORY OF AFRICAN AMERICANS 51, 74 (2010).

[14] *See* LOVEJOY at 93- 94, 96-97, 99-100.; *See also,* ROBIN D. G. KELLEY & EARL LEWIS, TO MAKE OUR WORLD ANEW, A HISTORY OF AFRICAN AMERICANS TO 1880 14 (2005). From the 1600s to 1800s, extensive political instability in northern, central, and eastern Africa created an array of mechanisms for obtaining human fodder for the Atlantic slave trade. A handful of large states, such as Songhai and Borno, were able to demand tribute paid in human slaves or engage in slave raids among weaker states or villages. Mercenary soldiers served warlords by capturing men, women, and children to use for trading with Europeans and Arab merchants. Warlords in small Islamic and pagan states, such as Watamba and Kesenje, demanded tribute to forestall raiding. In western Africa, Kongo nobility raided and pawned peasants for export to the slave trade. During periods of severe drought, self-enslavement and the sale of children occurred to avoid starvation.

[15] LOVEJOY at 97

[16] *Id.*

[17] Matthew White, *Colonial Activities: Slavery: Christendom*, SELECTED DEATH TOLLS FOR WARS, MASSACRES AND ATROCITIES BEFORE THE 20TH CENTURY, http://www.necrometrics.com/pre1700a.htm. These numbers are determinable because Africans had entered the European market and became the subject of accounting. Estimates range from a 35% to an 80% mortality rate from the time of capture in Africa through the first "seasoning" stage of slave labor. Matthew White estimates the most likely mortality rate at 62%.

losses[18] with no criminal responsibility for deaths of human beings.[19] But once these captured Africans entered bondage in European colonies or the United States, they became subject to western legal traditions that imposed a range of sanctions for the taking of human life, including traditions that criminalized the killing persons classified as slaves.[20]

European countries within the civil law tradition could look to the Justinian Institutes for rules governing slavery. The Institutes provided: "The main classification in the law of persons is this: all men are either free or slaves. . . Slavery is

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[18] The "case of Slaves is the same as that of Horses being thrown overboard" announced Lord Chief Justice Mansfield when presiding over a motion for a new trial of an insurance case involving jettisoned slaves. Anita Rupprecht, *A Very Uncommon Case: Representations of the Zong and the British Campaign to Abolish the Slave Trade,* 28 J OF LEG. HIST. 329, 329 (2007). Owners of ships that transported slaves to the Americas could purchase insurance to cover loss of their ships or of their slave cargo. Less commonly, captains and crew members could insure their "privilege" slaves, whom they were allowed to sell privately. Insurance coverage protected against losses arising from 'perils of the sea,' but not from deaths due to illness, common mortality or 'ill treatment.' Mitta Sharafi, *Insurance,* ENCYCLOPEDIA OF THE MIDDLE PASSAGE, (Toyin Falola and Amanda Warren, eds.) 230, 231 (2007).

[19] Neither Parliament nor Congress regulated the transport of slaves from Africa to the Americas until the late 18th Century. Parliament's first Act to control slavery was the Dolben's Act of 1788, 28 Geo.III, c.54, that attempted to limit the number of children transported for slavery. Congress enacted the The Slave Trade Act of 1794. 1 Stat. 348. The failure of the common law to prosecute even the deliberate killing of slaves in transit is illustrated by Zong incident. In 1781, Luke Collingwood, the captain of the ship Zong ordered his crew to throw overboard 132 living men women and children who were originally destined for sale as slaves in the Carribean. The owners of the Zong sought compensation from their insurers for the loss of these captives (at 30£ each), claiming that they were jettisoned to save the lives of the crew and remaining captives. Were this the case, the loss would be covered as a 'peril of the sea,' but if captives died from starvation or lack of water, their loss would be considered from 'natural causes,' which were uninsured. The insurers denied coverage and the owners filed suit. The resulting case, Gregson v. Gilbert (1783) gave rise to a trial on the issue of insurance liability with a verdict for the plaintiffs. Upon a motion for a new trial the panel of judges found that the plaintiffs had not established a need for jettison. Although the motion resulted in an order to retry the case, the ship owners appear to have abandoned their lawsuit. Abolitionist Granville Sharp worked to convince members of the Bar to prosecute the perpetrators of the deaths, but no criminal prosecution ever arose from the Zong massacre. However, the case brought the issue of slave transport to the attention of the English public and was important in fomenting abolitionist sentiment. *See,* Jane Webster, *The Zong in the Context of the Eighteenth Century Slave Trade*, 28*,* J OF LEG. HIST 285-98 at 285, 289, 291, 295, and 297 (2007).

[20] *See, e.g.*, State v. Reed, 9 N.C. 454. Discussed *infra*, n.40.

an institution of the law of all people it makes a man the property of another, contrary to the law of nature."[21]

The Institutes noted a tension between the theoretical absolute power of masters over slaves and limits on that power imposed by social and governmental norms:

> Owners authority over slaves restson the law of all peoples. We can observe the same thing everywhere: owners hold the power of life and death over slaves and owners get whatever the slave acquires. But nowadays no one in our empire may be cruel to his slaves except on legally recognized grounds and then only withn reason. [22]

Under Roman law, the punishment for the murder of a free person was banishment[23] (and compensation to the family of the murdered person), while punishment for the murder of a slave was governed by the Lex Aquilia, the Roman law governing wrongful loss to property[24] and limited to compensation to the slave owner for the wrong.[25]

Although English common law did not recognize slavery in the Roman tradition, villeinage—a status tied to the British land tenure system—was akin to slavery. [26] Yet English common law protected the lives of villeins. "In England killing a villein was as much murder as killing a lord. Yet villeins were then the most abject slaves and could be bought and sold as chattels; but because slaves can be

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[21] JUSTINIAN INSTITUTES, Book I, Chapter III, The Law of Persons. Translated with an Introduction by Peter Birks and Grant McLeod. (1987) at 39.

[22] JUSTINIAN INSTITUTES, Book I, Chapter VIII, Independent and Dependent People, *id.* at 41.

[23] John Bagnall Bury, *The Legislative Work of Justinian*, HISTORY OF THE LATER ROMAN EMPIRE, http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/BURLAT/23*.html. "Except in the case of parricide (murder of near relatives), for which Constantine (had) revived the ancient punishment of the culleus, or sack, in which the criminal was sewn up in the society of snakes (serpentum contuberniis misceatur) and drowned."

[24] Andrew Mason, *Underlying Yet Unwritten The Standards of Care and the Lex Aquilia,* http://www.roman-empire.net/articles/article-021.html.

[25] S.P. Scott, *The Digest or Pandects, Book IX, Tit. 2, On the Lex Aquila, in* THE CIVIL LAW (1932) http://droitromain.upmf-grenoble.fr/Anglica/D9_Scott.htm.

[26] Jonathan A. Bush, *The British Constitution and the Creation of American Slavery*, *in* SLAVERY AND THE LAW 379, 384 (Paul Finkelman ed., 1997). "Although English law had never abolished the category of "villenage"—common law serfdom—it was in complete desuetude, and common law had no other category for slaves."

bought and sold, it does not follow that they can be deprived of life."[27] The status of being English protected even the least of Englishmen.[28] Eventually, the status of being present in England protected any person from the status of being a slave, even people who were transported from Africa and the Americas for the purpose of bondage.[29]

Unfortunately, in the Spanish and Portuguese colonies of the Americas and Caribbean Islands, the precepts of the Justinian Codes gave way to a more mercantile and cruel approach to slavery. Catholic European colonizers enslaved infidels, indigenous Americans, and Africans, relying on their tradition that non-Christians could be enslaved for life.[30] But because slavery was supposed to terminate upon conversion to Christianity, the colonizers substituted color as the predicating characteristic of slavery and made it hereditary and transferable to children, based on the mother's status.[31] Slavery in the English colonies adopted the rule by which slavery was inherited from the mother.[32]

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[27] JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY: BEING A COMPILATION OF ALL THE DECISIONS MADE ON THAT SUBJECT, IN THE SEVERAL COURTS OF THE UNITED STATES, AND STATE COURTS. WITH COPIOUS NOTES AND REFERENCES TO THE STATUTES AND OTHER AUTHORITIES, SYSTEMATICALLY ARRANGED 253 (1837).

[28] *See* Rachel Foxley, *John Lilburne And The Citizenship Of 'Free-Born Englishmen'*, 47 HIST. J. 849, 852-53 (2004).

[29] Slavery Abolition Act, 1833, 3 & 4 Will. IV., c. 73 (Eng.); *see also,* Somerset v. Stewart, (1772) 98 Eng. Rep. 499, 510 (K.B.) (return on a writ in habeus corpus for the release of James Somerset "a negro of Africa sold to Charles Stewart, Esq, then in Jamaica, (who) has not been manumitted since.") The decision held that Somerset could not be detained for transport to Jamaica because slavery was unsupported by positive English law and therefore no action could be brought in English courts for the capture of a slave for sale abroad.

[30] *See* KELLEY & LEWIS, *supra* note 14.

[31] *Id.*

[32] "Act XII Negro womens children to serve according to the condition of the mother" (Laws of Virginia, Dec. 1662, 14th Charles II). Hening's Statutes at Large, 2 (1823) p. 170. Available from: Law Library of Congress, https://memory.loc.gov/ammem/awhhtml/awlaw3/slavery.html. *"Negro womens children to serve according to the condition of the mother.* WHEREAS some doubts have arrisen whether children got by any Englishman upon a Negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly,* that all children borne in this country shalbe held bond or free only according to the condition of the mother, *And* that if any christian shall committ ffornication with a Negro man or woman, hee or shee soe offending shall pay double the ffines imposed by the former act."

