

Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges

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CHALLENGING THE CHALLENGE: THIRTEENTH AMENDMENT AS A PROHIBITION AGAINST THE RACIAL USE OF PEREMPTORY CHALLENGES

Douglas L. Colbert †

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†† *Dred Scott v. Sandford*, 60 U.S. 393, 409 (1857).

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INTRODUCTION

The United States Supreme Court's 1965 decision in *Swain v. Alabama*¹ and its more recent 1986 decision, *Batson v. Kentucky*,² generated a plethora of scholarly commentary concerning the racially discriminatory use of the peremptory challenge.³ Although most

¹ 380 U.S. 202 (1965) (rejecting the argument that the state's use of the peremptory challenge to exclude African-American jurors violated the equal protection clause).

² 476 U.S. 79 (1986) (state's use of peremptory challenge is subject to commands of the equal protection clause when a defendant establishes a prima facie case that a prosecutor used peremptory challenges to remove prospective jurors of defendant's race).

³ A peremptory challenge is a "challenge to a juror to be exercised by a party to a civil action or criminal prosecution without assignment of reason or cause," and is lim-

scholars have condemned *Swain* as a green light to prosecutors' use of the peremptory challenge to disqualify African-American jurors,⁴ and many have criticized the effectiveness of the *Batson* remedy,⁵ few

ited in number by statute. BALLENTINE'S LAW DICTIONARY 933 (3d ed. 1969). Such challenges are distinct from challenges for cause which require a judicial finding that there is a "narrowly specified, provable and legally cognizable basis of [a juror's] partiality." *Swain*, 380 U.S. at 220. Challenges for cause are unlimited, but are frequently denied by trial courts because of the difficulty of establishing a juror's bias during voir dire or jury selection. See Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 546-50 (1975). This commentator noted that cause challenges rarely provide "effective[] screen[ing] [of] those who share biases and prejudices common to a racial or ethnic group" unless those jurors admit their biases. *Id.* at 554; see also *infra* note 585.

⁴ JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 166-67 (1977); Frederick L. Brown, Frank T. McGuire & Mary S. Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 197 (1978); Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A.L. REV. 247, 268-70 (1973); Roger Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283-303 (1968); John Andrew Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 HOUS. L. REV. 448 (1966); Bruce J. Winick, *Prosecutorial Peremptory Challenge Practice in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982); Note, *Racial Discrimination in Jury Selection—Limiting the prosecutor's right of peremptory challenge to prevent a systematic exclusion of blacks from criminal trial juries*. *United States v. Robinson*, 41 ALB. L. REV. 623 (1977); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979); Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967) (authored by Gary L. Geeslin); Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970) (authored by Harold A. McDougall, III) [hereinafter *Black Juries*]; Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977) (authored by Bradley S. Philips); Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 325 (1965); Recent Decision, *Juries—Systematic Exercise of Peremptory Challenges to Exclude Negro Jurors May Violate the Equal Protection Clause*, 1965 U. ILL. L. F. 588 (authored by David W. Schoenberg); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662 (1974) (authored by Lisa Van Amburg); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966) (authored by F.R.D.) [hereinafter *Blueprint*]. Some commentators have defended *Swain* and the unfettered use of peremptory challenges. See, e.g., Stephan A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982); Irving Younger, *Unlawful Peremptory Challenges*, 7 LITIGATION 23 (Fall 1980).

⁵ *Batson* represented a significant improvement from *Swain*'s "insurmountable" defense burden of proving that a prosecutor systematically excluded African-American jurors over a substantial time period. *Swain*, 380 U.S. at 224. Once the defense establishes prima facie evidence of racial exclusion, *Batson* requires the prosecutor to provide a race-neutral reason for exercising a peremptory challenge. Justice Marshall's fear that a skilled prosecutor could easily meet this burden has since been confirmed by court decisions and has been the subject of commentators' criticism. *Batson*, 476 U.S. at 105-06 (Marshall, J., concurring); see *infra* notes 492-515 and accompanying text; see also Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1 (1988); Developments, *Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1581 (1988); Note, *Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1025 (1987) (authored by Jonathan B. Mintz) [hereinaf-

have addressed the crux of the wrong to be remedied: the inherent injustice of the all-white jury.⁶ Further, commentators have relied exclusively on the procedural protections supplied by the fourteenth⁷ and sixth⁸ amendments in their analyses of these cases. While this procedure-oriented approach is important, it fails⁹ to en-

ter *Half Step*]; Note, *Batson v. Kentucky: Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755 (1988) (authored by Robert William Rodriguez) [hereinafter *Fair Cross-Section*]; Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 811-41 (1988) (authored by David D. Hopper).

⁶ Most commentators have emphasized the accused's right to object to the racially discriminatory peremptory challenge on the grounds of either fourteenth amendment equal protection or the sixth amendment right to an impartial jury. They have largely ignored the consequences of selecting an all-white jury to judge an African-American defendant or crime victim. Only a few scholars have focused specifically on the all-white jury as the constitutional wrong to be remedied. See, e.g., Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Kuhn, *supra* note 4, at 290-93; *Black Juries*, *supra* note 4; *Blueprint*, *supra* note 4.

⁷ Section 1 of the fourteenth amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV. For articles that base their criticism of *Swain* on fourteenth amendment equal protection grounds, see *supra* note 4. See also Alschuler, *supra* note 5; Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989) (prosecutor's peremptory challenge violates the fourteenth amendment's due process clause).

⁸ The sixth amendment states, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI. Articles that criticize *Swain* on sixth amendment grounds include Brown, McGuire & Winters, *supra* note 4; Robert L. Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 OKLA. L. REV. 385 (1985); Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C.L. REV. 501 (1986); Note, *Systematic Exclusion of Cognizable Groups by Use of Peremptory Challenges*, 11 FORDHAM URB. L.J. 927 (1983) (authored by Stephen W. Dicker); Note, *Batson v. Kennedy: Sixth Amendment Remedy in Equal Protection Clothes*, 22 GONZ. L. REV. 377 (1986/87) (authored by William D. DeVoe) [hereinafter *Sixth Amendment Remedy*]; Note, *Skin Color Doesn't Reason: Closing the Door on the Discriminatory Use of Peremptory Challenges*, 64 U. DET. L. REV. 171 (1986) (authored by Brian K. Zahra); Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980) (authored by John Collier Harrison).

⁹ The shortcomings of the fourteenth and sixth amendment remedies are seen in the relative ease with which a prosecutor may overcome a black defendant's objection to striking a prospective black juror by providing a race-neutral, trial related explanation. See *infra* notes 492-515 and accompanying text. With respect to a white defendant accused of committing a crime against an African-American, the same limitation applies: the defense will often be able to provide a racially neutral reason for dismissing an African-American juror.

I also disagree with a sixth or fourteenth amendment analysis to the extent that some courts and commentators have interpreted those amendments to permit the prosecution to object to a defendant's use of peremptory challenges in every criminal case.

sure that African-Americans are not peremptorily excluded from juries hearing cases in which either a member of the black community is accused by a white complainant or a black victim seeks vindication against a white perpetrator.¹⁰

A thirteenth amendment¹¹ analysis of the racially discriminatory use of the peremptory challenge avoids this limitation by focusing on the *outcome* of the jury selection process: the trial jury's racial composition. Historical evidence and recent sociological data¹² show that all-white juries are unable to be impartial in cases involving the rights of African-American defendants or crime victims. Since the beginning of slavery, the all-white jury has represented the ultimate obstacle to justice for African-American criminal defendants. Similarly, in the face of white juries, African-American crime victims have been unable to secure legal protection in the rare in-

See infra notes 463 & 497. Under this Article's thirteenth amendment analysis, the defendant's right to exercise peremptory challenges would be preserved except in the limited instance of the interracial case where a white defendant seeks to eliminate prospective black jurors and achieve an all-white jury. *See infra* note 24.

¹⁰ This article focuses on African-Americans' exclusion as trial jurors. A similar thirteenth amendment analysis would apply to other racially cognizable groups which can demonstrate a history of discrimination associated with second-class citizenship, or comparable conditions of involuntary servitude. *See Note, Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1026 (1969) (arguing that "all who suffer under 'badges and incidents' of second class citizenship are beneficiaries of the thirteenth amendment") [hereinafter *Anti-Discrimination Laws*]; *infra* note 153 and accompanying text (discussing congressional intention in passing the thirteenth amendment and the 1866 Civil Rights Act, and recent judicial clarification that the Act's protections include many groups not previously enslaved); *cf. Note, The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969) (limiting the thirteenth amendment to African-Americans and possibly Asian-Americans) [hereinafter *A Preliminary Analysis*]. While this Article emphasizes race discrimination, the thirteenth amendment's protection may also apply to any cognizable group that shares characteristics with racial groups subjected to involuntary servitude.

¹¹ Section one of the thirteenth amendment provides that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to her jurisdiction." U.S. CONST. amend. XIII. Section two states that "Congress shall have power to enforce this article by appropriate legislation." *Id.* The Supreme Court has recognized that the thirteenth amendment's prohibition of slavery includes the elimination of its badges and incidents. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (construing the Civil Rights Act of 1866 to bar racial discrimination by private persons in the sale of real property in light of the thirteenth amendment); *The Civil Rights Cases*, 109 U.S. 3, 20 (1883); *infra* notes 510-22 and accompanying text.

¹² Professor Johnson analyzed social scientists' research in determining whether a juror's racial bias affects a jury's determination of guilt. Based on these studies and additional research material, Professor Johnson concluded that all-white juries fail to give the benefit of the doubt to an accused African-American defendant, and are also less concerned with vindicating the rights of African-American crime victims than those of white victims. Johnson suggests that a minimum of three black jurors is necessary to ensure an impartial jury verdict in interracial cases. Johnson, *supra* note 6; *see infra* notes 548-63 and accompanying text.

stances where white people are prosecuted for interracial violence.¹³ Moreover, the continued disqualification of black jurors remains a badge signifying the subordinate status of people of African ancestry. Consequently, such racially-based peremptory challenges violate the thirteenth amendment's prohibition against slavery and its incidents.

When the thirteenth amendment was ratified in 1865,¹⁴ it embodied the marshalling of national power to abolish the American slavery system, including its badges and incidents. The thirteenth amendment's substantive jury protections stem from the understanding that slavery's incidents included denying legal justice and maintaining inferior citizenship status for African-American people. The amendment and its derivative statute, the Civil Rights Act of 1866,¹⁵ were quickly buried by the forces of reaction to Reconstruction and by narrow judicial construction. Current judicial interpretation, however, has soundly discredited a limited view of the federal government's thirteenth amendment powers. Indeed, the powerful potential of the thirteenth amendment to eradicate current vestiges of slavery has gained some recognition in the courts. It should now be extended to the racially discriminatory peremptory challenges in criminal and civil cases.

It is the author's view that the racially discriminatory use of the peremptory challenge cannot survive thirteenth amendment scrutiny. Such application of the amendment goes to the heart of the equal justice and fair trial impulses that underlay the passage of the thirteenth amendment and the Civil Rights Act of 1866. This novel approach provides the most far-reaching impetus for eliminating this courtroom vestige of slavery and for assuring the inclusion of African-American jurors.

Part One of this Article analyzes the peremptory challenge's original objective of protecting an accused's right to be judged by

¹³ For purposes of providing a thirteenth amendment analysis of the racially discriminatory use of the peremptory challenge, I include unredressed violence committed by white civilians as well as law enforcement officials. Professor Charles Jones convincingly argues that the thirteenth amendment is the source of constitutional power for prosecuting individual acts of racially motivated violence. Charles Jones, *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689 (1986).

¹⁴ The thirteenth amendment was introduced in March 1864, but failed to receive the two-thirds vote necessary to forward it to the states for ratification. It was reintroduced in January 1865 and won congressional approval on January 31, 1865, three months prior to General Lee's surrender at Appomattox Court House on April 9, 1865. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 64, 73 (1988); *infra* note 144. The thirteenth amendment was certified by the Secretary of State on December 18, 1865. 13 Stat. 774 (1865).

¹⁵ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

an impartial jury.¹⁶ For more than 500 years, English common law and American statutory law recognized the defendant's exclusive right to peremptorily strike jurors. The defendant's peremptory challenge was one of many fair trial protections systematically denied African-Americans during two centuries of slavery law in this country.

Part Two reviews the colonial and post-revolutionary American legal systems in which the denial of legal justice to African-Americans, and legalization of violence against them, were fundamental to maintaining the institution of slavery.¹⁷ The blanket rejection of African-Americans as trial jurors was usually accompanied by their systematic disqualification as witnesses and litigants. Where slavery existed within a colony or state, an accused black was often summarily punished at the whim of his or her owner. In the infrequent instances when an accused black was allowed a trial, he or she was tried and punished in an all-white court system in which the defendant could neither testify nor seek civil redress against a white person. Although most northern blacks gained access to the regular court system by the middle of the nineteenth century, their testimony, when permitted against a white person, was rendered virtually meaningless by all-white juries.

Part Three reviews the legislative intent of the thirteenth amendment and the first civil rights statute, the Civil Rights Act of 1866. This Article argues that one of the thirteenth amendment's primary objectives was to assure equal justice and universal freedom for African-American people. Indeed, the 1866 Civil Rights Act expanded blacks' freedom by granting them equal access to the legal system as witnesses and litigants, and by guaranteeing that they could enjoy the benefit of all laws for the protection of person and property¹⁸ through the Act's federal removal section. After reviewing the first judicial cases which upheld the broad applicability of the thirteenth amendment's promise of freedom and the 1866 Act's guarantee of equal justice, this Article analyzes these decisions in light of the retreat from the liberating purpose of the thirteenth amendment as reflected in Supreme Court decisions beginning in 1872. As a result of this retreat, Congress relied upon the fourteenth rather than the thirteenth amendment in addressing jury se-

¹⁶ See *infra* notes 26-45 and accompanying text.

¹⁷ See *infra* notes 67-69, 74-78, 82-84, 89-91, 99-102, 108, 118-22, 128 and accompanying text.

¹⁸ Section one of the 1866 Act guaranteed for all citizens "the same as is enjoyed by white citizens . . ." The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. Section three of the Act provides for removal relief for persons "who are denied or cannot enforce . . . the rights secured to them by the first section of this act." *Id.* ch. 31, § 3, 14 Stat. 27.

lection discrimination in The Civil Rights Act of 1875.¹⁹

Part Four analyzes several United States Supreme Court decisions between 1880 and 1883. These cases effectively eliminated two remedies: fourteenth amendment equal protection challenges, and the federal removal remedy.²⁰ By returning enforcement power to the states, these decisions led to the reinstitutionalization of the all-white jury, first through discriminatory jury venire selection procedures,²¹ and after 1935, through reliance on the peremptory challenge to strike prospective black jurors.²² Part Four concludes by arguing that the Supreme Court's reformed equal protection analysis in *Batson* continues to restrict the viability of the fourteenth amendment as a curb on racially inspired peremptory challenges.²³

Part Five suggests that the thirteenth amendment offers substantive protections against disqualification of African-American jurors through the peremptory challenge. The amendment is interpreted to require that two categories of peremptory challenges be abolished: the prosecutor's challenge in criminal cases against a black defendant ("defendant-centered") and the defense challenge in any case involving a white defendant and a black crime victim or civil rights plaintiff ("victim-determinative").²⁴ In criminal cases not involving an African-American, a white defendant should be able to object to a prosecutor's exclusion of African-American jurors and could prevail if the prosecutor were unable to provide a race-neutral explanation ("juror-focused").²⁵ Similarly, in a civil case where neither party was African-American, a litigant should be permitted to mount a *Batson*-type challenge against the opposing party's peremptory dismissal of an African-American juror. This Part of the Article concludes by delineating the mutual support and interplay of

¹⁹ Act of Mar. 1, 1875, ch. 114, 18 Stat. 335; *see infra* notes 229-30, 281, 303-15 and accompanying text.

²⁰ *See infra* notes 316-45 and accompanying text.

²¹ *See infra* notes 377-91 and accompanying text.

²² *See infra* notes 424-26, 449-54, 459 and accompanying text. In the 1935 case of *Norris v. Alabama*, 294 U.S. 587 (1935), the Supreme Court limited the previously unfettered discretion that state jury officials had employed since the late nineteenth century to disqualify African-Americans from inclusion on jury venires, based on their presumed moral and intellectual unfitness for jury duty. *See infra* notes 381-86, 442-44 and accompanying text.

²³ *See infra* notes 471-92 and accompanying text.

²⁴ Although the importance of the defendant's peremptory challenge in ordinary criminal cases should be appreciated, the historic role of anti-black violence in maintaining slavery and later in perpetuating black subordination makes it necessary to prohibit defense peremptories when they are used to strike prospective black jurors in race-sensitive crimes or civil rights violations. In these limited situations a prosecutor may prevent a white defendant from striking prospective black jurors because of the all-white jury's historic role in denying justice to black crime victims. *See infra* notes 575-76, 581-87 and accompanying text.

²⁵ *See infra* notes 579-94 and accompanying text.

the sixth and fourteenth amendments with the thirteenth amendment to eliminate the racially discriminatory use of the peremptory challenge.

1

ORIGIN AND PURPOSE OF THE PEREMPTORY CHALLENGE

Federal and state courts currently allow both the government prosecutor as well as the defense attorney to peremptorily remove a specified number of prospective trial jurors in a criminal case "without assigning any reason."²⁶ But for more than five hundred years, use of the peremptory challenge was the exclusive right of the defense lawyer as a means of protecting the fair trial rights of an accused.²⁷

Nearly seven centuries ago, in 1305, English legislators recognized the fundamental nature of the defendant's right to peremptorily strike potential jurors "who may be suspected of entertaining a prejudice" against the person on trial.²⁸ The new statute eliminated the prosecutor's peremptory challenge, and permitted prosecution removal of a juror only when the King's lawyers could "assign of their Challenge a Cause certain."²⁹ In doing so, the English Parliament abolished a practice that had permitted Crown prosecutors to remove unlimited numbers of jurors solely by asserting that it was being done in the King's name.³⁰ Parliament declared that these challenges were "mischievous to the subject, tending to infinite . . . danger."³¹ At the same time, Parliament declined to alter the common-law rule that allowed defendants thirty-five peremptory challenges in felony or treason cases to remove any juror believed to be partial to the government or prejudiced against the defense.

The intent of the 1305 statute was obvious: English legislators allowed the defendant, but not the King, to exercise peremptory challenges in order to protect the defendant's fair trial rights. Only by allowing an accused to remove potential jurors based upon "sudden impressions and unaccountable prejudices we are apt to con-

²⁶ See *supra* note 3.

²⁷ See generally J. PROFATT, A TREATISE OF TRIAL BY JURY § 155, at 210-11 (1877).

²⁸ *Id.*

²⁹ Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), *digested in* 1 PICKERING'S STATUTES 309 (1762).

³⁰ Profatt refers to the pre-1305 common-law practice in which the prosecution exercised unlimited peremptory challenges by simply alleging "quid non bons sunt pro rege." J. PROFATT, *supra* note 27, at 211. Since trial by jury did not replace earlier methods of resolving disputes such as trial by battle or trial by ordeal until after 1215, the Crown's peremptory challenges existed for less than a century before being repealed by the English Parliament in 1305. See generally J. VAN DYKE, *supra* note 4, at 3-4, 147.

³¹ SIR EDWARD COKE ON LITTLETON 156 (14th ed. 1791), *cited in* Swain v. Alabama, 380 U.S. 202, 213 (1965).

ceive upon the bare looks and gestures of another"³² could the defendant's right to be judged by an impartial jury be protected. Blackstone explained that English common law perpetuated the defendant's peremptory challenge because of a professed sense of "tenderness and humanity [to prisoners] A prisoner should have a good opinion of his jury The law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike."³³

During the next 500 years, English and then American common law continued to limit use of the peremptory challenge to the defendant. In England, a judicially developed procedure permitted prosecutors to temporarily "stand-aside" jurors it thought were not impartial without assigning cause.³⁴ Some American colonies permitted the "stand-aside" practice, but others resisted giving the government any access to a procedure intended to protect an individual against prosecutorial abuse.³⁵

The defendant's right to the peremptory challenge had become such a fundamental precept of American common law that in 1789, when Congress was drafting a constitutional amendment to guarantee an accused's right to an "impartial jury trial," the proposed language referred to "the right of challenge and other accustomed requisites."³⁶ Although the final draft of what would become the sixth amendment did not include mention of the accused's right of peremptory challenge, Congress codified the common-law rule in 1790 by providing for thirty-five defense peremptory challenges

³² 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND; A FACSIMILE OF THE FIRST EDITION OF 1765-1769 346-47 (1979).

³³ *Id.* at 346.

³⁴ The "stand-aside" procedure has been criticized for undermining the purpose of the 1305 statute because it often produced a result similar to that of the peremptory challenge. Profatt blamed "judicial construction" for creating a procedure that was contrary to the legislators' "evident design of . . . deny[ing] any right of peremptory challenge to the King." J. PROFATT, *supra* note 27, at 212-13. Van Dyke blames "[c]ourt practice [for] allow[ing] the crown to continue a procedure that Parliament had explicitly eliminated." J. VAN DYKE, *supra* note 4, at 148.

The stand-aside procedure is distinguishable from the peremptory challenge in one important respect: a juror directed to "stand-aside" may eventually be selected to serve on the jury; a juror peremptorily stricken is permanently excused and disqualified. Where jury selection was not completed because the defense used its peremptory challenges, or because the prosecutor exercised too many "stand asides," the "stand-aside" jurors would be recalled and could be removed only if the prosecutor showed "cause." *Cf.* *Swain v. Alabama*, 380 U.S. 202, 213 (1965) (referring to the defendant's peremptory challenge and the prosecutor's right to "stand aside" as "peremptories on both sides . . . [under] the settled law of England").

³⁵ J. VAN DYKE, *supra* note 4, at 148-49. During the colonial period, South Carolina, Georgia, and Pennsylvania permitted the "stand-aside." Florida, North Carolina, and Louisiana later approved of the practice.

³⁶ *Gazette of the United States*, Aug. 29, 1789, at 158.

in trials for treason, and twenty defense challenges in trials for other capital crimes.³⁷ Significantly, the federal statute maintained the centuries-old practice of denying such challenges to the government.

It was not until 1865, the same year that the thirteenth amendment was approved by both Houses, that Congress changed this long-held practice and provided for a limited number of prosecutor peremptory challenges in federal criminal trials.³⁸ Many state legislatures had passed similar laws in the period just preceding the Civil War, and the remaining states did so immediately following the War's conclusion.³⁹ Advocates of the prosecutor's peremptory challenge argued that it was necessary to overcome jury sympathy for

³⁷ An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 119 (1790).

³⁸ Act. of Mar. 3, 1865, ch. 86, § 2(v), 13 Stat. 500 (five prosecution and 20 defense peremptory challenges in capital and treason cases; two prosecution and ten defense challenges in noncapital felonies).

The fact that the prosecutor's peremptory challenge was created in the same year that Congress passed the thirteenth amendment suggests that some proponents of the federal peremptory challenge may have sought a procedural device to assure that African-Americans would never serve as jurors. *See infra* note 142 (speech of Rep. English in 1860). The congressional debates, however, do not support the notion that the prosecutor's peremptory challenge was originally intended to exclude on the basis of race. CONG. GLOBE, 38th Cong., 1st Sess. 435, 2198-99 (1864); CONG. GLOBE, 38th Cong., 2nd Sess. 127 (1865). Contrary to the Supreme Court's assertion that most states passed prosecutory peremptory laws between 1865 and 1870, these laws were actually passed prior to the thirteenth amendment's ratification. *Swain v. Alabama*, 380 U.S. 202, 216 (1965); *see infra* note 39. Presumably, the federal peremptory statute was a response to the 1856 United States Supreme Court decision in *United States v. Shackelford*, 59 U.S. (18 How.) 588 (1855). There, the Court rejected government's "stand-aside" as equivalent to the defendant's right to peremptorily challenge jurors. *Cf. United States v. Marchant*, 25 U.S. (12 Wheat) 480 (1827), where Justice Story suggested that the prosecutor's right to stand aside in a federal case was part of the common law inherited from England.

³⁹ In 1820, Alabama was the first state to pass a prosecutor's peremptory challenge law (§ 10, passed Dec. 21, 1820), followed by Georgia's Act of 1833, Penal Code Div. 322, § XV. Three states passed similar laws in the 1840s: Missouri (ch. 138, Art. VI, § 4 (1845)), Tennessee (CODE OF TENN. 1845-46, ch. 75), and Mississippi (ch. 65, Art. 8, referring to "the trial of any white person"). Ten states followed in the 1850s, five prior to the *Schackelford* decision and five just afterward: *see, e.g.*, Kentucky (ch. 6, Art. IV subdiv. II § 204 (1854)), North Carolina (REV. CODE 1854, ch 35, § 33), and Rhode Island, the first northern state, in 1854 (Pub. L., 1854, ch. 172, § 33). In 1856, Texas (Act of Aug. 26, 1856, art. 3038, ch. 111) enacted its law, and Connecticut (ch. 37, passed June 4, 1858), and New York (ch. 332, 81st Sess.) followed in 1858. Just prior to the Civil War, four northern states—Maryland (ch. 308, § 18, passed March 9, 1860), New Hampshire (ch. 2350, § 1, approved July 3, 1860), Pennsylvania (1860 Pa. Laws 440), and Michigan (No. 72, § 5, approved Feb. 25, 1861)—provided a prosecutor's right to strike prospective jurors.

After the thirteenth amendment was ratified in 1865, Maine (ch. 108, § 1, approved February 27, 1867), Massachusetts (ch. 151, approved April 10, 1869), Vermont (Public Act No. 128 (1872)), and West Virginia (ch. 47, § 23 (1872)) passed comparable statutes. Finally, New Jersey (1898 N.J. Laws, ch. 237, § 81), and Virginia (Code 1919, ch. 195, § 4900) were the last states to enact similar laws. (I thank research assistant David

the defendant. For example, Pennsylvania prosecutors complained about jury panels in which "one or more persons [were] pledged to the defendant . . .; the right to peremptorily challenge four jurors is the security of the public against such contingencies."⁴⁰

The history of the defendant's peremptory challenge follows a consistent tradition in which English common law and American state and federal law emphasized the fair trial rights of the accused.⁴¹ The relatively recent prosecutor's challenge suggests a concern that the government should not be prejudiced by potential jurors who might be ill-disposed to convict "one of their own."

Neither fair trial considerations nor sympathy for the accused, however, were relevant to a person of African ancestry facing a criminal charge. In the rare instance when a black person was granted a trial prior to the Civil War, the defendant was certain to be convicted when the accuser was a white person.⁴² In the absence of any known black jurors in this country prior to 1860,⁴³ the all-white jury expressed little sympathy for African-American defendants or crime victims; to the contrary, the denial of impartial courtroom justice was one of slavery's badges and incidents.

Although the peremptory challenge did not become a primary tool for excluding the black juror until 1935,⁴⁴ it must be viewed as the most recent incarnation of the anti-democratic impulse to keep juries all-white. Although the thirteenth amendment theoretically granted freedom to African-Americans, and the Civil Rights Act of 1866 targeted access to legal justice as one of the rights one must enjoy to be free,⁴⁵ the continuing exclusion of black jurors has meant that all-white juries continue to function as a barrier to black people's access to legal justice, whether as complainants or criminal defendants.

Weissman for his invaluable assistance in identifying the origin of each state's peremptory challenge).

⁴⁰ J. PROFATT, *supra* note 27, at 210-11.

⁴¹ See *supra* notes 35-37 and accompanying text. Although the peremptory challenge is not a constitutional right, the United States Supreme Court recognized that it is "one of the most important of the rights secured to the accused." *Frazier v. United States*, 335 U.S. 497, 506 n.11 (1948) (citing *Pointer v. United States*, 151 U.S. 396, 408 (1894)); see also *Aldridge v. United States*, 283 U.S. 308 (1931) (finding error in lower court's refusal to permit examination of prospective jurors as to their racial prejudices); *Lewis v. United States*, 146 U.S. 370, 376 (1892) (concluding that the peremptory challenge is "essential to the fairness of trial by jury").

⁴² See *infra* notes 94-95, 141 and accompanying text.

⁴³ See *infra* note 140 and accompanying text.

⁴⁴ See *infra* notes 406-26 and accompanying text.

⁴⁵ See *infra* notes 143-78, 203-38 and accompanying text.

II .

COLONIAL AND POST-REVOLUTIONARY LAWS: FIXING A
 “[S]TIGMA OF THE DEEPEST DEGRADATION . . . UPON THE WHOLE
 [AFRICAN-AMERICAN] RACE”⁴⁶

To understand how the racially inspired use of the peremptory challenge violates the thirteenth amendment, one must first look at the legal status of people of African descent in the United States during the 200 years when slavery existed as a legalized institution in this country. That status established the reference point against which the effects of abolishing the institution of slavery, and other post-Civil War attempts to grant freedom and legal equality for African-Americans as witnesses, litigants, and jurors, must be measured.⁴⁷ Similarly illuminating are the mechanisms of the ensuing backlash—in the form of disenfranchisement, discriminatory jury selection practices, and racial violence⁴⁸—that led to the reimposition of the all-white jury during the late nineteenth century, and which continues to the present.⁴⁹

The study of colonial (1660-1776) and post-revolutionary (1776-1860) law exposes the criminal justice system as a mainstay of institutionalized slavery. During the period that slavery existed in a colony or state, African-Americans were usually judged and summarily punished in special courts by all-white judges or juries for alleged crimes committed against whites.⁵⁰ Violent acts by whites against blacks were rarely defined as criminal and then only as property crimes committed against the slave’s white owner.⁵¹ Not only did the legal structure of slavery fail to protect blacks against the violent acts of whites, but it denied African-Americans the right to seek legal redress, or to testify as a witness against whites.⁵²

* * *

The Supreme Court’s decision in *Dred Scott v. Sandford*⁵³ sum-

⁴⁶ *Dred Scott v. Sandford*, 60 U.S. 393, 409 (1857).

⁴⁷ The Congressional intent in passing the thirteenth amendment and the Civil Rights Acts of 1866 and 1875 are discussed *infra* at notes 143-78, 203-38, 301-15 and accompanying text.

⁴⁸ See *infra* notes 377-437 and accompanying text.

⁴⁹ These sections attempt to synthesize three centuries of political and legal history in which African-American criminal defendants and crime victims were denied impartial justice and jury verdicts, a history which I believe is not generally well known. See DERRICK A. BELL, *AND WE ARE NOT SAVED* 217 (1987); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

⁵⁰ See *infra* notes 70, 94-96, 114, 136 and accompanying text.

⁵¹ See *infra* notes 77-78, 92-93, 99-102 and accompanying text.

⁵² See *infra* notes 79-80, 84, 89-91, 113, 127, 134-35 and accompanying text.

⁵³ 60 U.S. 393 (1857). For a thorough reporting of the case’s factual background and the process of judicial decision-making leading to the Court’s decision, see DON

marized more than 100 years of colonial legal treatment of people of African descent, and concluded that they had always been regarded as "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and . . . had no rights or privileges but such as those who held the power and the Government might choose to grant them."⁵⁴ In reviewing this country's early history, the Supreme Court relied on the "prevailing opinion of the time"⁵⁵ in each of the thirteen colonies to justify the enslavement of African people.⁵⁶

Nowhere was this racial stigma expressed more strongly than within the criminal legal process. Colonial criminal justice guaranteed virtual immunity against criminal prosecution of the white master (and of the white population generally) for assaults against black people. At the same time, the law barred the black victim from seeking legal redress or judicial intervention.⁵⁷

Although each colony's history was unique and the development of laws affecting its black population reflected local circumstances, the thirteen colonies all maintained special laws which applied only to African-American people and were administered against them by all-white judicial bodies.⁵⁸ Many colonies had separate courts and procedures that were used only when a white person accused a black person of criminal conduct.⁵⁹ Due process protections, such as the right to trial before an impartial jury, were almost

EDWARD FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978).

⁵⁴ *Dred Scott*, 60 U.S. at 404-05.

⁵⁵ *Id.* at 408.

⁵⁶ [F]or more than a century before [they had] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

Id. at 407. The Court referred to anti-miscegenation colonial laws in Maryland and Massachusetts as emblematic of this legal degradation. *Id.* at 407-09.

⁵⁷ See JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM 187-90* (3d ed. 1969); LORENZO J. GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND* (1974); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* (1978); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1814*, at 101-34 (1968).

⁵⁸ See W. JORDAN, *supra* note 57, at 104 ("No English colony remained without laws dealing specifically with the governance of Negroes."). Higginbotham reviewed the slave codes of Virginia, A. HIGGINBOTHAM, *supra* note 57, at 19-20, 32-36, 38-40, 50-53; Massachusetts, *id.* at 80-82; New York, *id.* at 115-23, 141-50; South Carolina, *id.* at 167-68, 170-90, 193-201, 216-18; Georgia, *id.* at 248-51, 252-61; and Pennsylvania, *id.* at 280-88, 299-305; see also J. FRANKLIN, *supra* note 57, at 76-78 (Maryland); *id.* at 78-81 (North Carolina); *id.* at 98-99 (Delaware); *id.* at 94-96 (New Jersey); *id.* at 101-11 (New England colonies of Connecticut, Rhode Island, and New Hampshire). Greene provides the most in-depth look at the New England colonies' criminal law enforcement. L. GREENE, *supra* note 57, at 124-66.

⁵⁹ See *infra* notes 68, 114, 134 and accompanying text.

nonexistent for the black slave defendant.⁶⁰

The status of African-Americans improved little after the Revolutionary War. The Supreme Court concluded in *Dred Scott v. Sandford*⁶¹ that there had not been any "change of opinion as to the relative rights and position of the white and black races in this country."⁶² The Court referred to state legislation⁶³ and the ratification of the Constitution⁶⁴ as evidence that "the same opinions and principles"⁶⁵ of "the inferior and subject condition of that race . . . [were] equally fixed and equally acted upon . . . the whole race."⁶⁶

In the period from 1776 to 1860, an all-white court or trial jury still determined a black defendant's guilt or innocence in both the northern and southern courtroom. Prior to the Civil War and the subsequent enactment of the thirteenth amendment, African-

⁶⁰ [Our ancestors] were probably impelled by a sense of common danger, and the duty of self-preservation, to vest this extraordinary jurisdiction in three justices and four freeholders, who might be hastily collected at the courthouse, and proceed to the condemnation and execution of a slave, without indictment, jury, or notice to the owner

State v. Ben, 8 N.C. (1 Hawks) 434-35 (1821) (emphasis added) (describing the procedures followed by North Carolina's special courts under its 1741 Act).

⁶¹ 60 U.S. 393 (1857).

⁶² *Id.* at 413. The Court's sweeping statements in *Dred Scott* fail to suggest the contradictions of American colonists who were waging a war for independence under the battle cry of the "natural" and "inalienable" rights of life, liberty and the pursuit of happiness, yet at the same time enslaving a significant portion of their population. See Edmund Morgan, *Slavery and Freedom: The American Paradox*, 59 J. AM. HIST. 5 (1972) (Arguing that "the rise of liberty and equality in this country was accompanied by the rise of slavery." Morgan concluded that the revolution preserved "the rights of Englishmen . . . by destroying the rights of Africans"); cf. William W. Froehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81 (1972) (suggesting that the Founding Fathers sought to cripple the institution of slavery by banning slavery in northern states and agreeing to close the slave trade in 1808).