B. The Legality of Murdering Slaves in North America

The English colonies on the North American continent that became the United States varied in different times and regions as to whether they criminalized or authorized taking the life of a slave or free person of African descent. For example, the Fundamental Constitutions of Carolina of 1669 provided: "Every freeman of Carolina shall have absolute power and authority over his negro slaves, of what opinion or religion soever," [33] while the 1740 Slave Code of South Carolina expressly discouraged brutality and imposed civil disabilities and liability on a person who murdered a slave.[34]

The slaveholding French colony in Louisiana afforded capital punishment for certain offenses that involved insubordination of slaves to their masters. The Code Noir, originally promulgated by Louis XIV for his French Caribbean colonies, took effect in 1724 and remained law until the U.S. took possession of Louisiana in 1803.[35] The Code Noir prescribed capital punishment for subordination and offenses including battery and theft:

> XXVII. The slave who, having struck his master, his mistress, or the husband of his mistress, or their children, shall have produced a bruise, or the shedding of blood in the face, shall suffer capital punishment.
>
> XXVIII. With regard to outrages or acts of violence committed by slaves against free persons, it is our will that they be punished with severity, and even with death, should the case require it.
>
> XXIX. Thefts of importance, and even the stealing of horses, mares, mules, oxen, or cows, when executed by

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[33] "Provision one hundred and ten" (The Fundamental Constitutions of Carolina, Mar. 1, 1669). North Carolina Colonia records 187-205. Locke's Works (Eighth Edition) X, 175. Available from: The Avalon Project, Lillian Goldman Law Library, Yale Law School, http://avalon.law.yale.edu/17th_century/nc05.asp.

[34] 1740 Slave Code of South Carolina, § 37. Available from: duhaime.org, http://www.duhaime.org/lawmuseum/lawarticle-1501/1740-slave-code-of-south-carolina-articles-34-37.aspx. "Be it enacted by the authority aforesaid, that if any person of [sic] persons whosoever, shall willfully murder his own slave, or the slave of any other person, every such person, shall, upon conviction thereof, forfeit and pay the sum of seven hundred pounds, current money, and shall be rendered, and is hereby declared altogether and forever incapable of holding, exercising, enjoying or receiving the profits of any office, place or employment, civil or military, within this Province."

[35] Louisiana's Code Noir, §§ 27–29 (1724). Available from: The Black Past: Remembered and Reclaimed, http://www.blackpast.org/primary/louisianas-code-noir-1724.

> slaves or manumitted persons, shall make the offender liable to corporal, and even to capital punishment, according to the circumstances of the case.[36]

Persons other than slave owners were often granted immunity from criminal prosecution for killing a slave. In the English colonies, a "white person's right to legally kill a slave contracted and expanded in conjunction with the patterns of social and economic development. One legal principle remained constant, however; the master's right to kill exceeded the right of a stranger to the slave. The broadest decriminalization of slave killing occurred in the early colonial statutes adopted in South Carolina, Georgia, North Carolina, and Virginia." [37] Statutes supplanted common law culpability for homicide, permitting slaveholders and others to wield maximum force to control bondsmen.[38]

The power to apply corporal and capital punishment to a slave was integral to the system of human bondage. In the 1829 case of *State v. Mann*, North Carolina Supreme Court Justice Thomas Ruffin wrote:

> But upon the general question, whether the owner is answerable *criminaliter*, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, the Court entertains but little doubt. —That he is so liable, has never yet been decided; nor, as far as is known, been hitherto contended. There have been no prosecutions of the sort. The established habits and uniform practice of the country in this respect, is the best evidence of the portion of power, deemed by the whole community, requisite to the preservation of the master's dominion . . . obedience (of the slave) is the consequence only of uncontrolled authority over the body . . . The power of the master must be absolute, to render submission of the slave perfect.[39]

But four years later, the Supreme Court of North Carolina decided that the common law drew the line at depriving a slave of his life solely for the purpose of extracting his labor:

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[36] *Id.*
[37] ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 63 (Routledge Revival ed., 2nd ed. 2012).
[38] *Id.*
[39] State v. Mann, 13 N.C. 263, 265 (1829).

> In establishing slavery, then, the law vested in the master the absolute and uncontrolled right to the services of the slave, and the means of enforcing those services follow as necessary consequences; nor will the law weigh with the most scrupulous nicety his acts in relation thereto. But the life of a slave being no ways necessary to be placed in the power of the owner for the full enjoyment of his services, the law takes care of that, and with me it has no weight to shew that, by the laws of ancient Rome or modern Turkey, an absolute power is given to the master over the life of his slave. I answer, these are not the laws of our country, nor the model from which they were taken; it is abhorrent to the hearts of all those who have felt the influence of the mild precepts of christianity; and if it is said that no law is produced to shew that such is the state of slavery in our land, I call on them to show the law by which the *life* of a slave is placed at the disposal of his master.[40]

Although it was common for slave-states to impose no criminal liability or punishment for a slave owner who murdered a slave, some states gave non-slave owners rights to use force on slaves found in the wrong place.[41] Ultimately, masters and hirers had the greatest right to kill slaves with impunity; overseers were next in line, and strangers were third.[42] Even as to strangers, however, the slave was not granted the full protections guaranteed by the common law.[43] During the colonial period, punishment for killing a slave was only a short prison term and restitution of value to the slave owner. [44] Despite the existence of legal and customary prohibitions on killing slaves, these rarely resulted in conviction unless a person in control of a slave killed in a manner that was "egregiously cruel even by the highly permissive standards of the slave regime."[45]

In contrast, many jurisdictions imposed harsh repercussions when a slave or a black freeman injured a white person. As noted, slaves could be subjected to capital punishment for simply bruising or injuring a master or his

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[40] State v. Reed, 9 N.C. 454, 456 (N.C.1823).
[41] FEDE, *supra* note 37 at 69-71.
[42] *Id.* at 74-79.
[43] *Id.* at 72.
[44] William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, *in* SLAVERY AND THE LAW 43 (Paul Finkelman ed., 1997).
[45] KENNEDY, *supra* note 1, at 31.

family.[46] In Virginia, a slave could receive the death penalty for sixty-eight separate offenses for which whites would receive imprisonment or not be criminally prosecuted at all.[47] Kentucky law punished whites who committed voluntary manslaughter by imprisonment with hard labor for no less than two and no more than four years, while providing the death penalty for a slave convicted of the same act.[48] Slaves could be culpable for a larger array of criminal offenses and subject to a wider spectrum of punishments than were whites.[49] The notion of parity in punishment, whereby individuals would be punished with equal severity or equal lenience was repugnant to a racist system that viewed blacks as inferior to whites"[50] Criminal law therefore provided slight protection and enhanced punishment for slaves.

C. Runaways, Patterollers, and the Fugitive Slave Act: Deputizing White Communities to Regulate Black Presence

Before the Revolutionary War both northern and southern colonies enacted police regulations to limit the movement of slaves. Thus, slaves, and later free blacks, could not be in public after certain hours at night without leave. Under Connecticut law, slaves and "colored servants" found in public:

> after nine o'clock without permission to be out, could be taken before a justice, who might order not over ten lashes on the bare back, with costs, unless the master should choose to redeem his servant by paying a fine of not over ten shillings. Any strange Indian or negro might be taken up to be sent home, unless found to have a pass or to be free.[51]

South Carolina's Slave Code of 1740 made it lawful for

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[46] *See supra* note 37.
[47] A. Leon Higginbotham Jr. & Anne F. Jacobs, *The Law Only as an Enemy, The Legitimization of Racial Powerlessness through the Colonial and Antebellum Criminal Laws of Virginia,* 70 N.C.L. REV. 969, 977 (1991-1992).
[48] GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 86 (1856).
[49] Kennedy, *supra* note 1 at 77.
[50] Higginbotham Jr. & Jacobs, *supra* note 47, at 969.
[51] Jeffrey R. Brackett, *Status of the Slave*, *in* ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD, 1775-1789 266 (1889).

any person in the colony to "take, apprehend and secure any runaway or fugitive slave."[52] These laws formalized the idea that presence of blacks in public spaces without visible evidence of white permission is, in itself suspicious. Black presence was subject to surveillance by the general population who could rely on the law to corporally punish unauthorized African Americans. [53]

1. Patterollers

From a settlement in 1526 to which the Spanish brought the first African slaves to what is now the United States,[54] until the Thirteenth Amendment became effective, slave revolts were an ever-present threat to slaveholders.[55] The English colonists created slave patrols to protect themselves and the slaves they held as property.[56] The primary functions of the patrols were: to apprehend runaway slaves and return them to their owners; terrorize slaves to deter escape and revolts; and to summarily discipline slaves for defiance or disobedience.[57] The operation of these patrols imbued white citizens with the power and duty to scrutinize and regulate

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[52] 1740 Slave Code of South Carolina, § 25. Available from: duhaime.org, http://www.duhaime.org/lawmuseum/lawarticle-1501/1740-slave-code-of-south-carolina-articles-25-28.aspx.

[53] A Virginia law of 1705 alllowed slave masters to "kill and destroy" runaways. J. BLAINE HUDSON, ENCYCLOPEDIA OF THE UNDERGROUND RAILROAD, 25 (2006). The South Carolina Slave Codes of 1722 provided that a runaway slave attempting to leave the province was subject to the death penalty. CHARLES M. CHRISTIAN, SARI BARNETT, BLACK SAGA THE AFRICAN AMERICAN EXPERIENCE: A CHRONOLOGY 37 (1998).

[54] HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS 163 (1943); *see also,* Guy Cameron & Stephen Vermette, *The Role of Extreme Cold in the Failure of the San Miguel de Gualdape Colony*, 96 THE GEORGIA HISTORICAL QUARTERLY 291-307 (2012). The first slave revolt in continental North America was in what is now South Carolina in 1526. Lucas Vasquez de Ayllon, a Spanish colonizer founded a town near the Pee Dee River. This settlement, San Miguel de Gualdape, consisted of 500 Spaniards and 100 enslaved Africans. Illness soon afflicted the settlement and Ayllon, among many others, died. The South Carolina Indians became hostile to the settlement, and, in November, a number of the enslaved Africans rebelled, escaping from the settlement to join the local Indians.

[55] William E. White *The Fear of Slave Revolts*. Colonial Williamsberg http://www.history.org/history/teaching/enewsletter/volume2/february04/primsource.cfm.

[56] GARY POTTER, THE HISTORY OF POLICING IN THE UNITED STATES, PART 1, *available at* http://plsonline.eku.edu/insidelook/history-policing-united-states-part-1.

[57] *Id.*

the behavior of blacks at all times and places.[58] Local law enforcement officials and their facilities were used extensively to protect slaveholders' property interest in their slaves.[59] Professor Taja-Nia Y. Henderson notes how this practice reinforced associations between criminality and blackness in the minds of the public:

> As slaveowners invoked law functionaries and modes of law (including incarceration in public facilities) to control their "unruly" bondsmen, and as the states created legal structures to reward private citizens in the use of force against bondsmen, southern jurisdictions structured an expansive system of public and private authority over blacks.[60]

Southern legal and social norms maintained, "it is the duty of every good citizen, who finds a slave at large . . .to deliver him to the nearest justice of the peace, for commitment."[61] In 1704, the Carolina colonies formalized this norm, adopting the colonies' first Patrol Act.[62] The act required colonial militia captains to select ten militiamen to form these special patrols.[63] The captain was to muster his command, and with them: "ride from plantation to plantation, and into any plantation, within the limits or precincts, as the General shall think fit, and take up all slaves which they shall meet without their master's plantation which have not a permit or ticket from their masters, and the same punish."[64]

The 1704 act was primarily concerned about escaped slaves, while revisions in a 1721 act suggested increasing

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[58] Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, *available at* http://plsonline.eku.edu/insidelook/brief-history-slavery-and-origins-american-policing. "The literature clearly establishes that a legally sanctioned law enforcement system existed in America before the Civil War for the express purpose of controlling the slave population and protecting the interests of slave owners. The similarities between the slave patrols and modern American policing are too salient to dismiss or ignore. Hence, the slave patrol should be considered a forerunner of modern American law enforcement."
[59] Taja-Nia Y. Henderson, *Property, Penalty and (Racial) Profiling,* 12 STAN. J. C.R. & C.L. 177, 179 (2016).
[60] *Id.* at 182.
[61] Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 5 (2008).
[62] Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AMERICAN JOURNAL OF POLICE 51, 59 (1988).
[63] *Id.* at 59.
[64] *Id.* at 59.

fears of uprisings.[65] Some jurisdictions mandated support of slave patrols by slaveholders. For example, in 1740, female plantation owners in Carolina became answerable for patrol service, but could procure any white person between ages sixteen and sixty to ride patrol for them.[66]

Members of these patrols were known variously as patorlers, padaroe, padarole, patterollers, or regulators.[67] They were the enforcers of the pass system, which required slaves to carry a pass from their owner to travel outside of a slave-owner's or hirer's presence.[68] "The patterollers prowled Southern roads, enforcing the curfew for slaves, looking for runaways, and guarding rural areas against the threat of black uprisings. They were authorized by law to give a specific number of lashes to any violators they caught,"[69] administer beatings, and exercise other forms of brutality against the black people they encountered.[70] The patrolling system was also used by the slaveholding classes to unify all whites against all blacks[71] and is seen as a precursor to both southern policing practices and the Ku Klux Klan.[72]

2. "No rights which the white man is bound to respect"

During the the two decades preceeding the Civil War, federal pro-slavery statutes and cases worked to instill notions of illegitimacy and illegality regarding the presence of blacks in non-slaveholding white communities.[73] Northern

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[65] *Id.*
[66] *Id.* at 60.
[67] *Id.* at 62; *see also*, *Ku Klux Klan: A History of Racism and Violence*, SOUTHERN POVERTY LAW CENTER 8 (2011), https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf.
[68] Reichel, *supra* note 62*,* at 62.
[69] *Id.*
[70] KELLEY & LEWIS, *supra* note 14, at 193.
[71] *Id.* The white solidarity motive in compulsory service in the interests of slaveholders was not well served; class conflicts between wealthy planters and poor whites debilitated the slave patrol system. *See also*, Rao, *supra* note 61.
[72] *See* Reichel, *supra* note 62 at 59-62; *see also, Ku Klux Klan: A History of Racism and Violence*, *supra* note 67.
[73] The practical effect of the case of Prigg v. Pennsylvania, 41 U.S. 539 (1842), and the Fugitive Slave Act of 1793, 1 Stat. 302, were described in Massachusetts Legislative Reports. In order to enforce the slavery of two to three million black people, "(T)he first object is to establish, not only in their own territories, but throughout the Union, the proposition that men of dark skin shall everywhere presumed to be slaves and that nowhere presumed to be citizens." House No. 41, Commonwealth of Massachusetts*,* General Court,

states that had used their courts and procedures to protect the freedom of escaped slaves and other African Americans who resided within their borders saw their efforts thwarted by pro-slavery Congresses and presidential administrations.[74]

"An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of their Masters," popularly known as The Fugitive Slave Act of 1850, was a federal statute that established a biased system of summary procedures to reclaim "fugitives from labor" found anywhere in the nation.[75] The statute preempted state laws and procedures that had arisen in northern judicial systems to prevent the use of local courts and law enforcement officers to recognize or administer slavery.[76] The law gave every procedural advantage to the slaveholder or agent reclaiming an alleged escapee[77] and even prohibited the captured person from testifying.[78] The Act's dictate that "all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required,"[79] and its "harsh penalties and minimal standards of proof could force northern whites to assume that all blacks they saw were fugitives even though in 1850 there were more than 150,000 free blacks living in the north."[80]

Federal officials used the Fugitive Slave Act to conscript

1843, p.20. Free states such as Indiana and Illinois also passed laws that presumed that blacks were slaves by requireing free blacks to provide documentary proof of their free status and to post bond to reside within the state or territory. *Slavery in the North: Illinois, Indiana*. http://slavenorth.com/northwest.htm. The Oregon Territory, criminalized the presence of free blacks by statute in 1844 and 1849 and by constitutional provision in 1857. *Breaking Chains: Slavery on Trial in the Oregon Territories* http://gregnokes.com/books/?p=1180.

[74] *See* ERIC FONER, GIVE ME LIBERTY!: AN AMERICAN HISTORY, 412, (2006).

[75] Fugitive Slave Act of 1850, ch. 49, § 9 stat. 446 (repealed 1864). Similarly to the U.S. Constitution, the act only uses euphemisms for slavery to avoid acknowledging that the most undemocratic of practices is protected by the law of the land.

[76] James Oliver Horton, Lois Horton.*A Federal Assault: Africa Americans and the Impact of the Fugitive Slave Law of 1850 in* SLAVERY AND THE LAW 43 (Paul Finkelman ed., 1997) at 145.

[77] Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Crisis of the Union,* 45 AKRON L. REV. 449, 457 (2012).

[78] Fugitive Slave Act of 1850*, supra* note 75 at § 6. "In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence…"

[79] *Id.* at § 5.

[80] Finkelman, *States' Rights, supra* note 77 at 453-58.

citizens in the capture of fugitive slaves[81]. Under a new *federal* posse comitatus power, U.S. marshals could conscript citizens to assist in the capture of fugitives.[82] Although abolitionists challenged being compelled to assist in returning blacks to bondage, risking charges of treason,[83] others were more compliant. Slave owners used the Act to reclaim fugitives from free states with a success rate close to 80%.[84]

The Dred Scott decision of 1856 injected additional bias against black rights into the nation's law.[85] Chief Justice Roger Taney's opinion promoted his personal beliefs about the social and political status of African Americans during the era in which the Declaration of Independence and the United States Constitution were promulgated.[86] In writing that people of African descent, even if free, could never be citizens of the United States, Taney dismissed the fact that free blacks voted in at least six states at the time of the Constitution's ratification and that at the time of his own decision blacks could vote and hold office in several states.[87] Taney pronounced: "[N]o state can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States."[88]

Taney used inflammatory rhetoric and absolute statements to reach beyond the issues raised by the facts of the underlying case, and he pushed the nation closer to civil war.[89] Taney's statement that "[The negro African race was] altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had

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[81] *See* Rao*, supra* note 61 at 3.
[82] *See* Rao, *supra* note 61 at 11-12. The posse comitatus comprised uncompensated, temporarily deputized citizens compelled by law to assist law enforcement officers to execute arrests, level public nuisances, and keep the peace. Used widely in state law enforcement and considered a duty of state citizenship to protect the public welfare, federal exercise of the power to raise the posse comitatus surged from 1850 to 1860 to enforce the Fugitive Slave Act.
[83] *Id.* at 3.
[84] *Id.* at 26.
[85] *Scott v. Sandford*, 60 U.S. 393 (1857).
[86] Paul Finkelman, *Slavery in the United States: Persons or Property?, in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 129 (Jean Allain ed., 2012).
[87] *Id.* at 128.
[88] *Scott*, 60 U.S. at 406.
[89] *Id.*; *see also,* FONER, *supra* note 74 at 423 (2006).

no rights which the white man was bound to respect,"[90] was meant to embed white supremacy into the canon of the nation's highest court as an absolute precept of U.S. law.[91] Taney's words became so powerfully seared into the law that a constitutional amendment was needed to overcome their power. And, although the Fourteenth Amendment deprived Taney's words of legal effect, the statement described the reality for the majority of black Americans for almost another century.