⁶³ The Court cited several New England state laws as examples of rights that were denied to northern African-Americans, regardless of status: the 1786 and 1836 Massachusetts anti-miscegenation laws and numerous Connecticut statutes, including an 1833 law which criminalized the teaching of nonresident black children. *Dred Scott*, 60 U.S. at 413-15 (citing *Crandall v. Connecticut*, 10 Conn. 340 (1833)). See J. FRANKLIN, *supra* note 57, at 163 (describing the *Crandall* case wherein a white mob broke the school's windows, insulted Mrs. Crandall, and forced the school's closure following her arrest). The Supreme Court also referred to an 1855 New Hampshire law that barred African-Americans from joining the state militia, and an 1844 Rhode Island anti-miscegenation statute. *Dred Scott*, 60 U.S. at 415, 416.

⁶⁴ *Dred Scott*, 60 U.S. at 416. The Court referred to U.S. CONST. art. I, § 9 (prohibiting Congress from lifting the importation of slaves until at least 1808), and art. 4, cl. 3 (slaves escaping to another state must be returned to the slave's owner). For an abolitionist critique of the Constitution, see STAUGHTON LYND, *CLASS CONFLICT, SLAVERY, AND THE U.S. CONSTITUTION* 153-83 (1967); Juliet E.K. Walker, *Whither Liberty, Equality or Legality? Slavery, Race, Property and the 1787 American Constitution*, 6 N.Y.L. SCH. J. HUM. RTS. 299 (1989); see also Justice Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337 (1987).

⁶⁵ *Dred Scott*, 60 U.S. at 413.

⁶⁶ *Id.* at 416.

Americans' exclusion from jury duty remained a national, uniform badge and incident of slavery.

A. Southern Colonial Justice for the African-American Defendant

Virginia's slave codes, enacted in the late seventeenth century, became a legislative model for the other southern colonies.⁶⁷ These laws gave the slaveowner virtually unlimited discretion to adjudicate guilt and to punish his slaves. No trial or judicial finding that the slave was, in fact, guilty was required.⁶⁸

Because summary justice was the rule, a criminal trial for a slave was the rare exception, granted most commonly when a white person other than the slave's owner was the accuser.⁶⁹ Even in these cases, the right to trial by jury rarely existed for the accused person of African ancestry, slave or free. Instead, special courts were created for the slave defendant, and were typically presided over by three white persons—a single justice of the peace and two freehold-

⁶⁷ A. HIGGINBOTHAM, *supra* note 57, at 39.

⁶⁸ In 1669, Virginia legalized an owner's killing of his slave who resisted corrective punishment by his master on the theory that "it cannot be presumed that propensed malice (which alone makes [murder] Felony) should induce any man to destroy his own estate." *Id.* at 36. In 1680, the Virginia legislature criminalized the act of self-defense by a black person, slave or free, by requiring that "any Negro [who] lift up his hand against any Christian he shall receive thirty lashes . . ." *Id.* at 39.

South Carolina followed the general principle that a master had the right to kill a slave who offered any resistance, regardless of the circumstances. *Id.* at 188-89; W. JORDAN, *supra* note 57, at 106 ("Masters were given immunity from legal prosecution should their slaves die under 'moderate' correction"). Its 1690 law authorized a white person to administer a "moderate" whipping to a slave who was apprehended trying to escape, but if the slave violently resisted, the authorized punishment ranged from whipping for a first offense, having his "nose slit, and face burnt in some place" for a second offense, and execution for a third conviction. A. HIGGINBOTHAM, *supra* note 57, at 171. In 1712, South Carolina law authorized a white person to "beat, maim, or assault" a slave who was travelling without a pass or to kill if the slave refused to show the pass and could not be taken alive. *Id.*

Further, South Carolina's 1722 and 1740 laws and Georgia's 1755 law justified a white person's killing of any slave who struck and injured another white person. *Id.* at 195, 256. Although South Carolina's 1740 law criminalized a master's "willful" killing of his slave, the misdemeanor crime was punishable merely by the imposition of a fine. The same law justified killing a slave if it was done "on a sudden heat or passion, or by undue correction." 2 BREVARD'S DIG. 241 (1814); see also JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY 202 (orig. published in 1837, reprinted 1968).

⁶⁹ Since the slaveowner had virtually unlimited discretion to punish a slave without judicial authorization, and a slave was powerless to complain if the punishment was excessive, the special courts were created primarily for a slave charged with a crime against a nonowner. More commonly, punishment was administered by "[a]ny white person—a drunken patrol, an absconding felon, or a vagabond mendicant—[who] is supposed to possess discretion enough to interpret the laws, and to wield the cowskin or cart-whip for their infraction." GEORGE MCDOWELL STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 94 (1856).

ers⁷⁰—who were frequently also slaveowners. Virginia law served as a model for the institutionalization of all-white judicial bodies throughout the colonies.

Throughout the South, colonial legislatures authorized severe and brutal sentences,⁷¹ to be determined and enforced by the individual white slaveowner or his agent.⁷² The value of a slave made execution a less preferred sentence, although it was legislatively mandated for an ever-expanding number of crimes.⁷³ While these laws attempted to define precise legal sanctions for a slave's "transgressions," slaveowners could inflict whatever punishment they desired. No record of legal reprobation exists for an owner who overstepped authorized sanctions in any southern colony.

⁷⁰ *Id.* at 91; W. JORDAN, *supra* note 57, at 106. Every southern colony—Maryland, Delaware, South Carolina, North Carolina, and Georgia—created special courts to try felony cases involving a criminal charge against a slave. See Md. Act of 1717, ch. 13, § 6; Delaware 1721 Act, *cited in* J. FRANKLIN, *supra* note 57, at 98-99; A. HIGGINBOTHAM, *supra* note 57, at 179-81 (describing South Carolina's courts); *id.* at 257-59 (referring to Georgia's system); North Carolina's 1741 Act, *cited in* State v. Ben, 8 N.C. (1 Hawks) 434 (1821). An accused slave was denied a right to trial by jury, and any "of the safeguards cherished by Englishmen . . ." A. HIGGINBOTHAM, *supra* note 57, at 180 (citing H. M. Henry, *The Police Control of the Slave in South Carolina* 58 (diss., Vanderbilt University (Emory, 1914)). Instead, the slave courts were known for passing "swift justice" in cases considered serious. Higginbotham cited a South Carolina case in which a black man was arrested for stealing a horse, tried, found guilty the next day, and executed the day after. *Id.* at 180.

⁷¹ While whipping was the most common punishment for a first-time offender for many crimes, more brutal punishment followed for repeat offenses. In South Carolina, for example, a slave's repeated acts of leaving the plantation without permission authorized his owner, or one acting under his direction, to brand the slave "with the letter R, on the right cheek," to mutilate by cutting off one of the slave's ears, to dismember by cutting "the cord of the slave's legs" above the heel or by castration in the case of a male slave, and ultimately, to kill the slave. A. HIGGINBOTHAM, *supra* note 57, at 177; see *supra* note 68.

⁷² Winthrop Jordan suggests that slave laws were primarily intended to impose discipline on white slaveowners in order to control the slave population. "It was the white man who was *required* to punish his runaways, prevent assemblages of slaves, enforce the curfews, sit on the special courts, and ride the patrols." W. JORDAN, *supra* note 57, at 108-09. According to Jordan, members of the legislative assemblies were mostly slaveowners who attempted to enforce slave-discipline by forcing owners, individually and collectively, to enforce the laws in their own self-interest. *Id.*

⁷³ Georgia's 1755 penal law provided for capital sentences for crimes that white legislators thought slaves were more likely to commit. Most of these sentences related to stealing or destroying property that would be punishable, if at all, with a minimal sentence if committed by a white person. Additional capital offenses were added to Georgia's 1765 and 1770 codes, included teaching another slave about the use of poisonous plants or herbs, striking a white person for a second time, or attempting to rape a white woman. In reviewing Georgia and South Carolina laws, Judge Higginbotham concluded that the slave's value meant that a capital sentence was "seldom imposed," despite being warranted for many offenses. A. HIGGINBOTHAM, *supra* note 57, at 256-57, 262.

B. Southern Colonial Justice for the African-American Complainant

Because severe sentences and even execution of slaves were legally prescribed punishments for unproven transgressions, the denial of black defendants' rights and denial of black complainants' rights were virtually synonymous. What would be deemed a criminal assault or homicide if committed by one white person against another became a legalized punishment when the victim was black. In addition, the rape of a black woman, free or slave, was not regarded as a crime.⁷⁴ Because the law recognized no legal rights for blacks, it allowed no legal redress.

Throughout the southern colonies, the murder of a slave by a white person was usually not considered a crime. For example, the colonies granted absolute immunity to a white person if he killed a slave who resisted apprehension, or who defended himself regardless of the circumstances.⁷⁵ The white person effectuating the capture always had the discretion to summarily execute the slave or to impose a less-than-ultimate sentence.⁷⁶ The limited instances where a southern colony classified the killing of a slave as a crime involved the killing of someone else's slave⁷⁷ and the laws provided that the slaveowner be compensated for the loss of property.⁷⁸ In every southern colony, slaves were denied access to courts⁷⁹ and

⁷⁴ See L. GREENE, *supra* note 57, at 203-05 (noting that even though crimes against a black woman were numerous, she had no legal recourse for sex crimes committed against her); W. JORDAN, *supra* note 57, at 141 (stating that a white man's dominion over blacks extended to sexual dominance).

⁷⁵ A. HIGGINBOTHAM, *supra* note 57, at 171.

⁷⁶ Some states provided greater incentive to the person apprehending a runaway slave and returning the "property" alive to its owner. For example, Georgia legalized the killing of a runaway slave, and paid a reward five times as great if a white person returned a slave alive rather than returning with a male slave's "scalp with Two ears." *Id.* at 254.

⁷⁷ Some southern colonies attempted to limit extreme cruelty against slaves when committed by a nonowner. Georgia, for example, created a civil cause of action for a slaveowner, not a slave, to sue and recover damages where a nonowning white "cut the Tongue put out the Eye Castrate[d] or . . . inflict[ed] any other Cruel punishment" on a slave. *Id.* at 255. South Carolina's penal code criminalized similar conduct, but limited the punishment to the payment of a fine to the slave-owner. *Id.* at 195.

⁷⁸ *Id.* In South Carolina, a white servant who killed a slave could be sentenced to three months in jail and four years of additional servitude. Corroboration by two white witnesses was required to convict, making this sentencing outcome extremely unlikely. *Id.* at 176, 253-54.

⁷⁹ By definition, a slave was regarded as property and therefore had no rights of his own and thus no standing to sue. Slaves could not be witnesses against white persons in civil or criminal cases. J. WHEELER, *supra* note 68, at 194. Some colonies, such as Virginia and South Carolina, created specific laws which prevented a slave from suing for ill treatment. *Id.* at 38, 195-97. Other colonies limited a slave's right to sue for freedom by requiring a white person to act as legal guardian. *Id.* at 194 (referring to South Carolina's 1740 Act).

were prevented from testifying against white people.⁸⁰ Consequently, slaveowners and white people generally had automatic immunity against crimes committed. Judge A. Leon Higginbotham summarized the nonperson status of people of African descent: "Once the slave status has been declared, most human rights are eradicated as a matter of law. The slave is denied the right to utilize the legal process in his behalf, to stop injustice for himself, his body or his family."⁸¹

The southern colonial legal system's refusal to provide legal protection to those enslaved also applied to the relatively few free blacks living in the South.⁸² Even though they enjoyed some rights equal to whites, such as the right to travel, to bear arms, or to own property, free African-Americans "had a good deal less liberty than the law allowed."⁸³ Because of their race, they, too, were branded legally inferior to whites, and their sworn testimony was automatically rejected in any criminal case where the alleged perpetrator was white.⁸⁴ Consequently, they were as vulnerable to physical attacks

⁸⁰ See G. STROUD, *supra* note 69. This author asserted that a slave, or a free black, could not be a witness against a white person in a civil or criminal case, offering the following explanation: "this exclusion is not confined to the evidence of slaves; but natives of Africa, and their descendants, whatever may be the shade of their complexion, and whether bond or free, are under the like degrading disability." *Id.* at 44. A slave could testify only against another slave, and sometimes against a free black. J. WHEELER, *supra* note 68, at 194. Virginia's statute was typical: "Any negro or mulatto, bond or free, shall be a good witness in pleas of the commonwealth for or against negroes or mulattoes, 'bond or free, or in civil pleas where free negroes or mulattoes shall alone be parties, and in no other cases whatsoever.'" G. Stroud, *supra* note 69, at 44 (quoting 1 REV. CODE OF VIRGINIA 422 (emphasis in original)). Stroud also discusses laws of Maryland, South Carolina, North Carolina, and Georgia. See *id.* at 44-48.

⁸¹ A. HIGGINBOTHAM, *supra* note 57, at 170.

⁸² IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 3, 45-48 (1974). In the pre-1790 period, free African-Americans constituted about four percent of the south's colonial black population. Of the approximately 3,650 free African-Americans living in the South, virtually all resided in Maryland (representing about half of the colony's black population), and Virginia (representing only one percent of the total black population in 1782). The few remaining free blacks lived in Georgia and Louisiana.

⁸³ *Id.* at 9. Berlin pointed out that southern colonies did not begin to prohibit free blacks from voting until the early eighteenth century when Virginia, North Carolina, and South Carolina passed laws. Georgia enacted a similar law in 1761, the same year that North Carolina lifted its ban. Maryland was the only southern colony to prohibit free blacks from joining the militia, and Virginia also was alone in specifically precluding free blacks from holding office. Berlin concluded that by the middle of the nineteenth century, free African-Americans' legal status had become comparable to a slave's, thus making them "slaves without masters." *Id.* at 318.

⁸⁴ Although free blacks had some rights equal to whites, southern law presumed every black to be a slave within the courtroom. In that context, they were consistently and deliberately disqualified as witnesses, jurors, and litigants against white parties. *Id.* at 65; see *supra* note 80. Not one criminal case has been found in which a free black testified against a white party; in a South Carolina chancery court, a free mulatto was

from whites as were slaves and continued to lack legal recourse within the colonial legal system.

C. Post-Revolutionary Developments in the South

During the period between the Revolutionary and Civil Wars, southern states generally maintained African-Americans' status as nonpersons, whether they were slave or free. In the early post-Revolutionary period, some southern states attempted to distinguish between the status of the free⁸⁵ black and the person held in bondage. Post-war legislative acts of manumission freed some blacks,⁸⁶ and, for a limited period, some states interpreted freedom to include the rights to vote, to own property, to bear arms, to serve in the militia, and to travel freely.⁸⁷

Despite these changes, a free southern black's status in the courtroom remained the equivalent of a slave's. Aside from manumission lawsuits,⁸⁸ courts denied slaves access to sue, or to file com-

allowed to sue a white person and to swear to the truth of his pleading. A. HIGGINBOTHAM, *supra* note 57, at 205-06.

⁸⁵ In 1790, the United States population was approximately four million people. African-Americans represented about 20% of the population, although only eight percent, or about 59,000, were not enslaved. Slightly more than half of the free black population lived in the South. J. FRANKLIN, *supra* note 57, at 217; I. BERLIN, *supra* note 82, at 48-50, 112-13.

Between 1790 and 1810, free African-Americans became the "fastest-growing element in the Southern population." I. BERLIN, *supra* note 82, at 49. As they grew in number, however, free blacks' economic and civil liberties were all but obliterated. *Id.* at 90. After 1810, their numbers declined and reflected a deterioration in free blacks' legal status throughout the Nation. See J. FRANKLIN, *supra* note 57, at 217.

⁸⁶ In 1782, Virginia repealed its fifty-nine-year-old prohibition on private acts of manumission, thereby allowing a slaveowner to manumit slaves under the age of forty-five by will or deed. In 1787, Delaware passed a similar act. The following year, Maryland extended manumission by will. When Kentucky joined the Union in 1792, it adapted the Virginia law, as did the Missouri territory in 1804. I. BERLIN, *supra* note 82, at 29-30; A. HIGGINBOTHAM, *supra* note 57, at 49.

⁸⁷ A. HIGGINBOTHAM, *supra* note 57, at 91. Shortly after the Revolution, Delaware, Maryland, and Kentucky enfranchised free blacks in their first constitutions. These states repealed their laws during the early nineteenth century, however, and other southern states disenfranchised blacks when they entered the Union. JOHN H. FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA, 1790-1860*, at 102, 116 (1943).

Although free blacks could own property, they could not rent or buy land, or enter certain occupations. *Id.* at 114-16; I. BERLIN, *supra* note 82, at 61-64. Their inability to testify against a white person also meant that they were unable to collect their debts and to avoid being victims of numerous frauds. I. BERLIN, *supra* note 82, at 65.

⁸⁸ See G. STROUD, *supra* note 69, at 52-57 (stating that where slavery existed, the general rule denied a slave the right to sue or to seek legal redress, with the exception that most states allowed court access when a slave sued for his freedom). Stroud also discusses the laws of South Carolina, Georgia, Maryland, Virginia, North Carolina, and Mississippi. *Id.* at 52-57; see also J. WHEELER, *supra* note 68, at 197, 388-415 (citing cases).

To succeed, a slave had to overcome the general presumption that "[b]eing a negro . . . he is presumed to be a slave." G. STROUD, *supra* note 69, at 53. Stroud points out

plaints against wrongdoers.⁸⁹ Some states drastically limited free blacks' right to sue by prohibiting every person of African ancestry from testifying against a white person because of their supposed intent to conceal or deny the truth.⁹⁰ Consequently, blacks had no personal remedy to redress violent acts by whites.⁹¹

States rarely prosecuted whites for kidnapping and enslaving free African-Americans because blacks were usually the only witnesses to the crime, and kidnappers would often arrange to have white persons testify on their behalf.⁹² In the rare instance where the state did prosecute, the all-white jury would acquit.⁹³

When accused of a crime, blacks were judged by an all-white court or jury, whether they were tried in the "special" courts or in

that this legal presumption facilitated the crime of manstealing because a kidnapped slave had the difficult task of convincing a southern court, consisting "in all probability . . . [of] slaveholders" that he was being illegally held. *Id.* In addition, some states like South Carolina and Georgia added an even more chilling deterrence to bringing such a suit: if the slave did not convince a judge and jury of his right to freedom, a court "was empowered to inflict such corporal punishment, not extending to life or limb, on the ward of the plaintiff, as they in their discretion shall think fit." *Id.* at 52 (quoting 2 BREVARD'S DIG. 229-30).

⁸⁹ J. WHEELER, *supra* note 68, at 197; *see also* G. STROUD, *supra* note 69, at 52 (because "a slave can neither acquire or retain property, as his own, contrary to the will of his master . . . he cannot be a party to a civil suit; for there is no species of civil suit which does not, in some way, affect property").

⁹⁰ J. WHEELER, *supra* note 68, at 194; G. STROUD, *supra* note 69, at 44 (citing Virginia (1 R.V.C. 422), Missouri (2 MISSOURI LAWS, 600), Mississippi (MISSISSIPPI REV. C ODE, 372), Kentucky (2 LITT. & SWI. 1150), Alabama (TOULMIN'S DIG. 672), Maryland (MARYLAND LAWS, Act of 1717, ch. 13, § 2 & 3, and Act of 1771, ch. 14 § 4), North Carolina and Tennessee, Act of 1777 ch. 2 § 42). Berlin believes that for a brief period between 1783 and 1787, Maryland and Delaware may have allowed free blacks to testify against whites, but by 1787 both states had barred free blacks from testifying. I. BERLIN, *supra* note 82, at 91 n.21.

⁹¹ G. STROUD, *supra* note 69, argues that a slaveowner's immunity from criminal prosecution was based "chiefly, if not solely" on the rule that banned a slave from testifying against a white person. *Id.* at 20. Stroud also describes the difficulty of convicting a slaveowner for whipping a slave to death because state law sanctioned "the master's power to inflict corporal punishment to any extent, short of life and limb." *Id.* at 28. Consequently, when a slave was killed after receiving a whipping that was considered "moderate correction," some states considered this a justifiable homicide. *See id.* at 20-28 (citing CLAY'S ALA. DIG. 413; Georgia Act of Dec. 2, 1799, 2 COBB'S DIG., 982; Missouri, Rev. Stat. 344-45; South Carolina, 2 BREVARD'S DIG. 241 (killing a slave "on a sudden heat of passion"); Statute, Laws of Tennessee, 676, 677).

⁹² I. BERLIN, *supra* note 82, at 99-101.

⁹³ *Id.* at 101 (citing minutes of Delaware Abolition Society, Dec. 21, 1803). One Delaware lawyer summarized the difficulty of obtaining convictions of white defendants in such cases:

[T]he propensities of juries to lean on the merciful side of the question, when the crime was committed against a black person, was so strong as to raise a high degree of suspicion that the accused would be acquitted, if they were prosecuted for kidnapping.

Id. (emphasis added).

the regular court system.⁹⁴ As likely as white juries were to acquit white defendants accused of crimes against a black person, they were virtually certain to convict a black defendant in an interracial case.⁹⁵ And when convicted, free blacks received punishments more severe than those whites received for committing the same crime.⁹⁶

When southern states first prescribed sanctions against the crime of homicide, slaves gained a modicum of legal protection.⁹⁷ Since blacks were not permitted to testify against whites, however,

⁹⁴ During the post-revolutionary, pre-Civil War period, most southern states extended the right to trial by jury in a capital case to slaves for two reasons: "[It] was intended to surround the life of the slave with additional safeguards, and more effectually to protect the property of the owner . . ." *State v. Jim*, 12 N.C. (1 Dev.) 142, 144 (1826).

Consequently, both free and enslaved African-Americans who were charged with capital crimes received trial by jury guarantees in the state constitutions of Alabama (ALA. CONST. title on slaves, § 2); Arkansas (ARK. CONST. art. 4, § 25); and Missouri (MO. CONST. art. 3, § 27). State law guaranteed these rights in Georgia, G. STROUD, *supra* note 69, at 89 (citing PRINCE'S DIG. 459); Maryland, *id.* at 89-90 (citing Md. Laws, Act of 1751, ch. 14); Mississippi, *id.* at 89 (citing MISS. REV. CODE 382); North Carolina, *id.* at 90-91 (citing REV. STAT., ch. III, §§ 42-4); Tennessee, *id.* at 89 (citing Act of 1835, ch. 19); and Kentucky, *id.* at 89 (citing 2 LITT. & SWI. 1164). Only South Carolina, Louisiana, and Virginia continued to hold these trials in their "Justice and Freeholder" courts. *See id.* at 91-92 (citing JAMES DIG. 392-93; Statutes of Louisiana of 1852, ch. 541; and CODE OF VIRGINIA, ch. 212, §§ 2, 4 & 5, at 787).

In noncapital cases, a slave's right to a jury trial was guaranteed in only two states: Missouri, for all misdemeanor and felony crimes, and Alabama, for offenses higher than petit larceny. Most other states maintained or created "Justices and Freeholder Courts" for a slave's noncapital crimes. *Id.* at 95.

⁹⁵ A Baltimore attorney "observed that local juries were 'inclined to convict a man merely because he was black, as an English judge . . . condemned every Irishman, merely because he was of that nation.'" I. BERLIN, *supra* note 82, at 335 (citing Baltimore Sun, Oct. 22, 1839). Berlin concluded that "free [blacks] rarely received justice at the hands of all-white judicial systems." *Id.*

⁹⁶ G. STROUD, *supra* note 69, at 74-88. Stroud's analysis of southern states' sentencing codes indicates that slaves faced capital sentences for crimes that called for minimal jail terms for white defendants or moderate terms for free blacks. *Id.* at 84-88. Virginia law, for example, classified four crimes as capital offenses if committed by any person. Sixty-eight additional crimes were punishable by death if committed by a slave. *Id.* at 77-80. Similarly, Mississippi's penal law classified twelve crimes as capital offenses for all persons convicted, but included thirty-eight additional crimes that were punishable by death only if committed by a slave. *Id.* at 80-83.

In noncapital cases, Stroud described the "punishment of universal prevalence and of perpetual occurrence" was to order that the slave be whipped with twenty to forty lashes, "well laid on." *Id.* at 94. Because of the slave's labor value, imprisonment was an unlikely sentence, and dismemberment was a less tolerated punishment. Some state laws, however, explicitly provided for "any torture . . . which can be practiced without producing death or dismemberment." *Id.*

⁹⁷ Just prior to the American Revolution, North Carolina law recognized the crime of murder of a slave, either by a slaveowner or any white person, as a misdemeanor punishable by imprisonment up to one year. *An Act to Prevent the Willful and Malicious Killing of Slaves*, Mar. 2, 1774, ch. XXXI N.C. Laws 274 (1791). In 1791, the North Carolina legislature upgraded the offense to a felony, and increased the punishment to the same as if he had killed a freeman, ch. IV N.C. News 3 (Supp. 1791-94), but this statute

states rarely enforced these sanctions.⁹⁸ Rape of black women still was still not recognized as criminal,⁹⁹ and a slaveowner's "right" to seriously injure a slave in 1829 was vindicated when a court reversed the conviction of a slaveowner who had shot a hired slave in the back as she attempted to flee from punishment.¹⁰⁰ Not only were slaveowners immune from assaults that fell short of killing their slaves,¹⁰¹ but in 1850, North Carolina's judicial process reinstated the legal right of any white person to impose summary discipline on any "insolent" black person without it constituting a crime: "unless

was declared unconstitutional ten years later in *State v. Bonn*, 1 N.C. (1 Hay W.) 191 (1801).

In 1821, a Mississippi court was the first to recognize the common-law crime of a slaveowner killing a slave. *State v. Jones*, 2 Miss. (1 Walker) 83, 84 (1820). Two years later, North Carolina's appellate court held that "a slave is a reasonable [creature] or more properly a human being . . . [then] killing a slave with malice prepense, is murder by the Common Law." *State v. Reed*, 9 N.C. (2 Hawks) 454, 455-56 (1823). Prior to the Civil War, every southern state considered it a capital offense to cause the "wilful, malicious and premeditated killing of a slave . . ." G. STROUD, *supra* note 69, at 20-21; see *State v. Flanigan*, 5 Ala. 477 (1843); *State v. Maner*, S.C.L. (2 Hill) 453 (1834); *Field v. State*, 9 Tenn. 156 (1829) (first recognizing the common-law crime of manslaughter against a slave); *Chandler v. State*, 2 Tex. 305 (1847).

⁹⁸ G. STROUD, *supra* note 69, at 20.

⁹⁹ More than halfway into the twentieth century, no southern white male had been convicted of raping a black woman. GERDA LERNER, *BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY* (1972); see also SUSAN BROWNMILLER, *AGAINST OUR WILL* 234, 410-12 (1975); BELL HOOKS, *AIN'T I A WOMAN* (1981); Judith Schacter, *The Long Arm of the Law*, 60 TUL. L. REV. 1247, 1262 (1986); Jennifer Wriggins, *Rape, Racism, and The Law*, 6 HARV. WOMEN'S L.J. 103 (1983).

¹⁰⁰ *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829). In *Mann*, the North Carolina court stated:

We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master . . . it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute.

Id. at 267-68. The *Mann* ruling effectively foreclosed a slave from seeking judicial intervention when assaulted by a slaveowner or his hirer. See *Hoover v. North Carolina*, 20 N.C. (3 & 4 Dev. & Bat.) 365 (1839). In *Hoover*, the same North Carolina court reinforced the principle that a slaveowner could not face criminal prosecution for having beaten, tortured, and starved his slave, but could be criminally charged only if the slave died from the assault. "A master may lawfully punish his slave, and the degree must, in general, be left to his own judgment and humanity, and cannot be judicially questioned. . . . [T]he master's authority is not altogether unlimited. He must not kill. There is, at the least, this restriction." *Id.* at 368. In *State v. Caesar*, 31 N.C. (9 Ired.) 391 (1849), North Carolina's Chief Justice indicated the widespread nature of these assaults that were never prosecuted.

¹⁰¹ South Carolina and Louisiana recognized the crime of cruel and unusual punishment of slaves, but followed North Carolina's precedent in deciding that the mere beating of a slave was not criminal. *State v. Maner*, S.C.L. (2 Hill) Rep. 453, 456 (1834) (reinforcing the complete immunity provided a South Carolina slave owner for "a mere beating [of his slave] unaccompanied by circumstances of cruelty or an attempt to kill and murder"); J. WHEELER, *supra* note 68 (disagreeing with Stroud's characterization "that the master may, at his pleasure, inflict any species of punishment upon the person of his slave") (quoting G. STROUD, *supra* note 59, at 23).

a white man, to whom insolence is given, has a right to put a stop to it, in an extra judicial way, there is no remedy for it. This would be insufferable. Hence we infer . . . that this extra judicial remedy is excusable."¹⁰²

Despite the similarities between the denial of legal rights for blacks under the colonial legal system and the denial of legal rights to blacks under post-revolutionary southern law, there was one difference: state court decisions during the post-revolutionary period reveal the embryonic stages of judicial reliance upon the rule of law. Yet, judicial intervention never challenged the underlying master-slave relationship or the institution of slavery itself. The few "enlightened" court decisions that appear to reflect a humanitarian impulse to provide greater legal protection for slaves in reality only strengthened slaveowners' property interests.¹⁰³ Southern state court cases between 1820 and 1860 illustrate the incipient, yet uneven, growth of the region's efforts to define the boundaries of permissible conduct against blacks and yet maintain the master's absolute dominion.¹⁰⁴

¹⁰² *State v. Jowers*, 33 N.C. (11 Ired.) 555, 557 (1850). Ten years earlier, the North Carolina court in *State v. Jarrott*, 23 N.C. (1 Ired.) 76 (1840) had stated in dicta that a slave's insolence in calling a white person a thief would have justified an "ordinary" assault, but not the excessive knife attack used in the case. *Id.* at 83-84.

¹⁰³ *See State v. Hale*, 9 N.C. (2 Hawks) 582 (1823), where a North Carolina court declared that a stranger's assault against a slave was a crime in "keeping pace with the march of benignant policy, and provident humanity, which for many years, has characterized every Legislative act, relative to the protection of slaves." *Id.* at 583. The court's decision also kept pace with its concern that the slaveowner's property value would be diminished if a white person's assaultive conduct went punished: "If such offences may be committed with impunity, the public peace will not only be rendered extremely insecure, but the value of slave property must be much impaired, for the offenders can seldom make any reparation in damages." *Id.* at 585.

¹⁰⁴ *See Patrick S. Brady, Slavery, Race and Criminal Law in Antebellum North Carolina: A Reconsideration of the Thomas Ruffin Court*, 10 N.C. CENT. L. REV. 248 (1978-79). In *State v. Will*, 18 N.C. (1 Dev. & Bat.) 121 (1834), a North Carolina appellate court recognized a slave's right of self-defense against a master's life-threatening assault when charged with murder, but rejected it as a valid defense against a manslaughter charge. "Resistance . . . on the part of the slave to the battery of his master cannot be legally excused, although such battery may be unreasonable [only] the degree of [the slave's] criminality [will be reduced] . . ." *Id.* at 171. The same North Carolina court denied a black person's right of self-defense if "insolent" to a white person in *State v. Jowers*, 33 N.C. (2 Ired.) 555 (1850), but then upheld a noninsolent black's "natural right of self-defense" against the "gross oppression" of a police officer making an unlawful arrest in *State v. Davis*, 52 N.C. (Jones) 52 (1859); *cf. State v. Jones*, 2 Miss. (Walker) 83, 84 (1821) (murder of a slave first defined as a common law crime); *Mitchel v. Wells*, 37 Miss. 235, 275-76 (1859) (a lone dissenting judge on Mississippi's highest court lamented 38 years later that the majority's reversal of a white defendant's conviction for the killing of a slave had removed the last legal restraints against such killing).

One commentator, A.E. Nash, argued that the South's appellate process "insisted on reasonably fair trial standards" by reversing nearly 60% of 232 capital convictions of black defendants between 1850-1860, and by affirming approximately 30 convictions of whites for crimes committed against blacks. A.E. Keir Nash, *A More Equitable Past? South-*

D. Northern Colonial Justice for the African-American Defendant

Northern colonies were the first to legalize slavery, both *de facto*¹⁰⁵ and *de jure*;¹⁰⁶ yet their first slave codes did not appear until 1702, decades after Virginia's model code was enacted.¹⁰⁷ Northern slave codes followed the southern principle that allowed a slave-owner "to punish . . . slaves for . . . Crimes and offenses at [the master's] Discretion" without fear of criminal prosecution.¹⁰⁸ Although they shared a common legislative philosophy of summary punishment of blacks and immunity for whites, the northern slave codes were distinguishable from those of the southern colonies in that they afforded more legal protection to the criminally accused slave.

In the New England colonies, which had the smallest black populations,¹⁰⁹ an accused black, free or slave, was generally guaranteed the same due process protections as a white defendant, including the right to trial by jury in the regular court system and the right to testify in court against whites.¹¹⁰ Massachusetts' judicial

ern Supreme Courts and the Protection of the Antebellum Negro, 48 N.C.L. REV. 197, 233-35 (1968); A.E. Keir Nash, *The Texas Supreme Court and Trial Rights of Blacks*, 58 J. AM. HIST. 622 (1971); A.E. Keir Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970); see also Daniel J. Flanagan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. SO. HIST. 537 (1974); cf. MICHAEL STEPHEN HINDUS, *PERSONS AND PLANTATION: CRIME, JUSTICE AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA 1767-1878* (1980); Patrick S. Brady, *supra* note 104; Michael Stephan Hindus, *Black Justice Under White Law*, 63 J. AM. HIST. 599 (1976). Yet, the opening provided by appellate review was minuscule when compared to the cases that never reached the criminal courts or were never prosecuted against whites. STANLEY ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* 56-58 (1963). John Hope Franklin noted that free blacks may have received the greatest protection from the higher courts when compared with "the laws that were seldom enforced" for slaves' protection, but added that the court process was not very helpful to slaves. "The laws that were for the purpose of protecting the slaves were few and were seldom enforced. It was almost impossible to secure a conviction of a master who mistreated his slave." J. FRANKLIN, *supra* note 57, at 206-07.

¹⁰⁵ A. HIGGINBOTHAM, *supra* note 57, at 100 (stating that the Dutch West India Company imported 11 black males into the Dutch settlement of New Netherlands in 1626) (citing EDGAR McMANUS, *A HISTORY OF NEGRO SLAVERY IN NEW YORK II* (1970)).

¹⁰⁶ L. GREENE, *supra* note 57, at 63. In 1646, Connecticut became the first colony to authorize slavery by legislative act. See Robert J. Cottrol, *Law, Politics and Race in Urban America: Towards a New Synthesis*, 17 RUTGERS L.J. 483 (1986).

¹⁰⁷ Pennsylvania enacted its first statute dealing with slaves in 1700, New York in 1702, and Massachusetts in 1728. See A. HIGGINBOTHAM, *supra* note 57, at 281.

¹⁰⁸ *Id.* at 119.

¹⁰⁹ In 1750, approximately 12,000 black people lived in the four New England colonies, while 19,000 lived in New York, New Jersey, and Pennsylvania. Almost seven times as many African-Americans, 206,000 lived in the colonial south. J. FRANKLIN, *supra* note 57, at 61.

¹¹⁰ New England slaves were allowed to testify against a white person, even in cases where a black person was not a party, L. GREENE, *supra* note 57, at 179; J. FRANKLIN, *supra*

process went one step further in protecting a black defendant's right to trial by impartial jury, permitting the defendant to challenge prospective jurors during jury selection.¹¹¹ As was true in every colony, none of the prospective jurors was black.¹¹²

Other northern colonies, such as New York, New Jersey, and Pennsylvania, did not accord such rights to a slave defendant. These colonies used judicial procedures more similar to those used in the South. They denied slaves the right to testify against a white person,¹¹³ and created special courts to decide criminal cases involving slave defendants.¹¹⁴ In each colony, slaves were denied the right to a jury trial, although a 1708 New York statute permitted slaveowners to obtain jury trials for their criminally accused slaves.¹¹⁵ Unlike white criminal defendants, however, New York slaves did not have the right to challenge jurors whom they considered biased.¹¹⁶ And if the jury found a slave guilty of certain crimes, the defendant's status resulted in a significantly harsher and more

note 57 at 104. Massachusetts' judicial decisions established slaves' rights to be charged with a crime through the regular procedure of indictment by a grand jury. See *The Franck Negro*, 3 Mass. Ct. Bay of Assts. 194 (1669); see also *The Negro Sebastian*, 5 Mass. Recs 117 (1676) (establishing slaves' rights to be tried by a jury in the regular court system and to appeal their cases to the highest courts). See L. GREENE, *supra* note 57, at 184-85. Rhode Island, however, administered special courts for the trial of slaves accused of purloining, "the only instance in which New England law established special trial procedures for Negroes." ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 13 (1967).

¹¹¹ See L. GREENE, *supra* note 57, at 185, referring to a Massachusetts trial in 1691 in which the defendant slave, during jury selection, "making no challenge against any of them they were sworn for his tr[ial]."

¹¹² *Id.* at 299, 332.

¹¹³ Prior to 1664, under Dutch rule, a New York slave could testify against other blacks, or in cases when one or both of the parties was white. *Id.* at 104. But under English rule, New York's 1702 slave code prohibited a slave from testifying in any matter except against another slave who had been charged with conspiring to escape, killing his master, or destroying his master's property. *Id.* at 119-20. In 1730, a New York statute explicitly disqualified a slave from testifying against any free black, even when that person had been accused of conspiring to kill the slave's master. *Id.* at 133. Similar anti-testimony laws were passed in New Jersey, see A. ZILVERSMIT, *supra* note 110, at 23-24, and Pennsylvania, which also applied this prohibition to include free blacks during the years 1700-1780. A. HIGGINBOTHAM, *supra* note 57, at 281-82, 299; see J. FRANKLIN, *supra* note 57, at 221; EDWARD R. TURNER, *THE NEGRO IN PENNSYLVANIA, SLAVERY-SERVITUDE-FREEDOM 1639-1861*, at 110, 113 (1911).

¹¹⁴ The composition of these courts was similar to that of the special courts in the South: an all-white body consisting of justices of the peace and freeholders. A. HIGGINBOTHAM, *supra* note 57, at 124. New York created special courts in 1708 consisting of three justices of the peace and five freeholders. *Id.* (citing Colonial Laws of New York, ch. 181, 631 (Oct. 30, 1708)). In 1700, Pennsylvania established a special court for the trial of "negroes [which included] two justices of the peace and six of the most substantial freeholders of the neighborhood." *Id.* at 281, 306. New Jersey established special courts for slaves in 1714 and discontinued their use in 1768. See A. ZILVERSMIT, *supra* note 110, at 13-16.

¹¹⁵ A. HIGGINBOTHAM, *supra* note 57, at 124-25.

¹¹⁶ *Id.*

brutal punishment than that faced by white defendants.¹¹⁷ If convicted of an assault against a white person, a New York slave could receive *any* judicial sentence except death or amputation; if a jury convicted a slave of any number of capital offenses, the slave faced a mandatory death penalty.¹¹⁸

Despite the disparity in sentencing black and white defendants, the northern colonies appear to have relied more frequently on judicial process than did the southern colonies and to have imposed less brutal sentences in noncapital cases.¹¹⁹ Most northern legislatures did not authorize branding, mutilation, or dismemberment as lawful sentences for a slave's repeated offenses in noncapital cases.¹²⁰ However, in capital crimes such as murder, rape of a white person,¹²¹ or threats to state security,¹²² New York, New Jersey, and Pennsylvania sentencing laws were as cruel as any imposed in the southern colonies.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 119-24.

¹¹⁹ "The [New England] codes were not nearly as harsh as those of the southern colonies or even the middle colonies. There were few capital crimes and little branding and maiming. The usual form of punishment was the lash which, admittedly, was generously used both by masters and by colonial officials." J. FRANKLIN, *supra* note 57, at 106; L. GREENE, *supra* note 57, at 130-43; W. JORDAN, *supra* note 57, at 104; A. MEIER & E. RUDVICK, *FROM PLANTATION TO GHETTO* (1970).

Although colonial New York, New Jersey, and Pennsylvania laws authorized sentences such as branding, maiming, dismemberment and execution by fire, they apparently were not employed as systematically in noncapital crimes as they were in the South. A. ZILVERSMIT, *supra* note 110, at 22. For some crimes, such as striking and injuring a white person, northern slaves faced a less severe judicial sentence than imposed by southern law. New York's 1702 law provided a maximum sentence of 14 days in jail and/or corporal punishment, "not extending to [the slave's] life or limb," A. HIGGINBOTHAM, *supra* note 57, at 120; *cf.* South Carolina's 1722 law which mandated a death sentence in such cases if the white person was injured or bruised. *Id.* at 186, 195.

¹²⁰ A. HIGGINBOTHAM, *supra* note 57, at 119, 132, 146.

¹²¹ "In 1706, the courts had been empowered to punish capital offenses committed by a slave 'in such manner and with such circumstances as the aggravation and enormity of the crime shall merit.'" *Id.* at 124. In one case, four slaves were put to death with "all the torment possible for a terror to others" for the murder of a family of seven. W. JORDAN, *supra* note 57, at 116. A 1700 Pennsylvania law provided that any black convicted of attempting to rape a white woman or maid be castrated, but it was repealed in 1706 when the punishment was changed to whipping, branding, and deportation. *See* A. HIGGINBOTHAM, *supra* note 57, at 282. New Jersey's 1704 Act also authorized castration for the crime of rape, and branding when a slave was convicted of grand larceny. W. JORDAN, *supra* note 57, at 154.

¹²² In 1712, a New York slave conspiracy trial resulted in mass convictions on charges of arson and the murder of nine white people. The trial judge sentenced 13 slaves to die by hanging, a fourteenth was chained and starved to death, three others were burned (one over a slow fire for eight to ten hours), and another was broken on the wheel. W. JORDAN, *supra* note 57, at 115-16. Nearly 30 years later, charges of another slave conspiracy resulted in a New York court convicting and sentencing 13 blacks to die by burning at the stake and 18 by hanging (along with four whites), and 70 other blacks were expelled from the colony. *Id.* at 116-20; A. ZILVERSMIT, *supra* note 110, at 20-23.

E. Northern Colonial Justice for the African-American Complainant

In the New England colonies, both free and enslaved blacks' access to the court process and the right to testify against a white person were protected. There, African-Americans theoretically had the same procedural rights as did whites to seek redress for any criminal or civil wrongs.¹²³ Beginning in 1765, a smattering of cases in Massachusetts illustrated that these written protections occasionally materialized for some black complainants. In that year, a free black woman successfully sued and recovered damages against a white man who kidnapped her and kept her as a slave.¹²⁴ In 1769, a black slave sued his owner "in trespass for assault and battery, and imprisoning . . . [him] in servitude."¹²⁵ Five years later, a slave obtained a jury verdict awarding him his freedom.¹²⁶

In colonial New York, New Jersey, and Pennsylvania, however, because an African-American could not testify against a white person or seek judicial redress, a white person had virtual immunity to commit crimes ranging from assault to murder against black people.¹²⁷ Though whites could theoretically testify on behalf of blacks against their white perpetrators, one can understand why this rarely happened.

In the unusual situation where a colony recognized the crime of raping a black woman, the legislature provided special *de jure* protection for the white offender. A 1700 Pennsylvania law eliminated any punishment for white men found guilty of raping a black slave.¹²⁸

The legal systems of these colonies thus closely resembled the Southern model. Indeed, violence that was legally used to subju-

¹²³ L. GREENE, *supra* note 57, at 181-85.

¹²⁴ A. HIGGINBOTHAM, *supra* note 57, at 84; A. ZILVERSMIT, *supra* note 110, at 19 (stating that New England slaves could be a witness against a white man and could sue in regular courts).

¹²⁵ A. HIGGINBOTHAM, *supra* note 57, at 84-85.

¹²⁶ *Id.* at 85. Significantly, the slave's post-Revolutionary right to civil recourse eventually led to the abolition of slavery in 1783. See *Quock Walker v. Jennison*, Proc. Mass. Hist. Soc. 1873-1875, 296 (Sept., 1781) (a slave successfully sued for damages against several white persons, including his owner, who had beaten him severely); *Commonwealth v. Jennison*, Proc. Mass. Hist. Soc., 1873-1875, 294 (April, 1783) (the State successfully prosecuted Quock Walker's owner following a court's charge that "Our Constitution . . . sets out . . . that every subject is entitled to liberty . . . and in short is totally repugnant to the idea of being born slaves," and the trial jury convicted the slave-owner of assault and battery).

¹²⁷ A. HIGGINBOTHAM, *supra* note 57, at 146, 282.

¹²⁸ Since legal protection depended upon the rare sight of white witnesses coming forward, it had even less meaning for deterring the most common form of violence against slaves on the plantation. FREDERICK DOUGLASS, *A NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* (1845). See generally G. STROUD, *supra* note 69; *infra* note 134.

gate blacks was a crucial mechanism for the perpetuation of the institution of slavery in these northern colonies.

F. Post-Revolutionary Developments in the North

The movement toward freedom during the Revolutionary War eventually led northern states to abolish slavery. Between 1780, when Pennsylvania's legislature called for the "Gradual Abolition of Slavery,"¹²⁹ and 1804, when New Jersey passed its emancipation statute,¹³⁰ every original northern colony proclaimed its intent to abolish slavery.¹³¹

In New England, this process guaranteed the continuation of the *de jure* rights that slaves and free blacks had enjoyed during most of the colonial period.¹³² In the remaining northern states—New York, Pennsylvania, and New Jersey—the master-slave relationships continued long after enactment of abolition legislation.¹³³ Until state law officially abolished slavery, slave codes continued to deny

¹²⁹ A. HIGGINBOTHAM, *supra* note 57, at 299-303, 310. Pennsylvania did not abolish slavery outright: African-Americans born after the law was enacted were free only after serving their mothers' masters for 28 years. See A. ZILVERSMIT, *supra* note 110, at 116-17. The Pennsylvania law became a model for other northern states; New York, New Jersey, and Connecticut passed similar laws in subsequent years.

¹³⁰ A. ZILVERSMIT, *supra* note 110, at 192-93.

¹³¹ Vermont's Constitution explicitly outlawed slavery when it entered the Union in 1777. *Id.* at 116. Rhode Island freed its slaves in 1784. *Id.* at 119. A Connecticut statute passed in 1784 required that a child of a slave remain in bondage until 25 years old (reduced to age 21 in 1797). *Id.* at 123. In 1799, New York's law maintained slavery until a male reached his 28th birthday and a female turned 25; slavery was officially abolished in 1827. *Id.* at 182. New Jersey passed a gradual act in 1804 under which all slave children born after that date would be free when they reached their 25th birthday if male, or their 21st birthday if female. *Id.* at 192-93. New Hampshire passed legislation in 1857 which specifically banned slavery and provided for citizenship. *Id.* at 117.

¹³² See *supra* notes 123-26 and accompanying text. The small black population in New England was assured "the same judicial procedure and protection in criminal [and civil] cases as did white persons." L. GREENE, *supra* note 57, at 184. These included the right to testify in court, to seek redress in the legal system, and to receive procedural protections as a criminal defendant. See *supra* notes 124, 126 and accompanying text.

¹³³ See *supra* note 131. The 1860 census revealed that slaves were still living in New Jersey and Pennsylvania, and were presumably not liberated unless still alive when the thirteenth amendment was passed in 1865. A. ZILVERSMIT, *supra* note 110, at 207-08.

New York's legislative acts during this period demonstrate the ambivalent approach toward providing court access rights for African-Americans. On February 17, 1809, the New York legislature granted a slave's right to seek legal redress for personal injuries (1809 N.Y. Laws), following successful criminal prosecutions against two white people in the brutal beating of their slaves. Four years later, however, New York reaffirmed a slave's disqualification to testify against a white person. In the same 1813 Act, the legislature extended a slave's right to trial by jury, except when accused by a white person of assault. A. HIGGINBOTHAM, *supra* note 57, at 145 (citing P. Van Ness and John Woodworth, eds., *Laws of the State of New York Revised and Passed at the 36th Session of the Legislature (1813)*, vol. 2, 207). Finally, in 1827 when slavery was officially abolished, African-Americans were able to testify against a white person and to exercise their right to trial by jury. A. HIGGINBOTHAM, *supra* note 57, at 147.

slaves' rights.¹³⁴

Once the states abolished slavery, they also began to remove legal obstacles that denied African-Americans access to court. Statutes that had denied slaves the right to testify against white persons were repealed in many states,¹³⁵ and black criminal defendants were afforded the same *de jure* procedural protections as accused whites, including the right to trial by jury in the regular court system.¹³⁶

The expansion of procedural legal protections that followed slavery's abolition, however, was often accompanied by racial violence which chilled blacks' exercise of their newly attained rights. New York, Pennsylvania, and Ohio experienced significant episodes of white mob violence that resulted in substantial injury to blacks and damage to their property.¹³⁷ This violence was often accompa-

¹³⁴ New York's "special courts" were abolished in 1827. A. HIGGINBOTHAM, *supra* note 57, at 147. Pennsylvania's special courts and laws for slaves also lasted for the life of a slave. *Id.* at 272. New Jersey eliminated its slave courts in 1768, but enforced slave codes until 1844, when slavery was officially abolished. A. ZILVERSMIT, *supra* note 110, at 221. While slavery existed, each state prohibited people of African ancestry from testifying against a white accuser, and from filing a criminal complaint unless a white person provided "credible" testimony. Consequently, every white person received near-automatic immunity in assault, murder and rape cases when a black person was the only witness to the crime.

¹³⁵ In 1830, a free black could testify against a white person throughout New England, New Jersey, New York, and Pennsylvania. By 1860, Iowa, Michigan, Minnesota, Ohio, and Wisconsin had guaranteed this right. Oregon passed a similar law in 1862, and California followed in 1863. In 1865, Indiana and Illinois became the last northern states to repeal laws that had excluded black people from testifying against a white person. Paul Finkleman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum South*, 17 *RUTGERS L. REV.* 414, 424, 426 (1986).

¹³⁶ E. TURNER, *supra* note 113, at 116 (stating that free blacks were tried in same courts, punished with same penalty, and given same civil rights as a white person following the 1780 Act).

¹³⁷ White mob violence occurred in several northern states and cities prior to 1865. See LEONARD P. CURRY, *THE FREE BLACK IN URBAN AMERICA, 1800-1850*, at 96-11 (1981). J. FRANKLIN, *supra* note 57, at 234-35; LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860*, at 100, 106-11 (1961). In New York, anti-black riots took place in New York City in 1834, and in the upstate cities of Utica and Palmyra in 1839. In 1863, during the Civil War, the largest civil insurrection in American history other than the South's occurred in New York City, when many blacks were murdered and others were forced to take refuge in Central Park or New Jersey. See E. FONER, *supra* note 14, at 32-33 (citing ADRIAN COOK, *THE ARMIES OF THE STREETS: THE NEW YORK CITY DRAFT RIOTS OF 1863* (1974)).

In Philadelphia, white mobs attacked African-Americans several times between 1834 and 1849. L. CURRY, *supra*, at 106. In 1834, white mob violence resulted in the killing of one black person, the beating of many others, and the burning of thirty homes and several churches. The following year, another similar attack caused numerous injuries, destroyed buildings, and led to hundreds of black people fleeing the city. In 1838, white mobs burned several buildings in the black community. In 1842, white mobs went on a two night rampage of assault and arson, causing "serious injuries . . . on every black person encountered." *Id.*

In Cincinnati, white mobs attacked blacks and destroyed buildings within the black community in 1829, 1836, and 1841. The 1841 riot was described as the most violent:

nied by inaction or inadequate response by state law enforcement officials toward those responsible. In virtually every situation, either the state did not prosecute or the all-white jury did not convict the perpetrator. In those rare cases where there was a successful prosecution, the courts imposed an extra-lenient punishment that failed to vindicate the rights of the black crime victim.¹³⁸ Frederick Douglass described African-Americans' plight in Philadelphia: "No man is safe—his property and all that he holds dear, are in the hands of the mob, which may come upon him at any moment, at midnight or mid-day, and deprive him of his all."¹³⁹

Moreover, despite the *de jure* eligibility of many qualified black people, northern juries remained all-white prior to 1860.¹⁴⁰

1500 white people attacked blacks for two nights, killing several and injuring many more. Local law enforcement decided to take black males into custody, assuring them that they and their families would be protected. The white mobs then attacked the black women and their children. *Id.* at 108.

¹³⁸ In general, Curry describes this leniency as not uncommon. L. CURRY, *supra* note 137, at 107. In Philadelphia, law enforcement officials failed to arrest white lawbreakers in four of the five anti-black riots between 1834-1849. In the only incident in which arrests were made, ten rioters were found guilty, but they neither received a prison sentence, nor were they required to pay a fine. *Id.* A Philadelphia citizens' committee report concluded that African-Americans could avoid similar violence if they would behave "inoffensively and with civility at all times and . . . not . . . be obtrusive." L. LITWACK, *supra* note 137, at 101.

In 1863 in New York, whites were not prosecuted after having engaged in the New York City insurrection. See E. FONER, *supra* note 14, at 32. In Cincinnati, whites were sentenced to pay fines in the 1829 riot. L. CURRY, *supra* note 137, at 107. In Providence, during the Hardscrabble Riot of 1824, police made no effort to halt the destruction of property. Later one watchman testified that he "considered he was doing his duty by going there and keeping as still as possible." *Id.* at 102.

¹³⁹ L. LITWACK, *supra* note 137, at 102.

¹⁴⁰ *Id.* at 94. This commentator indicated that the first black jurors served at a trial in Worcester, Massachusetts in 1860 (citing THE LIBERATOR, Apr. 1, 1859; THE LIBERATOR, June 15, 1860; C. J. Farnes, *Walt Whitman Looks at Boston*, 1 N.E. QUARTERLY at 356 (1928); ISAAC CANDLER, A SUMMARY VIEW OF AMERICA 291 (1824)); see L. GREENE, *supra* note 57, at 299 (free blacks could not serve as jurors in New England); A. MEIER & E. RUDVICH, *supra* note 119, at 76; see also ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (P. Bradley ed. 1945) (describing the distinction between *de jure* and *de facto* rights for free blacks in the antebellum north: "If oppressed, they may bring an action at law, but they will find none but whites among their judges; and although they may legally serve as jurors, prejudice repels them from that office." *Id.* at 359 (emphasis added)).

Juror eligibility was generally tied to voting, and African-Americans who met the criteria could have theoretically served as jurors prior to 1860 in Maine, Massachusetts, Michigan (limited voting rights), New Hampshire, New York (property requirement to vote), Ohio (mulatto persons could vote), and Vermont. See Finkleman, *supra* note 135, at 425. However, it is questionable how many eligible blacks actually did vote. In New York, the \$250 property requirement was considered "not a trifle for a man doomed to toil in the lowest stations; few Negroes are in consequence competent to vote. They are in fact very little better than slaves, although called free." L. LITWACK, *supra* note 137, at 83-84 (quoting CARL D. ARFWEDSON, THE UNITED STATES AND CANADA IN 1832, 1833 AND 1834, 239 (1834)). In other states, public anti-black opinion made it less likely that an eligible black voter actually exercised his franchise rights. *Id.* at 84-93.

Although blacks could now testify in court, all-white juries could freely disregard that testimony which they had legally rejected for more than 150 years. A black defendant's sworn testimony was still regarded as inherently unreliable and untrustworthy.

When the first African-Americans broke the color barrier and sat as trial jurors at a Worcester, Massachusetts criminal trial in 1860,¹⁴¹ the event did not escape the notice of a United States Congressman from Indiana who warned of the dangerous consequences that would follow:

Republicanism . . . in Massachusetts would allow a white man to be accused of crime by a negro; to be arrested on the affidavit of a negro, by a negro officer; to be prosecuted by a negro lawyer; testified against by a negro witness; tried before a negro judge; convicted before a negro jury; and executed by a negro executioner; and either one of these negroes might become the husband of his widow or his daughter!¹⁴²

III

THE THIRTEENTH AMENDMENT

As military defeat of the southern confederacy appeared imminent, the Thirty-Eighth Congress sought to overrule *Dred Scott v. Sandford*¹⁴³ and to legalize slavery through enactment of the thirteenth amendment to the United States Constitution.¹⁴⁴ Although

¹⁴¹ L. LITWACK, *supra* note 137, at 96 (citing New York Constitutional Debates of 1846). English traveler Edward Abdy referred to the "difficulty of finding unprejudiced witnesses and juries" when a black defendant was on trial. EDWARD ABDY, *JOURNAL OF A RESIDENCE AND TOUR IN THE UNITED STATES OF AMERICA FROM APRIL 1833 TO OCTOBER 1834*, vol. 1, 46-47, 95; vol. III, 151 (1935).

¹⁴² L. LITWACK, *supra* note 137, at 96-97; *see* CONG. GLOBE, 36th Cong., 1st Sess. 285 (1860) (statement of Rep. English, Indiana (Dem.) after learning that two black jurors had been included on the Worcester, Massachusetts monthly jury list).

Congressman English's speech, "The Political Crisis," denounced some of the New England states, New York, Ohio, Michigan, Wisconsin, and Iowa for passing laws allowing blacks to testify and sit on juries. The Congressman compared these Republican states with Democratic states, such as Indiana, Illinois, Oregon, and California, that barred African-Americans from testifying against whites and from sitting as jurors. In his concluding remarks, Congressman English described Republican "equality laws" as disgusting, since they were contrary to the Democratic party's view that the United States government was a white man's government. *Id.*

¹⁴³ 60 U.S. 393 (1857).

¹⁴⁴ U.S. CONST. AMEND. XIII. The thirteenth amendment was introduced in the House of Representatives on December 14, 1863 by James M. Ashley of Ohio. CONG. GLOBE, 38th Cong., 1st Sess. 19 (1863). That same day, Iowa Congressman James F. Wilson, chair of the House Judiciary Committee, introduced a joint resolution seeking that the amendment be submitted to state legislatures for ratification. *Id.* at 21. On January 13, 1864, Missouri Senator Henderson made a similar motion in the Senate. *Id.* at 145. Following debate in the spring, 1864, the Senate passed the amendment 38 to 6. *Id.* at 1490. The House vote, 93 in favor and 65 opposed, fell thirteen votes short of the two-thirds needed to forward it to the states for ratification. *Id.* at 2995. (The official

the amendment's proponents were forced to concentrate on refuting arguments that Congress lacked power to amend the Constitution,¹⁴⁵ they identified the amendment's general objective as one of promoting justice and equality before the law. The legislative histories of the thirteenth amendment and the Civil Rights Act of 1866 show that the purpose of the amendment was to reach the root of slavery and prepare for the destruction of the system.¹⁴⁶

A. Legislative Intent

The legislative debate which shaped the thirteenth amendment underscored Congress's concern that the amendment was intended to do more than merely strike "the shackle . . . from the limbs of the hapless bondsman."¹⁴⁷ Massachusetts Senator Henry Wilson, the

vote was later changed to 96-66, 21 not voting, *id.* at 3014). Following the November 1864 elections, the newly constituted House reconsidered the Amendment in its second session and, after extensive debate, more than two-thirds voted in favor. *Id.* at 531.

¹⁴⁵ The principal argument used by opponents against the passage of the thirteenth amendment during the first session of the 38th Congress was based on principles of federalism and advocacy of states' rights: "Let us leave it . . . to each state to do what it believes to be just and expedient in reference to its own people and its own institutions." *Id.* at 2940 (statement of Rep. John Pruyn, N.Y.); *see also id.* at 2926 (statement of Rep. William Holman, Ind.); *id.* at 2615 (statement of Rep. Anson Herrick, N.Y.); *id.* at 2945 (statement of Rep. Martin Kalbfleisch, N.Y.); *id.* at 2992-95 (statement of Rep. George Pendleton, Ohio); *id.* at 1356-66, 1440-41 (statement of Sen. Saulsbury, Del.); *id.* at 104 app. (statement of Sen. Davis).

Many, however, openly defended slavery. Indiana Congressman Edgerton, for example, remarked: "Better, sir, for our country, better for man that negro slavery exist a thousand years than that American white men lose their constitutional liberty in the extinction of the constitutional sovereignty of the Federal States of the Union." *Id.* at 2987. New York Congressman Wood argued that this is "no time to make or alter constitutions . . . Nations do not alter their forms of government amid revolutions." *Id.* at 2940.

Several proponents understood Congressman Wood to mean that slavery was the best condition for African-Americans. *See id.* at 2942. They attacked him for suggesting "a proposition so monstrous and so barbarous . . ." *Id.* at 2980 (statement of Rep. Russell Thayer, Pa.). Illinois Congressman Farnsworth replied, "What vested right has any man or State in property of man?" *Id.* at 2978; *see also* CONG. GLOBE, 38th Cong., 2d Sess. 220 (1865) (statement of Rep. John Broomall, Pa.). But Kentucky Congressman John Mallory joined Wood's remarks when he said that the "condition of slavery . . . is the best . . . in which the African has ever been placed on the continent of America . . . as it regards his physical, moral and intellectual want." CONG. GLOBE, 38th Cong., 1st Sess. 2983 (1864).

Opponents also argued that the absence of 11 southern states invalidated the amendment because there would be less than three-fourths of the states voting to ratify. *Id.* at 2988 (statement of Indiana Rep. Joseph Edgerton); *id.* at 2978 (statement of Rep. Mallory).

¹⁴⁶ CONG. GLOBE, 38th Cong., 1st Sess. 1203 (1864) (Sen. Henry Wilson, Mass.); *see also id.* at 2980 (statement of Rep. Russell Thayer, Penn.) ("Now is the time to uproot and destroy forever this prolific cause of all our sufferings."); *id.* at 1370 (statement of Sen. Clark, N.H.).

¹⁴⁷ CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1863-64).

first to speak after the amendment was introduced in the Senate on March 29, 1864, promised that:

If this Amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it.¹⁴⁸

New Hampshire Senator Daniel Clark, President pro tempore of the Senate, echoed Senator Wilson and explained that the proposed amendment would not only accomplish the "simple" emancipation of slaves, but would also "plant new institutions of freedom."¹⁴⁹

The amendment's supporters understood that there was an institutional foundation that supported slavery, a system of laws that propelled the black race to an inferior and subordinate position. During the congressional debates, a central theme of many legislators was that the denial of justice to people of African ancestry was a primary incident of "this poisonous plant."¹⁵⁰ For example, Iowa Congressman James F. Wilson, co-author of the amendment and Chair of the House Judiciary Committee, compellingly argued that slavery contradicted and threatened the concept of justice that was a "main object" of the American people when "they ordained the Constitution of the United States Slavery is injustice. The establishment of justice would destroy slavery. Both cannot live in peace We must establish justice on the tomb of slavery or have it not at all."¹⁵¹

Some legislators made general references to badges of slavery that had denied blacks the privileges and immunities of citizenship which belonged to every free citizen, "high or low, rich or poor,"¹⁵²

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1329.

¹⁵⁰ *Id.* at 1481. Massachusetts Senator Charles Sumner described how "courts which should have been asylums of liberty have been changed into barracoons Under the influence of slavery, justice, like Astraea of old, had fled." *Id.* Pennsylvania Congressman William Kelly viewed the amendment's primary objective as securing "justice to all men," *id.* at 2985, while in Illinois Congressman Isaac Arnold's words, "liberty, equality before the law, is to be [its] greatest cornerstone." *Id.* at 2989. Congressman Arnold's statement continued: "Much yet remains to be done. . . . While our gallant soldiers are subduing the rebels in the field, let us second their efforts by sweeping from the statute book every stay and prop and shield of human slavery, the scourge of our country, and let us crown all by incorporating into our organic law the glorious prohibition of slavery." *Id.* Pennsylvania Congressman E.C. Ingersoll supported "the adoption of this amendment because it will secure to all the oppressed slave his natural and God-given rights . . . a right to live . . . in a state of freedom . . . the day is not far distant when we may rejoice in the glorious consummation of the eternal principles of liberty, truth, and justice." *Id.* at 2990-91.

¹⁵¹ CONG. GLOBE, 38th Cong., 1st Sess. 1201 (1863-64).

¹⁵² *Id.* at 1319 (statement of Sen. Wilson).

black or white.¹⁵³ Iowa Senator James Harlan was one of the few early proponents of the amendment who attempted to define the specific rights to be included within its guarantee of freedom. Senator Harlan identified some of "the necessary incidents of slavery which it was the specific object of the amendment to abolish," including, among others, the denial to blacks "of a status in court."¹⁵⁴ He argued that the institution of slavery had "robbed [African-Americans] of all their rights and then robbed [them] of their capac-

¹⁵³ Professor tenBroek, the seminal commentator on the amendment, concluded that the amendment's prohibition against slavery and involuntary servitude included "a direct ban against many of the evils radiating out from the system of slavery," and protected against "the denial to the blacks, bond and free, of their natural rights . . . [and] the denial to the whites of their natural and constitutional rights." Jacob tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CAL. L. REV. 171, 180 (1951). He describes free blacks as "only less degraded, spurned and restricted than his enslaved fellow. He bore all the burdens, badges and indicia of slavery save only the technical one." *Id.* at 179. Reviewing the legislative record, wrote Professor tenBroek, "explode[s] the traditionally accepted belief [that] the scope and meaning of the thirteenth amendment" was limited solely to the abolition of slavery and emancipation of those enslaved. *Id.* Rather, it guaranteed blacks their natural and constitutional rights by eliminating the badges and incidents of slavery, and extended these protections to whites.

Congressman James F. Wilson introduced the amendment by referring to the "twenty million of free men [white and black] in the free states [who] were practically reduced to the condition of semi-citizens of the United States," and whose "enjoyment of rights, privileges and immunities . . . could be enjoyed only when debased to the uses of slavery." CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1863-64).

Senator Wilson described the poor white man as the "wronged victim of the slave system, . . . impoverished, debased, dishonored by the system that makes toil a badge of disgrace, and . . . [who] will . . . begin to run the race of improvement, progress and elevation" once slavery is abolished. *Id.* at 1324. Congressman E.C. Ingersoll asserted that the amendment's guarantees would apply to "the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of this thrice-accused institution of slavery [which has kept them in] ignorance, in poverty, and in degradation." *Id.* at 2990.

For additional discussion of the thirteenth amendment framers' intent to protect white Unionists, see Amicus Curiae Brief of Eric Foner, John H. Franklin, Louis R. Harland, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward and Mary Frances Berry at 19, *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) [hereinafter *Historians' Brief*]; *St. Francis College v. Al-Khazaraji*, 481 U.S. 604, *reh'g denied*, 483 U.S. 1011 (1987); and *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (holding respectively that Arab-Americans and Jewish-Americans are among the groups protected within the 1866 Civil Rights Act); G. Sidney Buchanon, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. REV. 1 (1974).

¹⁵⁴ CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1863-64). Senator Harlan named several incidents of slavery including "the conjugal relation . . . , the abolition practically of the parental relation . . . , the relation of person to property . . . , the right to testify . . . and the right to human sympathy . . . , the suppression of the freedom of speech and of the press . . . , [and] the perpetuity of the ignorance of its victims."

See also Judiciary Committee Report related to proposed statute, S. 99, Equality before the Law, concerning allowing testimony of African-Americans against white persons in federal court. SENATE REPORTS (Feb. 29, 1864). Senator Sumner also referred to "that odious rule of evidence, so injurious to justice and discreditable to the country . . ." *Id.* at 1482.

ity to complain of wrong." The Senator recognized that the white, slaveowning class's exclusive control over the administration of justice and selection of judicial bodies had "robbed [African-Americans] of their power to appear before impartial tribunals for the redress of any grievance, no matter how severe."¹⁵⁵

Opponents of the thirteenth amendment argued against its passage because they recognized that the amendment's guarantee of freedom meant more than merely freeing the slaves from bondage. New York Congressman Fernando Wood charged that the amendment would result in "the utter and complete extirpation of slavery from the soil of the Republic,"¹⁵⁶ a consequence which his New York colleague, Anton Herrick, feared would allow Congress to control the states' domestic affairs.¹⁵⁷ Indiana Congressman William Holman argued that the amendment's guarantee of freedom was equivalent to granting African-Americans full rights of citizenship:

Is freedom the simple exemption from personal servitude? No sir. In the language of America it means the right to participate in government, the freedom for which our fathers resisted the British empire . . . the elevation of the African to the august rights of citizenship.¹⁵⁸

Following the narrow defeat of the thirteenth amendment in 1864,¹⁵⁹ Congressman Ashley, the Republican floor leader, pledged to reintroduce the amendment after the November election.¹⁶⁰ As the second session of the Thirty-Eighth Congress convened, it was clear that the November voters had delivered a "more definite expression of the public will" to the House.¹⁶¹ One representative explained the popular mandate that had emerged from the election: "what has transpired between the last session of Congress and the present . . . [is] that the policy pursued by the Administration has been indorsed by the vote of the people . . . [by a] four hundred thousand majority"¹⁶² Public interest in the passage of the

¹⁵⁵ CONG. GLOBE, 38th Cong. 1st Sess. 1439 (1863-64).

¹⁵⁶ *Id.* at 2942.

¹⁵⁷ *Id.* at 2635.

¹⁵⁸ *Id.* at 2962.

¹⁵⁹ See *supra* note 144.

¹⁶⁰ CONG. GLOBE, 38th Cong., 2d Sess. 3357 (1864-65).

¹⁶¹ *Id.* at 144 (statement of Rep. Godlove Orth, Ind.: "Probably it was right that the question of reconsideration should have been postponed. . . . [I]n a Government like ours, resting upon the will of the people . . . , it was well to have another and more definite expression of the public will.")

¹⁶² *Id.* at 155 (statement of Rep. William Higby, Cal.). Though many Democrats lost in the 1864 congressional elections, they retained their seats until March 4, 1865. President Lincoln threatened to call a new session of Congress in order to pass the thirteenth amendment, but first sought to sway lame duck Democrats to vote in favor under the theme of national unity. His arguments succeeded in convincing 14 Democrats who had lost their elective posts to vote in favor of the amendment, providing the necessary two-

thirteenth amendment was reflected by the actively contested debate that consumed eight consecutive days of House session in January, 1865.¹⁶³ Both supporters and opponents sharpened their disagreements as they considered the consequences of granting freedom.

Proponents of the amendment still emphasized that slavery was "a system . . . at variance with . . . every idea of justice."¹⁶⁴ In explanation of the phrase "equal rights before the law,"¹⁶⁵ they re-emphasized earlier calls for "removing every vestige of African slavery from the American Republic."¹⁶⁶ This caused opponents to charge that the Republican-led Congress intended to include African-Americans as members of the "political community formed and brought into existence by the Constitution of the United States,"¹⁶⁷ who would be entitled to and eligible for many rights, including the rights to vote and to serve as jurors.¹⁶⁸

thirds majority. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 838-39* (1988); see *infra* note 176 for a description of the excitement surrounding the amendment's passage.