II. FREEDOM WITHOUT PROTECTION

A. Black Lives Did Not Matter: White Civilian Policing of White and Black Spaces

1. Lynching

The Thirteenth Amendment[92] was ratified on December 6, 1865, ending legalized slavery in the United States. State governments in the defeated Confederate states responded by enacting the Black Codes, which denied freedmen rights of civic participation such as the right to vote, testify against whites, or serve on juries or in state militias.[93] After President Andrew Johnson vetoed federal legislation designed to protect black freedom, Congress approved the language of the Fourteenth Amendment and sent it to the states for ratification.[94] The Fourteenth Amendment granted African Americans citizenship and promised that "no state . . . shall deny to any person within its jurisdiction the equal protection of the laws."[95] Ratification of the Fourteenth Amendment was one of the conditions required by the Military Reconstruction Act of 1867, which placed ten southern states under military rule.[96] On July 28, 1868, Secretary of State William Seward declared that three fourths of the states had

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[90] *Scott*, 60 U.S. at 407.
[91] Dred Scott v. Sanford was "the first Supreme Court decision to endorse white supremacy as a constitutional norm…" Daniel A. Farber, Fatal Loss of Balance: Dred Scott Revisited, A, 39 Pepp. L. Rev. 13, 21 (2011).
[92] U.S. CONST. amend. XIII.
[93] FONER, *supra* note 74, at 489.
[94] *Id.* at 491.
[95] U.S. CONST. amend. XIV.
[96] Gabriel J. Chin, *The 'Voting Rights Act of 1867': The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N. C. L. REV. 1581, 1590 (2004).

ratified the Fourteenth Amendment.[97]

The Thirteenth and Fourteenth Amendments should have, at the very least, erased the legal distinctions that allowed people to take African American lives without risk of sanction from the state. Instead, state and local governments routinely countenanced white murders of black people despite the existence of criminal laws that should have resulted in convictions and punishment[98]. The U.S. Supreme Court found that early attempts by the federal government to intervene to protect blacks from civilian violence were unconstitutional, [99] and in the mid-1870s, the national government refused to intervene to check Ku Klux Klan violence against blacks because the rest of the country was "tired out by southern problems." [100] With the end of Reconstruction, blacks would no longer receive federal protection from, or prosecution of white on black violent crime.[101] Furthermore, if a black person was believed to have committed an infraction against white supremacy in any of its manifestations, the accused was unprotected by due process if white vigilantes chose to enforce their own code of behavior for blacks.[102]

The Ku Klux Klan, the White Leagues, the Red Shirts, the Knights of the White Camellia, and the Southern Cross were among the white extra-legal paramilitary societies bent on destroying the capacity of African Americans and their allies to exercise their political and economic rights and to defend their communities.[103]

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[97] *See A Century of Law Making for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, Statutes at Large, 708–11, LIBRARY OF CONGRESS, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=741.

[98] KENNEDY, *supra* note 1, at 38-40.

[99] *United States v. Stanley*, 109 U.S. 3 (1883) (holding the Civil Rights Act of 1875 unconstitutional, which had outlawed racial discrimination by private individuals and organizations); *The Slaughter-house Cases*, 83 U.S. 36 (1873) (finding that the Fourteenth Amendment Privileges and Immunities Clause protected only federal privileges and immunities); *United States v. Cruikshank*, 92 U.S. 542 (1875) (holding that the Fourteenth Amendment Due Process Clause did not protect people from private deprivations of due process or equal protection).

[100] FONER, *supra* note 74, at 506–507.

[101] KENNEDY, *supra* note 1, at 41-42.

[102] *Id.* at 563–564.

[103] GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 132 (1984); *see also,* James Gray Pope,

> They targeted all forms of black power, including economic (assertive laborers and successful farmers and entrepreneurs), informational (schoolteachers and individuals who knew and asserted their rights), and paramilitary (leaders of militias and self-defense societies, as well as armed individuals who stood up to intimidation).[104]

Between 1882 and 1968, 4,743 recorded lynchings occurred in the United States.[105] Although lynching was used primarily against blacks in the South, other minorities and white people were the primary victims in the West and Southwest.[106] Of these people that were lynched, 72.7% were black.[107] Many lynchings were never officially recognized or recorded.[108] Numerous blacks were murdered by whites, who were not prosecuted or, if they were tried, were acquitted by all-white juries without regard to the evidence, even to confessions.[109] As was the case before the Civil War, state laws continued to prohibit black people from testifying against whites in court.[110]

A lynching that occurred after a patently unconstitutional trial resulted in a contempt trial before the U.S. Supreme Court. It also demonstrated the futility of legal process when a mob of vigilantes literally could not wait to see the slaughter of their target.[111] Despite a stay of execution from the U.S. Supreme Court, residents of Chattanooga, Tennessee lynched Ed Johnson, an uneducated African American, twenty-four years old, unjustly convicted of

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Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon, 49 HARV. C.R.-C.L. L. REV. 385, 387 (2014).

[104] Pope, *supra* note 103.

[105] *History of Lynchings*, NAACP, http://www.naacp.org/pages/history-of-lynchings.

[106] *Id.*

[107] *Id.*

[108] Equal Justice Initiative, *Lynching In America: Confronting the Legacy of Racial Terror*, Second Edition, Report Summary at 4 (2015) http://eji.org/reports/lynching-in-america.

[109] MARK CURRIDEN & LEROY PHILLIPS, CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM 216 (1999).

[110] This procedural barrier was also used against Chinese, Native Americans, and Mexicans, effectively denying legal protection from depredation by whites. *See People v. Hall*, 4 Cal 399 (1854).

[111] These events are described in CURRIDEN AND PHILLIPS, *supra* note 109.

the rape of a twenty-one-year-old white woman.[112] Johnson's attorney presented many witnesses who could vouch that he was on the other side of town at the time of the crime.[113] The rape victim could not see her attacker and could not tell what race he belonged to, but Sherriff Joseph Shipp pushed her to identify her assailant as black.[114] Johnson was later identified by a white man who was responding to an advertised reward of $375 for information leading to an arrest.[115] The arrest was made while Sheriff Shipp was seeking re-election and under tremendous pressure to solve the case.[116]

Johnson was convicted of the rape by an all-white jury.[117] The threat of mob violence if Johnson was not hanged soon permeated the trial proceedings.[118] During the trial one of the jurors rushed towards the defendant and yelled, "If I could get at him I'd tear his heart out right now."[119] In his closing argument, Johnson's attorney cited numerous prejudicial rulings and actions of the trial judge.[120] Although the jury was spilt eight for guilt and four for acquittal on the first day of deliberations, they rendered a guilty verdict the next morning.[121] A motion for retrial was denied by the Tennessee Supreme Court, and a petition for habeas corpus was denied by the federal district court.[122]

Two African American attorneys, Noah Parden and Emanuel D. Molyneaux Hewlett, accomplished the unprecedented by convincing the Supreme Court to grant an appeal of the federal district court's denial of a writ of habeas corpus.[123] Justice John Marshall Harlan issued an order to stay all proceedings in the Tennessee system and hand Johnson over to federal custody.[124] The Supreme Court's order was ignored and Sheriff Shipp conspired to facilitate

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[112] *See id.*, *supra* note 109, at 216-18.
[113] *Id.* at 97-98.
[114] *See id.* at 31.
[115] *Id.* at 91.
[116] *See id.* at 30.
[117] CURRIDEN & PHILLIPS, *supra* note 109, at 82, 158.
[118] *Id.* at 124.
[119] *See id.*, at 109.
[120] *Id.* at 112-113.
[121] *Id.* at 118-120.
[122] *Id.* at 147-149, 168.
[123] CURRIDEN & PHILLIPS, *supra* note 109, at 192-96.
[124] *Id.* at 147-149, 168.

Johnson's lynching by allowing the jail where Johnson was held to be assaulted by vigilantes.[125] The mob hung Johnson from Chattanooga's Walnut Street Bridge and shot at him until a bullet broke the rope hanging Johnson.[126] As Johnson lay when he had fallen he crowd continued to shoot him with so many rounds that they tore his body apart.[127]

Sherriff Shipp and five other defendants were found guilty of contempt in the only criminal case in which the actual trial occcured in the Supreme Court.[128] Those convicted were sentenced to either sixty or ninety days of imprisonment.[129] They served in relative comfort in the federal prison in Washington D.C., and were released early for good behavior.[130] Although the Supreme Court vindicated its honor, the court would never again directly intervene to combat mob rule directly, allowing lynching to continue for decades more.[131]

Black leaders such as Ida B. Wells and Walter White tried to invoke public outrage about the extent and cruelty of lynch-mob murders and refuted the canard that lynching was carried out as punishment for sexually assaulting white women. In her speech 'Lynch Law in America' Wells noted:

> Negroes were killed for disputing over terms of contracts with their employers. If a few barns were burned some colored man was killed to stop it. If a colored man resented the imposition of a white man and the two came to blows, the colored man had to die, either at the hands of the white man then and there or later at the hands of a mob that speedily gathered. If he showed a spirit of courageous manhood he was hanged for his pains, and the killing was justified by the declaration that he was a "saucy nigger." Colored women have been murdered because they refused to tell the mobs where relatives could be found for "lynching bees." Boys of fourteen years have been lynched by white representatives of American civilization. In fact, for all kinds of offenses—and, for no offenses—from murders to misdemeanors, men and

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[125] *Id.* at 198-210.
[126] *Id.* at 213-14.
[127] *Id.*
[128] *United States v. Shipp*, 203 U.S. 563 (1907). *See also,* Famous American Trials http://law2.umkc.edu/faculty/projects/ftrials/shipp/shipp.html.
[129] CURRIDEN & PHILLIPS, *supra* note 109, at 335.
[130] *Id.* at 337-38.
[131] *Id.*

> women are put to death without judge or jury; so that, although the political excuse was no longer necessary, the wholesale murder of human beings went on just the same.[132]

Wells based her speech on research she conducted after white mobs lynched Thomas Moss, Calvin McDowell, and Henry Steward in Tennessee.[133] The trio were black business owners who had dared to defend their successful co-operative grocery from a jealous white competitor and his supporters.[134] Wells research of lynchings in Mississippi demonstrated that mob violence was usually usedto deny black people economic or political power and "to keep them under the thumb of the white establishment.[135]

Lynching was also attacked in an article that appeared in the September 1918 issue of *The Crisis* (the monthly magazine published by the NAACP)—Walter White shared the details of a series of lynchings he investigated in Brooks and Lowndes Counties, Georgia.[136] White attributes twelve lynchings and murders, including an infanticide, to white mobs bent on punishing and terrorizing the black community for the killing of a white farmer known for abusing black workers he obtained through convict leasing.[137] White was

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[132] Ida B. Wells-Barnett, *Lynch Law in America*, DIGITAL HISTORY (1900), http://www.digitalhistory.uh.edu/active_learning/explorations/lynching/wells4.cfm.

[133] Barbara Bair, *Though Justice Sleeps, in* TO MAKE OUR WORLD ANEW: A HISTORY OF AFRICAN AMERICANS FROM 1880 29-30 (Robin D. G. Kelley & Earl Lewis eds., 2005).

[134] *Id.* at 29-30.

[135] *Id.* at 31.

[136] Walter F. White, *The Work of a Mob*, 16 THE CRISIS 221-223 (Sept. 5, 1918), *available at* http://library.brown.edu/cds/repository2/repoman.php?verb=render&id=1292949357905500&view=pageturnerjk&pageno=13.

[137] *Id* at 221; Convict leasing or peonage was a system prevalent in southern states after Reconstruction. Prisoners were contracted out to farmers or industry as laborers in exchange for payment to the state or locality that had custody of the inmate. The prisoners were ostensibly working to pay for the costs of their imprisonment and, in some instances, for fines and court costs. Blacks were often convicted on concocted charges or selectively enforced vagrancy or loitering charges. Peonage had been outlawed by Congress in 1867; however, after 1880 many Southern black men became trapped in peonage, and the system was not completely eradicated until the 1940s. *Convict Lease System,* http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=2&psid=3179. The convict lease system is described in detail in DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM

able to collect the information about the ringleaders of these mobs and present their names to the Governor of Georgia, Hugh M. Dorsey.[138]

Three years later, in April 1921, Dorsey addressed a citizen's conference to unveil his *Statement from Governor Hugh M. Dorsey as to the Negro in Georgia*.[139] An attempt to improve race relations and rehabilitate Georgia's national reputation for racial oppression, the published statement listed 135 examples of the mistreatment of blacks in the state and suggested remedies, such as compulsory education for both races, penalties for counties in which lynchings occurred, and a state commission to investigate those crimes.[140] These reforms did not occur. Although praised by the black press nationally, the prevailing public reaction to the report by whites in Georgia was outright denial, Dorsey's vilification, and a digging in of the heels by race-baiters and white supremacists.[141] A "Black Lives Don't Matter" sentiment drowned out Dorsey's call for the white public to stop terrorizing black people.

A major effort of the NAACP in the 1920s was their attempt to secure passage of a federal anti-lynching law.[142] Although never enacted, the threat of federal legislation did have an impact. Eventually most southern states adopted various forms of anti-lynching law, some criminalizing participation, others imparting protections for arrested persons in situations that seemed likely to invoke mob violence.[143] But these laws were often ignored, contributing to the "unusual sanction American culture conferred on extralegal violence in defense of prevailing relations of

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THE CIVIL WAR TO WORLD WAR II (2008).

[138] White, *supra* note 136; *see* Patricia Stallings, *Hugh M. Dorsey (1871-1948)*, NEW GEORGIA ENCYCLOPEDIA (Sept. 9, 2014), http://www.georgiaencyclopedia.org/articles/government-politics/hugh-m-dorsey-1871-1948. Dorsey was a politically progressive governor, but, ironically, he rose to prominence as the prosecutor in the Leo Frank case. Leo Frank, a Jewish factory supervisor, was convicted of killing a thirteen-year-old worker, Mary Phagan. In an atmosphere of anti-Semitic political rhetoric, a mob removed Frank from his jail cell and lynched him.

[139] Timothy J. Pitts, *Hugh M. Dorsey and "The Negro in Georgia"*, 89 THE GEORGIA HISTORICAL QUARTERLY 185–212 at 185. (2005).

[140] *Id.* at 194-96.

[141] *Id.* at 196-204.

[142] AUGUST MEIER & ELLIOTT M. RUDWICK, FROM PLANTATION TO GHETTO: AN INTERPRETIVE HISTORY OF AMERICAN NEGROES 198 (1966).

[143] KENNEDY, *supra* note 1, at 47.

power."[144]

2. Rioting

Black Americans faced another form of mob violence: riots initiated by whites resulted in both black and white deaths.[145] Usually the majority of the dead were blacks who also lost their property and had to flee from their homes and neighborhoods.[146] These riots were fueled by white resentment and often triggered by false stories about black men assaulting white women, or by attempts of black communities to defend themselves from violence and harassment by residents of white neighborhoods.[147] These riots occurred in northern and eastern states as well as in the south.[148]

The New York Draft Riot of 1863 occurred the day after the announcement of the names drawn for the first round of conscription for the Union Army.[149] A crowd raided the draft headquarters, set fire to warehouses, clubbed and lynched blacks and burned down the Colored Orphan Asylum.[150] The mob "rampaged through the black community, killing or beating as many African Americans as they could find."[151] In 1866, white rioters in Memphis murdered forty-six black men and women, raping some of the women and destroying schools and hospitals built by the Freedmen's Bureau.[152]

Other riots were essentially *coup d'etats* in which Republican coalitions of blacks and whites won elections but were driven from power through violence from southern Democrats. The Colfax Massacre of Easter 1873 occurred when white Democrats, angry over a close defeat, organized a white militia. A battle for the town courthouse ensued when the badly outnumbered African Americans were attacked by

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[144] NANCY MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN 187 (1994).
[145] HENRY LOUIS GATES, LIFE UPON THESE SHORES: LOOKING AT AFRICAN AMERICAN HISTORY, 1500-2008 at 206, 240-43, 262 -264 (2011).
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] MEIER & RUDWICK,*supra* note 142, at 129.
[150]. *Id.* at 129-130.
[151] *Id.*
[152] *Id.* at 155.

cannon and firearms [153] Approximately 150 African Americans were killed, including forty-eight who were murdered after the battle. Only three whites were killed.[154]

The Wilmington Race Riot of 1898 saw white Democrats force the white Republican mayor and other city officials resign after intimidation tactics failed to keep black voters away in the mayoral election.[155] The Democrats installed their political choices while white mobs killed almost thirty blacks, jailed others and drove out more.[156] In the aftermath of the riot close to 1,500 black residents left Wilmington for good.[157]

3. Sundown Towns

White civilians and law enforcement officers worked together throughout the United States to enforce *de facto* and *de jure* residential restrictions against blacks. Between 1890 and 1968, thousands of towns and counties across the United States forbade black people to be within town limits after sundown.[158] Known as "sundown towns," some of these places drove out their black populations, "mounting little race riots" and forbidding new African Americans settlers.[159] Blacks who worked or had business in these towns could not live in these areas. James Loewen documented the existence of 184 towns that actually marked their city limits with signs excluding blacks from remaining after dark inlusing ones that read:, "Nigger, Don't Let The Sun Go Down On You In (the town's name)."[160]

These towns were prevalent in border states such as Ohio, Indiana, and Illinois. James Loewen's research indicates that in Illinois, two-thirds of all incorporated municipalities with populations larger than 1,000 were sundown towns. Oregon, Indiana, and some other northern

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[153] CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 21-22 (2008).
[154] *The Colfax Massacre (1873),* THE BLACK PAST: REMEMBERED AND RECLAIMED, http://www.blackpast.org/aah/colfax-massacre-1873.
[155] *How the Only Coup D'Etat in U.S. History Unfolded,* NPR, Weekend Edition Aug. 17, 2008, http://www.npr.org/templates/story/story.php?storyId=93615391.
[156] GATES, *supra* note 145, at 206-07.
[157] *Id.* at 207.
[158] JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 4 (2005).
[159] *Id.* at 90-105.
[160] *Id.* at 4, 195.

states showed similar proportions. Some of the towns Loewmen that identified as sundown towns still have minimal numbers of African Americans.[161]. Loewen concludes that outside of the South, "probably a majority of all incorporated places kept out African Americans."[162]

Some of these towns enacted ordinances to forbid non-whites from residing in them, even though such laws violated the Fourteenth Amendment.[163] Other towns simply used their sheriff or police to enforce unwritten policies that prohibited black residents.[164] Another tool was freeze-outs: campaigns to make blacks feel unwelcome by isolating them from community institutions and activities.[165] In Bell City, Missouri, a citizens' meeting resulted in eight resolutions to exclude blacks, including "inviting" Negroes to move out of town.[166] Some towns used buy-outs to cull African Americans from their populations.[167] From their expansion at the turn of the century, many suburbs were created as white enclaves. Restrictive covenants used to exclude blacks and other groups were deemed unconstitutional to enforce in 1948.[168] However, federal government home loan programs required their use until 1950, and more than 98% of the home loans guaranteed by the Federal Housing Administration and Department of Veterans Affairs were available only to whites.[169]

Interestingly, sundown towns were rare in most of Dixie.[170] The later development of sundown suburbs in the South emulated northern patterns of race relations. Gated

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[161] Loewen writes that as of the 2000 census no African Americans lived in the Ziegler or Johnson City Illinois. In 2014 two African Americans lived in Johnson City (population 3,506) http://www.city-data.com/city/Johnston-City-Illinois.html. In the same year six African Americans lived in Ziegler, Illinois (total population 1,762) http://www.city-data.com/city/Zeigler-Illinois.html. Note: These figures do not include persons identified as mixed-race.

[162] *Id.* at 4.

[163] *See Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that residential segregation ordinances were unconstitutional). Since state action is clearly involved when laws are promulgated, the Fourteenth Amendment Equal Protection Clause would forbid exclusionary ordinances.

[164] LOEWEN, *supra* note 158, at 103-05.

[165] *Id.* at 105-07.

[166] *Id.*

[167] *Id.* at 108-09.

[168] *Shelley v. Kramer*, 334 U.S. 1 (1948).

[169] Margalynne Armstrong, *Race and Property Values in Entrenched Segregation,* 52 U. MIAMI L. REV. 1051, 1057 (1997); LOEWEN, *supra* note 158, at 130.