¹⁶³ The debates began on Friday, January 6, when Congressman Ashley reintroduced the amendment on the floor of the House, *CONG. GLOBE*, 38th Cong., 2d Sess. 138 (1865), and after eight days of debate a vote on the amendment was postponed to January 28. Many legislators participated in the debate, often punctuated by intense exchanges that reflected their diverse views.

¹⁶⁴ *Id.*; see also *id.* at 142 (statement of Rep. Godlove Orth, Ind.: "What is this institution of American slavery? A system of fraud, of injustice, of crime, and of tyranny.").

¹⁶⁵ *Id.* at 154, 155 (statement of Rep. Henry Davis of New York: "I am not . . . one of those who believe that the emancipation of the black race is of itself to elevate them to an equality with the white race. . . . [B]ut I would make every race free and equal before the law . . .").

¹⁶⁶ *Id.* at 155 (statement of Rep. Henry Davis of New York).

¹⁶⁷ *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1857). Pennsylvania Congressman Thayer summarized the principal arguments of those who opposed the amendment's passage: First, Congress lacked constitutional power to amend. *CONG. GLOBE*, 38th Cong., 2d Sess. 150-54 (1865); see *id.* at 197 (statement of Rep. Andrew Rogers, N.J.); *id.* at 154 (statement of Rep. Charles Eldridge, Wis.); *id.* at 177, 179-80 (statement of Rep. Elijah Ward, N.Y.); *id.* at 221-25 (statement of Rep. George Pendleton, Ohio); *id.* at 523 (statement of Rep. James Brown, Wis.). Second, it was improper to pass an amendment when the South was unrepresented in Congress. *Id.* at 149-50; see *id.* at 146-48 (statement of Rep. George Bliss, Ohio); *id.* at 219-20 (statement of Rep. James Cravens, Ind.); *id.* at 523, 524 (statement of Rep. Alexander Coffroth, Pa.). Third, abolishing slavery would amount to an injustice to private property rights. *Id.* at 181-83 (statement of Rep. Brutus Clay, Ky.).

¹⁶⁸ Congressman Voorhees accused "[t]he party now in power [of] seek[ing] to enfranchise the liberated negro, to make him a voter, a juror, and eligible to office." *CONG. GLOBE*, 38th Cong., 2d Sess. 181 (1865) (emphasis added). Virginia Congressman John Stiles seconded these remarks: "The right of negroes to become voters, jurors, and in all respects equal with the white man is the favorite theory of the times and of the party in power." *Id.* at 291 (emphasis added); see also *id.* at 2986 (statement of Rep. Edgerton, who believed that federal and state citizenship rights, including the right to vote, were all logically involved in the proposed amendment). Others denounced the call for freedom and equality. *Id.* at 179 (statement of Rep. Mallory, Ky.); see also *id.* at 177 (statement of Rep. Ward, who feared that the amendment would mean that "all persons shall

Supporters of the amendment rallied to the general theme that “[j]ustice, long delayed, should be awarded”¹⁶⁹ to African-American people. Some specifically addressed the legal process. Elaborating on his first session support for granting Negroes all the rights of white men,¹⁷⁰ Pennsylvania Congressman William Kelley turned his attention to the one-sided results of the all-white jury. Congressman Kelley read into the congressional record an 1864 New Orleans newspaper editorial that severely criticized an all-white jury’s acquittal of a white defendant who admitted killing a young black man.¹⁷¹ The editorial condemned the all-white verdict because it failed to meet the “twofold purpose” of a jury: “Justice has to strike the culprit and avenge the blood of the innocent, as well as to defend the accused party against undue prejudices.”¹⁷²

The editor exhorted his readers to demand change: “Why have we no representatives in the jury? Are our lives, honor, and liberties to be left in the hands of men who are laboring under the most stubborn and narrow prejudice? Is there any protection or justice for us at their hands?”¹⁷³ The editorial closed with a plea to Congressional abolitionists who would be reconsidering the passage of the thirteenth amendment to completely reform the laws relating to the formation of the jury.¹⁷⁴

Congressman Kelley added that slavery made it virtually impossible for an accused black, or for white people in the South loyal to

be equal under the law, without regard to color . . .”). Ohio Congressman White argued that the constitutional ban on slavery would empower Congress to pass “appropriate legislation” that would destroy the fundamental nature of government:

What will be the effect of turning loose this mass of people? Do you propose to enfranchise them, and make them “before the law” . . . the equals of the white man; give them the right of suffrage; the right to hold office; *the right to sit upon juries*? Do you intend . . . to make this a mongrel Government, instead of a white man’s Government?

Id. at 216 (statement of Rep. C.A. White, Ohio) (emphasis added).

¹⁶⁹ *Id.* at 200 (statement of Rep. John Farnsworth, Ill.). Representative John McBride of Oregon stated:

Sir, let the rights and status of the Negro settle themselves as they will and must upon their own just basis. If, as a race, they shall prove themselves worthy [of] the elective franchise, I tell gentlemen they will enjoy the right; they will demand and they will win it, and they ought to have it.

Id. at 201-02; *see id.* at 220 (statement of Rep. John Broomall, Pa.); *id.* at 234 (statement of Rep. Smith, Ky.); *id.* at 244 (statement of Rep. Russell Thayer, Pa.).

¹⁷⁰ *Id.* at 2987.

¹⁷¹ Congressman Kelley was referring to an editorial published in the New Orleans Tribune, Dec. 15, 1864, a newspaper he characterized as “the organ of the proscribed race in Louisiana.” In the Louisiana case, “[t]here was no dispute as to any of the facts”: the white defendant purposefully pushed a young black man into the water, and watched him drown while preventing a rescue by any of the victim’s friends. CONG. GLOBE, 38th Cong., 2d Sess. 289 (1865).

¹⁷² *Id.* (quoting from the New Orleans Tribune, Dec. 15, 1864).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 2009 (1864-65).

the Union, to receive a fair trial. "Where will they find an unprejudiced judge and an impartial jury to vindicate their innocence when falsely accused . . . ?"¹⁷⁵ Congressman Kelley thus acknowledged that the exclusion of black jurors was one of slavery's badges because it denied courtroom justice to the African-American community.

When the House passed the amendment,¹⁷⁶ the fundamental nature of the amendment's constitutional prohibitions and guarantees was not lost on supporters or opponents.¹⁷⁷ Though not delineating specific rights, privileges, and immunities of citizenship, the thirteenth amendment's congressional debates laid the conceptual foundation for defining freedom and liberty,¹⁷⁸ a task taken up later in the formulation and passage of the Civil Rights Act of 1866.

B. The Southern Response: White Violence and the Black Codes

Immediately following the Civil War, a southern wave of violence clearly signalled that the Confederacy would seek to prevent the thirteenth amendment from removing slavery's badge of injustice to African-American people. In Arkansas, "24 Negro men[,] wom[e]n and children were [found] hanging to trees all [a]round the Cabbins";¹⁷⁹ in Louisiana "white men whipped colored men just the same as they did before the war";¹⁸⁰ in Texas, blacks were "frequently beaten unmercifully";¹⁸¹ in South Carolina and Alabama, black men were murdered for "insubordination";¹⁸² in Georgia,

¹⁷⁵ *Id.* at 289 (1865).

¹⁷⁶ After the House vote was recorded, 119 in favor, 56 opposed, 8 not voting, the House response was described as follows:

The announcement was received by the House and by the spectators with an outburst of enthusiasm. The members on the Republican side of the House instantly sprung to their feet, and, regardless of parliamentary rules, applauded with cheers and clapping of hands. The example was followed by the male spectators in the galleries, which were crowded to excess, who waved their hats and cheered loud and long, while the ladies, hundreds of whom were present, rose in their seats and waved their handkerchiefs, participating in and adding to the general excitement and intense interest of the scene. This lasted for several minutes.

Id. at 531.

¹⁷⁷ Congressman Kelley described the amendment as "unfolding a new page in national life," *id.* at 290, while opposing Kentucky Congressman Robert Mallory called the measure radical and revolutionary. *Id.*

¹⁷⁸ After the amendment was passed by Congress, Frederick Douglass stated, "Verily, the work does not end with the abolition of slavery, but only begins." E. FONER, *supra* note 14, at 76.

¹⁷⁹ *Id.*, at 119 (citing letter from William L. Mallet to Thaddeus Stevens, May 28, 1866, Stevens Papers).

¹⁸⁰ *Id.* (citing S. REP. NO. 693, pt. 2, at 175-76, 191).

¹⁸¹ *Id.* (citing EXEC. DOC. NO. 27, at 83).

¹⁸² *Id.* at 120.

North Carolina, and Virginia, violent assaults and killings marked the end of the War.¹⁸³

A historian of the period noted that violence often went unpunished because local law enforcement officials refused to prosecute offenders.¹⁸⁴ Some officials were reluctant to prosecute because they feared such a decision would be "unpopular and dangerous," and could lead to loss of public office.¹⁸⁵ Most declined to prosecute because they still believed that blacks had no right to legal protection from whites' violence. Slavery's legacy made it all but impossible for southern law enforcement officials to punish white offenders after the War. "[B]ecause Southern whites viewed violence as an acceptable means of labor and race control, white sheriffs, magistrates, judges, and jurors often proved unwilling to mete out justice to whites who committed acts of violence against freed men."¹⁸⁶

The long standing rule that disallowed the testimony of blacks against whites was a focal point of whites' legal immunity. However, the letters of Freedmen Bureau officials, who were assigned to various confederate states during the post-War period,¹⁸⁷ reveal that the inadmissibility of testimony was only the first obstacle to courtroom justice for people of African ancestry. For even where a state's rules allowed blacks to testify, the more serious barriers to overcome were the "white judges and jurors [who] would disregard [the] testimony offered by blacks."¹⁸⁸ In many states, federal offi-

¹⁸³ *Id.* at 12.

¹⁸⁴ CONG. JOINT COMM. ON RECONSTRUCTION REPORT, CONG. GLOBE, 39th Cong., 1st Sess. (1866) followed hearings on post-War conditions in the South regarding the failure of local and state officials to enforce the criminal laws where the victim was black or viewed as a white unionist. REPORTS OF ASSISTANT COMM. OF THE FREEDMEN'S BUREAU, 1865, S. EXEC. DOC. NO. 27, 39th Cong., 1st Sess. 23 (1866); Freedmen's Affairs, S. EXEC. DOC. NO. 66, 39th Cong., 1st Sess. (1866); Murder of Black Soldiers, U.S. REP. NO. 23, 39th Cong., 2d Sess. (1866). E. FONER, *supra* note 14, at 203-05, refers to "police forces as well as state militias frequently terroriz[ing] the black population . . ." Foner concludes that "blacks . . . had little confidence in the courts of Presidential Reconstruction." See also Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329 (1952); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 874-75 (1985).

¹⁸⁵ E. FONER, *supra* note 14, at 204.

¹⁸⁶ DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868, at 25 (1979); see also E. FONER, *supra* note 14, at 205.

¹⁸⁷ The Bureau of Refugees, Freedmen, and Abandoned Lands Act was first passed in March 1865, and authorized the President to appoint a Commissioner to direct the Bureau's operations and as many as 10 assistant commissioners. Though the statute was vague in describing the agency's authority, its general purpose was to protect blacks in the post-War South. See also D. NIEMAN, *supra* note 186. The Bureau's specific responsibilities included distributing clothing, food, and fuel to freedmen and to white southern refugees. E. FONER, *supra* note 14, at 69.

¹⁸⁸ D. NIEMAN, *supra* note 186, at 18 (emphasis added) (citing Letter from Assistant

cial and prosecutors realized that eliminating discriminatory testimony did not mean that an accused black could receive a fair trial "owing principally to the prejudice of [white] jurors."¹⁸⁹

Although many southern state law enforcement officials declined to act against white violence, the ones that did arrest and prosecute those responsible rediscovered the one-sided results of the all-white jury process. For example, in Texas, whites were indicted and charged with 500 murders of blacks between 1865 and 1866.¹⁹⁰ In the 500 subsequent trials, all-white Texas juries acquitted every one of the defendants.¹⁹¹

In the words of one historian, the post-War violence "reflected whites' determination to define in their own way the meaning of freedom and their determined resistance to blacks' efforts to establish their autonomy . . ." ¹⁹² As further evidence of what "their own way" meant, every confederate state passed a series of laws,¹⁹³ the

Commissioner Samuel Thomas to Commissioner O.O. Howard (Sept. 21 1865). Thomas's fellow official, Assistant Bureau Commissioner Orlando Brown of Virginia, also questioned the impartiality of a southern court in evaluating a black person's sworn testimony: "is it probable that justices would give such testimony its proper weight especially where their white neighbors are a party to a suit?" *Id.* (citing letter from Orlando Brown to O.O. Howard (Sept. 8, 1865)). Neiman discusses the difficulties facing Bureau agents in Louisiana:

In this situation, the problem was not that state officials refused to admit blacks to the witness stand or denied them equal rights; the heart of the matter was that state law enforcement and judicial officials deprived freedmen of substantive justice through inaction, unfair rulings, and prejudiced verdicts.

Id. at 25.

¹⁸⁹ *Id.* at 137 (quoting William Fitch, United States Attorney at Savannah).

¹⁹⁰ *Id.* at 120.

¹⁹¹ *Id.* at 204-05 (citing JAMES W. SMALLWOOD, *TIME OF HOPE, TIME OF DESPAIR: BLACK TEXANS DURING RECONSTRUCTION* 33 (1981)). That South Carolina's trials delivered similar results is revealed from comments made by the head of that state's Freedmen's Bureau: "It seldom results in anything but the acquittal of the criminal." *Id.* at 204 (citing letter from South Carolina Bureau head Robert K. Scott to James L. Orr (Dec. 13, 1866)). In Alabama, the report was the same: "It is almost impossible to convict a white man for an offense committed against a freedman. No jury is impanelled that will weight out to such an offender a just amount of punishment." *Id.* at 130 (citing letter from an Alabama agent to Gen. Wager Swayne (Apr. 27, 1866)).

While reluctant to convict a white defendant charged with violence against blacks, an all-white panel was ready to convict an accused black person, often on flimsy evidence and "after a mere mockery of a trial." *Id.* at 26 (citing letter from Col. George D. Robinson to Col. C. Cadle (Jan. 17, 1866)). In Boydton, Virginia, a Federal agent reported how black defendants were convicted "on the poorest kind of circumstantial evidence." *Id.* at 131 (citing letter from George Graham to Gen. O. Brown (Aug. 31, 1868)).

¹⁹² E. FONER, *supra* note 14, at 120; see Historian's Brief, *supra* note 153, at 5.

¹⁹³ In November 1865, Mississippi passed the first "Black Codes." South Carolina and Louisiana followed soon thereafter with similar legislation. D. NIEMAN, *supra* note 186, at 83, 86. In January 1866, Florida enacted laws that were as harsh as any state's in 1866. *Id.* at 89-91. Mindful of northern reaction to these laws, Alabama, Georgia, and Virginia passed facially non-discriminatory codes in March 1866. *Id.* at 92-98.

The last three states to pass Black Codes were Texas and Tennessee (in the fall of

purpose of which was "to make Negroes slaves in everything but name."¹⁹⁴ Though some states' "Black Codes" were worse than others, they saddled blacks with "onerous disabilities and burdens, and curtail[ed] their rights . . . to such an extent that their freedom was of little value"¹⁹⁵ In general, the Codes restored white control over the mobility and working conditions of free blacks through the use of labor contracts and compulsory work laws that were enforced by southern state judicial systems.¹⁹⁶

The Black Codes permitted a black person to testify against whites, but only in cases where one of the parties was black.¹⁹⁷ Freedman Bureau officials reported in 1865 that in states allowing such testimony the effect of a black person's testimony was negligible in the face of the all-white jury and court.¹⁹⁸ Secure in the knowledge that repeal of testimony laws was uneventful when white judges and jurors evaluated the validity of black testimony, every southern state modified the absolute bar on testimony by blacks by passing new laws between December 1865 and February 1867.¹⁹⁹

1866) and Arkansas, which relied on pre-War laws until enacting its Black Code in February 1867. THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 109, 113, 114 (1965).

¹⁹⁴ D. NIEMAN, *supra* note 186, at 72-98. The Black Codes represented a legalized form of slavery and were characterized by apprenticeship laws, labor contract laws, vagrancy laws, restricted travel, and a legal system that denied civil and legal rights to blacks while imposing extremely harsh criminal penalties against them. CONG. GLOBE, 29th Cong., 1st Sess. 145 (1866). See generally D. NIEMAN, *supra* note 186, at 72-98; T. WILSON, *supra* note 193, at 96-115 (detailing the particular Black Codes of each southern state).

¹⁹⁵ Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

¹⁹⁶ Southern states' judicial systems enforced the compulsory work laws through vagrancy and sentencing statutes which forced a black person to either accept a labor "contract" or be sentenced to be hired out as an unpaid owner. The nonpayment of a court fine also resulted in additional periods of work. W.E.B. DuBois described the use of vagrancy laws in the post-War South: "Negroes must leave the old plantations . . . but if caught wandering in search of work, and thus unemployed and without a home, this was vagrancy, and the victim could be whipped and sold into slavery." W.E.B. DUBOIS, *BLACK RECONSTRUCTION* 152-53, 154-67 (1953); see also E. FONER, *supra* note 14, at 199-204; D. NIEMAN, *supra* note 186, at 72-98; T. WILSON, *supra* note 193, at 96-115.

¹⁹⁷ The Mississippi legislature was the first to repeal its testimony law and allow African-Americans a limited right to testify. Following the State's initial refusal to pass such a law, President Andrew Johnson warned Mississippi's Governor that federal troops would remain in the state, and that Mississippi's senators and representatives would not be seated in Congress, until Mississippi passed legislation that "[g]ave] protection to all freedmen . . . in person and property without regard to color." D. NIEMAN, *supra* note 186, at 74. Every southern state followed Mississippi's example, and repealed laws that had previously barred blacks from testifying against whites. The new laws permitted testimony in cases where a black was a party to the action, although some differences existed in each state's laws. *Id.* at 94, 99, 100, 109, 113. For example, Florida and Virginia did not admit a black person's sworn deposition into evidence. *Id.* at 99-100; see also W. DUBOIS, *supra* note 196, at 152-53.

¹⁹⁸ See *supra* notes 187-89 and accompanying text; E. FONER, *supra* note 14, at 204.

¹⁹⁹ D. NIEMAN, *supra* note 186, at 25.

North Carolina made certain that the message was not lost on jurors: prior to a black person's sworn testimony, judges were required to warn the witness to tell the truth.²⁰⁰ Federal Bureau agents also reported that some state prosecutors urged white jurors to discount the testimony of blacks because their "childlike nature and propensity to lie made them unreliable witnesses."²⁰¹

The states' procedural reforms were meaningless to the outcome of cases when measured against the reality that a black person's testimony would be rejected by the all-white court or jury. The Black Codes perpetuated the exclusion of black people from juries, and several states reinforced this practice by passing specific laws that limited jury eligibility to whites only.²⁰² Interestingly, most of these state laws were passed after the Civil Rights Act was approved by Congress, perhaps in anticipation that the Act's equal rights protections threatened to dismantle the institution of the all-white jury.

C. Civil Rights Act of 1866

The South's violent response to the passage of the thirteenth amendment delivered a clear message that black people's "freedom" would include neither protection of their civil rights nor equality with whites.²⁰³ As United States legislators met in the Thirty-Ninth session of Congress, Republican Party members were determined to ensure the enforcement of the amendment by elaborating its meaning in statute. As described below, in seeking to establish "freedom as a permanent institution," the legislators recognized that lack of justice for black people in the courts of the country had been an integral part of the institution of slavery because it denied black people redress for wrongs committed against them.

²⁰⁰ T. WILSON, *supra* note 193, at 105.

²⁰¹ D. NIEMAN, *supra* note 186, at 131.

²⁰² Texas, Tennessee and Arkansas, the last three states to pass Black Codes, see *supra* note 193, enacted specific laws that disqualified blacks from serving as jurors. See T. WILSON, *supra* note 193, at 110, 113, 114. Florida was the first, and only, southern state whose Codes specifically provided that only white males could serve as jurors. D. NIEMAN, *supra* note 186, at 89-90.

²⁰³ The South's response to the passage of the thirteenth amendment was not unexpected. Michigan Congressman Howard spoke for many when he said:

It was easy to foresee, and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of the old slaveholders. It was easy to look far enough into the future to perceive that it would be a very unwelcome measure to them, and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment.

CONG. GLOBE, 39th Cong., 1st Sess. 503 (1866).

Illinois Senator Lyman Trumbull, a moderate-conservative Republican²⁰⁴ and Chair of the Senate Judiciary Committee, introduced legislation that was to give meaning to the thirteenth amendment's "declar[ation] that all persons in the United States should be free."²⁰⁵ In Senator Trumbull's words, "the only object . . . is to secure equal rights to all the citizens of the country [T]he bill applies to white men as well as to black men."²⁰⁶

To give "practical effect, life, vigor, and enforcement"²⁰⁷ to the amendment, Senator Trumbull proposed that the Civil Rights Bill of 1866 guarantee citizenship rights for people of African ancestry and thereby overturn the Supreme Court's ruling in *Dred Scott v. Sandford*. The Bill's first sentence declared that all persons born in the United States were United States citizens, and as Senator Trum-

²⁰⁴ Contrary to popular belief, the overwhelming majority of United States Senators who favored civil rights legislation between 1863-1869 were not radical republicans but were "consistent conservatives" or "centrists-moderates." MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869 (1974). Benedict describes Senator Trumbull as one of the 15 "consistent conservatives" (five were regarded as centrists/moderates, and 11 were considered radicals) for the following reasons: "He continually opposed radical legislation, led[] the effort to restore Louisiana in 1865, led[] the movement to weaken the disqualification section of the Fourteenth Amendment in 1866, oppos[ed] black suffrage . . . , vot[ed] to acquit [President] Johnson on the impeachment in 1868, and oppos[ed] efforts to sustain southern Republican governments after 1868." *Id.* at 39. Eric Foner described Senator Trumbull as "embody[ing] the moderate . . . policy" of Republicans. *See* E. FONER, *supra* note 14, at 243.

²⁰⁵ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866); *see also id.* at 504 (statement of Sen. Howard); *id.* at 1152 (statement of Rep. Thayer):

It was the purpose of the [thirteenth] amendment to relieve those who were slaves from all the oppressive incidents of slavery . . . to secure to that class of persons the fundamental rights of citizenship . . . which constitute the essence of freedom . . . life, liberty, and property, and which make all men equal before the law

Representative James F. Wilson (Iowa) introduced the Civil Rights Bill in the House with even more sweeping constitutional declarations than those offered by Senator Trumbull:

If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family.

Id. at 1118.

²⁰⁶ *Id.* at 599; *see also id.* at 1118 (statement of Rep. James Wilson); *id.* at 1263 (statement of Rep. Broomall: "Its terms embrace the late rebels, and it gives them the rights, privileges, and immunities of citizens of the United States . . .").

Many proponents and opponents of the Bill spoke about the statute's protection to every citizen in the Republic's domain, and emphasized that it was not intended to be limited to the South. Proponents included Rep. Wilson, *id.* at 1117; Rep. Broomall, *id.* at 1263; and Sen. Henderson, *id.* at 3035. Those opposed to the bill were: Sen. Johnson, *id.* at 504-05; Sen. Davis, *id.* at 595; Sen. Cowan, *id.* at 603; Rep. Rogers, *id.* at 1120-21; and Rep. Bingham, *id.* at 1291, 2542.

²⁰⁷ *Id.* at 1151 (Rep. Thayer).

bull stated, were entitled to "the great fundamental rights belonging to free citizens."²⁰⁸ The Bill then enumerated several of these specific rights, including the "same right to sue, be parties, . . . give evidence . . . and to full and equal benefit of all laws . . . for the security of person and property, as is enjoyed by white citizens."²⁰⁹ To assure that these rights would receive federal protection, section three of the 1866 Act provided for federal removal "of all causes . . . affecting persons who are denied or cannot enforce in the [state] courts . . . any of the rights secured to them by the first section of this act."²¹⁰

In the congressional debates that preceded passage of the 1866 Act, legislators identified repeal of the slave laws that had prevented black people from testifying or offering evidence against whites in court as among the "inevitable incident[s] to liberty, without which liberty would be but a name."²¹¹ Each such law was said to have deprived the black population of protection of their natural rights.²¹² The Bill's supporters argued that one could not proclaim

²⁰⁸ *Id.* at 475 (Sen. Trumbull). The first sentence of the Civil Rights Act of 1866 states that "all persons born in the United States . . . excluding Indians not taxed, are hereby declared to be citizens of the United States." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

²⁰⁹ *Id.*

²¹⁰ *Id.* at § 3. Professor Robert Goldstein's excellent and comprehensive analysis of section 3 removal relief distinguishes between the 1866 Act's intent to create federal jurisdiction for state court defendants "who are denied or cannot enforce" section 1 rights in the state courts, and its intent to create federal jurisdiction "on behalf of a class of persons (such as victims or witnesses) *other* than state court *defendants*" who are likewise unable to enforce rights guaranteed by the Act. Robert D. Goldstein, Blyew: *Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 482-83 (1989) (criticizing the Supreme Court's failure to follow this distinction in *Blyew v. United States*, 80 U.S. (13 Wal.) 581 (1872)) (emphasis in original); see *infra* notes 264-80 and accompanying text.

²¹¹ CONG. GLOBE, 39th Cong., 1st Sess 42 (1865) (statement of Sen. Sherman). Senator Trumbull addressed both the antebellum laws and the Black Codes statutes during the debate: "[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited." *Id.* at 474.

²¹² Wilson concluded that the "great fundamental rights" were the natural rights of man:

Before our Constitution was formed, the great fundamental rights . . . belonged to every person who became a member of our great national family.

. . . .
Upon this broad principle I rest my justification of this bill. I assert that we possess the power to do those things which Governments are organized to do; that we may protect a citizen of the United States against a violation of his rights by the law of a single State; that by our laws and our courts we may intervene to maintain the proud character of American citizenship; that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States. . . .

Id. at 1119.

freedom and then refuse to guarantee access to the courtroom.²¹³ An opponent of the Bill, Pennsylvania Senator Cowan, was one of the few who recognized that guaranteeing the right to testify begged the ultimate issue to be decided: would a jury believe a black person's testimony? "[W]hatever objections there may be to their testimony will go to their credibility rather than to their competency."²¹⁴

Democratic opponents of the Bill sought to restrict the impact of the thirteenth amendment's prohibition on slavery. They argued that the thirteenth amendment only severed the master-slave relationship,²¹⁵ and had not bestowed upon the freed slave all the rights of a free citizen.²¹⁶ In fact, this position was expressed by some of the same legislators who had previously opposed passage of the thirteenth amendment because of its potential sweep.²¹⁷ Opponents argued that the amendment should be narrowly construed and that: "It was not intended to overturn this Government and to revolutionize all the laws of the various States everywhere."²¹⁸ Others warned that the removal remedy would "wholly absorb all

²¹³ *Id.*; *cf. id.* at 1157 (statement of Rep. Thornton, in opposition to the bill, who argued that it was not "necessary that the negro should be a witness in all cases between parties to secure his freedom"); *id.* at 480 (statement of Sen. Saulsbury that there exists "no right on the part of the [black] person to testify").

²¹⁴ *Id.* at 1783; *see supra* note 188.

²¹⁵ *Id.* at 499 (statement of Sen. Cowan: "That amendment . . . was simply made to liberate the negro slave from his master. That is all there is of it. . . . Nobody pretends that it was to be wider in its operation than to cover the relation which existed between the master and his negro African slave."); *id.* at 476 (statement of Sen. Saulsbury); *id.* at 1156 (statement of Sen. Thornton); *cf.* Sen. Trumbull's response to Sen. Saulsbury; *id.* at 43. Sen. Howard answered Sen. Cowan's view of the thirteenth amendment:

[S]uch was not the intention of the friends of this amendment at the time of its initiation here and at the time of its adoption . . . much less by the liberty-loving people

. . . .

Its intention was to make him the opposite of a slave, to make him a freeman. . . . [E]ntitled to those rights which we concede to a man who is free

Id. at 503-04; *see also* remarks of Rep. Garfield ("What is freedom? Is it the bare privilege of not being chained? . . . If this is all, then freedom is a better mockery, a cruel delusion") *quoted in* E. FONER, *supra* note 14, at 66 (quoting THE WORKS OF JAMES A. GARFIELD 1882-1883).

²¹⁶ CONG. GLOBE, 39th Cong., 1st Sess. 476 (statement of Sen. Saulsbury).

²¹⁷ *Id.* at 499 (statement of Sen. Cowan); *id.* at 113, 477 (statement of Sen. Saulsbury); *id.* at 317 (statement of Sen. Hendricks); *id.* at 185 (statement of Sen. Davis).

²¹⁸ *Id.* at 499 (statement of Sen. Cowan); *see also id.* at 479-80 (statement of Sen. Saulsbury); *id.* at 317 (statement of Sen. Hendricks); *id.* at 1063-64 (statement of Rep. Hale); *id.* at 1120, 1122 (statement of Rep. Rogers); *id.* at 1154 (statement of Rep. Eldridge); *id.* at 1268, 1270-71 (statement of Rep. Kerr); *id.* at 1292 (statement of Rep. Bingham).

Republican proponent Sen. Morrill responded: "I freely admit this species of legislation is absolutely revolutionary. But are we not in the midst of revolution . . . a civil and political revolution which has changed the fundamental principles of our Government in some respects." *Id.* at 570.

reserved state sovereignty and rights,"²¹⁹ and give Congress unlimited power to secure civil rights in the North as well as the South.²²⁰ Some characterized the Bill "as one of the most dangerous that was ever introduced . . . because it promised to bestow [equality] upon the whole free negro population."²²¹ As one Congressman in favor of the Bill stated: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States."²²²

The moderate-conservative wing of the Republican Party overwhelmingly supported passage of the civil rights legislation. Radical Republicans also endorsed the Act, although they favored more fundamental change.²²³ Consequently, the nonradicals were surprised when the leader of their party, President Andrew Johnson, agreed with the opposition and vetoed the Civil Rights Bill.²²⁴ Johnson said the bill represented "an absorption and assumption of power by the General Government which . . . must . . . destroy our federative system [and] foment discord between the two races Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the

²¹⁹ *Id.* at 506, 1777-79 (statement of Sen. Johnson); *id.* at 60 (statement of Sen. Guthrie); *id.* at 1120 (statement of Rep. Rogers); *id.* at 1156-57 (statement of Rep. Thornton); *id.* at 1266 (statement of Rep. Raymond); *id.* at 1295-96 (statement of Rep. Latham).

²²⁰ Though Congress's focus was on the southern codes, it was quite clear from the debate that congressmen on both sides of the Bill were aware that its protections applied to the entire nation. See *infra* notes 237-38 and accompanying text.

²²¹ CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (statement of Sen. Saulsbury). Rep. Eldridge also characterized the bill as "one of the most insidious and dangerous of the various measures which have been directed against the interest of the people of this country." *Id.* at 1154.

²²² *Id.* at 1266 (statement of Rep. Raymond, New York); see also *id.* at 486 (statement of Sen. Saulsbury); *id.* at 601 (statement of Sen. Hendricks).

²²³ Moderate and conservative Republicans opposed black suffrage but favored civil rights equality. See E. FONER, *supra* note 14, at 235-36, 176-239. Conservative Pennsylvania Senator Cowan expressed the consensus that had been built in favor of the 1866 Act: "I believe all the moderate, conservative men of this Chamber are fully agreed that every man should have his national rights secured . . . that he should have the right to sue and be sued, and to testify in courts of justice." CONG. GLOBE, 39th Cong., 1st Sess. 96 (1865).

Radical republicans supported the 1866 Act, although their objectives went beyond equality in civil rights. M. BENEDICT, *supra* note 204, at 149. Some, led by Thaddeus Stevens, advocated land confiscation from the wealthiest 10% of confederate planters, with forty acres being distributed to each freedman, and the remaining 90% being sold to the highest bidder. E. FONER, *supra* note 14, at 235. Stevens's amendment received only 37 votes. M. BENEDICT, *supra* note 204, at 149-50.

²²⁴ E. FONER, *supra* note 14, at 247. The vote in both Houses of Congress indicated the strong support for the civil rights statute. Considerably more than the two-thirds required voted in favor in the Senate (33-12, 5 not voting) and in the House (111-38, 34 not voting). CONG. GLOBE, 39th Cong., 1st Sess. 607, 1367 (1866).

United States?"²²⁵ Senator Trumbull was the first to respond to Johnson's action by saying, "If the bill now before us, and which goes no further than to secure civil rights to the freedman, cannot be passed, then the constitutional amendment proclaiming freedom to all the inhabitants of the land is a cheat and a delusion."²²⁶

In April 1866, the Thirty-Ninth Congress overrode Johnson's veto and in doing so upheld congressional power to pass any law securing freedom to persons in the United States.²²⁷ According to

²²⁵ CONG. GLOBE, 39th CONG., 1st Sess, 1681, 1679 (Johnson's Veto Message). President Johnson's speech also indicated that he feared Congress's power to "declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to hold any office, and, finally, to vote." *Id.* at 1679. Johnson's animosity toward blacks is described in HANS LOUIS TREFOUSSE, *ANDREW JOHNSON: A BIOGRAPHY* (Norton ed. 1990).

²²⁶ CONG. GLOBE, 39th cong., 1st Sess. 1761 (1866).

²²⁷ Some proponents of equality before the law remained unconvinced about the constitutionality of the 1866 Bill. During the debate, Ohio Congressman Bingham, the second highest ranking Republican, proposed a constitutional amendment to secure the Bill's objective of guaranteeing a citizen's "equal protection of life, liberty and property" and "privileges and immunities." *Id.* at 1034, 1088 (statement of Rep. Bingham). Other Republican supporters of the Bill respected Representative Bingham's concern about the constitutionality of the 1866 Act:

The gentleman from Ohio . . . says the act is unconstitutional. Now I have the highest respect for his opinions as a lawyer, and for his integrity as a man On so vital a point I wish to make assurance doubly sure.

. . . .

. . . If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people.