[170] LOEWEN, *supra* note 158, at 70.

communities and "Whitopias" provide contemporary versions of sundown towns.[171]

Sundown towns were enforced and maintained by citizens and law enforcement officers. The basic method of enforcement was direct communication that would quickly escalate to violence at the hands of a gang of boys and young men:[172]

> When a Negro is seen in town during the day he is generally told of these traditions. . . and is warned to leave before sundown. If he fails to take heed, he is surrounded at about the time darkness begins, and is addressed by the leader of the gang in about this language: "No nigger is allowed to stay in this town over night. Get out of here now, and get out quick. . ." If he hesitates, little stones begin to reach him from unseen quarters and soon persuade him to begin his hegira.[173]

The reality of these threats was illustrated in Oneida, Tennessee, when police and civilians chased a hobo into the woods when he got off a freight train in town during the 1940's.[174] The man's bullet-ridden body was carried out an hour later.[175]

Local police enforced sundown rules, making sure that blacks who stopped on their way through white towns knew that they had to keep moving.[176] Charles Jones, an African American man who lives in Beaumont, Texas, tells a very typical tale about having car problems in a nearby sundown town, Vidor. In the 1960's, when Jones was nineteen, he and three of his black friends were changing a flat tire on their broken down car in Vidor one night.[177] A white policeman stopped and said: "Well, let me tell ya—you boys better wrap and get out of here, because I'm going to go to that next exit

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[171] Rich Benjamin, *The Gated Community Mentality*, N.Y. TIMES, Mar. 29, 2012, http://www.nytimes.com/2012/03/30/opinion/the-gated-community-mentality.html?_r=0; *see also,* RICH BENJAMIN, SEARCHING FOR WHITOPIA: AN IMPROBABLE JOURNEY TO THE HEART OF WHITE AMERICA 2 (2009).
[172] LOEWEN, *supra* note 158, at 228–229.
[173] *Id.*
[174] *Id.* at 231.
[175] *Id.*
[176] Police involvement described *id.*at 233-36.
[177] Keith Oppenheim, *Texas city haunted by 'No Blacks after dark' past*, CNN, Dec. 13, 2006, http://www.cnn.com/2006/US/12/08/oppenheim.sundown.town/index.html.

and come back around. You better be gone!"[178] Some police officers were very helpful, helping stranded blacks get parts or a tow to the nearest safe town. [179] But black motorists risked violence, whether they stopped in a sundown town unintentionally or simply were driving through.[180]

More recently, Vidor tried to limit African American residency in the town. [181] In 1993, the federal government tried to integrate Vidor's public housing with several African-American families.[182] Soon thereafter, the Ku Klux Klan marched in Vidor and "(W)ithin months, the few black families moved out. And African-Americans were left with a deep impression that still exists today."[183] Vidor still has a reputation for being racist, despite attempts by town officials and boosters to be more welcoming [184] Integrated or predominantly minority regional high school football teams generally choose not to play Vidor's high school team.[185]

III. HOLDING WHITE CIVILIANS ACCOUNTABLE

Over time, more groups of people have become subject to prosecution for killing black people. The United States has moved from being a land in which civilians and law enforcement officers could take black lives with little risk of prosecution to one in which civilians who take black lives can usually expect legal consequences. Conviction is uncertain: compare the case of George Zimmerman, who was acquitted of murdering Trayvon Martin, with that of Michael Dunn, who was sentenced to life for the first-degree murder of Jordan Davis.[186]

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[178] *Id.*
[179] LOEWEN, *supra* note 158, at 233
[180] *Id.* at 232-34.
[181] Sam Howe Verhovek, *Blacks Moved to Texas Housing Project,* NY TIMES January 14, 1994 at http://www.nytimes.com/1994/01/14/us/blacks-moved-to-texas-housing-project.html.
[182] *Id.*
[183] Oppenheim, *supra* note 177.
[184] Avi Zaleon, *SE Texas football blocks out line dividing races,* BEAUMONT ENTERPRISE, Nov. 20, 2014, http://www.beaumontenterprise.com/news/article/SE-Texas-football-blocks-out-line-dividing-races-5906825.php.
[185] *Id.*
[186] Mychal Denzal Smith, *Michael Dunn Was Found Guilty-but That's Not Enough to Ensure Justice in an Unjust World,* THE NATION, Oct. 2, 2014, http://www.thenation.com/article/michael-dunn-was-found-guilty-thats-not-enough-ensure-justice-unjust-world/. In 2013, George Zimmerman was tried

That Zimmerman and Dunn were even prosecuted is a testament to changes in the protection of black lives that can be traced to the achievements of the civil rights movement. Not only did the movement eventually stem the tide of white civilian violence against blacks, it also helped achieve justice for some of the victims of white supremacist resistance to desegregation. Early state prosecutions were often futile due to jury nullification, where white jurors refused to convict despite being presented with sufficient evidence to meet the beyond a reasonable doubt standard.[187]

After a long history of public indifference to the failure to prosecute or convict white civilians for the murder of black people, there is now widespread condemnation of the U.S. legal system for these failures. This change in public opinion has its roots in the modern civil rights era that began with the *Brown v. Board of Education* decision of 1954.[188] The Supreme Court's determination that the Fourteenth Amendment's Equal Protection Clause prohibits *de jure* segregation in public schools resulted in violent protests against integration and a resurgence in the activity of the Ku Klux Klan.[189] Law enforcement officers in states of the Deep South perpetrated violence against members of the civil rights movement, instead of protecting them from mob

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and acquitted of second degree murder and manslaughter for killing seventeen-year-old Trayvon Martin. Lizzete Alvaarez and Cara Buckley, *Zimmerman is Acquitted in Trayvon Martin Killing* NY TIMES July 13, 2013 http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?_r=0. Zimmerman shot the unarmed Martin during a struggle, which began after Zimmerman followed Martin because he was suspicious of his presence in Zimmerman's Sanford, Florida neighborhood. *The Trayvon Martin Killing, Explained,* MOTHER JONES, Mar. 18, 2012, http://www.motherjones.com/politics/2012/03/what-happened-trayvon-martin-explained. Conversely, in October 2014, a Jacksonville, Florida, jury convicted Michael Dunn for the first degree murder of Jordan Davis, an unarmed seventeen-year-old who Dunn shot during a dispute over loud music as the teen sat in a friend's car in a convenience store parking lot. Lizette Alvarez, *Florida Man is Convicted of Murdering Teenager Over Loud Music,* N. Y. TIMES, Oct. 1, 2014, http://www.nytimes.com/2014/10/02/us/verdict-reached-in-death-of-florida-youth-in-loud-music-dispute.html?_r=0. In both cases, the defendants claimed that they killed in self-defense after they initiated altercations with African American teenaged boys, but Dunn had no physical contact with his victim.

[187] KENNEDY, *supra* note 1, location 1370 of Kindle edition.

[188] *See generally Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954).

[189] *Ku Klux Klan: A History of Racism and Violence, supra* note 67, at 25.

violence.[190] Local prosecutors were not prone to charging the police. The Civil Rights Division of the U.S. Department of Justice prosecuted fifty-two cases involving police violence between January 1958 and July 1960, but obtained convictions in only four cases due to the hostility of local judges and juries.[191]

Civil rights activists, or even persons who were merely suspected of working to promote civil rights for blacks, risked racist violence and murder. The Civil Rights Memorial in Montgomery, Alabama, displays the names of Civil Rights Martyrs killed between the years of 1954 and 1968.[192] The website for the memorial provides accounts of the murders and reveals no successful prosecutions of the persons responsible for the deaths of any of the victims before 1963.[193]

However, a persistent quest for justice on the part of local civil rights activists and others who demanded that government prosecute racially motivated killings, even decades after the fact,[194] eventually led to the 1967 convictions of some of the men responsible for the 1963 murders of freedom riders Chaney, Goodman, and Schwemer.[195] In 1994, Byron de le Beckwith was convicted of

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[190] *Martin Luther King and the Global Freedom Struggle: Selma to Montgomery March*
http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_selma_to_montgomery_march/

[191] *Long Road to Justice: The Civil Rights Division at 50*.
http://www.civilrights.org/publications/reports/long-road/policing.html.

[192] *Civil Rights Martyrs,* SOUTHERN POVERTY LAW CENTER,
https://www.splcenter.org/what-we-do/civil-rights-memorial/civil-rights-martyrs.

[193] *Id.*

[194] S. Willoughby Anderson, *The Past on Trial, Birmingham, the Bombing and Restorative Justice,* 96 CAL. L. REV. 471, 486 (2008).

[195] *See* Gary Younge, *1963, The Defining Year of the Civil Rights Movement,* THE GUARDIAN, May 7, 2013,
https://www.theguardian.com/world/2013/may/07/1963-defining-year-civil-rights. As a watershed year for the modern Civil Rights Movement, 1963 saw an indelible series of events that raised public consciousness of and support for the struggle against segregation and the violent resistance of southern power structures to reform. In May, television broadcast images of the police in Birmingham, Alabama, turning fire hoses on young people trying to peacefully march in protest against segregation. In June, NAACP leader Medgar Evers was assassinated in front of his home. On August 28, Dr. Martin Luther King delivered his "I have a dream" speech to 250,000 people of all races gathered for the March on Washington for Jobs and Freedom. Two weeks later, white supremacists in Birmingham bombed the Sixteenth Street Baptist Church, killing four young girls. Both state law enforcement and the F.B.I. investigated the church bombing. In a move that effectively stalled the F.B.I investigation,

the 1963 assassination of Medgar Evers.[196] In 1977, 2001, and 2002, we saw the convictions of three of the four men whose bomb killed Addie Mae Collins, Cynthia Wesley, Carole Robertson, and Denise McNair at the Sixteenth Street Baptist Church in Birmingham, Alabama, in 1963.[197] It took many years after these victims' deaths to convict some of those responsible, but it did happen. Although the federal government never passed a federal lynching law, the civil rights movement finally focused the nation's attention on the use of lethal violence by white civilians against black civilians.

The Civil Rights Movement eventually resulted in contemporaneous local prosecutions for racist murder.[198] The 1968 conviction of Cecil Sessums, an Exalted Cyclops[199] of the White Knights of the Ku Klux Klan, for the murder of Vernon Dahmer, the president of the Forrest County NAACP, was the first time a white man was found guilty for murdering a black man in "modern Mississippi history."[200] In 1997, Henry F. Hays became the first white person executed for the murder of a black person in Alabama since 1912.[201] Hays and his Klan accomplices almost escaped any punishment for murdering nineteen-year-old Michael Donald. Donald was on his way home from the store when he was randomly grabbed by Hays and James Knowles, who were looking for a black victim because of their anger at a hung jury in the case of a black man accused of murdering a white police officer.[202] "It

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the state prosecuted the man who constructed the bomb, but for unrelated charges of unlawfully possessing dynamite. Five years after the bombing, the F.B.I. closed the case when the federal statute of limitations for civil rights violations expired. *See also,* S. Willoughby Anderson, *supra* note 194, at 478, 481-82.

[196] David Stout, *Byron De La Beckwith Dies: Killer of Medgar Evers Was 80*, N.Y. TIMES, Jan. 23, 2001, http://www.nytimes.com/2001/01/23/us/byron-de-la-beckwith-dies-killer-of-medgar-evers-was-80.html.

[197] Russell, *supra* note 7, at 1239–1241.

[198] PATRICIA MICHELLE BOYETT, RIGHT TO REVOLT 4, 241 (2015).

[199] An Exalted Cyclops is the top leader in a local Ku Klux Klan chapter. *See* Eric Pianin, *A Senator's Shame,* WASHINGTON POST, *June 19, 2005,* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/18/AR2005061801105.html#.

[200] *White Man Gets Life for Dahmer Murder*, 75 THE CRISIS 4, Apr. 1968, at 132.

[201] *Klan Member Put to Death in Race Death*, N.Y. TIMES, June 6, 1997, http://www.nytimes.com/1997/06/06/us/klan-member-put-to-death-in-race-death.html.

[202] Jesse Kornbluth, *The Woman Who Beat The Klan,* N.Y. TIMES MAGAZINE, Nov. 1, 1987, http://www.nytimes.com/1987/11/01/magazine/the-woman-who-

took two years, a second F.B.I. investigation and a skillfully elicited confession to convict Tiger Knowles of violating Michael Donald's civil rights and Henry Hays of murder."[203] Represented by the Southern Poverty Law Center, Michael's mother, Beulah Mae Donald, filed a civil suit against the United Klans of America. The seven-million-dollar verdict in her favor bankrupted the organization.[204]

IV. DEMANDING AN END TO LAW ENFORCEMENT IMPUNITY

A. The Over-Criminalization of Black People and Encounters with Police

For three hundred years, the rarity of prosecution or lack of criminal liability protected white people, even those not involved in formal law enforcement, when they took black lives in the United States. Although the protection that criminal law prosecution provides individuals has been extended to blacks who are killed by civilians,[205] African Americans are more likely than whites to be fatally wounded by police officers. *Cop in the Hood,* a blog by Professor Peter Moskos, a former police office, presents this analysis:

> The odds that any given black man will shoot and kill a police officer in any given year is slim to none, about one in a million. The odds for any given white man? One in four million. The odds that a black man will be shot and killed by a police officer is about 1 in 60,000. For a white man those odds are 1 in 200,000.[206]

Many factors go into determining the meaning of comparative statistics about the race of people who kill or are killed by police. One of these factors is the frequency of encounters between police and civilians. Police stops of

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beat-the-klan.html.

[203] *Id.*

[204] *Id.*

[205] Some conservative critics of the Black Lives Matter movement ask the question: "What about black on black crime?" Gary Younge discusses the problematic implications of the black-on-black crime trope and points out that the police are hired to protect the public and that police should be held legally responsible for killing people in appropriate situations. Gary Younge, *About 'Black on Black Crime': No we should not stop talking about police shootings*, THE NATION, Dec. 9, 2014, http://www.thenation.com/article/about-black-black-crime/.

[206] Peter Moskos, *Killed by Police (2 of 3): Race,* COP IN THE HOOD, Apr. 12, 2015, http://www.copinthehood.com/2015/04/killed-by-police-2-of-3-race.html.

African Americans for "driving while black" are widely reported occurrences.[207] The National Institute of Justice reports that more people of color are stopped by police than whites, but notes the difficulty of determining how much of the differential is due to racial discrimination.[208]

One of the factors contributing to racial discrepancies may be found in the role of police as protectors of geographic racial boundaries.[209] Many people in the United States still live in racially unitary enclaves, even though civil rights legislation in effect since the 1960s prohibits racially exclusionary housing policies and behavior.[210] Neighborhood segregation empowers residents of white neighborhoods to question the legality of the mere presence of a nonwhite person. Rather than risking prosecution for violently enforcing black exclusion from putative sundown towns and sundown suburbs, private citizens leave the enforcement of racial boundaries in the hands of the police.

The history of associating black people with criminality also has contemporary repercussions that lead to unnecessary police encounters with black people. A strong mental association exists between race and crime that powerfully influences perceptions of neighborhood crime levels, beyond any actual association between race and crime.[211] 911 calls abound with reports that the caller has seen a suspicious black person.[212] Websites such as Nextdoor.com,[213] messaging

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[207] David A. Harris, *Driving While Black: Racial Profiling On Our Nation's Highways*, AMERICAN CIVIL LIBERTIES UNION SPECIAL REPORT (June 1999), https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways.

[208] *Racial Profiling and Traffic Stops*, NATIONAL INSTITUTE OF JUSTICE (June 10, 2013), http://www.nij.gov/topics/law-enforcement/legitimacy/pages/traffic-stops.aspx.

[209] For example, police who observed 'misplaced race,' described as black faces in white areas of suburban Kirkwood Missouri often assumed deviance on the part of tblack residents. ANDREA S. BOYLES, RACE, SPACE AND SUBURBAN POLICING: TOO CLOSE FOR COMFORT, 101, 107-12 (2015).

[210] *See* Margery Austin Turner, *Why Haven't We Made More Progress in Reducing Segregation?,* NYU FURMAN CENTER (Apr. 2014), http://furmancenter.org/research/iri/essay/why-havent-we-made-more-progress-in-reducing-segregation.

[211] Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AMERICAN JOURNAL OF SOCIOLOGY 717, 748 (2001).

[212] Ted Thornhill, *It's Not Illegal to Be Black,* DAILY MAIL ONLINE, May 7, 2015 http://www.dailymail.co.uk/news/article-3071957/It-s-not-illegal-black-Cops-complain-online-white-people-getting-freaked-black-neighbors-wasting-police-

apps like Operation GroupMe, [214] and the failed app SketchFactor[215] all enable users to provide neighbors or law enforcement real-time information about the presence of suspicious people. All are accused of being used to profile blacks and Latinos.[216]

Law enforcement is expected to police blacks in a manner that conforms with societal expectations regarding residential racial boundaries. Even though blacks cannot legally be banned from residing or being present in white communities, the intrusion of black people—particularly black men—is accorded high scrutiny by residents who call upon the police to report their suspicions. This appears to be what occurred in the death of Trayvon Martin—though Martin was legitimately present in the neighborhood where he was murdered, resident George Zimmerman called the local police and went out to pursue Martin, despite being told to stay in his home.[217] Martin was killed in the struggle that occurred when Martin confronted Zimmerman about following him.[218]

African Americans who are stopped by police can feel as

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time-911-calls.html; Jaya Saxa *Dear 911 Callers--Stop Phoning the Cops Everytime You See a Black Person,* THE DAILY DOT, May 7, 2015 http://www.dailydot.com/via/911-calls-racially-profiling-black-people/.

[213]*Communicating a crime or possible criminal activity to your neighbors*, NEXTDOOR, https://help.nextdoor.com/customer/portal/articles/1959173#e. The website includes a policy against racial profiling: "Please remember, Nextdoor has a guideline against posting messages that are perceived as discriminatory or racial profiling. The definition of racial profiling on Nextdoor is: 'The discriminatory practice of using an individual's race or skin color alone to make on the spot assumptions about possible criminal behavior.' Posts that violate this guideline may be removed and the member posting may be suspended."

[214] Terrence McCoy, *The secret surveillance of 'suspicious' blacks in one of the nation's poshest neighborhoods*, WASHINGTON POST, Oct. 13, 2015, https://www.washingtonpost.com/local/social-issues/the-secret-surveillance-of-suspicious-blacks-in-one-of-the-nations-poshest-neighborhoods/2015/10/13/2e47236c-6c4d-11e5-b31c-d80d62b53e28_story.html.

[215] Andrew Marantz, *When an App Is Called Racist*, NEW YORKER, July 29, 2015, http://www.newyorker.com/business/currency/what-to-do-when-your-app-is-racist.

[216] Jason Tashea, *Websites and Apps for Sharing Crime and Safety Date Have Become Outlets for Racial Profiling,* ABA JOURNAL, Aug. 1, 2016 http://www.abajournal.com/magazine/article/crime_safety_website_racial_profiling.

[217] Lizette Alvarez, *U.S. Won't File Charges in Trayvon Martin Killing*, N.Y. TIMES, Feb. 24, 2015, http://www.nytimes.com/2015/02/25/us/justice-dept-wont-charge-george-zimmerman-in-trayvon-martin-killing.html. Zimmerman's acquittal was an unfortunate recurrence of escaping liability for killing a young African American male.

[218] *Id.*

if the legality of their presence is being questioned or disrespected. The dread of encounters with police end up having the same effect as the signs on the outskirts of sundown towns:

> Race-based traffic stops turn one of the most ordinary and quintessentially American activities into an experience fraught with danger and risk for people of color. Because traffic stops can happen anywhere and anytime, millions of African Americans and Latinos alter their driving habits in ways that would never occur to most white Americans. Some completely avoid places like all-white suburbs, where they fear police harassment for looking "out of place."[219]

Black Americans also face hyper-scrutiny and presumptions of criminality when the police use traffic stops to wage the so-called war on drugs. Police can stop drivers for traffic violations or investigatory stops. In the investigatory stops, they look for evidence of criminal activity. African Americans are disproportionately the target of the latter:

> The key influence on who is stopped in traffic safety stops is how you drive; in investigatory stops it is *who you are*, and being black is the leading influence. In traffic safety stops, being black has no influence: African Americans are not significantly more likely than whites to be stopped for clear traffic safety law violations. But in investigatory stops, a black man age twenty-five or younger has a 28 percent chance of being stopped for an investigatory reason over the course of a year; a similar young white man has a 12.5 percent chance, and a similar young white woman has only a 7 percent chance. And this is after taking into account other possible influences on being stopped, like how you drive.[220]

Investigative stops were an important component of the U.S. Drug Enforcement Agency's (DEA) Operation Pipeline program to interdict drugs, weapons and drug money.[221]

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[219] Kent Willis, *Fear of the Truth Drives Dodge of Racial Profiling Study,* https://acluva.org/387/fear-of-the-truth-drives-dodge-of-racial-profiling-study/.
[220] Charles Epp & Steven Maynard-Moody, *Driving While Black,* THE WASHINGTON MONTHLY, Jan./Feb. 2014, http://www.washingtonmonthly.com/magazine/january_february_2014/ten_miles_square/driving_while_black048283.php?page=all.
[221] Donald Tomaskovic-Devey & Patricia Warren, *Explaining and eliminating racial profiling*, CONTEXTS, May 20, 2009, https://contexts.org/articles/explaining-and-eliminating-racial-profiling/.