Id. at 2498 (statement of Rep. Broomall); *see also id.* at 2502 (statement of Rep. Raymond, who voted to uphold the President's veto after first voting in favor of passage); *id.* at 2511 (statement of Rep. Elliot); *id.* at 2896 (statement of Rep. Doolittle); *id.* (statement of Rep. Howard). In addition, several Congressmen who opposed the Bill also questioned its constitutionality. *See, e.g., id.* at 497 (statement of Sen. Van Winkle); *id.* at 41 (statement of Sen. Cowan); *id.* at 504 (statement of Sen. Johnson); *id.* at 1120 (statement of Rep. Rogers). *But see infra* note 249 and accompanying text, citing federal and state court decisions that upheld the constitutionality of the 1866 Act pursuant to the thirteenth amendment. Though Congress tabled this proposal, doubts about the future repeal of the Bill led Republicans to include Bingham's language when they introduced what would become the fourteenth amendment to the United States Constitution, only three weeks after overriding the President's veto. *Id.* at 2459. On April 30, 1866, Representative Stevens introduced the House-Senate Joint Committee's Reconstruction plan, which is the current language included in the first section of the fourteenth amendment. When introducing the amendment, Stevens addressed those who argued that "the civil rights bill secures the same things." *Id.* at 2459. Stevens explained that a law is repealable by a majority, "[a]nd . . . the first time that the South with their copperhead allies obtain the command of Congress it will be repealed. The veto of the President and their votes on the Bill are conclusive evidence of that." *Id.*

The equal protection section of the Act was not seen as exceptional because it was viewed as equivalent to the 1866 Bill's protections. *See id.* at 2459 (statement of Rep. Stevens); *id.* at 2498 (statement of Rep. Broomall); *id.* at 2511 (statement of Rep. Elliot); *id.* at 2896 (statement of Rep. Doolittle); *id.* at 2896 (statement of Rep. Howard). The controversial sections of the fourteenth amendment were contained in sections two and three. Section two concerned the issue of black suffrage and determination of a southern state's number of representatives in Congress, *id.* at 2544, 2869; section three

one scholar, the Act won the overwhelming support of Congress because it "was an expression of most Americans' sense of fundamental justice," and contained "modest objective[s]" that were intended "to protect Southern blacks (and whites) from corrupt law enforcement practices that allowed crimes against them to go unpunished, and subjected them to arrest, trial, and conviction of crimes by hostile and prejudiced sheriffs, judges, and juries."²²⁸

Although the 1866 Act did not specifically address the issue of the all-white jury,²²⁹ its guarantee that a person receive "the full and equal benefit of all laws . . . for the security of person and property" significantly changed the southern trial jury's composition. Following an 1866 federal circuit court decision²³⁰ that upheld the constitutionality of the Civil Rights Act and the Military Reconstruction Act passed in 1867,²³¹ black jurors began to appear in several south-

sought to deny voting rights to those who aided the confederacy until 1870, *id.* at 2544 (Representative Stevens's declaration: "Give us the third section or give us nothing").

²²⁸ Kaczorowski, *supra* note 184, at 883. Professor Kaczorowski argues that the equal protection guarantees of the 1866 Act permit courts and Congress to add rights that they believe are essential to the enjoyment of the natural rights of life, liberty and property.

²²⁹ Voting and jury duty for African-Americans were controversial and potentially divisive issues for Republicans in 1866. To assure passage, Republican floor leaders Senator Trumbull and Representative Wilson, argued that the 1866 Civil Rights bill "has nothing to do with" voting rights or jury service. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).

Opponents viewed the clear language of the 1866 Act as including voting and jury duty rights within the statute's guarantee of "equal benefit of all laws . . . as those enjoyed by white persons." *See id.* at 477-78, 606 (1866) (statement of Sen. Saulsbury); *id.* at 1122 (statement of Rep. Rogers); *id.* at 1157 (statement of Rep. Thornton); *id.* at 1291 (statement of Rep. Bingham). Some Republican proponents agreed, *see id.* at 768 (statement of Sen. Wade); *id.* at 1058 (statement of Rep. Kelly); *id.* at 1642 (statement of Rep. Garfield). Others sided with their floor leader's position of the Bill. *Id.* at 1255 (statement of Sen. Wilson); *id.* at 1151 (statement of Rep. Thayer); *id.* at 1263 (statement of Rep. Broomall); *id.* at 1832 (statement of Rep. Lawrence).

Benno Schmidt has suggested that "[i]t is child's play to argue that a right to serve on juries . . . is within the family of rights" covered by the 1866 Act because it is a right "essential . . . [and] necessary to full and equal benefit of all laws . . . for the security of person and property." Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1426-27 (1983) (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27). Even if the 1866 Act was narrowly construed, Schmidt contends that "it by no means follows . . . that a right to serve on juries without racial discrimination was beyond the protection of the Act." *Id.* at 1427. To the contrary, Schmidt argues, "an equal right to serve on juries is in harmony with the general aim of the 1866 Act—impartial justice with respect to basic civil rights of life, liberty and property." *Id.* He concludes by stating that "it is very difficult to accept that legislative history, narrowly conceived, should trump general text in constitutional interpretation." *Id.*; *see* tenBroek, *supra* note 153, at 181, 187; Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 683-86 (1979).

²³⁰ 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

²³¹ The Military Reconstruction Act was passed on March 2, 1867 over President Johnson's veto. Ch. 153, 14 Stat. 428; ch. 6, 15 Stat. 2. The Act divided the South into

ern states, including Georgia,²³² Texas,²³³ North Carolina,²³⁴ South Carolina,²³⁵ and Louisiana.²³⁶ By 1870, the integrated jury was a common sight in those states.²³⁷ This dramatic change in the courtroom was consistent with the sentiments of many, like Congressman Thayer, who voted for the thirteenth amendment and the 1866 civil rights statute:

The [1866] bill . . . is to prevent that great measure from remaining a dead letter upon the constitutional page of this country. . . . The practical question now to be decided is whether . . . [a

five military districts, and authorized the President to appoint a major general to command each district and protect life and property. The five generals, with the exception of the first military district in Virginia, ordered county sheriffs to select black jurors either from its list of registered voters alone (Gen. Pope, third district covering Georgia, Florida, and Alabama), or in combination with taxpayer lists (Gen. Sickels, second district covering North and South Carolina; Gen. Ord, fourth district covering Mississippi and Arkansas; Gen. Hancock, fifth district covering Texas and Louisiana). D. NIEMAN, *supra* note 186, at 203-03, *see* E. FONER, *supra* note 14, at 307-08, 330. State constitutional conventions between 1867-1869 eliminated property requirements for jury service. *Id.* at 320. Despite these changes, “[i]n many instances, [state] judges avoided military interference by covertly excluding blacks from jury duty or by allowing a very few to serve as jurors.” D. NIEMAN, *supra* note 186, at 203.

²³² In one Georgia county, voters elected a black Justice of the Peace, who immediately broke the previous color barrier in jury selection by administering a policy which assured that there would be an equal representation of blacks and whites on a Georgia jury. E. FONER, *supra* note 14, at 358.

²³³ On May 8, 1867, the New York Times published a front page article entitled *Important Order by General Griffin—Jurors in Texas*. The article described the Commanding General in Texas issuing two directives. The directive first applied to any white male eligible for jury duty, and required that before he could sit as a juror, he must swear, under oath, that he “never voluntarily borne arms against the U.S. . . . [and promises to] support and defend the Constitution.” The second directive focused on assuring that African-Americans would serve on Texas juries. The directive referred to section two of the Civil Rights Act, and reminded the Texas official in charge of empaneling jurors that it was a misdemeanor for any public official to deprive a citizen of any equal protection right secured by the Act. N.Y. Times, May 8, 1867, at 1, col. 4.

²³⁴ A New York Times article published on August 9, 1867, entitled *The Jury Order Enforced*, described the first integrated jury selected in Wilmington, North Carolina. The “jury of inquest” seated equal numbers of white and black people. N.Y. Times, Aug. 9, 1867, at 4, col. 6. Three weeks later, the same newspaper reported on a North Carolina state court opinion that upheld the right of black people to serve as jurors. The court’s decision declared that the thirteenth amendment had abolished the automatic exclusion of black people from serving as jurors, and that the Civil Rights Act of 1866 affirmatively granted black citizens the same rights enjoyed by whites including the right to serve as a juror. N.Y. Times, Aug. 30, 1867, at 5, col. 2.

²³⁵ In Charleston, South Carolina, federal district court judge Bryan ruled that the selection of an integrated jury was constitutional with the passage of the thirteenth amendment and the Civil Rights Act of 1866. N.Y. Times, *Decision by Judge Bryan Relative to Colored Jurymen*, Oct. 17, 1867, at 1, col. 4; *see* E. FONER, *supra* note 14, at 458.

²³⁶ A New York Times article reported on a New Orleans state judge swearing in the first black grand juror in Louisiana. N.Y. Times, Oct. 20, 1867, at 1, col. 6.

²³⁷ *See* E. FONER, *supra* note 14, at 366, 372. *See supra* notes 231-36 and accompanying text, describing the first black citizens to serve as trial jurors in each of these states.

large class of people] shall have the benefit of this great charter of liberty given to them by the American people.

[W]hen I voted for the amendment to abolish slavery . . . I did not suppose that I was offering them a mere paper guarantee.²³⁸

D. Judicial Interpretation of the Thirteenth Amendment 1866-1871

It would not be long before judicial interpretation reinforced Thayer's analysis that the thirteenth amendment and the 1866 Act were more than "mere paper guarantees." One month after the Act was passed, the United States Attorney in Kentucky indicted three white men for burglarizing the home of a black family in *United States v. Rhodes*.²³⁹ The United States Attorney argued in federal court that black victims of crimes committed by whites were unable to enforce their right of personal security in Kentucky state courts because state law disqualified every black person from testifying against a white criminal defendant.²⁴⁰

Supreme Court Justice Noah Swayne, sitting as the designated Circuit Court Justice, rejected the defendant's claim that the civil rights statute was an unconstitutional usurpation of state authority. Justice Swayne concluded from the Act's legislative history that Congress's "main object" in moving to protect a black person's right to testify was to avoid perpetuating a "denial of justice" against black crime victims and criminal defendants.²⁴¹ Justice Swayne viewed the testimony rule together with the role of all-white "[c]ourts and juries that were frequently hostile to the colored man, and administered justice, both civil and criminal, in a corresponding spirit." The result, said the Justice, was that "[c]rimes of the deep-

²³⁸ CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866).

²³⁹ 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151); see ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 9-10 (1985).

²⁴⁰ In *Bowlin v. Kentucky*, 65 Ky. (2 Bush) 5 (1867), Kentucky's highest court reversed a white defendant's conviction based on the testimony of a black witness. The court also upheld a state statute which allowed a black's testimony only in cases against blacks or Indians, or in civil cases to which only blacks or Indians were parties. *Id.* at 6.

²⁴¹ *United States v. Rhodes*, 27 F. Cas. 785, 787 (C.C.D. Ky. 1866) (No. 16,151). Recognizing the vulnerability of the entire African-American community when a crime against an individual member went unpunished, Justice Swayne construed the language that gave federal courts jurisdiction to include crime victims as among those "affect[ed]" by the "cause." *Id.* at 786-87. Taking into account the historical circumstances in which no legal remedy had been available to African-American crime victims, Justice Swayne asserted that the court's responsibility was to resolve "[e]very doubt . . . in favor of the validity of the [1866] law." *Id.* at 793. "It is incredible that all this machinery, including the agency of the freemen's bureau, would have been provided, if the intention were to limit the criminal jurisdiction conferred . . . and exclude all white persons from its operation." *Id.* at 787.

est dye were committed by white men with impunity."²⁴²

Because the thirteenth amendment guaranteed freedom, said Justice Swayne, the 1866 Act grant of citizenship was theoretically "unnecessary": as free people, every black person was entitled to the status and rights of citizenship.²⁴³ However, given whites' continued opposition to blacks' rights, the Justice acknowledged that in the absence of the Civil Rights Act, the "simple" abolition of slavery would have "been a phantom of delusion. . . . [S]lavery would have been in effect restored"²⁴⁴

Justice Swayne's decision in *Rhodes* upheld Congress's authority to "give full effect to the abolition of slavery thereby decreed [under the thirteenth amendment]."²⁴⁵ Because all branches of the United States government are charged with upholding the Constitution, Swayne also highlighted the enforcement responsibilities of the executive and judicial branches.²⁴⁶

The following year, Chief Justice Chase, who sat as a Circuit Court Judge in Maryland, breathed additional life into the thirteenth amendment. In *In re Turner*,²⁴⁷ the Chief Justice ruled that an apprenticeship contract violated the equal protection clause of the Civil Rights Act because it required the petitioner to work until she was eighteen years old under conditions similar to those under slavery. Such conditions were incidents of slavery and thus directly violated the guarantees of the thirteenth amendment.²⁴⁸

By upholding the constitutionality of the 1866 Civil Rights Act, these circuit court decisions²⁴⁹ provided a constitutional foundation

²⁴² *Id.*

²⁴³ *Id.* at 789. Justice Swayne concluded that the rights of citizenship were a direct result of the thirteenth amendment's grant of freedom: "[T]he emancipation of a native born slave by removing the disability of slavery made him a citizen. If these views be correct, the provision in the act of congress conferring citizenship was unnecessary, and is inoperative." *Id.*

²⁴⁴ *Id.* at 794.

²⁴⁵ *Id.* at 793. In deciding that the 1866 Civil Rights Act was a constitutional exercise of congressional power under the thirteenth amendment, Justice Swayne cited *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional." See *Rhodes*, 27 F. Cas. at 791. In making his decision, Swayne also referred to article 1, section 8, cl. 18—the necessary and proper clause of the constitution. *Id.* at 792.

²⁴⁶ "[The thirteenth amendment] would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needed for [t]he purpose [of abolishing slavery]." *Id.* at 793.

²⁴⁷ 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

²⁴⁸ *Id.* at 339.

²⁴⁹ In addition to the U.S. Circuit Court decisions in *Rhodes* and *In re Turner*, Professor Kaczorowski cites two unreported federal district court opinions which upheld congressional power and intent to pass the 1866 Civil Rights Bill. R. KACZOROWSKI, *supra*

for federal prosecutions of individuals who perpetuated the badges and incidents of slavery. Yet, despite the occurrence of organized white violence against blacks in the late 1860s, only the United States Attorney in Kentucky aggressively prosecuted white offenders.²⁵⁰ The years 1869 through 1871 witnessed an unparalleled escalation of white terror and lawlessness.²⁵¹ Congressional hearings conducted in 1870 revealed Ku Klux Klan criminality "so pervasive that local law enforcement authorities in several Southern states were unable to provide even the semblance of criminal law enforcement."²⁵² Following the hearings, Congress passed new federal

note 239, at 22. See also note 235, decribing a South Carolina decision upholding Congress's authority and applying it to jury selection.

Most state appellate courts also upheld the constitutionality of the Act in the years immediately following its enactment. *E.g.*, *Kelley v. State of Arkansas*, 25 Ark. 392 (1869) (upholding the constitutionality of the Act, and upholding a black witness's testimony against a white defendant); *Gaines v. State*, 39 Tex. 606, 611-12 (1873); see *People v. Washington*, 36 Cal. 658 (1869) (acknowledging authority of federal government to enforce civil rights). The *Washington* decision was overruled in *People v. Brady*, 40 Cal. 198 (1870) (states' rights theory) but reinstated in *Van Valkenburg v. Brown*, 43 Cal. 43 (1872). See also *Ex parte Warren*, 31 Tex. 143 (1868); *supra* note 234 (describing an 1867 North Carolina court decision upholding Act as it applied to jury selection); *Smith v. Moody*, 26 Ind. 299 (1866); *United States v. Rhodes*, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (No. 16,151) (citing *In re A.H. Somers*, an 1866 Maryland high court decision); *cf.* *Bowlin v. Commonwealth*, 65 Ky. (2 Bush) 5 (1867) (striking down the Act as a violation of a state's sovereignty to secure its citizens' rights); *State v. Rash*, 6 Del. (1 Houst.) 271, 279-80 (Del. Ct. Gen. Sess. 1867) (refusing to challenge the constitutionality of Act, and declaring that the right to testify was a rule of state judicial procedure rather than of citizenship).

²⁵⁰ Benjamin Bristow, the U.S. Attorney in Kentucky, prosecuted 29 cases under the 1866 Civil Rights Act, including *United States v. Rhodes*, discussed *supra* notes 239-46 and accompanying text. See Goldstein, *supra* note 210, at 469-74. In 1870, Bristow became the first Solicitor General and helped enforce the aggressive prosecutorial policy established by the first Attorney General, Amos T. Ackerman. See R. KACZOROWSKI *supra* note 239, at 52, 80-83, 86, 87, 89-92.

²⁵¹ In 1867, African-Americans began to form political groups, such as the Union League, "the political voice of the freedman," for the purpose of gaining voting rights, inclusion on local juries, and protection against white offenders, among other issues. E. FONER, *supra* note 14, at 283-85. During the state constitutional conventions held in 1867, African-Americans gained state suffrage rights as the Republican Party won control of the southern state governments. *Id.* at 314. Beginning in 1868, white supremacy groups, such as the Ku Klux Klan, the Knights of the White Camelia, and the White Brotherhood, engaged in a pattern of systematic violence throughout the South. The violence targeted individual blacks who attempted to vote or who were active in the Republican Party. *Id.* at 425-27. White mobs attacked any African-American whom they believed was "impudent" or who resisted behaving in accordance with the former master-slave relationship. *Id.* at 430. Black elected officials were particularly vulnerable; ten percent of those who served on the state constitutional conventions in 1867-68 were victims of violence, including seven who were murdered. *Id.* at 426.

²⁵² R. KACZOROWSKI, *supra* note 239, at 81. The Ku Klux Klan is described as "a military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy." E. FONER, *supra* note 14, at 425. The KKK leadership included "the very best citizens" living in the south, including "planters, merchants, lawyers, and even ministers." *Id.* at 432-33; see D. NIEMAN, *supra*

criminal legislation²⁵³ and created a Department of Justice to prosecute cases in which citizens' civil and political rights had been violated.

While all-white state juries had previously freed whites responsible for violating blacks' civil and political rights, federal prosecutors now directed their arguments to newly constituted multiracial juries. In 1867, the year following Justice Swayne's decision in *Rhodes*, a remarkable change occurred in the administration of justice in the South: a black person's testimony was not only heard, but it was evaluated by a jury consisting of black, as well as white, jurors.²⁵⁴ In many southern states of the Republican controlled South, including Georgia, Texas, North Carolina, South Carolina, and Louisiana, African-American men began to be called and to serve as jurors.²⁵⁵ By 1870, as "biracial democratic government . . . was functioning effectively in many parts of the south,"²⁵⁶ the culpability or civil liability of whites prosecuted for racially motivated violence was frequently being judged by juries of both blacks and whites. "By having black men on the juree bench," said one former slave, "we then could defend our rights before the laws."²⁵⁷

Between 1870 and 1873, the Justice Department's record in successful prosecutions of white supremacists was extraordinary,

note 186, at 200; R. KACZOROWSKI, *supra* note 239, at 53. For details of Klan violence see E. FONER, *supra* note 14, at 425-44; ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971).

White violence during this period went virtually unpunished. "If a white man kills a colored man in any of the counties of this State . . . you cannot convict him." E. FONER, *supra* note 14, at 435 (citing a Florida sheriff testifying during KKK Hearings). Professor Kaczorowski describes local law enforcement officials' failure to respond as caused either by fear or because they were "members of the Klan and participated in their crimes." R. KACZOROWSKI, *supra* note 239, at 55.

²⁵³ Enforcement Act of 1870, ch. 114, 16 Stat. 140, was primarily concerned with prosecuting those who interfered with an individual's right to vote. In 1871, Congress enacted a second Enforcement Act, sometimes referred to as the Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871), which was a comprehensive remedy against violations of civil rights and included the "re-enact[ment of] the [1866] civil rights bill . . . for the purpose of carrying the fourteenth amendment into effect." *The Slaughterhouse Cases*, 15 F. Cas. 649, 655 n.6 (C.C. La. 1870) (No. 8408).

²⁵⁴ See E. FONER, *supra* note 14, at 355, 358, 362, 372; N.Y. Times, Oct. 20, 1867, at 1, col. 6; N.Y. Times, Oct. 17, 1867, at 1, col. 4; N.Y. Times, Aug. 30, 1867, at 5, col. 2; N.Y. Times, Aug. 9, 1867, at 4, col. 6; N.Y. Times, May 8, 1867, at 1, col. 4; *supra* note 237.

²⁵⁵ See *supra* notes 232-36.

²⁵⁶ E. FONER, *supra* note 14, at 372. Foner noted that the absence of the black juror in communities or states under Democratic control was generally accompanied by a denial of justice to blacks. For example, in Virginia, which managed to avoid implementing the reforms of Reconstruction, one Freedmen Bureau official commented: "It is almost impossible to convict a white man for an offense committed against a freedman." *Id.* at 420. Civil litigants fared no better.

²⁵⁷ E. FONER, *supra* note 14, at 421 (citing letter from former Tennessee slave J.W. Bailey to Tennessee Governor Dewitt Senter (May 15, 1869)).

particularly when compared to the government's previous granting of virtual immunity to such offenders. Federal prosecutions culminating in jury verdicts increased nearly twelvefold, from forty-three cases during the Department's initial year in 1870 to over 500 cases in 1872.²⁵⁸ Jury results were even more astonishing as "Republican jurors and magistrates now treated black testimony with respect"²⁵⁹ In 1872, integrated juries returned guilty verdicts in ninety percent or more of these cases, almost double the federal conviction rate in non-civil rights criminal cases.²⁶⁰ The combination of an aggressive federal law enforcement policy and juries' willingness to credit testimony against white defendants led one federal officer in 1872 to conclude that the Department was on the verge of destroying the Klan.²⁶¹

Federal enforcement of civil rights law had proven that "[t]he law on the side of freedom is of great advantage . . . where there is power to make that law respected."²⁶² However, 1872 represented the high water mark of the federal government's policy of aggressive prosecution. Later that year, political support weakened and federal funding decreased, forcing the Justice Department to cut back to a strategy of selective prosecution against white terrorists.²⁶³ The

²⁵⁸ Professor Kaczorowski deserves primary credit for his "prodigious archival efforts" in revealing the Justice Department's substantial efforts to enforce civil rights in its early years, 1870-1873. See Goldstein, *supra* note 210, at 475 n.25; see also R. KACZOROWSKI, *supra* note 239, at 81-112. In 1870, the Justice Department prosecuted 43 civil rights violators. In 1871, United States Attorney General Ackerman directed that the full force of federal power should be employed against the Klan, and the number of prosecutions increased to 271. *Id.* at 83, 87. The backlog was substantial, with only one-quarter of the cases completed, primarily because of a lack of funds, court congestion, and constitutional challenges in Alabama and Mississippi. *Id.* at 88-89. In 1872, the number of prosecutions almost doubled, with 555 cases being prosecuted.

²⁵⁹ E. FONER, *supra* note 14, at 537.

²⁶⁰ R. KOCZOROWSKI, *supra* note 239, at 106; *id.* at 104 (456 white defendants out of 505 tried were convicted by jury verdict in 1872). United States attorneys in South Carolina and Mississippi were particularly successful. In South Carolina, juries convicted 90% of 105 defendants, *id.* at 105; in Mississippi, 73% of 356 defendants were found guilty. *Id.*

In 1873, 537 cases were tried before a jury; the conviction rate was 92%. *Id.* The United States Attorney's office in North Carolina had an astonishing 98% conviction rate (263 of 269 cases), and Mississippi convicted 184 of 234 defendants tried. *Id.* at 107.

²⁶¹ *Id.* at 393.

²⁶² E. FONER, *supra* note 14, at 458 (citing FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 377 (1962)).

²⁶³ R. KACZOROWSKI, *supra* note 239, at 102, 107-12. Professor Kaczorowski describes the difficulties faced by Justice Department attorneys in prosecuting civil rights violations because of a shortage in resources, and a lack of congressional support. *Id.* at 83-87, 102, 109. Despite the lack of adequate resources, Attorney General Ackerman pursued an aggressive prosecution policy until he abruptly resigned in late 1871. His successor, George Williams, ordered a stricter policy of selective prosecution. More than 40% of the civil rights criminal docket was *nolle prosequi* in 1872, and in 1873, that

year 1872 also marked the beginning of Supreme Court judicial decision-making which would soon eviscerate the substantial gains made by blacks in the courtroom in the short period since the thirteenth amendment was passed in 1865.

E. Judicial Interpretation 1872-1874

1. *Blyew v. United States*²⁶⁴

Justice Swayne's warning in *Rhodes* that future courts might tamper with the thirteenth amendment's intended legal protections for the black race proved all too prescient.²⁶⁵ Beginning with the Supreme Court's 1872 decision, *Blyew v. United States*, the thirteenth amendment's broad promise to abolish slavery and grant freedom was whittled away and soon lost altogether. Although the Court's decision in *Blyew* upheld the 1866 Civil Rights Act's constitutionality, it severely restricted the federal removal procedure which was the only means for overcoming state inaction and prosecuting white offenders in federal court.²⁶⁶

In *Blyew*, the Court reviewed the federal conviction of two white defendants for axing to death a black married couple, their son, and his ninety-seven-year-old, blind grandmother. The only witnesses to the crime were two of the couple's children who had managed to escape. Under Kentucky law, the defendants could not have been prosecuted because Kentucky courts still did not permit a black person to testify against a white defendant.²⁶⁷

Sensing that application of state law would result in another denial of justice, Justice Department attorneys assumed jurisdiction under the Civil Rights Act. Relying on testimony of the two surviv-

increased to 59%. *Id.* at 106. In the spring and summer of 1873, Attorney General Williams suspended all civil rights prosecutions and arrests, and President Grant ordered that clemency and pardons be considered for convicted offenders. *Id.* at 110-12.
²⁶⁴ 80 U.S. (13 Wall.) 581 (1872). For a detailed factual account of *Blyew*, see Goldstein, *supra* note 210, at 469-74.

²⁶⁵ Justice Swayne's concluding remarks in *Rhodes* warned of the disastrous consequences that would follow were a future Court to circumvent the legislative intent of the 1866 Act: "Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow." *United States v. Rhodes*, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (No. 16,151).

²⁶⁶ Professor Goldstein agrees with Professor Kaczorowski regarding *Blyew's* importance as the first Supreme Court decision in which the "counterrevolution" began to limit the federal government's responsibilities in civil rights enforcement. Goldstein, *supra* note 210, at 474-75, 506; R. KACZOROWSKI, *supra* note 239, at 140. Following the Supreme Court's decision in *Blyew*, federal criminal prosecutions for violations of the Civil Rights Acts of 1866, 1870, and 1871 were virtually eliminated. *Id.* Previously convicted defendants were released by presidential pardon. *Id.* at 142.

²⁶⁷ *Bowlin v. Commonwealth*, 65 Ky. (2 Bush) 10 (1867). In addition to preventing the child witness's testimony, Kentucky's discriminatory law precluded the admissibility of the oldest child's dying declaration. Goldstein, *supra* note 210, at 471.

ing family members, they successfully prosecuted both defendants, who were then sentenced to death by United States District Court Judge Ballard. On appeal, the defendants attacked the federal court's claim to jurisdiction. They also maintained that the federal removal statute did not apply to the two child witnesses because they were not "affected" persons within the language of the Act.²⁶⁸

United States Solicitor General Bristow argued that "the history of the times . . . the object to be accomplished forbid this construction,"²⁶⁹ and insisted that Congress's intent in conferring federal jurisdiction in the Civil Rights Act was to protect a citizen's right to testify as among "those rights which . . . are . . . essential to the perfect enjoyment of freedom."²⁷⁰

The Supreme Court's majority opinion acknowledged the historical denial of legal protection to the black citizenry that led to the Civil Rights legislation.²⁷¹ Yet the Court's awareness was transparently selective. It referred to a black defendant's due process rights under the Act, but ignored Congress's overriding intent to protect the life and personal security of blacks from random, unredressed violence committed by whites. The Court upheld federal removal of cases only in situations where a criminal defendant's right to a jury trial or to receive equal protection during sentencing might be jeopardized by state court procedures;²⁷² it rejected the Act's underlying premise that a black crime victim should enjoy federal protection where a state's evidentiary rules precluded a black person's testimony against those responsible.²⁷³ The Court made no reference to

²⁶⁸ *Blyew*, 80 U.S. at 585-88 (argument presented in defense brief); *id.* at 582 (arguments presented in government's brief). For a full discussion of the defense and prosecution's arguments in *Blyew*, see Goldstein, *supra* note 210, at 490-99.

²⁶⁹ Brief for the United States at 26, *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872).

²⁷⁰ *Id.*

²⁷¹ *Blyew*, 80 U.S. at 593.

²⁷² *Id.* at 592-93.

²⁷³ The Court accomplished this result by narrowly constraining the "causes affecting persons" language of the 1866 Act to apply only to the technical parties of record, the accused and the government, and not to witnesses who "are no more affected . . . than is every other person." *Id.* at 591. Under the Court's interpretation, the ninety-seven-year-old grandmother "victim of the frightful outrage . . . [was] beyond being affected by the cause itself." *Id.* at 594. The Court's logic led it to conclude that the federal removal statute applied only to "persons in existence," *id.* at 594, and not to cases where black people had been murdered by whites.

Professor Goldstein persuasively argues that the Supreme Court wrongfully construed the "affecting jurisdiction" removal remedy and significantly undermined the meaning of Reconstruction policy, *i.e.*, to guarantee federal enforcement of civil rights and equality when states failed to do so. Goldstein sharply critiques the Court's misplaced reliance on *United States v. Ortega*, 24 U.S. (11 Wheat.) 467 (1826) for limiting the legislative intent of the "cause affecting jurisdiction" language. Goldstein, *supra* note 210, at 503-04; see *supra* note 241.

the consequences that flowed from its decision: a white person in Kentucky could continue to kill blacks with immunity as long as the only witnesses to the crime were also black.

The dissent, written by Justice Bradley and joined by Justice Swayne, spared few words against the Court's construction of the legislative intent of the 1866 Act.²⁷⁴ The dissenting Justices reminded their brethren that Congress's main object in proposing the thirteenth amendment was not to "merely strik[e] off the fetters of the slave" but to remove the "incidents and consequences of slavery."²⁷⁵ The dissenting opinion noted that one of Congress's most important objects in passing the 1866 Bill was to guarantee equal justice for persons of African descent and to "place [them] on an equality of rights and privileges with other citizens."²⁷⁶ The Justices stressed the importance of giving all citizens the right to enter "a complaint before a magistrate, or the grand jury, and [appear] as a witness on the trial of the offender."²⁷⁷

Justices Bradley and Swayne viewed the unpunished act of murdering a black person as "a case of denial of rights to the colored population of that State"²⁷⁸ because it left the life of every black person vulnerable to similar attack. When a white person was not prosecuted because a court automatically rejected the testimony of a black witness, the resulting wrong "deprive[d] a whole class of the opportunity of th[e] right [of bringing the offender to justice]"²⁷⁹ and perpetuated a stigma of black inferiority which could only be erased by a successful criminal prosecution.

For the dissenters, the majority holding restored an "incident" of slavery that the Civil Rights Act had intended to abolish—the denial of a black person's access to the courtroom. "If . . . doors of justice [are] shut in [a black person's] face on the ground that he is a colored person, and cannot testify against a white citizen, it seems . . . almost a stultification of the law to say that the case is not within

²⁷⁴ "To say that actions or prosecutions intended for the redress of such outrages are not 'causes affecting the persons' who are the victims of them, is to take . . . a view of the law too narrow, too technical, and too forgetful of the liberal objects it had in view." *Blyew*, 80 U.S. at 599 (Bradley, Swayne, JJ., dissenting).

²⁷⁵ *Id.* at 501.

²⁷⁶ *Id.* at 595.

²⁷⁷ *Id.* at 598.

²⁷⁸ *Id.* at 598 (Bradley, Swayne, JJ., dissenting). The dissenters declared that . . . to refuse their evidence and their sworn complaints is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case.

Id. at 599.

²⁷⁹ *Id.*

its scope."²⁸⁰

Scrambling to save the abolitionist vision of the thirteenth amendment subsequent to *Blyew*, Republican Congressmen increasingly turned to the fourteenth amendment for power to issue pro-liberation legislation.²⁸¹ But the Supreme Court that issued *Blyew* marched steadily backwards in decisions issued over the next decade and, despite congressional efforts, fully executed a general retreat from the national goal of liberating the black race from slavery and inferior citizen status.

2. The Slaughterhouse Cases²⁸²

The Court's 1873 decision in the *Slaughterhouse Cases* represented another major judicial milestone in the retreat to the "Democratic Conservative ideology of states' rights."²⁸³ The *Slaughterhouse Cases* returned control for enforcing civil rights to the same state forces that had previously enslaved African-Americans.²⁸⁴ In these cases, white butchers challenged a Louisiana law that granted monopoly rights to a slaughterhouse corporation as violating their right as United States citizens to pursue an occupation. The Court rejected the butchers' claim and thus limited the reach and meaning of the fourteenth amendment's privileges and immunities clause.²⁸⁵ Dicta in the Court's decision, however, established the theoretical grave in which the thirteenth amendment would lay buried for the next century.

The butchers had argued that the Louisiana law violated the thirteenth amendment's prohibition against involuntary servitude. They claimed that the monopoly arrangement revived a form of feudal land and property relations which violated the thirteenth amendment by granting a powerful corporation special privileges at the expense of individuals' right to use their own land and property.²⁸⁶ Although the majority opinion described the thirteenth amendment

²⁸⁰ *Id.*

²⁸¹ Act of Mar. 1, 1875, ch. 114, 18 Stat. 335; see *supra* note 227, *infra* notes 303-15 and accompanying text.

²⁸² 83 U.S. (16 Wall.) 36 (1873).

²⁸³ Kaczorowski, *supra* note 184, at 938.

²⁸⁴ By 1873, Democrats had regained governorships in Tennessee, Georgia, and Virginia, and had a substantial voice in state legislatures in Alabama, Florida, North Carolina and Tennessee. Republicans enjoyed undisputed control only in Arkansas, Louisiana, Mississippi, and South Carolina. E. FONER, *supra* note 14, at 539.

²⁸⁵ In *Slaughterhouse*, the Supreme Court ruled that the butchers' right to pursue their occupation was a privilege and immunity that "belong[s] to citizens of the States . . . and [is] left to the State governments for security and protection." 83 U.S. at 78. Federal protection of a citizen's privileges and immunities was narrowly defined to include doing business with the government, traveling on the high seas, gaining access to seaports, and assembling and petitioning for redress of grievances. *Id.* at 78-79.

²⁸⁶ *Slaughterhouse*, 83 U.S. at 49-51.

as a "grand yet simple declaration of the personal freedom of all the human race,"²⁸⁷ it limited the amendment's prohibition against involuntary servitude to the abolishment of chattel slavery and nothing more.²⁸⁸ In finding that the state law did not violate the thirteenth amendment, the majority stated that it "requires an effort" and "a microscopic search . . . to find in [the amendment] a reference to servitudes, which may have been attached to property."²⁸⁹

The Supreme Court's ruling in the *Slaughterhouse Cases* provided a glimpse of the sweeping restrictions that the Court would later place on the thirteenth amendment's prohibition against badges and incidents of slavery in the *Civil Rights Cases*.²⁹⁰

3. United States v. Cruikshank²⁹¹

Supreme Court Justice Bradley, sitting on a federal lower court, generated a final spark of recognition of the power of the thirteenth amendment in *United States v. Cruikshank*.

Cruikshank concerned the criminal prosecution of a group of 300 to 400 Ku Klux Klansmen who had engaged in "[t]he bloodiest single instance of racial carnage in the Reconstruction era."²⁹² A federal grand jury indicted ninety-seven individuals and charged each with murder and conspiracy. Only nine defendants were actually tried in federal court and each was ultimately acquitted on the murder charges. One jury, however, did find three of the defend-

²⁸⁷ *Id.* at 69.

²⁸⁸ In the lower court decision, *The Slaughterhouse Cases*, 15 F. Cas. 649 (C.C. La 1870) (No. 8408), Supreme Court Justice Bradley and Circuit Court Justice Woods struck down the state law as violating the individual's right to pursue an occupation under the fourteenth amendment's privileges and immunities clause, and under the thirteenth amendment's 1866 Act. *Id.* at 655. However, the Supreme Court majority in *Slaughterhouse* reversed the lower court's finding, and concluded that the prohibition applied only to human beings and not to an individual's property right to choose an occupation.

In dissent, Justice Field pointed out liberty implications when a monopoly license required a "person . . . to pursue only one trade or calling, and only in one locality of the country." Justice Field explained that "to labor even for his own benefit only in one direction . . . [was] almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude." 83 U.S. at 90-91.

²⁸⁹ *The Slaughterhouse Cases*, 83 U.S. at 69.

²⁹⁰ 109 U.S. 3 (1883).

²⁹¹ 25 F. Cas. 707 (C.C. La. 1874) (No. 14,897), *aff'd*, 92 U.S. 542 (1875).

²⁹² E. FONER, *supra* note 14, at 437. Following a disputed governor's election in Louisiana, the Klan attacked and overwhelmed Republican forces in an attempt to regain white rule and install the Democratic nominee in office. Despite the official Republican surrender, the Klan army mutilated and murdered 60 of the black Republican resisters. The notorious nature of these crimes persuaded the Justice Department to modify the non-enforcement policy it had followed since 1873. R. KACZOROWSKI, *supra* note 239, at 178.

ants guilty of conspiracy.²⁹³

Although Justice Bradley reversed the defendants' convictions on the ground that the indictment was vague, he laid a conceptual foundation for federal prosecution of racially motivated violence based on the "affirmative operation"²⁹⁴ of the thirteenth amendment. The amendment's guarantee of liberty gave Congress authority to "place the other races on the same plane of privilege as that occupied by the white race."²⁹⁵ Prosecuting those who violated a citizen's rights and privileges was necessary to guarantee full "equality before the law" and to eliminate the "badge of servitude"²⁹⁶ in the form of violence against black citizens. Unlike "ordinary" crimes such as murder, assault, and theft, crimes directed against a victim's race or prior enslavement were within federal protection because they sought to deprive "the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws."²⁹⁷

Although Justice Bradley's opinion upheld the thirteenth amendment as the source of constitutional authority for federal prosecutions of racially motivated violence against black people,²⁹⁸ his freeing of the white defendants was received as a blow against national enforcement of civil rights. The publication of the decision in June 1874 was greeted by widespread violence, terrorism, and intimidation against blacks, which continued even as Congress enacted a new Civil Rights Act in 1875.²⁹⁹

²⁹³ *Id.* at 175-78.

²⁹⁴ *Cruikshank*, 25 F. Cas. at 711. Justice Bradley also found authority in the fifteenth amendment for federal prosecution of voting right violators. *Id.* at 713.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 711.

²⁹⁷ *Id.* at 712. In such cases, Justice Bradley wrote:

[T]he war on race, whether it assumes the dimensions of civil strife or domestic violence, whether carried on in a guerrilla or predatory form, or by private combinations, or even by private outrage or intimidation, is subject to the jurisdiction of the government of the United States; and when any atrocity is committed which may be assigned to this cause it may be punished by the laws and in the courts of the United States

Id. at 714.

²⁹⁸ In 1876, the Supreme Court affirmed Justice Bradley's dismissal of the indictment in *Cruikshank*, but made no reference to the thirteenth amendment as a source of congressional legislative power. Nor did the decision comment on Justice Bradley's distinction between "ordinary crimes" which would be tried and punished in the state courts, and "crimes of race" which would be prosecuted by federal authority. *United States v. Cruikshank*, 92 U.S. 542 (1875).

²⁹⁹ Following the *Cruikshank* decision, "violence, terrorism and intimidation became widespread [as] organized bands of guerrillas patterned after the Ku Klux Klan sprang up to overthrow Southern Republican governments and restore white rule." Louisiana, Alabama, South Carolina, and Tennessee were the scenes of white violence against blacks in 1874. R. KACZOROWSKI, *supra* note 239, at 188, 189-92. In Mississippi, the following year, crimes "were committed in broad daylight by undisguised men, as if to

F. The Civil Rights Act of 1875

During Reconstruction, several southern states abolished the all-white jury system that had existed throughout the 200 years preceding the Civil War.³⁰⁰ In 1872 and 1876, Democratic conservatives rode the crest of Klan violence and dissatisfaction with Republican reconstruction policy, regaining control of state governments in Alabama, Arkansas, Georgia, Mississippi, North Carolina, Texas, and Virginia.³⁰¹ Following the Supreme Court's 1873 decision in the *Slaughterhouse Cases*, white conservatives had primary responsibility for enforcing and protecting civil rights. This return to power, accompanied by increasing white mob violence after the *Cruikshank* decision in 1874, threatened to reverse many of blacks' newly won rights. All-white juries once again absolved white people who engaged in violence against the black citizenry and Republican Party leaders. The United States Attorney of the Southern District of Alabama wrote that "'any man may murder a Republican, for political reasons without the slightest reason to fear that he will be punished, but with every reason to believe that he will be applauded for the act.'"³⁰²

In 1875, the Republican Congress responded by introducing new national civil rights legislation to protect black citizens' right to serve as jurors in state court proceedings. Modeled after the 1866 Civil Rights Act, section four of the 1875 Act subjected public officials to misdemeanor charges for disqualifying any citizen from serving as grand or petit jurors "on account of race, color or previous condition of servitude." Individual state officials, however, still determined whether a citizen "possess[ed] all other qualifications

underscore the impotence of local authorities and Democrats' lack of concern about federal intervention." E. FONER, *supra* note 14, at 559; *see also* *United States v. Butler*, 25 F. Cas. 213 (C.C.S.C. 1877) (No. 14,700) (describing violence against blacks in South Carolina).

³⁰⁰ *See supra* notes 228-38, 254-61 and accompanying text.

³⁰¹ J. FRANKLIN, *supra* note 57, at 327-28. Klan violence made it almost impossible for Republicans to campaign in many parts of Georgia, Alabama, and Florida during the elections of 1869 and 1870. E. FONER, *supra* note 14, at 442-43. In 1870 state elections, Democrats regained political power in border states like Maryland, West Virginia, Kentucky, Missouri, and Delaware, and in upper South states such as Virginia and Tennessee. *Id.* at 421-22, 441-42. In 1873, Texas and Virginia were firmly in control of the Democratic party, while Arkansas and Alabama were "redeemed" in 1874, and Mississippi in 1875. *Id.* at 549-53. Only Louisiana, South Carolina, Florida, and North Carolina were "unredeemed" states prior to elections in 1876. *Id.* at 511, 569.

³⁰² R. KACZOROWSKI, *supra* note 239, at 189-90 (quoting the letters from the Chairman of the Alabama Republican Executive Committee to United States Attorney General Williams in September and December of 1874); *see* *United States v. Butler*, 25 F. Cas. 213, 220 (C.C.S.C. 1876) (No. 14,700) (jury unable to reach a verdict against white defendants charged with killing 13 black men; defendants described as "leading rascals of the Republican party").

which are or may be prescribed by law.”³⁰³

Supporters of the new legislation recognized the connection between the 1866 Act’s guarantee that black people could testify in court, and the need to assure that black jurors would evaluate that testimony. Senator Edmunds argued that “if it be . . . constitutional to say that there shall be equal rights in respect to calling of witnesses, then it must follow that there must be equal rights in the same degree in respect of the selection of jurors.”³⁰⁴ Indiana Senator Morton declared that the inclusion of black jurors was necessary to overcome the still prevailing attitude among “[white] men who have been educated and taught to believe that colored men have no civil and political rights that white men were bound to respect.”³⁰⁵ He asserted that all-white juries had failed to guarantee a black person’s right to a fair trial because the white race was “filled with a prejudice and passion . . . that would prevent them from doing justice”³⁰⁶ in cases involving black defendants or black complainants:

Now, I ask, if with the prejudices against the colored race entertained by the white race, even in some of the Northern States and certainly in all of the Southern States, [how can] the colored man enjoy[] the equal protection of the laws, if the jury that is to try him for a crime or determine his right to property must be made up exclusively of the white race.³⁰⁷

Other proponents of the Act targeted individual Democrat-controlled southern states as the focus of the statute’s objective. Mississippi Congressman Lynch argued that “[t]he opposition to civil

³⁰³ Act of March 1, 1875, ch. 114, § 4, 18 Stat. 335.

³⁰⁴ 3 CONG. REC. 1866 (1875) (statement of Sen. Edmunds). Tennessee Congressman Lewis also echoed the theme of the 1866 Civil Rights Act: “Unless we are prepared to give to the colored man the same protection and the same legal rights we gave the white man, our professions as a nation of loving liberty and respecting justice are but miserable falsehoods, hypocritical and detestable.” *Id.* at 998 (statement of Rep. Lewis).

South Carolina Congressman Cain recalled the nation’s promise a decade earlier when it abolished slavery and granted freedom to African-Americans:

I think this country owes it to [black people]. Having lifted them out of slavery, having emancipated them, having given them manhood in a sense, I regard it as essential to the interests of the country that they shall make them citizens of this country, with all that that word imports, and that they shall guarantee to them the protection necessary for their lives and for their property.

Id. at 957; *see id.* at 958 (statement of Rep. Harris, who argued that the abolition of slavery meant that all “distinctions of color” should be destroyed).

³⁰⁵ *Id.* at 1795 (statement of Sen. Morton).

³⁰⁶ *Id.* at 1863.

³⁰⁷ *Id.* at 1793. During the debate, Connecticut Senator Eaton asked Senator Morton: “Would the passage of this law give the negro the slightest benefit in an attempt to be placed in a jury-box in Indiana?” Senator Morton responded “I should think it would if he is not allowed that privilege already.” *Id.* at 1864; *see also id.* at 1865 (“[A] law of this kind . . . is an absolute necessity for the protection of these people even in the [Connecticut] Senator’s own state . . .”) (Senator Logan’s response to Senator Eaton).

rights in the South . . . is confined almost exclusively to States . . . where the Legislature has failed or refused to pass a civil-rights bill."³⁰⁸ Congressman Lynch also spoke about the farce of a black person seeking justice in Kentucky's state courts, "where the decision of the judge is virtually rendered before he enters the courthouse, and the verdict of the [all-white] jury substantially rendered before it is impaneled."³⁰⁹ Senator Morton identified North Carolina and South Carolina as states where a black person could never receive a fair trial or legal redress as long as white people were given "the exclusive right . . . to sit upon juries and to adjudicate upon the rights of colored men."³¹⁰

The congressional debate preceding the passage of the Act was politically charged and highly partisan. Democratic senators, such as Pennsylvania Senator Merriman, accused the Republicans of supporting the legislation's "extreme measures" for the sole purpose of "secur[ing] the vote of eight hundred thousand or a million negroes."³¹¹ Republican Senator Edmunds from Vermont countered by charging that the Democratic opposition had "stood together" and resisted proposed civil rights legislation "year after year" because they still questioned "the fundamental propriety" of abolishing slavery.³¹²

The Democratic opposition argued that only the fourteenth amendment could be a possible basis for constitutional authority, but they rejected it as justification for federal intervention in the selection of state jurors. For example, Ohio Senator Thurman declared that only the first section of the fourteenth amendment guaranteeing citizenship could "give the slightest color" to support the anti-discrimination statute. The Senator concluded, however, that the amendment's citizenship clause "confers no right to be selected or to act as jurors" because if construed literally, it would also entitle women and children, as United States citizens, to sit as jurors.³¹³ Crude racism was apparent in the objections of some senators. Sen-

³⁰⁸ *Id.* at 947. Mississippi Congressman Lynch was one of seven black congressmen who sat in the 43rd Congress. Each of these congressmen was a persuasive advocate of the Civil Rights Act of 1875. Congressman Lynch and South Carolina Congressman Cain addressed the anti-discriminatory jury selection statute; the others focused remarks on the Act's anti-discriminatory public accommodation sections.

³⁰⁹ *Id.* at 945; *see also* South Carolina Congressman Cain's statement in which he refers to "the tales of horror now being brought out by the investigating committees in the South . . . [and] the fact that it is not the northern people or the republican party that makes this strife in the country." *Id.* at 956.

³¹⁰ *Id.* at 1863.

³¹¹ *Id.* at 1797.

³¹² *Id.* at 1869.

³¹³ *Id.* at 1791-92; *see also id.* at 1796 (statement of Sen. Merriman); *id.* at 1791, 1866 (statement of Sen. Thurmond); *id.* at 1861 (statement of Sen. Carpenter).

ator Hamilton raised the specter that the statute would lead to a "white race of commingled blood," and would "extinguish" the white race by causing "equality among races." "Nature," said the Senator, "will settle a question that you cannot by law."³¹⁴ Virginia Congressman Whitehead struck a similar chord when he asserted that the equal rights object of the bill would never satisfy "the colored man . . . because the Almighty has given him what he cannot get rid of—a black skin."³¹⁵

G. Judicial Interpretation of the Jury Anti-Discrimination Statute 1880-1881

Opponents had warned that the jury anti-discrimination statute would be found unconstitutional and would only "involve the colored man in litigation in which he is certain to be defeated."³¹⁶ However, this prediction proved false. In *Ex Parte Virginia*³¹⁷ and *Strauder v. West Virginia*,³¹⁸ both decided on March 1, 1880, the Supreme Court upheld Congress's power to enact an anti-discrimination jury selection statute and struck down a West Virginia state law that excluded all black citizens from jury duty.

In two other Supreme Court cases, *Virginia v. Rives*,³¹⁹ also decided on March 1, 1880, and *Neal v. Delaware*,³²⁰ decided the following year, the forecast of the futility of litigation under the Act on behalf of blacks proved accurate. Court cases failed to achieve racially integrated juries, the clear goal of the Act. The Court's conceptual analysis in *Rives* eliminated federal removal relief in cases of discriminatory juror selection;³²¹ in *Neal*, the Court developed an almost impossible evidentiary standard for proving intentional discrimination and establishing an equal protection violation.³²² Consequently, for most of the next century, a state's racially exclusionary practices during jury selection became virtually immune from federal statutory or constitutional challenge.

In *Strauder v. West Virginia*, the defendant sought, under the federal removal statute, to remove his trial to federal court.³²³ He argued that the West Virginia courts' systematic exclusion of black

³¹⁴ *Id.* at 116 (appendix).

³¹⁵ *Id.* at 953.

³¹⁶ *Id.* at 1863 (Statement of Sen. Carpenter).

³¹⁷ 100 U.S. 339 (1880).

³¹⁸ 100 U.S. 303 (1880).

³¹⁹ 100 U.S. 313 (1880).

³²⁰ 103 U.S. 370 (1881).

³²¹ See *infra* notes 332-37 and accompanying text.

³²² See *infra* note 344 and accompanying text.

³²³ *Strauder* relied on the removal statute included in the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, and subsequently reenacted in the Enforcement Act of 1870, ch. 114, §§ 16-18, 16 Stat. 140. Under the 1870 Enforcement Act, Congress eliminated

jurors, pursuant to statute,³²⁴ violated the 1875 anti-discrimination Act and denied him "full and equal benefit of all laws and proceedings . . . for the security of his person."³²⁵ The state trial court denied the defendant's application, and an all-white jury convicted him of murder.

In reversing the defendant's conviction, the Supreme Court first reviewed the "history of our times" when the thirteenth and fourteenth amendments were passed. The Court concluded that the amendments' "common purpose . . . [was] securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights the superior race enjoy."³²⁶ "The true spirit and meaning of the amendments" were to protect against "[s]tate laws [that] might be enacted or enforced to perpetuate the [legal] distinction that had before . . . regarded [blacks] as an inferior or subject race."³²⁷ The Court concluded that, by excluding all persons of Strauder's race, the West Virginia statute violated black citizens' fourteenth amendment equal protection right to "exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."³²⁸

Though explicitly relying on the fourteenth amendment equal protection clause, the *Strauder* Court recognized that the exclusion of blacks from jury duty threatened to perpetuate black inferiority, the ideological underpinning of slavery. The thirteenth amendment's prohibition against maintaining badges and incidents of slavery was clearly addressed by the Court in finding the West Virginia law unconstitutional:

post-conviction relief; otherwise it followed, with some modification, the language of the 1866 Act.

When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, *any right secured to him by any law providing for the equal civil rights* of citizens of the United States, . . . such suit or prosecution may . . . be removed, for trial, into the next circuit court to be held in the district where it is pending."

Revised Statutes § 641 (1875) (emphasis added) (emphasized language replacing the following language from the 1866 Act: "rights secured to them by the first section of this act").

³²⁴ The West Virginia law stated that "[a]ll white male persons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors, except as hereinafter provided." 1872-1873 W. Va. Acts 102.

³²⁵ *Strauder v. West Virginia*, 100 U.S. 303, 304 (1880).

³²⁶ *Id.* at 306.

³²⁷ *Id.*

³²⁸ *Id.* at 308.

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority and a stimulant to that race prejudice which is an impediment to securing individuals of the race that equal justice which the law aims to secure to all others.³²⁹

In the second case upholding the constitutionality of the anti-discrimination Act, *Ex Parte Virginia*,³³⁰ the Supreme Court affirmed the federal conviction of a Virginia state judge who had been indicted for violating section four of the 1875 Act by failing to select qualified black citizens as grand or petit jurors.

The Court ruled that the anti-discrimination jury selection statute was "appropriate legislation" by which to enforce the fourteenth amendment's equal rights protection. The civil rights statute was necessary, the Court explained, to reverse "that condition of inferiority and servitude"³³¹ which existed prior to the thirteenth amendment when slave defendants were not entitled to a trial by jury, much less the right to insist upon a jury which did not purposefully exclude members of their own race.

Thus, the Act survived two constitutional attacks. First, in *Strauder*, the Court recognized that when a state law excluded blacks from jury duty, the defendant was entitled to employ the federal remedy of removal. Second, in *Ex Parte Virginia*, the Court upheld the constitutionality of empowering the federal government to indict state officials who violated the Act by purposefully excluding black jurors.

Despite the broadly liberating interpretation of the thirteenth and fourteenth amendments underlying these decisions, the actual fate of the Act was sealed in the third Supreme Court decision issued on March 1, 1880. In *Virginia v. Rives*,³³² the Supreme Court eliminated the use of the federal removal remedy whenever exclusion resulted from a state official's *practices*, rather than from a state's law or "legislative impediments."³³³ In *Rives*, the defendant asserted in his removal petition that no black person had ever served

³²⁹ *Id.*

³³⁰ 100 U.S. 339 (1880).

³³¹ *Id.* at 344. The Court stated that the "one great purpose" of the thirteenth and fourteenth amendments was "to raise the colored race from that condition of inferiority and servitudes in which most of them had previously stood, into perfect equality of civil rights with all other persons They were intended to take away all possibility of oppression by law because of race or color." *Id.* at 344-45. The antidiscrimination jury selection statute guaranteed "an impartial jury trial by jurors indifferently selected or chosen." *Id.* at 345.

³³² 100 U.S. 313 (1880).

³³³ *Id.* at 320.

on a criminal or civil jury in Patrick County, Virginia. Federal Circuit Court Judge Rives granted removal following the defendants' conviction by an all-white Virginia jury. The Supreme Court reversed, stating:

[W]hen a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, . . . it can hardly be said that he is denied, or cannot enforce, "in the judicial tribunals of the State, the rights which belong to him." In such a case, it ought to be presumed the [state] court will redress the wrong.³³⁴

The Supreme Court's willingness in *Rives* to entertain this baseless presumption³³⁵ made the federal removal statute inapplicable when the practices of a state official, rather than the state's laws or constitution, excluded blacks from juries because of race.

The denial of federal removal relief in *Rives* gave considerable comfort to state officials who engaged in practices which excluded blacks from jury duty: they did not have to fear federal prosecution under section four of the 1875 Act.³³⁶ For most of the next century, the Supreme Court refused to find violations of statutes which would require removal under the *Rives* test, regardless of evidence showing that blacks had been systematically excluded from jury selection.³³⁷ *Ex Parte Virginia* was thus left behind as "solitary and ne-

³³⁴ *Id.* at 321.

³³⁵ The Democratic Party of the post Civil-War era had always stood for "states' rights," a return to local self-government, and non-intervention by the federal government in the southern states' treatment of their former slaves. See E. FONER, *supra* note 14, at 500, 509 (quoting Indiana Senator Oliver Morton: "Whenever certain people talk about local self-government by the people . . . they mean the white people"); *supra* notes 157, 215-22 and accompanying text. The South's resistance to the thirteenth amendment—as exemplified by the Black Codes—was clear evidence against the Court's idealistic presumption that state courts would protect the rights of the blacks once the federal presence was removed. When federal indictments against Klan violence were dismissed in *United States v. Cruikshank*, 25 F. Cas. 707 (C.C. La. 1874) (No. 14,897), *aff'd*, 92 U.S. 542 (1875), United States Attorney Minnis told United States Attorney General Williams that leaving protection of civil rights to state courts would "render them worthless." R. KACZOROWSKI, *supra* note 239, at 184 (citing July 3, 1874 letter).

Following a disputed Presidential election in 1876, Republican Rutherford Hayes gained the presidency when Justice Bradley cast the decisive vote as the final person selected to the fifteen-member Electoral Commission. Hayes ordered the removal of the northern army from the South in 1877. The removal of federal troops ended a fourteen year Reconstruction policy to secure federal protection of citizens' fundamental rights. *Williams v. City of New Orleans*, 729 F.2d 1554, 1579-80 n.28 (5th Cir. 1984); E. FONER, *supra* note 14, at 575-82. For a detailed account of the "Compromise" of 1877, see C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF THE END OF RECONSTRUCTION* 188-96 (1956).

³³⁶ One commentator summarized the *Strauder-Rives* rulings as "recogniz[ing] removal when it is least needed to protect federal rights and deny[ing] it when it is needed the most." Schmidt, *supra* note 229, at 1437.

³³⁷ Following the Supreme Court's decision in *Rives*, federal removal became available only when state law or a state court decision denied jury eligibility, and not when

glected authority" for using the criminal remedy to directly enforce the right of black persons to sit on juries.³³⁸

The *Rives* opinion had one further consequence for the fourteenth amendment equal protection clause. The defendant in that case had sought, in his removal petition, the assurance that blacks would constitute one-third of the federal trial jury selected. The Court ruled that equal protection under the fourteenth amendment only protected against exclusion because of race, and rejected the notion that a black defendant had a "right to have the jury composed in part of colored men." "A mixed jury in a particular case," said the Court, "is not essential to the equal protection of the laws."³³⁹ Thus, the *Rives* Court curtailed equal protection challenges to jury composition.

The burial of federal relief was deepened in 1881, in *Neal v. Delaware*,³⁴⁰ when the Supreme Court established an insurmountable constitutional standard for establishing an equal protection violation.³⁴¹ In *Neal*, the State did not rebut the defendant's evidence that no black person had ever served as a juror in Delaware, although blacks constituted one-fifth of the State's population. Delaware's Chief Justice explained the exclusion of blacks as "in no wise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience or moral integrity, to

state practice systematically excluded African-Americans from jury selection. See, e.g., *Kentucky v. Powers*, 201 U.S. 1 (1906); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Murray v. Louisiana*, 163 U.S. 101 (1896); *Smith v. Mississippi*, 162 U.S. 593 (1896); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Bush v. Kentucky*, 107 U.S. 110 (1883).

Federal removal remained unavailable for state criminal defendants until 1966, when the Supreme Court reexamined the constitutional reach of the federal removal statute, 28 U.S.C. 1443 (1958). The Court's review followed southern states' strategy of prosecuting civil rights demonstrators who were engaged in constitutionally or federally protected activities. Some commentators urged the Court to reconsider the narrow interpretation it had previously given to removal relief. See Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 803 (1966) ("§ 1443 is plagued by unlikely constructions which leave it impotent to cope with any state infringements of civil rights save those which state ingenuity outgrew three quarters of a century ago").

The Court, however, reaffirmed the *Rives* doctrine in *Peacock v. City of Greenwood*, 384 U.S. 808 (1966) (denying removal relief when defendants alleged that they could not enforce their federal right to engage in a voter registration campaign). The Court breathed some life back into the removal remedy in *Georgia v. Rachel*, 384 U.S. 780 (1966) (defendants demonstrated that a state court's criminal trespass prosecution had denied their exercise of the federally protected right to use public accommodations).

³³⁸ *Cassell v. Texas*, 339 U.S. 282, 303 (1950) (Jackson, J., dissenting).

³³⁹ *Rives*, 100 U.S. at 323.

³⁴⁰ 103 U.S. 370 (1880).

³⁴¹ See *infra* note 344 and accompanying text.

sit on juries.”³⁴² The Supreme Court rejected this explanation, calling it a “violent presumption” and concluded that “the showing thus made . . . presented a prima facie case of denial . . . of that equality of protection . . . secured by the Constitution and laws of the United States.”³⁴³

Although the Court reversed the defendant’s conviction, it imposed a nearly impossible burden of proof on the defense. To succeed, a defendant was required to show uncontroverted evidence of the total exclusion of African-Americans from juries over a substantial period of time.³⁴⁴ To this day, this evidentiary burden has made successful equal protection challenges to the trial jury a rarity, despite revision of the standard by the Supreme Court in 1935 in *Nor-*

³⁴² *Neal*, 103 U.S. at 393-94.

³⁴³ *Id.* at 397.

³⁴⁴ In general, southern state courts denied defendants’ equal protection challenge to the jury venire unless state officials admitted that blacks were excluded from jury duty because of their race: “With almost absolute uniformity, the State courts have held that there is no ground for quashing the indictment unless it is shown that Negroes were kept off the juries purposely and because of their race or color.” GILBERT THOMAS STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 250 (1910).

Texas officials appeared to be the most candid in admitting their reason for not selecting blacks to serve as jurors. See *Smith v. State*, 77 S.W. 453 (Tex. Crim. 1903) (only black selected for jury duty was one who had either moved out of the county, and thus could not serve, or who was dead); *Smith v. State*, 69 S.W. 151 (Tex. Crim. 1902) (state officials testified that blacks were excluded from jury duty because their presence would create a racial conflict injurious to blacks); *Leach v. State*, 62 S.W. 422 (Tex. Crim. 1901) (commissioners admitted that they wouldn’t select a black for jury duty if they were aware of his race); *Kipper v. State*, 62 S.W. 420 (Tex. Crim. 1901) (jury commissioners testified that they kept blacks off the juries because their presence “would be offensive to the white jurors”); *Whitney v. State*, 59 S.W. 895 (Tex. Crim. 1900) (state jury commissioners admitted they excluded blacks because they considered them unfit). In *Hanna v. State*, 105 S.W. 793 (Tex. Crim. 1907), a Texas Appeals Court rejected uncontroverted evidence that no black had served on a jury for two years, stating that the evidence failed to show the alleged discrimination in the absence of a state official’s admission.

Other state courts made similar findings. In *Royals v. State*, 75 So. 199 (Fla. 1917), the Supreme Court of Florida accepted a jury commissioner’s testimony that he did not racially discriminate in selecting jurors, despite testimony from a deputy sheriff that he could not remember any blacks serving as jurors in 27 years, and from a doctor who stated “there are many hundred [blacks] qualified for jury duty.” *Id.* at 200. In *Ransom v. State*, 96 S.W. 953 (Tenn. 1906), a Tennessee defendant submitted nine affidavits, including one from a black attorney, attesting to having never “known, heard, or seen a colored man called as juror, grand or petit” in the past ten or so years, including himself. *Id.* at 955. The Supreme Court of Tennessee rejected the sufficiency of the evidence presented, stating that “it only appears from said affidavits that the affiant during the period mentioned by them, had not seen or heard a colored man called to serve on the jury.” *Id.* at 956. Similarly, Missouri’s highest court, in *State v. Thomas*, 157 S.W. 330 (Mo. 1913), affirmed a lower court’s opinion that rejected evidence showing that 900 blacks had never been called for jury duty, although qualified to serve, because it only “tended to prove that the negro race had been discriminated against in the past, . . . not . . . in the particular panel of jurors . . . from which a jury was drawn to try defendant.” *Id.* at 334.

ris v. Alabama.³⁴⁵

H. The Obliteration of the Thirteenth Amendment

1. The Civil Rights Cases³⁴⁶

Having effectively eliminated use of the federal removal remedy to enforce nondiscriminatory jury selection procedures, the Supreme Court in 1883 rendered its final blow against the thirteenth amendment in the *Civil Rights Cases*. Although the Court was not directly concerned with a state's exclusion of black jurors,³⁴⁷ its decision finalized the "juridical rationale for the abdication of national responsibility" for the enforcement of civil rights protections.³⁴⁸ By limiting the meaning of the thirteenth amendment's prohibition against the badges and incidents of slavery, the Court rendered the amendment ineffectual as a civil rights tool until it decided *Jones v. Alfred H. Mayer Co.*³⁴⁹ eighty-five years later.

Indeed, the *Civil Rights Cases* had this disastrous effect despite consensus by the eight-Justice majority that the thirteenth amendment was meant not only to remove the shackles of slavery, but also "to declare and vindicate those fundamental rights which appertain to the essence of citizenship . . . the enjoyment or deprivation of which contributes to the essential distinction between freedom and slavery."³⁵⁰ Writing for the majority, Justice Bradley declared that the amendment "establish[ed] and decree[d] universal civil and political freedom . . . and cloth[ed] Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."³⁵¹

In finding a strong theoretical foundation for the potential reach of the amendment, Justice Bradley seemed to be building

³⁴⁵ 293 U.S. 552 (1935).

³⁴⁶ 109 U.S. 3 (1883).

³⁴⁷ The *Civil Rights Cases*, 109 U.S. 3 (1883), involved a consolidation of five criminal and civil cases brought under the first two sections of the 1875 Act, which outlawed discrimination in the use and enjoyment of public accommodations. The Court's decision in the *Civil Rights Cases* declared these sections unconstitutional. *Id.* at 25; cf. *Ex Parte Virginia*, 100 U.S. 339 (1880) (upholding the antidiscriminatory jury selection procedures of the 1875 Act); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (same).

³⁴⁸ Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967). The majority opinion limited the constitutional reach of the fourteenth amendment when it characterized the amendment as "only . . . corrective in . . . character, addressed to counteract and afford relief against State regulations or proceedings." *The Civil Rights Cases*, 109 U.S. at 23. This interpretation limited the fourteenth amendment to state, rather than individual, action, and prevented direct federal intervention in the absence of state action.

³⁴⁹ 392 U.S. 409 (1968).

³⁵⁰ *The Civil Rights Cases*, 109 U.S. at 20.

³⁵¹ *Id.*

upon his dissents in *Cruikshank* and *Blyew*.³⁵² Bradley's majority opinion, however, wholly ignored the Court's prior recognition in *Dred Scott v. Sandford* that discriminatory laws and practices were proof of the "enduring marks of inferiority and degradation"³⁵³ against the entire African race. Instead, Bradley presented a radically revised version of history:

There were thousands of free colored people . . . before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet *no one*, at that time, thought it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens.³⁵⁴

Declaring that "mere discriminations on account of race or color were not [then] regarded as badges of slavery,"³⁵⁵ Bradley concluded that the thirteenth amendment "merely abolishe[d] slavery"³⁵⁶ and did not guarantee a citizen's equal rights. In an exercise of judicial activism, the majority rejected Congress's determination that racial discrimination was a principle incident and badge of slavery.³⁵⁷ Rather, the Court concluded that "it would be running the slavery argnment into the ground to make it apply to every act of discrimination"³⁵⁸ The Court's final message admonished the federal government to cease its efforts to protect the rights of the black citizenry:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws³⁵⁹

³⁵² Justice Bradley had written expansively on the thirteenth amendment power to deter "the war on race" in *United States v. Cruikshank*, 25 F. Cas. 707 (C.C. La. 1874) (No. 14,897), *aff'd*, 92 U.S. 542 (1875), and in *United States v. Blyew*, 80 U.S. 581 (1872) (Bradley J., dissenting), where he argued that the amendment authorized removal legislation against racial discrimination. For a discussion of *Cruikshank* see *supra* notes 291-99 and accompanying text. For a discussion of *Blyew*, see *supra* notes 264-81 and accompanying text. Professor Scott provides an excellent analysis of Mr. Justice Bradley's journey which led to his narrow interpretation of the thirteenth and fourteenth amendments in the *Civil Rights Cases*. John A. Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment: From the Slaughterhouse Cases to the Civil Rights Cases*, 15 RUTGERS L. REV. 552 (1971); see also E. FONER, *supra* note 14, at 579-80; Kinoy, *supra* note 348, at 404-06.

³⁵³ *Dred Scott v. Sandford*, 60 U.S. 393, 416 (1856).

³⁵⁴ The *Civil Rights Cases*, 109 U.S. at 25 (emphasis added).

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 22-23.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 25.

In his scathing dissent, Justice John Harlan mentioned Bradley's eleven-year-old dissenting opinion in *Blyew*: "The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."³⁶⁰

Harlan argued that the majority had "departed from the . . . full effect" of the "rights inhering in a state of freedom" that the American people had sought to accomplish when they ratified the thirteenth amendment.³⁶¹ Justice Harlan agreed with the Bradley majority that the thirteenth amendment had established "universal freedom" and empowered Congress to remove certain "burdens and disabilities [which were] the necessary incidents of slavery."³⁶² But he believed that Congress's authority included the power to issue anti-discrimination legislation that would "uproot the institution of slavery wherever it existed in the land" and destroy its foundation, which "rested wholly upon the inferiority as a race of those held in bondage."³⁶³ He believed that when the government promised universal freedom to black people, it "necessarily involved immunity from, and protection against, all discriminations against them because of their race, in respect of such civil rights as belong to freemen of other races."³⁶⁴

Harlan predicted that the majority decision would usher in "an era of constitutional law, when the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master."³⁶⁵ Indeed, his warning was correct. Law enforcement officials stood passively by as white vigilante groups celebrated the Supreme Court's endorsement of states' rights by unleashing a new form of systematic terror: the lynch mob. In the thirteen-year period that followed the Court's decision in the Civil Rights Cases, white southern mobs acted with virtual immunity and lynched more than 2500 people.³⁶⁶ Of the thousands of whites who

³⁶⁰ *Id.* at 26 (Harlan, J., dissenting).

³⁶¹ *Id.*

³⁶² *Id.* at 20-21 (majority opinion).

³⁶³ *Id.* at 35-36 (Harlan, J., dissenting).

³⁶⁴ *Id.* For Justice Harlan, discrimination in the use of public conveyances was one of the "burdens which lay at the very foundation of the institution of slavery as it once existed." *Id.* at 39.

³⁶⁵ *Id.* at 57.

³⁶⁶ The Archives at Tuskegee Institute maintain statistics of lynchings that occurred between 1882 and 1968. ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950*, at 6-7 (1980) (citing the Tuskegee Institute's statistics). Unlike murder that "operated in secrecy to evade the law," a lynching was "carried out in public fashion with scores, hundreds, and often thousands of eye-witnesses." *Id.* Between 1883

participated in these crimes, the states successfully prosecuted less than one percent.³⁶⁷

2. *Plessy v. Ferguson*³⁶⁸

In 1896, the Supreme Court ruled in *Plessy v. Ferguson* that segregating black and white railway passengers was a constitutional exercise of a state's police powers. By this time, courts had construed the thirteenth amendment so narrowly that the eight-Justice *Plessy* majority did "not understand [why] the Thirteenth Amendment is strenuously relied upon by the plaintiff"³⁶⁹ Justice Bradley having retired, Justice Brown wrote for the majority. He did not even mention the thirteenth amendment's guarantee of "universal civil and political freedom . . . to obliterate slavery with all its badges and incidents."³⁷⁰ Instead, Justice Brown further restricted the thirteenth amendment by limiting it to cases involving compulsory exploitation of labor and peonage.³⁷¹ The majority unabashedly proclaimed that the drafters of the thirteenth amendment never intended that racially discriminatory state laws should be affected by the abolition of slavery. The Court concluded that a "legal distinction . . . founded in the color of the two races, . . . must always exist

and 1896, when the South regained local rule, the Institute recorded 2310 lynchings. *Id.* Though the majority of victims were African-Americans, more than 40% (1023) were white supporters of Reconstruction policy. *Id.* Of the more than 2000 victims lynched between 1900-1935, 93% were African-Americans. *Id.*; see IDA WELLS BARNETT, *CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA WELLS BARNETT* 47-53 (Alfred M. Duster ed. 1970); NEIL McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW* 229 (1989) (describing white violence in Mississippi between 1889 and 1945 that accounted for nearly 13% of all lynchings).