Beginning in 1984, the DEA financed the training of over 25,000 state and local police officers in forty-eight states to recognize, stop, and search potential drug couriers.[222] Officers in Operation Pipeline stopped blacks and Latinos in highly disproportionate numbers, even though the rates of contraband found on profiled minorities were typically lower than that of whites who were stopped.[223] The more frequent encounters with police are one of the reasons why black people are "disproportionately impacted by police killings."[224]

B. 9,900 Deaths, Forty-Seven Prosecutions

Law enforcement's use of deadly force is a significant problem affecting people of all races in the United States. Police officers kill an estimated 1,100 people in the United States each year.[225] In 2015, the total tallied by The Guardian was 1,134—the highest ever.[226] Although a substantially greater number of whites overall were killed, for African American males between the ages of fifteen and thirty-four, the rate of police-involved deaths was five times that of white men of the same age.[227] Statistics indicate that the percentage of black people shot by police is even greater. For example, in Chicago between 2008 and 2015, close to 75%

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[222] *Id.*

[223] Gary Webb, *Driving While Black: Tracking unspoken law-enforcement racism*, ESQUIRE, Jan. 29, 2007, http://www.esquire.com/news-politics/a1223/driving-while-black-0499/.

[224] Of course, members of any racial group are subject to death at the hands of police, but the only group in the U.S. with a greater proportion of victims of police killings is Native Americans. *Deadly Force: Police Use of Lethal Force In the United States*, AMNESTY INTERNATIONAL, June 18, 2015, http://www.amnestyusa.org/research/reports/deadly-force-police-use-of-lethal-force-in-the-united-states?utm_source=feature&utm_medium=web&utm_campaign=DeadlyForce.

[225] Philip M. Stinson, *Police Shootings: A New Problem or Business as Usual?,* UPROOTING CRIMINOLOGY BLOG (Sept. 2015), http://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1050&context=crim_just_pub.

[226] Jon Swaine et al., *Young black men killed by US police at highest rate in year of 1,134 deaths*, THE GUARDIAN, Dec. 31, 2015, http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men. "The Guardian's investigation, titled The Counted, began in response to widespread concern about the federal government's failure to keep any comprehensive record of people killed by police. Officials at the US Department of Justice have since begun testing a database that attempts to do so, directly drawing on The Counted's data and methodology."

[227] *Id.*

of the people shot by police was African American.[228] One in five of those killed were unarmed, while a similar percentage actually fired shots at the police.[229]

Despite significant numbers of civilians killed by police, few officers are found culpable. Between the years 2005 and 2014, only forty-seven law enforcement officers were prosecuted for homicide, with a mere 22% conviction rate.[230] The vast majority of cases were deemed justifiable by investigating prosecutors or grand juries,[231] and proceeded no further. The standard applied in many jurisdictions is whether the officer had "a reasonable apprehension of an imminent threat of deadly force or serious bodily injury being imposed against the officer or some other person."[232] Other states allow the use of lethal force to effectuate felony arrest or suppress "opposition to arrest."[233]

Investigationsn of officer-committed shootings often rely on the officer's testimony, corroborated by fellow police. The advent of cellular phone videography and the increasing use of surveillance cameras and body video cameras have created a new dynamic. In 2015, when officers in North Charleston, South Carolina, Chicago, and Los Angeles claimed their use of deadly force in the respective killings of Walter Scott,[234] Laquan Macdonald,[235] and Brendon Glenn[236] was justified,

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[228] *Police Accountability Task Force Executive Summary*, CHICAGO POLICE ACCOUNTABILITY TASK FORCE, 8 (Apr. 2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_Executive_Summary_4_13_16-1.pdf.

[229] *Id.* In 2014, the most recent year for which the FBI has released statistics, fifty-four police officers were feloniously killed. *FBI Detailed Assault Data on Law Enforcement Officers Killed and Assaulted 2014,* FBI (2015), https://www.fbi.gov/about-us/cjis/ucr/leoka/2014/detailed-assault-topic-page-summaries. 42 of the alleged perpetrators were white, 13 were black, 2 were American Indian/Alaska Native, 1 was Asian/Pacific Islander, and race was not reported for 1 offender. https://ucr.fbi.gov/leoka/2014/officers-feloniously-killed.

[230] As of September 2015. Stinson, *supra* note 225.

[231] Jon Swaine & Ciara McCarthy, *Dozens of killings by US police ruled justified without public being notified*, THE GUARDIAN, Apr. 13, 2016, http://www.theguardian.com/us-news/2016/apr/13/the-counted-us-police-killings-officers-cleared.

[232] Stinson, *supra* note 225.

[233] *Deadly Force: Police Use of Lethal Force in the United States, supra* note 224.

[234] *Former Police Officer Who Shot Walter Scott Denied Bail* THE GUARDIAN, September 14, 2015. https://www.theguardian.com/us-news/2016/jan/04/walter-scott-michael-slager-shooting-south-carolina-bail.

[235] *Police Accountability Task Force Executive Summary*, *supra* note 228, at 2-4.

[236] Kate Mather, *LAPD Killing of Unarmed Homeless Man was Unjustified, Police Commission Says,* LA TIMES, APRIL 12, 2016.

videos of the incidents provided contradictory evidence. The officers who shot Scott[237] and Macdonald have been charged with murder, while the L.A. Chief of Police, Charlie Beck, has called for the prosecution of the officer who killed Glenn.[238]

Since Officer Darren Wilson shot and killed Michael Brown in Ferguson, Missouri,[239] the nation has witnessed widespread public outcry about police use of excessive force. The killing of unarmed black youth and men has generated insistent demands for police accountability, led by the Black Lives Matter movement.[240] In 2015, eighteen police officers were charged in fatal on-duty shootings, more than three times the average yearly number over the preceding decade.[241] This is markedly different from the public indifference and state tolerance of police killings of unarmed suspects in the recent past. Says professor of criminology Philip Stinson: "No one cared to notice this stuff was going on in the country for a long time. Now the media is paying attention. Prosecutors know they're being watched and they're paying attention."[242]

CONCLUSION

There is a new sense of national outrage over shootings of unarmed black people,[243] even though whites also suffer from police use of lethal force. The focus on the impact of police violence on the black community is encouraging because it seems to tacitly acknowledge that racial bias permeates our

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http://www.latimes.com/local/lanow/la-me-ln-lapd-venice-shooting-20160412-story.html.

[237] *Police officer charged in Walter Scott shooting released on bail*, THE GUARDIAN, Jan. 4, 2016, *Police officer charged in Walter Scott shooting released on bail*, THE GUARDIAN, Jan. 4, 2016. https://www.theguardian.com/us-news/2016/jan/04/walter-scott-michael-slager-shooting-south-carolina-bail.

[238] Ian Lovett, *Los Angeles Joins Debate on Force After Police Killing of a Homeless Man*, N.Y. TIMES, Apr. 16, 2016, at A12.

[239] *See* Cohen*, supra* note 2.

[240] *See* Jelani Cobb, *The Matter of Black Lives: A new kind of movement found its moment. What will its future be?,* NEW YORKER, Mar. 14, 2016, http://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed.

[241] Shaila Dewan & Timothy Williams, *More Police Officers Facing Charges, but Few See Jail*, N.Y. TIMES, Dec. 29, 2015, http://www.nytimes.com/2015/12/30/us/more-police-officers-facing-charges-but-few-see-jail.html?_r=0.

[242] *Id.*

[243] Lovett, *supra* note 238.

criminal justice system. The work of social justice activists and scholars such as Bryan Stevenson [244] and Michelle Alexander[245] has helped to draw public attention to injustices such as wrongful convictions and mass incarceration, and their disproportionate impact on African Americans. Although the protests about the deaths of Michael Brown, Eric Garner, Tamir Rice, and others have not yet resulted in the prosecution of the officers for their deaths, they have generated scrutiny in other cases.

Particularly encouraging is the emergence of a serious movement to reform police practices. Efforts such as the President's Task Force on 21st Century Policing acknowledge the gulf of mistrust between communities of color and the police.[246] The Task Force recommends that:

> Law enforcement culture should embrace a guardian—rather than a warrior—mindset to build trust and legitimacy both within agencies and with the public. Toward that end, law enforcement agencies should adopt procedural justice as the guiding principle for internal and external policies and practices to guide their interactions with rank and file officers and with the citizens they serve.[247]

Other, more concrete reforms are also being discussed. An article written in the aftermath of tragic shootings by police and horrific retaliatory shootings of police officers suggests:

1. Enacting a national standard for the use of force by law enforcement.

2. Collect data on the use of force by police and on police discipline.

3. Teach all police de-escalation techniques and implement departmental policies in which de-escalation is prioritized.

4. Require police forces to have continuous access to mental health professionals who can advise and assist law

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[244] *See* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014).

[245] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[246] *Final Report of the President's Task Force on 21st Century Policing*. WASHINGTON, DC: OFFICE OF COMMUNITY ORIENTED POLICING SERVICES (May 2015).

[247] *Id.*

enforcement in situations involving mentally ill or disabled actors.

5. End policing practices implemented primarily to generate revenue, such as arrest or ticket quotas.

6. De-militarize police.

If law enforcement can adopt the mantle of guardianship and protect black lives along with all other lives, our nation would move a giant step closer towards achieving its ideals. By forcing the country to scrutinize whether police in the U.S. overuse lethal force against civilians, the Black Lives Matter movement has raised questions about contemporary policing whose answers can benefit the entire nation.