³⁶⁷ "[M]ore than ninety-nine percent of those responsible escaped arrest, prosecution, conviction, and punishment." R. ZANGRANDO, *supra* note 366, at 10; see NAACP, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918*, at 11-28 (1919).

³⁶⁸ 163 U.S. 537 (1896).

³⁶⁹ *Id.* at 543.

³⁷⁰ The Civil Rights Cases, 109 U.S. at 20-21.

³⁷¹ *Plessy*, 163 U.S. at 542. The Brown majority opinion stated that "slavery implies involuntary servitude—a state of bondage, the ownership of mankind as chattel or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services." After *Plessy*, the Supreme Court continued to apply a narrow definition of the thirteenth amendment's prohibition on slavery and its badges and incidents. See *Corrigan v. Buckley*, 271 U.S. 323 (1926) (refusing to find that a racially restrictive covenant was an incident of slavery because it prevented blacks from owning or transferring property); *Hodges v. United States*, 203 U.S. 1 (1906) (dismissing indictments against white defendants who physically forced black workers to abandon their jobs); see also *Butler v. Perry*, 240 U.S. 328 (1916) (Court applied a limited definition to the thirteenth amendment's prohibition against involuntary servitude); *Robertson v. Baldwin*, 165 U.S. 275 (1897); cf. *United States v. Morris*, 125 F. 322 (D. Ct. E.D. Ark. 1903) (the only federal case upholding federal power under the thirteenth amendment to prosecute whites who interfered with African-Americans' fundamental right to lease lands and to be employed as laborers).

. . . [and] has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."³⁷²

Justice Harlan, again the lone dissenter, predicted that the majority decision would, "in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case* [sic]."³⁷³ He also predicted that "the present decision . . . will not only stimulate aggressions . . . upon the admitted rights of colored citizens," but would also "arouse race hate [and] create and perpetuate a feeling of distrust between these races."³⁷⁴ The Justice maintained his consistent belief that the thirteenth amendment prevented "the imposition of any burdens or disabilities that constitute badges of slavery or servitude."³⁷⁵ He suggested that under the *Plessy* majority's reasoning, a state could provide for the separation of black and white jurors during deliberation.³⁷⁶ This speculation foreshadowed segregationists' reliance on *Plessy* to justify an even graver indication of legal inferiority: the virtual exclusion of black citizens from serving as jurors.

IV

POST-RECONSTRUCTION: THE INSTITUTION OF THE ALL-WHITE JURY

Beginning in the early 1880s, the former confederate states developed and implemented strategies to disenfranchise blacks and to prevent them from sitting as jurors. Bolstered by the decisions in the *Civil Rights Cases*³⁷⁷ and *Virginia v. Rives*,³⁷⁸ state legislatures relied on gerrymandering, reapportionment, and confusing election schemes.³⁷⁹ The following year, Mississippi lawmakers amended

³⁷² *Plessy*, 163 U.S. at 543. The Court also stated that it was clear that a segregation law, which made it a crime for black and white people to sit together, "did not stamp the colored race with a badge of inferiority." *Id.* at 551. Even "if this [were] so," said the Court, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*

³⁷³ *Id.* at 559 (Harlan, J., dissenting).

³⁷⁴ *Id.* at 560.

³⁷⁵ *Id.* at 555.

³⁷⁶ *Id.* at 562. Justice Harlan elaborated:

May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that . . . its supremacy will be imperiled, by contact . . . with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a "partition," . . . to prevent black jurors from coming too close to their brother jurors of the white race.

Id.

³⁷⁷ 109 U.S. 3 (1883). For discussion of the Civil Rights Cases, see *supra* notes 346-67 and accompanying text.

³⁷⁸ 100 U.S. 313 (1879). For a discussion of *Rives*, see *supra* notes 332-39 and accompanying text.

³⁷⁹ J. FRANKLIN, *supra* note 57, at 334.

the state constitution to include "special" voting requirements. These constitutional requirements limited voting and jury duty to citizens who could pay a poll tax, who had never been convicted of any larceny-related offenses, who could read and write, and who understood all sections of the state constitution.³⁸⁰

In 1892, Mississippi's legislature further restricted black jury participation by passing another law vesting discretion in three state officials to select jurors based on their "good intelligence, sound judgment, and fair character."³⁸¹ Other Southern states later adopted similar regulations. In the 1898 case of *Williams v. Mississippi*,³⁸² the Supreme Court upheld the constitutionality of Mississippi's discretionary jury selection statute and voting requirements, despite the effect they had in disqualifying most of Mississippi's 190,000 previously eligible black citizens from jury duty. The Court rejected the defendant's contention that the state had violated his equal protection rights when all-white grand and trial juries indicted and convicted him. The Court reasoned that Mississippi's constitutional requirements applied to "weak and vicious white people,

³⁸⁰ *Id.* at 339. Mississippi's 1890 constitution stated that "every elector shall . . . be able to read any section of the constitution of this State; or he shall be able to understand the same when read to him." MISS. CONST. art. 12, § 244 (1890) (cited in *Williams v. Mississippi*, 170 U.S. 213, 217 n.1 (1898)). For an excellent review of Mississippi's disfranchisement of the black voter, see Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—And Beyond*, 57 MISS. L. J. 591-673 (1987); see also N. McMILLEN, *supra* note 366, at 38-44.

In one of the first published accounts, Charles Spahr described the disfranchisement process in Mississippi:

[A]n uncommonly bright negro over in Mississippi who was determined to vote, studied the Constitution thoroughly before applying for his papers. He brought his tax receipts with him, and they were all found to be properly made out. Then came the questioning to determine whether he "understood" the Constitution. "What," began the judge, "are the provisions of *Magna Charta* [sic], incorporated in the fundamental law of Mississippi?" The negro stood blank for a moment, and then answered in despair, "I dunno, judge, unless it is that no coloured person shall vote in this State." "That's right," exclaimed the judge handing him his papers, "you are the first n——r that has answered it."

CHARLES B. SPAHR, *AMERICA'S WORKING PEOPLE* 105-06 (1900).

I thank Mari Matsuda for her thoughtful advice against spelling out racial slurs "to avoid harm to others, and to prevent desensitization to harmful words." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2329 n.49 (1989).

³⁸¹ In *Gibson v. Mississippi*, 162 U.S. 565, 589 (1896) and in *Smith v. Mississippi*, 162 U.S. 593 (1896), the Supreme Court denied defendants' federal removal petitions, which challenged the constitutionality of the all-white jury chosen pursuant to Mississippi's new jury selection procedures. The defendants asserted that blacks had been eliminated from service as jurors "for a number of years." In rejecting the defendant's petition the Court reasserted the *Strauder-Rives* doctrine, that in the absence of state law denying blacks the right to serve on a jury, a defendant's only remedy was state court review.

³⁸² 170 U.S. 213 (1898).

too."³⁸³

The Court also rebuked the defendant's argument that the state had administered the jury selection standard of "good intelligence, sound judgment, and fair character," in an evil and discriminatory manner.³⁸⁴ Despite Mississippi officials' flagrant "presumption"³⁸⁵ of blacks' ineligibility for jury service, the Justices unanimously concluded that Mississippi's laws were constitutional because "it has not been shown that their actual administration was evil, only that evil was possible under them."³⁸⁶

Following this decision, other state legislatures added similar requirements to their state constitutions. By 1910, South Carolina, Louisiana, North Carolina, Alabama, Virginia, Georgia, and Oklahoma had all disenfranchised blacks.³⁸⁷ The effect was a stunning reversal of blacks' ability to exercise their voting rights.³⁸⁸ The link between voter and juror eligibility, combined with administration of discretionary juror selection statutes, virtually eliminated black citizens' participation in the administration of justice.³⁸⁹ In

³⁸³ *Id.* at 222.

³⁸⁴ *Id.* at 213.

³⁸⁵ See *Neal v. Delaware*, 103 U.S. 370 (1881), discussed *supra* notes 340-43.

³⁸⁶ *Williams*, 170 U.S. at 225.

³⁸⁷ J. FRANKLIN, *supra* note 57, at 340-41.

³⁸⁸ In Louisiana, 130,000 blacks had been registered to vote and represented a majority in twenty-six parishes. In 1900, two years after Louisiana incorporated a "grandfather clause" into its constitution, fewer than five percent remained eligible to vote and were not a voting majority in any parish. Similarly, in 1900, only 3000 of 181,000 age-eligible Alabama blacks were qualified to vote after that state repealed its constitution. *Giles v. Harris*, 189 U.S. 475 (1903). Similar patterns were present throughout the segregated south. J. FRANKLIN, *supra* note 57, at 340-41.

³⁸⁹ A survey conducted during the first decade of the twentieth century indicated that few blacks sat as jurors in the south. See G. STEPHENSON, *supra* note 344, at 253-72. Stephenson's survey targeted counties where blacks constituted one-half or more of the population in 1900. In Alabama, three responding counties said blacks had never sat on juries; in one community where blacks outnumbered whites 5 to 1, a court official said it would be considered "farcical" if a black ever served. *Id.* at 253-54. In Arkansas, blacks had not sat on juries in one county since 1894, and did not "serve in [another] county on regular juries" despite outnumbering whites eight to one. *Id.* at 154-55. In Georgia's eleven counties, not one black citizen had ever served on a state jury, according to the recollection of responding officials. *Id.* at 256-58. The survey reported similar findings in Mississippi, Missouri, North Carolina, South Carolina, and Virginia. *Id.* at 259-63, 263-65, 265-67, 267-68, and 269-71. In Florida, three of the five counties reported that blacks had not served on juries for "many years" because it was "a thing of the past" during "the days of Carpetbag Rule;" in the other two counties, the clerks answered that a "large number" served on federal juries, although "it is very rare" in the state courts because "there are but few Negroes, about one per cent," who have the "approved integrity, fair character, sound judgment and intelligence" to serve as jurors. *Id.* at 255-56.

In some states, there were exceptions to this general phenomenon. One Louisiana county reported that blacks represented one half of trial jurors and "a much smaller proportion" on the grand jury; the remaining parishes followed the general pattern of few blacks serving as jurors. *Id.* at 258-59. In two Texas districts, blacks comprised 25%

this way, the United States Supreme Court decisions from *Blyew* to *Williams* functioned as a springboard for state reversal of civil rights gains of the Reconstruction Era.³⁹⁰ Consequently, as the nation moved into the twentieth century, the all-white jury was firmly re-entrenched in the southern courtroom. Although it was common for blacks to have served as jurors during Reconstruction, they virtually disappeared from the southern jury box by 1900, even in counties where they constituted an overwhelming majority of the local population.³⁹¹

At the same time, the southern states reduced protections for African-Americans against white mob terror and violence. In the four years following Justice Harlan's 1896 warning that racial segregation would "stimulate aggressions . . . and arouse race hate,"³⁹² white mobs lynched more than 400 black people.³⁹³ In virtually every one of these cases, and in 2000 lynchings of black people that followed between 1900 and 1935, southerners³⁹⁴ and northerners³⁹⁵

and 10% of the jurors selected. *Id.* at 268-69. And in Oklahoma, some blacks served on grand and trial juries "nearly every term", *id.* at 267, although, in a 1910 case, an Oklahoma state judge discharged a jury for which four blacks had been selected because "he would not insult white men by making them serve on a jury with Negroes." *Id.* at 252 (citing News and Observer, Feb. 17, 1910 (Raleigh, N.C. newspaper)).

³⁹⁰ Following *Williams v. Mississippi*, the Supreme Court rarely interfered with a state official's administration of its jury selection laws until 1935. A state official's denial that blacks were disqualified from jury service because of their race was sufficient to bar Supreme Court review. *Thomas v. Texas*, 212 U.S. 278 (1909). Only when state court procedure denied a defendant the opportunity, futile as it might be, to prove an equal protection violation did the Court invoke its review powers. See *Carter v. Texas*, 177 U.S. 442, 448 (1900) (state court refused to hear evidence that blacks had been systematically excluded from serving as grand jurors "for a great many years" in Galveston County, Texas); *Rogers v. Alabama*, 142 U.S. 226 (1904) (Supreme Court similarly overruled a state court ruling which had deprived the defendant of even raising the issue of discrimination in jury selection); John R. Gillespie, *The Constitution and the All-White Jury*, 38 Ky. L.J. 65 (1950).

³⁹¹ See E. FONER, *supra* note 14, at 595; *supra* note 389 (discussing state-by-state survey of black exclusion from jury selection).

³⁹² *Plessy v. Ferguson*, 163 U.S. 560 (1896).

³⁹³ R. ZANGRANDO, *supra* note 366, at 6-7.

³⁹⁴ Confident that they had immunity from criminal prosecution, southern whites terrorized black communities in Wilmington, North Carolina and Lake City, South Carolina in 1898, and in New Orleans in 1900. J. FRANKLIN, *supra* note 57, at 341. In 1904, in Statesboro, Georgia, white mobs lynched two convicted black men by burning them alive. They also generally engaged in "wholesale terrorism" against African-Americans by killing a married couple, assaulting other blacks, and destroying the homes of numerous black families. Two years later, in Atlanta, Georgia, white mobs went on an even worse rampage. They burned black citizens' homes and businesses and attacked "every black person they saw" as police officers refused to respond. Two days later, the violence spread to an Atlanta suburb where whites, aided by local police, killed four "substantial" black citizens and injured many others. In each of the three Georgia anti-black riots, public officials failed to prosecute and punish the perpetrators. *Id.* at 440-41; RACIAL VIOLENCE IN THE UNITED STATES 44-46 (Alan D. Grimshaw ed. 1969) [hereinafter RACIAL VIOLENCE].

³⁹⁵ Beginning in the 1890s, and peaking just after World War I, many African-Amer-

states failed to arrest and prosecute tens of thousands of whites who engaged in these and other open acts of brutality. In the rare situation when a locality initiated a criminal prosecution, all-white juries assured acquittal of the white defendants.³⁹⁶

Following the return of black soldiers after the first World War, white mob violence intensified in both the North and South.³⁹⁷ In 1919, more blacks were lynched than in any of the preceding eleven years, but local law enforcement and all-white juries combined to absolve virtually every responsible white attacker.³⁹⁸ Congressional

icans migrated to the North. They sought to escape the South's economic hardship, terror, and denial of legal protection. J. FRANKLIN, *supra* note 57, at 471-72; R. ZAGRANO, *supra* note 366, at 26. In the early 1900s, in Philadelphia and in towns in Ohio and Indiana, northern whites greeted the blacks with violent attacks and threatened their lives. J. FRANKLIN, *supra* note 57, at 443. In 1908, national attention was drawn to anti-black violence in Abraham Lincoln's hometown of Springfield, Illinois. When a white citizen attempted to rescue two convicted black prisoners from a white lynch mob, the enraged mob hanged two other black men, destroyed 15 black businesses and homes, and caused death and injury to many others before the state militia established order. A grand jury denounced the failure of local police to stop rioters, and indicted 50 of the 100 people arrested. The leaders of the mob went unpunished. *Id.* at 443-44; RACIAL VIOLENCE, *supra* note 394, at 51-56. The Springfield riot led to the creation of the NAACP in 1910. See J. FRANKLIN, *supra* note 57, at 286-88; R. ZAGRANO, *supra* note 366, at 22-23. In 1913, in Coatesville, Pennsylvania, a mob of 4000 white people lynched a black man who was chained to a bed and threw him three times into a bonfire. Local juries failed to convict any of those involved. *Id.* at 26-27.

³⁹⁶ Only 0.8% of the white criminals responsible for lynching 2000 black men and women between 1900-1935 were successfully prosecuted and convicted. JAMES H. CHADBOURN, *LYNCHING AND THE LAW* 14 (1933). Such white defendants were convicted at a similar rate between 1882 and 1933. MICHAEL BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER* 9 (1987). In total, only 40 convictions resulted from the 5150 recorded victims of mob terror. *Id.*

³⁹⁷ In the summer of 1919, the nation witnessed 25 anti-black riots throughout the nation as blacks coming home from the war found whites "determined to see that there should be no wholesale distribution of the blessings of liberty." JAMES M. MCPHERSON, *BLACKS IN AMERICA* 194 (1971); see J. FRANKLIN, *supra* note 57, at 480-81. Chicago was the scene of the worst violence in the north. Over 13 days, 38 people were killed, 15 of whom were white and 23 black; 1000 homes, mostly those of black people, were destroyed. RACIAL VIOLENCE, *supra* note 394, at 97-105. Two years earlier in East St. Louis, Illinois, white rioters killed 40 blacks and destroyed 312 homes. A congressional report attributed the violence primarily to the hiring of black workers, who were part of the "Great Migration" north. More than 300,000 African-Americans left the South at the peak of migration in 1917. J. MCPHERSON, *supra*, at 185.

In the South, an allegation of police brutality in Houston, Texas in 1917 led to a confrontation between armed black soldiers and white police and citizens; in the shooting that ensued, twelve whites and one black person were killed. The Army prosecuted the black soldiers "with only a pretense of a trial." Thirteen soldiers were executed and 41 others received life sentences. *Id.* at 75-87; see J. FRANKLIN, *supra* note 57, at 460. In 1919, in Elaine, Arkansas, black farmers attempted to unionize. A confrontation with local police ensued, and a deputy sheriff was killed. White mobs murdered more than 200 African-Americans, but no whites were prosecuted. *Id.* at 315. However, 79 blacks were convicted of the sheriff's murder, and 12 were given death sentences. These sentences were subsequently overturned in *Moore v. Dempsey*, 261 U.S. 86 (1923); see RACIAL VIOLENCE, *supra* note 394, at 51-73.

³⁹⁸ In 1919, 76 black people were lynched; this was the highest number since 1908,

attempts to pass an anti-lynching statute failed in the early 1920s.³⁹⁹ The debate and outcry, however, led southern states to "abandon the use of the rope and faggot for pragmatic reasons," and to replace lynchings with a more "[humane] . . . method of racial control"—the judgment and imposition of capital sentences by all-white juries.⁴⁰⁰ Faith in the all-white jury's verdict against accused blacks made lynching a less preferred response to charges of interracial violence after 1935,⁴⁰¹ although it remained in use as one form of terror against those seeking to fulfill the thirteenth amendment's promise of "universal freedom" and equal rights later in the century.⁴⁰²

when 89 were murdered. R. ZANGRANNO, *supra* note 366, at 6-7. Although most whites who participated in anti-black violence escaped punishment, the Illinois Attorney General successfully prosecuted 20 white men (and 11 black men) for their actions during the East St. Louis, Illinois violence. See *supra* note 397 for a discussion of the East St. Louis incident.

³⁹⁹ The anti-lynching movement was spawned in the post-Reconstruction period by black clergy and journalists. In the 1890s, Ida Wells Barnett actively campaigned in favor of a federal anti-lynching law. R. ZANGRANNO, *supra* note 366, at 13; see generally IDA WELLS BARNETT, ON LYNCHINGS (1969). In 1918, the NAACP began lobbying for an anti-lynching bill. In 1921, the House of Representatives passed a federal statute, but a filibuster by southern senators succeeded in defeating the Bill. Other legislative efforts in 1935 and 1940 were also rebuffed by the filibuster tactics of southern democrats. J. FRANKLIN, *supra* note 57, at 486-87; R. ZANGRANNO, *supra* note 366, at 41-71.

⁴⁰⁰ M. BELKNAP, *supra* note 396, at 22-26 (citing WALTER WHITE, ROPE AND FAGGOT, A BIOGRAPHY OF JUDGE LYNCH (1929)).

Prior to 1890, states rarely imposed death sentences. Beginning in the 1890s, the number of death sentences increased sharply. In the 1920s, juries sentenced 1038 people to die, about two-thirds of whom were African-Americans. For the first time, the number of executed blacks exceeded the number of blacks killed by white mobs. WILLIAM S. BOWERS, LEGAL HOMICIDE: RACIAL DISCRIMINATION IN STATE IMPOSED EXECUTIONS 36-37, 59 (1974). In the 1930s, all-white juries convicted and sentenced more people to death than in any other decade in United States history. African-Americans represented more than two-thirds of the 1523 people who were executed. Southern jury verdicts accounted for more capital sentences than in the North and West combined (a trend that was maintained through the 1960s). *Id.*

Although southern states began in the 1930s to rely on the legal process to prosecute black defendants, lynch mobs continued to murder with impunity. Carleton Beals & Abel Plenn, *Louisiana's Black Utopia*, 141 THE NATION 503-05 (Oct. 30, 1935). In addition, some southern states' law enforcement methods were condemned by the United States Supreme Court. See *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Four Negroes*, THE NATION 269-70 (Feb. 24, 1940); THE NATION, 674-76 (Dec. 31, 1935). In reviewing this history, the United States Civil Rights Commission concluded that, although whites are not immune from public brutality, "Negroes feel the brunt of official brutality, proportionately more than any other group in American society." N.Y. Times, Nov. 17, 1961, at 1, col. 2.

⁴⁰¹ Prior to 1935, lynch mobs murdered 5643 people throughout the United States. W. BOWERS, *supra* note 400, at 36. After 1935, the jury verdict became the primary mechanism for imposing death sentences against southern defendants. Of 64 citizens killed by white mobs after 1935, all but seven were African-American. See R. ZANGRANNO, *supra* note 366, at 6-7.

⁴⁰² Following the second World War, southern whites revived the lynch mob and delivered a message to returning black soldiers that they "must not expect or demand

A. From *Norris* to *Swain*: Equal Protection Challenges 1935-1965

From 1880 until 1935, the *Rives-Neal* doctrine made it all but impossible to challenge the elimination of blacks as trial jurors. In the 1935 case of *Norris v. Alabama*,⁴⁰³ the Supreme Court provided a basis for court challenges to the systematic exclusion of blacks and other racial minorities from the venire of prospective grand and petit juries. As a result of these challenges, the Supreme Court invalidated exclusionary jury selection procedures in several states, leading to modest changes that allowed one or more blacks to serve as grand jurors and to be called as members of the trial jury venire.

While the Court's decisions whittled away at the *Rives-Neal* barrier to the jury room, they proved woefully incapable of assuring that blacks actually served on trial juries. In the wake of *Norris*, states turned to a new procedural weapon, the peremptory challenge, to strike prospective black jurors. The Supreme Court's 1965 decision in *Swain v. Alabama*⁴⁰⁴ once again reinforced the constitutionality of the all-white trial jury when it sanctioned the rearguard exclusion of prospective black jurors from the jury box through the use of the prosecutor's peremptory challenge.

B. The *Norris v. Alabama* Breakthrough

*Norris v. Alabama*⁴⁰⁵ grew out of the nationally known Scottsboro trial in which nine black men were tried for allegedly raping two white women. At that trial, the nation watched as "southern justice" denied the nine defendants effective assistance of legal counsel, and then condemned them to die following a trial described as a "legal lynching."⁴⁰⁶ Following the United States

any change in their status from that which existed before they went overseas." R. ZANGRANDO, *supra* note 366, at 174. In July, 1946, a white mob lynched two married black couples in Walton County, Georgia. See H. William Fitelson, *The Murders at Monroe*, THE NEW REPUBLIC, Sept. 2, 1946, at 258. In August, a Louisiana mob lynched a black veteran and an Alabama mob assaulted numerous black servicemen. Whites also murdered a black union organizer in Gordon, Georgia, and a black man who attempted to vote in Athens, Tennessee. The most notorious, and internationally reported, brutality involved Isaac Woodward. Three hours after Woodward's army discharge, he was brutally assaulted by two white South Carolina policemen who gouged out Woodward's eyes and denied him medical treatment. R. ZANGRANDO, *supra* note 366, at 174; see *infra* notes 432-34 and accompanying text (describing the usual acquittals of white defendants charged with interracial violence in the South between 1955 and 1965).

⁴⁰³ 294 U.S. 587 (1935).

⁴⁰⁴ 380 U.S. 202 (1965).

⁴⁰⁵ 294 U.S. 587 (1935).

⁴⁰⁶ R. ZANGRANDO, *supra* note 366, at 99. See DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1979), for complete details of the case, including the one-day trials held in a "mob" atmosphere in which all-white juries convicted eight of the nine young black defendants. The United States Supreme Court reversed the jury ver-

Supreme Court's reversal of their convictions,⁴⁰⁷ the defendants' strategy was to challenge Alabama's all-white jury system, which would ultimately retry them.

Uncontradicted evidence indicated that no black person had served as either a trial or grand juror in two Alabama counties during a fifty-year period.⁴⁰⁸ Nonetheless, in denying the defendants' equal protection argument that racial discrimination was responsible for the blacks' exclusion, Alabama courts accepted the standard explanation offered by the counties' jury commissioners: that no African-Americans in the counties were fit to discharge the duties of a juror.⁴⁰⁹

Faced with overwhelming evidence that this philosophy had systematically barred black jury service since at least the turn of the century, the Supreme Court found "it impossible to accept such a sweeping characterization . . . so contrary to the evidence as to the many qualified negroes [living there] . . ."⁴¹⁰ The Court's opinion in *Norris* restated its rejection of "the violent presumption"⁴¹¹ behind the total exclusion of blacks from jury service. The opinion also indicated that the Court would no longer defer to a state official's perfunctory denial that racial discrimination had caused the exclusion: "If . . . mere general assertions by officials of their per-

dict in *Powell v. Alabama*, 287 U.S. 45 (1932), finding that the defendants' Tennessee defense attorney was unprepared for trial and unaware of Alabama criminal procedure. Carter was less legalistic when he described the attorney as "so stewed he could hardly walk straight." D. CARTER, *supra*, at 22. The case became an internationally cause celebre when the Communist Party intervened, called the charges "trumped up," and provided new counsel through its International Labor Defense (ILD) committee. The NAACP entered the case soon thereafter, and accused the Communist Party of using the case for propaganda purposes. The ILD argued *Powell* before the Supreme Court and gained reversal of the defendants' convictions. Thereafter, a joint defense trial team was formed, led by anti-communist attorney Samuel Liebowitz. See D. CARTER, *supra*, at 316-34; GENNA REA McNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 109-11, 119-21 (1983).

⁴⁰⁷ *Powell v. Alabama*, 287 U.S. 45 (1932) (first case in which the Supreme Court held that the fourteenth amendment's due process clause guarantees an accused the right to counsel when charged with a capital crime in a state proceeding).

⁴⁰⁸ At a pretrial hearing, several state officials testified that there had never been a black juror "on any grand or petit jury . . . within the memory of witnesses who had lived there all their lives." *Norris*, 294 U.S. at 591. One jury commissioner added that all-white trial and grand juries had been the rule in every trial held during "the entire history of th[e] county." *Id.*

The defendants in *Norris* also challenged the exclusion of black trial jurors in Morgan County where the jury trial was scheduled to be held. The uncontradicted testimony of witnesses who "were over fifty years of age and had always lived in Morgan County" established that "no negro had ever served on a jury in that county" within their memory. *Id.* at 596-97.

⁴⁰⁹ *Id.* at 598-99.

⁴¹⁰ *Id.* at 599.

⁴¹¹ *Neal v. Delaware* 103 U.S. 370, 397 (1881); Bernard S. Jefferson, *Race Discrimination in Jury Service*, 19 B.U.L. REV. 413 (1939).

formance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement."⁴¹²

The *Norris* decision paved the way to successful challenges of state court convictions in other cases where African-Americans had been systematically excluded from jury duty. In the twelve-year period following *Norris*, the nation's highest court affirmed its "solemn duty to make independent inquiry and determination of the disputed facts,"⁴¹³ and reversed all-white jury convictions of black defendants in capital cases in Oklahoma,⁴¹⁴ Kentucky,⁴¹⁵ Louisiana,⁴¹⁶ Texas,⁴¹⁷ and Mississippi,⁴¹⁸ where all-white juries had sat uninterrupted for decades. In each case, the defendants established a prima facie case of discrimination by showing the long-continued exclusion of Negroes from jury service, and states were unable to rebut this evidence by proving that nondiscriminatory factors were responsible.

The Supreme Court's decision in *Norris v. Alabama* eased the evidentiary burden for establishing a prima facie case of purposeful discrimination. Once a defendant presented statistical evidence of total exclusion of blacks from juries, the burden shifted to the state to provide nondiscriminatory reasons for the fact that only whites had served as grand or trial jurors. In this sense, *Norris* represented a constitutional leap forward in successfully challenging and modifying state selection procedures which had prevented black people from being included in the venire panel.

Two Texas cases decided during this post-*Norris* period illus-

⁴¹² *Norris*, 294 U.S. at 598.

⁴¹³ *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) (footnote omitted).

⁴¹⁴ *Hollins v. Oklahoma*, 295 U.S. 394, 395 (1935) (Court reversed conviction after finding that black citizens were excluded from jury service "for a long period").

⁴¹⁵ *Hale v. Kentucky*, 303 U.S. 613, 614-15 (1938) (no black person had served as a trial or grand juror in the county during a 30-year period between 1906 and 1936, despite constituting 700 out of the 6700 qualified jurors and 16% of the overall population).

⁴¹⁶ *Pierre v. Louisiana*, 306 U.S. 354, 359 (1939) (only one black person had been called for grand or petit jury during a 40-year period between 1896 and 1936 despite constituting almost 50% of the population).

⁴¹⁷ *Hill v. Texas*, 316 U.S. 400, 403 (1942) (an assistant district attorney testified he never knew of a black person serving as grand juror during his 16 years as a judge and 27 years living in Dallas County where 61,000 blacks lived, including 19,000 men); *Smith v. Texas*, 311 U.S. 128, 129 (1940) (although African-Americans constituted 20% of population and 10% of poll taxpayers, only five served as grand jurors out of 384 selected during a seven-year period; in those five grand juries in which there was one black member, the same individual served three times).

⁴¹⁸ *Patton v. Mississippi*, 332 U.S. 463, 466 (1947) (where Justice Black found an "uncontradicted showing that for thirty years or more no Negro had served as a juror in the criminal courts of Lauderdale County").

trated the limitations on the Court's willingness to use its power to overrule the dominance of the white juror. In 1945, in *Akins v. Texas*,⁴¹⁹ the Court sanctioned Dallas County's plan to "comply" with prior Supreme Court rulings⁴²⁰ by seating only one token black person on each grand jury. The Court upheld this selection scheme, despite testimony by Dallas's jury commissioners that they "had no intention of placing more than one negro on the panel."⁴²¹ In the five-year period after *Akins*, Dallas jury commissioners selected a single black juror to serve on each of twenty-one consecutive grand juries, a practice that the Court again refused to condemn in *Cassell v. Texas*.⁴²² Although these cases concerned the selection of grand jurors,⁴²³ the message that tokenism was sufficient to shield

⁴¹⁹ 325 U.S. 398 (1945). The *Akins* case is discussed in George C. Edwards, *White Justice in Dallas*, 161 THE NATION 253-55, 301 (Sept. 15, 1945).

⁴²⁰ The *Akins* decision was a significant departure from two prior Supreme Court cases, *Smith v. Texas*, 311 U.S. 128 (1940), and *Hill v. Texas*, 316 U.S. 400 (1942), which rejected explanations provided by Texas state jury commissioners for why so few black citizens were selected as grand jurors. In *Smith*, state officials testified that "chance and accident," and not racial discrimination, were responsible for their selecting only three black people as grand jurors in Harris County over an eight-year period. *Smith*, 311 U.S. at 131. The Court dismissed the argument. "Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service." *Id.* In *Hill*, the Court likewise rejected testimony by Dallas County jury officials who attributed the absence of any black grand juror over a sixteen year period to the fact that they "did not know of a qualified negro that . . . would make a good grand juror" among the more than 19,000 black men over 21 years of age living in the county. *Hill*, 316 U.S. at 402.

⁴²¹ *Akins*, 325 U.S. at 406. A second commissioner added: "[W]hen we found one with all the qualifications of a grand juror we felt like that was satisfactory representation." *Id.* at 406-07. Dissenting Justice Murphy concluded that "clearer proof of intentional and deliberate limitation on the basis of color would be difficult to produce." *Id.* at 410 (Murphy, J., dissenting). Nevertheless, the six Justice majority remained "unconvinced that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list" and affirmed the state court conviction. *Id.* at 407.

⁴²² 339 U.S. 282 (1950). A Texas jury commissioner testified that he was not "personally acquainted with any negro citizen of Dallas County that [he] thought was qualified to sit on the Grand Jury, at that time." *Id.* at 288 n.23. The Court concluded that the commissioners' failure "to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color" resulted in racial discrimination in juror selection. *Id.* at 289. Despite reversing the defendant's conviction, the Supreme Court's decision did not condemn the obvious tokenism in Dallas's grand jury selection.

⁴²³ After *Cassell* and *Akins*, the Court found equal protection violations where state officials denied even token participation by African-Americans on grand juries and state selection practices revived the "violent presumption of group ineligibility to serve as trial jurors." *Neal v. Delaware*, 103 U.S. 370, 397 (1881). In practically every one of these cases, the Court reversed indictments and convictions rendered by all-white juries against black defendants in capital cases, when members of the defendant's race had been systematically excluded from eligibility to serve as trial or grand jurors. *See, e.g.*, *Reece v. Georgia*, 350 U.S. 85 (1955) (the Court reversed defendant's conviction on the ground that defendant was deprived of his opportunity to challenge the grand jury selection in Cobb County, Georgia, which had excluded blacks from serving as grand ju-

racist jury selection procedures from constitutional challenge also applied to the selection of a trial jury.

This loophole allowed the all-white jury to remain a firmly entrenched institution in the South during the thirty-year period following *Norris*. Under the progeny of *Norris*, a state could withstand constitutional scrutiny by accommodating one or more black persons on a grand jury, where their votes would be powerless to change the outcome of the predominantly white body's decision. The *Norris* equal protection standard for selecting trial jurors was fulfilled simply by including a minuscule number of black persons on the trial panel from which the jury was chosen. To assure that not one of these prospective black jurors actually sat as a trial juror, states relied on a prosecutor's peremptory challenge.⁴²⁴

rors for 18 years despite the presence of a substantial black population); see also *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Hernandez v. Texas*, 347 U.S. 475 (1954).

The Court also invalidated Georgia's jury selection practice of using yellow cards for prospective black jurors and white cards for prospective white jurors because the practice made it "easier for those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S. 559, 562 (1953). In *Avery*, not one of the 60 trial jurors selected was a black person. *Id.* at 561. See also *Jones v. Georgia*, 389 U.S. 24 (1967) (only one black on grand jury); *Whitus v. Georgia*, 385 U.S. 545 (1967) (only three of 33 potential grand jurors were black); *Williams v. Georgia*, 349 U.S. 375 (1955) (using white and yellow tickets, court picked only blacks out of 120 potential jurors). *But cf.* *Brown v. Allen*, 344 U.S. 443 (1953) (denying challenges to convictions based on the low number of black jurors in proportion to population).

⁴²⁴ Within days of the Alabama Governor's announcement that he would comply with the Supreme Court's decision and "observe the supreme law of America," *N.Y. Times*, Apr. 6, 1935, at 1, col. 3, southern news correspondents reported that some politicians were seeking new ways to exclude blacks. *N.Y. Times*, Apr. 17, 1935, § 4, at 6, col. 1. While some in the southern press urged that "the [Norris] decision . . . be accepted in dead earnest," *id.*, these same editorials recognized that the prospective black juror "may [now] be subject to a personal examination . . . not commonly applied to white persons." *N.Y. Times*, Apr. 7, 1935, § 4, at 8, col. 2.

Seven months later, a *New York Times* reporter reviewed the results of the combined "personal examination" and peremptory challenge "device." He concluded that "a Negro on a trial jury is as rare as ever in the deep South. . . . In both criminal and civil cases, . . . Negroes . . . can be — and are — easily eliminated by one or both sides through the striking privilege." *N.Y. Times*, Nov. 17, 1935, § 4, at 7, col. 1. The reporter noted the limited impact of the *Norris* decision: "It is a long cry from the jury roll to a jury room, and thus far few Negroes have made it Negroes are just about as consistently excluded from jury duty in this part of the South today as before the Supreme Court decisions." *Id.* His interviews with southern lawyers left the reader with a lasting impression of an equally bleak future. One attorney explained, "There are enough loopholes and human ingenuities at hand to keep them excluded . . . for a long time to come." *N.Y. Times*, Nov. 17, 1935, § 5, at 7, col. 1.

The few who made it into the jury box appear to have been selected in cases where both parties in a criminal or civil case were African-Americans. See, e.g., *N.Y. Times*, Mar. 14, 1945, at 14, col. 7; *N.Y. Times*, Oct. 2, 1936, at 27, col. 6; *N.Y. Times*, Feb. 7, 1936; *N.Y. Times*, Sept. 25, 1935, at 2, col. 3.

If a black person was selected to sit as a trial juror in an interracial crime, he was the "token" representative acceptable by the court system. See, e.g., *N.Y. Times*, Jan. 7,

Indeed, scholars had predicted that the Court's decision would have minimal impact. One explained that *Norris* would "not create any radical change in the negro's actual rights [of serving as jurors] in the South. At best, most negroes who qualify may be barred from jury service by challenge, peremptory or with cause."⁴²⁵ Charles Mangum's comprehensive 1940 study concluded that the Supreme Court's jury discrimination decision would not change the practice of eliminating blacks as trial jurors, but would merely lead the states to rely on the peremptory challenge to eliminate any black person who qualified to serve as a trial juror.⁴²⁶

C. Southern Violence 1945-1965

Following the second World War, all-white juries continued to acquit white southerners who engaged in interracial violence. Newspaper articles reported in 1946 that an all-white Mississippi jury deliberated ten minutes before rejecting a black widow's testimony and acquitting five white men, including two deputy sheriffs, charged with killing her husband.⁴²⁷ The following year, the twenty men who were accused of lynching Willie Earle were acquitted by a South Carolina all-white jury whose members apparently disregarded the defendants' signed confessions.⁴²⁸ Incidents of this kind were common and continued well into the second half of the twentieth century.⁴²⁹ During this same period, all-white juries carried out

1938, at 1, col. 2 (referring to an Arkansas rape trial in which the black juror was a 66-year-old man "whose success as a farmer and timber man is known throughout the State").

⁴²⁵ *Comments on Recent Cases*, 24 ILL. B.J. 233, 234 (1936).

⁴²⁶ CHARLES S. MANGUM JR., *THE LEGAL STATUS OF THE NEGRO* 308, 333 (1940).

⁴²⁷ *Trial and Terror*, NEWSWEEK, Nov. 4, 1946, at 33. For a description of other incidents of racial violence in the summer of 1946, see *infra* note 462.

⁴²⁸ *Twelve Good Men and True*, THE NEW REPUBLIC, June 2, 1947, at 9.

⁴²⁹ Three years later, an Alabama jury deliberated for one hour and twenty minutes before acquitting two white police officers accused of beating a black man to death while he was in their custody. *Little Scottsboro*, NEWSWEEK, Nov. 19, 1951, at 31. In 1951, an all-white Florida coroner's jury freed a sheriff who had shot two black prisoners, killing one, while transporting them to court for a new trial following the Supreme Court's reversal of their conviction. *Ocala: Echo of Injustice*, THE NATION, Mar. 1, 1952, at 203. The following year, an all-white Florida jury convicted a black man of raping a white woman despite the lack of persuasive evidence. *Id.* at 204. In 1955, an all-white Mississippi jury acquitted several white men charged with killing 14-year-old Emmett Till after he allegedly wolf-whistled at a white woman. CONRAD LYNN, *THERE IS A FOUNTAIN: THE AUTOBIOGRAPHY OF A CIVIL RIGHTS LAWYER* 155 (1979). Derrick Bell relies on various sources in concluding that Till was brutally murdered not primarily because of his conduct toward the woman, but because he refused to grovel or to plead for mercy. DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* 68 n.19 (2d ed. 1980). In 1957, an all-white jury acquitted two white men accused of bombing a black church in Montgomery, Alabama. AMERICA, June 15, 1957, at 316 reports that "the defendants made no serious attempt to disclaim the crime as charged. Rather, they were proud they had committed this outrage." Despite the apparent evidence of guilt, the jury acquitted the defendants

a policy of imposing death sentences where black defendants were accused of committing capital crimes against white people, whereas southern whites who committed capital offenses against black people were almost never sentenced to death.⁴³⁰

During the post-World War II period, some changes occurred in the southern jury. Black jurors occasionally appeared in significant numbers,⁴³¹ and an all-white jury did not necessarily mean that every white offender would escape punishment.⁴³² Usually, however, an all-white jury would free "one of their own." During the ten-year period ending in 1965, southerners were charged with committing fifty-eight civil rights killings; only six people were ever convicted of these crimes, and fewer still received prison sentences.⁴³³

After all-white juries refused to convict a white deputy sheriff

in one hour, thirty-five minutes. *Trial by Jury*, THE NEW REPUBLIC, June 10, 1957, at 4; see also TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963, 199-201 (1988) (describing criminal act and its aftermath).

⁴³⁰ Death penalty statistics indicate the disproportionate capital punishment sentences that southern juries have imposed on black defendants. Prior to 1968, 543 defendants were sentenced to die after a rape conviction; in 90% of the cases, the defendant was a black man and the crime victim was a white woman. In southern murder cases, two-thirds of the defendants sentenced to die were African-Americans. W. Bowers, *supra* note 400, at 36-37.

⁴³¹ In 1951, a North Carolina jury consisting of eight white and four black men deadlocked in the trial of Mack Ingram. Defendant Ingram, a black sharecropper and father of nine children, was charged with assault for having "leered" at a "pretty 17-year-old blonde" white woman. He "looked at me funny," said the girl, although "he got no closer than 75 feet." The two jury holdouts for conviction were both black jurors. *Deadlock in Yanceyville*, NEWSWEEK, Nov. 26, 1951, at 25-26. In Frankfort, Kentucky, an all-black jury apparently accepted a black defendant's self-defense claim when it found him guilty of voluntary manslaughter, not first degree murder, in the killing of a white man. *Report of Racial Trends*, NEWSWEEK, Oct. 10, 1949, at 23.

⁴³² In 1959, an all-white Florida jury convicted four white men for the sexual assault of a black college woman; each was sentenced to life imprisonment. LIFE, June 29, 1959, at 38; THE COMMONWEAL, June 26, 1959, at 316-17. THE COMMONWEAL article indicated that a white man had never been executed for raping a black woman, although all-white Florida juries had imposed death sentences on 37 black defendants convicted of raping white women. See also N.Y. Times, Jan. 24, 1958, at 12, col. 5 (all-white jury convicted four Klansmen in the beating of a black man; state court judge sentenced each to prison terms of from one to six years).

When the crime did not involve a white person, all-white southern juries did not always convict black defendants, even those as politically unpopular as Martin Luther King. In 1960, an all-white jury acquitted Dr. King of perjury in connection with the filing of his tax returns. T. BRANCH, *supra* note 429.

⁴³³ *Opening a Second Front*, NEWSWEEK, Nov. 8, 1965, at 33. Of the six convicted, the punishment ranged from a seven month suspended sentence to a single life term for murder. In the 34 killings that occurred after 1960, "the perpetrators . . . have, with one exception, never served a day in prison." AMERICA, Dec. 18, 1965, at 768. Among the more notorious crimes in which all-white juries failed to convict defendants were the murder of civil rights leader Medgar Evers in 1963, see N.Y. Times, Oct. 25, 1989, at B9, col. 1, and the murder of Army reservist Lemuel Penn in 1964, N.Y. Times, Sept. 11, 1964, at 23-24.

and a Klansman leader in the killings of two civil rights workers in 1965,⁴³⁴ President Lyndon Baines Johnson addressed the recurring "injustice to Negroes at the hands of all-white juries"⁴³⁵ and spoke in favor of introducing new federal legislation to end jury discrimination: "If [the trial jury's] composition is a sham, its judgment is a sham. And when that happens, justice itself is a fraud, casting off the blindfold and tipping the scales one way for whites and another way for Negroes."⁴³⁶ President Johnson's hopes for jury reform, however, were not realized.⁴³⁷ In 1965 the United States Supreme Court sanctioned the prosecutor's peremptory challenge in *Swain v. Alabama*, thus assuring that all-white juries would continue to reign in most states, at least until the Court's 1986 decision in *Batson v. Kentucky*.

D. Exclusion of Black Jurors in the North

The South's official segregation policy and its failure to redress violence against African-Americans made it an obvious target for legal challenges. Several of these Supreme Court decisions focused the public's attention on the instrumental role that all-white juries played in denying legal protection to black defendants and crime victims, particularly in cases involving interracial violence.

During most of this century, little attention has been paid to the black juror's status in the North. Research describing the racial composition of northern trial juries during the first half of the twentieth century is almost nonexistent.⁴³⁸ There are only a few re-

⁴³⁴ In September, 1965, an all-white jury in Lawndes County, Alabama deliberated for one and one-half hours before acquitting volunteer deputy sheriff and "prominent citizen" Thomas L. Coleman in the fatal shooting of Jonathan Daniels, a white Episcopal seminarian from New Hampshire. Daniels was active in the voter registration campaign. *N.Y. Times*, Oct. 18, 1965, at 24, col. 3.

In October, 1965, a Hayneville, Alabama all-white jury acquitted Klansman Collie Leroy Wilkins in the murder of white civil rights worker Viola Liuzzo who was returning from the Selma-Montgomery civil rights march. Kenneth Crawford, *Kurtains for the Klan*, *NEWSWEEK*, Dec. 13, 1965, at 34. Two months later, a federal trial jury convicted Wilkins and two other Klansmen of conspiracy for violating the worker's civil rights. Federal District Court Judge Frank Johnson sentenced each defendant to the maximum ten year prison term. *Id.* On the previous day, an all-white state jury in Anniston, Alabama convicted a white "night-rider" of second degree murder for gunning down a black man. Despite the guilty verdicts, one newspaper called the convictions "too little and too late," noting that each defendant would be eligible for parole in just over three years. *AMERICA*, Dec. 18, 1965, at 768.

⁴³⁵ *N.Y. Times*, Nov. 17, 1965, at 1, col. 4.

⁴³⁶ *Id.*

⁴³⁷ The House of Representatives voted to pass the jury reform bill, but it failed to gain the required votes in the Senate. *See CONG. GLOBE*, 89th Cong., 2d Sess. (1866).

⁴³⁸ One researcher's comments indicate his dissatisfaction, both with the available literature and with the difficulty of learning whether black citizens actually served on northern trial juries during the first half of this century: "Asking, then, what has been

ported state court decisions pertaining to a defendant's challenge of a northern state's jury selection.⁴³⁹

Although the paucity of court challenges and published material may initially suggest that racial discrimination did not exist in the selection of northern juries, careful examination of the available evidence leads to the opposite conclusion. Anti-black hostility greeted many African-Americans when they moved north and west at the beginning of this century and in the twenty-five-year period following World War I.⁴⁴⁰ As extreme manifestations of this hostility, racial violence erupted in Chicago in 1919, in New York City in 1935, and in Detroit and New York City again in 1943.⁴⁴¹

In this setting, northern jury officials were charged with selecting jurors who met the "intelligence, experience and integrity" test,⁴⁴² the same discretionary standard that southern commission-

done, one can summarize: little on the specific question of blacks and the jury." ALFRED SCHAUFELBERGER, *BLACKS AND THE TRIAL BY JURY* (1973).

I am fortunate to have discovered a 1924 study of juror composition in seven northern and mid-west cities. CLARENCE CALLENDAR, *THE SELECTION OF JURORS—A COMPARATIVE STUDY OF THE METHODS OF SELECTION AND THE PERSONNEL OF JURIES IN PHILADELPHIA AND OTHER CITIES* (1924). Although this study does not discuss the racial composition of juries, its analysis of class and gender considerations provides useful information in gaining a sense of the typical northern juror during the first decades of this century. In 1959, Jack Greenberg attempted to learn the extent of African-Americans inclusion as trial jurors in northern cities. JACK GREENBERG, *RACE RELATIONS AND AMERICAN LAW* (1959). For additional background on northern juries, see C. MANGUM, *supra* note 426, at 308-55.

⁴³⁹ See, e.g., *People v. Dukes*, 19 Ill. 2d 532, 169 N.E.2d 84 (1960), *cert. denied*, 356 U.S. 830 (1961); *People v. Harris*, 17 Ill. 2d 446, 161 N.E.2d 809 (1959), *cert. denied*, 362 U.S. 928 (1960); *People v. Douglas*, 709 Ill. 230, 99 N.E.2d 13 (1951); *People v. Roxborough*, 307 Mich. 575, 12 N.W.2d 466, *cert. denied*, 323 U.S. 749, *reh'g denied*, 323 U.S. 815 (1944); *Commonwealth v. Raymond*, 412 Pa. 194, 194 A.2d 150 (1963), *cert. denied*, 377 U.S. 999, *reh'g denied*, 379 U.S. 893 (1964); *Commonwealth v. Banmiller*, 391 Pa. 141, 137 A.2d 236, *cert. denied*, 356 U.S. 945 (1958).

⁴⁴⁰ See *supra* notes 395 & 397 for a discussion of violence against blacks in the North during the first two decades of this century. Racial violence usually followed African-Americans' migration to northern cities. In Chicago, the black population doubled just prior to the 1919 violence; 50,000 blacks moved to Detroit during the three years preceding the 1943 riot; and in New York and Los Angeles, sharp increases in the black population were followed by racial violence. J. FRANKLIN, *supra* note 57, at 250, 309, 391.

⁴⁴¹ In 1943 in Detroit, President Roosevelt called in 6000 soldiers to restore order after white mobs had roamed the streets for 30 hours, assaulting many black people. J. FRANKLIN, *supra* note 57, at 403-04. Police violence killed 17 people, all of whom were black, and caused extensive property damage. *RACIAL VIOLENCE*, *supra* note 394, at 140-44. Two black men were later convicted of being the "principle incitors" of the riot. *N.Y. Times*, Oct. 23, 1943, at 28, col. 8. For an account of the 1943 New York violence, see Walter White, *Behind the Harlem Riot*, *THE NEW REPUBLIC*, Aug. 16, 1943, at 220.

⁴⁴² C. CALLENDAR, *supra* note 438, at 10. Callender studied jury selection procedures in seven cities, and found that every city except Philadelphia relied on discretionary standards to select qualified jurors: New York, *id.* at 52 ("intelligent, of sound mind and good character"); Chicago, *id.* at 61 ("fair character, . . . approved integrity, . . . sound judgment"); Boston, *id.* at 68 ("good moral character, of sound judgment"); Pittsburgh,

ers had used to eliminate almost every black citizen from the southern trial venire. In one of the first published studies on jury composition in northern cities, Clarence Callender described the strong class and gender bias that characterized the discretionary selection process. In each of seven northern cities, state jury officials demonstrated their clear preference for choosing professional and semi-professional jurors, and for rejecting those employed as skilled, semi-skilled or unskilled workers.⁴⁴³ In all but one city, jury commissioners also systematically excluded women from jury duty.⁴⁴⁴ Considering the "elite" nature of jurors, it was extremely unlikely that African-Americans were included. Indeed, according to African-American attorney Conrad Lynn, who began practicing in New York City in 1933: "It was unthinkable that a black person would ever serve as a juror in any felony case in which another black person was being tried prior to World War II."⁴⁴⁵

Between 1911 and 1933, many northern states passed legisla-

id. at 64 ("sober, intelligent, and judicious persons"); Baltimore, *id.* at 72 ("intelligence, sobriety and integrity of such persons"); and St. Louis, *id.* at 75 ("sober and intelligent, of good reputation"). Philadelphia selected jurors "divid[ed] . . . fairly equally between the several divisions of [each] ward. . . . [T]he judge [then] determin[e]d . . . the relative proportion of men and women jurors and the proportion of different occupations." *Id.* at 16.

⁴⁴³ Callender divided male jurors into four categories (A-D), based on their occupations. Category A represented professional men (*e.g.* corporate officials, bankers, engineers, publishers, real estate, insurance); category B consisted of semi-professionals (*e.g.*, bookkeepers, salesmen, foremen, secretaries); category C referred to skilled and semi-skilled workers (*e.g.*, bakers, blacksmiths, conductors, electricians, machinists); and category D contained unskilled workers (*e.g.*, laborers, porters, janitors, drivers). *Id.* at 20-21.

Women, who served only on Philadelphia juries, were divided into three categories: business women (*e.g.*, clerks, bookkeepers, teachers, saleswomen), manual workers (*e.g.*, skilled and unskilled laborers, dressmakers, domestic servants), and housewives and "ladies". *Id.* at 21-22.

Callender's study reveals that, in each city, working people (categories C and D) were disproportionately excluded from juries. *Id.* at 23. Consequently, a typical 12 person Philadelphia jury consisted of three professional men, three sales/supervisory men, four skilled/semi-skilled workers, and a twelfth juror who may have been an unskilled laborer or a "business" woman. *Id.*

All-male juries in Boston, Pittsburgh, Chicago, Baltimore, and St. Louis were roughly comparable to Philadelphia's professional and semi-professional dominated juries. New York City's jury was the most skewed against including skilled, semi-skilled, or unskilled workers as trial jurors. Ninety-four percent of the trial jurors selected were men "from the better class of residential sections . . . [and] from the higher grade occupations" *Id.* at 53.

⁴⁴⁴ Philadelphia women constituted 12.1% of trial jurors; a "business" woman's chances for selection were considerably greater than a woman manual worker or housewife. *Id.* at 23; *see* N.Y. Times, Jan. 23, 1941, at 40, col. 3 (the first black woman jurors were called during World War II because of the shortage of male jurors).

⁴⁴⁵ Telephone interview with Conrad Lynn, Esq. (Oct. 13, 1988). Mr. Lynn recalled first seeing black jurors serving on some civil and criminal cases in Harlem Municipal Court in the 1930s. Callender explained that "a limited number of persons were taken from each of the sections of the city populated by laboring classes and foreign elements

tion that was aimed at eliminating discrimination in jury selection procedures. These statutes were often modeled after section four of the Civil Rights Act of 1875.⁴⁴⁶ It is fair to assume that these laws were a response to the existence of discrimination in using a discretionary method of selecting jurors.⁴⁴⁷ Ironically, the state anti-discrimination laws proved to be as ineffective as the 1875 federal statute had been: not one state commenced a criminal prosecution alleging violation of these laws.⁴⁴⁸

Following the Supreme Court's ruling in *Norris v. Alabama*, northern defendants duplicated southern legal strategies and began to challenge selection procedures that resulted in all-white grand and trial juries. As in the South, however, these challenges failed whenever a northern court determined that "one or more" African-Americans were included on state jury venires.⁴⁴⁹ As black citizens

for service upon municipal court juries which are to serve in those sections of the city." C. CALLENDAR, *supra* note 438, at 58.

African-American senior citizens confirmed Lynn's recollection. In a random series of interviews with 23 New Yorkers ages 70 to 88, not one remembered a single African-American called to serve on a trial jury prior to World War II (my thanks to research assistant Marjorie Modestil who travelled to three day care centers to obtain this information). In "important" criminal cases, such as murder or conspiracy, New York City's jury commissioner selected special blue ribbon juries that consisted of 97% professional males who worked in business, finance, banking, insurance and sales. The Supreme Court upheld the "blue-ribbon" trial jury in *Fay v. New York*, 332 U.S. 261, *reh'g denied*, 332 U.S. 784 (1947); this "special" jury was eventually eliminated on September 1, 1965. N.Y. Times, July 16, 1965, at 29, col. 6.

⁴⁴⁶ C. MANGUM, *supra* note 426, at 312, cites the following criminal statutes as evidence of jury selection discrimination in the North: IND. STAT. ANN. § 10-903 (Burns 1933); 1930 N.Y. CONSOL. LAWS ch. 7 § 13; MICH. COMP. LAWS § 16, 811 (1929); N.J. COMP. STAT. p. 1442, § 3 (1911); OHIO CODE § 12,868 (Throckmorton, 1929); R.I. GEN. LAWS § 4692 (1923).

⁴⁴⁷ Evidence of the black juror's disappearance from state grand juries is found in newspaper articles and court cases describing the first black grand jurors in New York City, N.Y. Times, Mar. 2, 1937, at 23, col. 2; in Nassau County, N.Y., N.Y. Times, July 9, 1947, at 16, col. 3; and in the Bronx, N.Y. Times, July 6, 1950, at 30, col. 4. Other articles announced the first black grand jury foreman in New York City, N.Y. Times, Jan. 4, 1944, at 11, col. 2; in Brooklyn, N.Y. Times, Jan. 4, 1944, at 13, col. 7; and in Uniontown, N.J., JET, Dec. 13, 1956, at 7.

⁴⁴⁸ See *supra* text accompanying note 338 (referring to *Ex Parte Virginia*, 100 U.S. 313 (1880) as the only instance in which a state jury commissioner was prosecuted under section four of the 1875 Act).

⁴⁴⁹ Illinois appellate courts consistently rejected defendant challenges to exclusion of African-American trial and grand jurors between 1939 and 1969. See *People v. Price*, 371 Ill. 137, 20 N.E.2d 61 (1939); *People v. Rhode*, 403 Ill. 41, 85 N.E.2d 24 (1949); *People v. Cross*, 40 Ill.2d 85, 237 N.E.2d 437, *cert. denied*, 393 U.S. 221 (1968); *People v. Gregory*, 95 Ill. App.2d 396, 237 N.E.2d 720 (1968); *People v. Davenport*, 111 Ill. App.2d 197, 249 N.E.2d 328 (1969).

State courts in Pennsylvania, New Jersey, and Rhode Island have also denied similar challenges. See, e.g., *Commonwealth ex rel. Tolliver v. Ashe*, 336 Pa. 206, 8 A.2d 541 (1939); *State v. Smith*, 93 A. 353 (S. Ct. R.I. 1915); N.Y. Times, May 7, 1935, at 10, col. 3; N.Y. Times, Apr. 18, 1935, at 8, col. 4. *But cf. Dixon v. State*, 224 Ind. 327, 67 N.E. 2d 138 (1946) (court upheld challenge on due process grounds).

reached the jury box, the prosecutor's peremptory challenge became the principle weapon for striking prospective black jurors. Appellate decisions in Michigan, Illinois, and Pennsylvania upheld the race-conscious use of the prosecutor's challenge, and denied defendants' challenges to the all-white juries that resulted.⁴⁵⁰ In some northern cities, prosecutors did not have to use their peremptory challenges; prosecuting and defense attorneys excused each black juror "by agreement."⁴⁵¹

The emerging picture of the northern trial jury resembles the all-white jury of the South. As discussed below, the extensive use of the peremptory challenge to maintain all-white juries is measured,

⁴⁵⁰ The prosecutor's race-conscious use of the peremptory challenge to strike prospective African-American jurors occurred most frequently when an African-American defendant was charged with violence against a police officer or a white person. *See, e.g.*, cases cited *supra* note 439; *see also Due Process in New Jersey*, THE NATION, Mar. 26, 1949, at 358 (describing the "Northern Scottsboro" case in which an all-white Trenton, New Jersey jury found six black men guilty in the killing of an elderly white man); N.Y. Times, Dec. 23, 1947, at 17, col. 5 (describing a New York City "blue-ribbon" jury's conviction of two black men for the murder of a police detective).

In some cases, a prosecutor admitted that race considerations motivated his jury selection strategy. *See People v. Roxborough*, 307 Mich. 575, 12 N.W.2d 466, 471 (prosecutor explained his reasons for peremptorily challenging "more than thirty" prospective black jurors: "Every Negro in Detroit is a number or policy player anyhow, and as such is unfit to serve on a case involving such matters"), *cert. denied*, 323 U.S. 749, *reh'g denied*, 323 U.S. 815 (1944).

⁴⁵¹ J. GREENBERG, *supra* note 438, at 406-07 (Chicago's Public Defender referred to "a time . . . , and we would have to go back a number of years, that there would be an agreement between the State's Attorney and the Defense Counsel to excuse all negroes by agreement.").

Interviews with practicing attorneys and citizens who were of jury service age during this period provide further evidence that African-Americans and other people of color were systematically excluded from serving as criminal trial jurors in the North prior to 1965. Retired New York City African-American Judge William Booth, who started his legal practice in 1950, describes how the "peremptory was used most of the time by District Attorneys in New York City's five boroughs and in Nassau County. I always made a record but it fell on deaf ears." Telephone interview (Oct. 13, 1988). Ernie Goodman, for example, began trying criminal cases in Michigan in 1929, and remembers "jury panels . . . consisting of all or almost all-white members until the late 1960's." Letter from E. Goodman to author (Oct. 6, 1988). Walter Gerash, whose criminal practice in Denver, Colorado began in 1955, remembers the exclusion of minority jurors lasting until 1959. Letter from W. Gerash to author (Nov. 10, 1988). Los Angeles attorney John McTernan stated that in 1933 "very few blacks were on jury panels . . . , and with the use of peremptory challenges, it was unusual for a black person to be on a jury in most cases between 1933-1943." Letter from J. McTernan to author (Oct. 7, 1988). Lawrence Kennon, admitted to the Illinois Bar in 1956, recalled no African-Americans on a jury venire when he began his twenty-two year career as a Cook County prosecutor in the State Attorney's Office in 1962. When community pressure resulted in calling some black citizens for jury duty, Kennon remembers how the peremptory challenge became the principle weapon used by prosecutors and defense lawyers to eliminate each prospective African-American juror. "I would challenge the practice in my office and in the courtroom, but risked being held in contempt by judges and being ostracized by my colleagues." Interview with Mr. Kennon by Mr. William Boyle, Stanford Law student (Aug. 4, 1989); telephone conversation with William Kennon (Jan. 4, 1990).

at least in part, by the many reported state and federal court challenges that followed the United States Supreme Court decisions in *Swain v. Alabama* in 1965 and *Batson v. Kentucky* in 1986.

E. *Swain, Batson*, and the Peremptory Challenge

Although the Supreme Court's jury discrimination rulings from 1935 to 1965 allowed some African-Americans to serve as grand jurors or to be included on the trial jury venire, these decisions had little effect on the racially segregated jury box. As commentators predicted, prosecutors relied on the unfettered exercise of peremptory challenges as the ultimate trump card for attaining all-white juries. The prosecutor's peremptory striking of prospective black jurors simply replaced the jury commissioner's arbitrary disqualification of eligible black citizens to become the primary means for retaining the "whites-only" jury.

In *Norris v. Alabama*, the Supreme Court noted that no black person had served as a juror in Jackson or Morgan Counties for fifty years. In 1965, thirty years after *Norris*, the Supreme Court reviewed the factual record presented in *Swain v. Alabama*⁴⁵² and discovered that the Court's decisions had done little to change the all-white jury trial system in Alabama. While the *Swain* opinion referred to a recent fifteen-year period in which only whites sat as jurors, the "undisputed" evidence suggested "that no Negro ha[d] ever served on a jury in the history of the county."⁴⁵³ The majority opinion highlighted the important role that the peremptory challenge had assumed in maintaining all-white juries. As Alabama's highest court had noted in affirming *Swain's* conviction, the peremptory challenge neutralized the Supreme Court's stated principle of nondiscrimination in jury selection.⁴⁵⁴

Despite this acknowledgement of the role of the peremptory challenge in perpetuating the all-white jury, the Court in *Swain v. Alabama* upheld the prosecutor's use of the peremptory challenge to remove all of the six black prospective jurors. The *Swain* Court concluded that the prosecutor exercised his peremptory challenges consistent with their "essential nature . . . [to strike jurors] without a reason stated, without inquiry and without being subject to the court's control."⁴⁵⁵

The Supreme Court's analysis failed to recognize the prosecu-

⁴⁵² 380 U.S. 202 (1965).

⁴⁵³ *Id.* at 235 (Goldberg, J., dissenting).

⁴⁵⁴ "[N]egroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury." *Swain v. State*, 375 Ala. 505, 515, 156 So. 2d 368, 375 (1963), *aff'd*, 380 U.S. 202 (1965).

⁴⁵⁵ *Swain*, 380 U.S. at 220.

tor's race-conscious striking of jurors as a technique to continue the denial of justice to African-American criminal defendants. Rather, the Court characterized the peremptory challenge as a neutral procedure, one "necessary" to "trial by jury."⁴⁵⁶

The *Swain* Court's opinion allowed only a slim possibility that a black defendant would be able to prove that his equal protection rights had been violated by a prosecutorial use of the peremptory challenge. In *Swain*, the defendant alleged that the reason why no black person had served on a criminal trial in Talladega County for the past fifteen years was due to prosecutorial elimination of prospective black jurors during jury selection. The Court rejected the proof offered by the defendant as insufficient to overcome "the presumption . . . that the prosecutor is using the State's challenges to obtain a fair and impartial jury."⁴⁵⁷ It concluded that the defendant's evidence had failed to "show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talladega County."⁴⁵⁸

Not surprisingly, the *Swain* evidentiary rule made it virtually impossible for black defendants to prove equal protection violations in prosecutorial use of peremptory challenges. Indeed, during the next twenty-one years, state and federal courts regularly rejected such claims.⁴⁵⁹ Defendants were routinely unable to establish that over a period of time "the State [had never] seen fit to leave a single [black person] on any jury in a criminal case"⁴⁶⁰ and that the "prosecutor [was] . . . responsible for the removal of Negroes."⁴⁶¹

More than two decades passed before the Supreme Court revised its equal protection analysis and allowed the fourteenth

⁴⁵⁶ *Id.* at 219.

⁴⁵⁷ *Id.* at 222.

⁴⁵⁸ *Id.* at 224. Justice Goldberg, in dissent, argued that the majority ignored the trial record regarding "the State's involvement in the total exclusion of Negroes from jury service. . . . In *Swain*, the prosecutor admitted that "we strike a jury different from what if it was two white men involved or two colored men." *Id.* at 234 (Goldberg, J., dissenting). Justice Goldberg concluded that "in a good many cases Negroes have been excluded by the state prosecutor, either acting alone or as a participant in arranging agreements with the defense." *Id.* at 235.

⁴⁵⁹ See *Batson v. Kentucky*, 476 U.S. 79, 85 n.17 (1986) (listing cases in which defendants failed to satisfy *Swain*'s burden). *Swain*'s standard of proof was exceedingly difficult to meet. See *State v. Washington*, 375 So. 2d 1162 (La. 1979); *State v. Brown*, 371 So. 2d 751 (La. 1979); Annotation, *Use of Peremptory Challenges to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R.3d 14 (1977). One court called *Swain*'s proof requirement "Mission Impossible." *McCray v. Abrams*, 750 F.2d 1113, 1120 (2d Cir. 1984), *reh'g denied*, 756 F.2d 277 (2d Cir. 1985) (en banc), *vacated and remanded*, 478 U.S. 1001 (1986).

⁴⁶⁰ *Swain*, 380 U.S. at 224.

⁴⁶¹ *Id.* at 223.

amendment claim to take on added significance. Building on sixth amendment principles and state and federal case law,⁴⁶² the Supreme Court modified *Swain's* "crippling burden of proof"⁴⁶³ in the 1986 case, *Batson v. Kentucky*. In *Batson*, the Court set forth a new evidentiary requirement: the defendant need only show that the prosecutor's peremptory challenges targeted members of the defendant's "cognizable racial group."⁴⁶⁴ If this was shown, a fair inference would be drawn that those potential jurors were struck because of their race,⁴⁶⁵ and the evidentiary burden would shift to the prosecutor to "come forward with a [race-]neutral explanation for challenging black jurors."⁴⁶⁶

⁴⁶² Following the Supreme Court's decision in *Swain v. Alabama*, some state courts built on sixth amendment, fair cross-section principles stated in *Taylor v. Louisiana*, 419 U.S. 522 (1975), and guaranteed in their state constitutions to overcome *Swain's* "insurmountable" burden of proving systematic prosecutorial abuse on peremptory challenges. In *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), California's Supreme Court relied on the cross-section requirements of its state constitution to forbid use of the peremptory challenge by either party to strike jurors on the basis of group identification. The California court created a mechanism for challenging a prosecution or defense peremptory challenge; this became the basis for the Supreme Court's equal protection remedy in *Batson*. The moving party must demonstrate that the struck jurors belong to a cognizable group, and that they were struck because of group membership and not for specific bias. Five state and two federal courts followed *Wheeler's* sixth amendment analysis. See *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated*, 478 U.S. 1001 (1986), *cert. denied*, 479 U.S. 1046 (1987); *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986); *Riley v. State*, 496 A.2d 997 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *State v. Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (1985); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (1980).

The Supreme Court declined in *Batson* to rule whether the sixth amendment prohibited the racially discriminatory use of peremptory challenges despite it being the only ground raised by the petitioner. *Batson*, 476 U.S. at 85 n.4. Following *Batson*, the Court has refused to apply sixth amendment principles to jury selection. See *Holland v. Illinois*, 110 S. Ct. 803 (the sixth amendment fair cross-section requirement does not prevent the prosecution from exercising its peremptory strikes to strike cognizable racial groups from jury), *reh'g denied*, 110 S. Ct. 1514 (1990); *Teague v. Lane*, 489 U.S. 288, *reh'g denied*, 109 S. Ct. 1771 (1989) (sixth amendment fair cross-section requirement does not apply to petit jury on writ of habeas corpus); *Lockhart v. McCree*, 476 U.S. 162 (1986) (fair cross-section requirement may apply to jury venires but not to the process of choosing juries).

⁴⁶³ *Batson*, 476 U.S. at 92.

⁴⁶⁴ *Id.* at 96.

⁴⁶⁵ [T]o establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence . . . of peremptory challenges at the defendant's trial[,] . . . the defendant first must show that he is a member of a cognizable racial group, . . . [and] that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venireman from the petit jury on account of their race.

Id. at 96.

⁴⁶⁶ *Id.* at 97. Since *Batson* was decided, some courts have rejected a defendant's equal protection argument and showing of a prima facie case of purposeful discrimina-

In *Batson*, the Court recognized that the prosecutor's pervasive use of the peremptory challenge to eliminate black jurors could no longer remain "largely immune from constitutional scrutiny."⁴⁶⁷ By shifting the burden of proof to the prosecutor, the Court eliminated the prior insurmountable hurdle that had required defendants to prove the historical discriminatory practice of their prosecutors.

Justice Thurgood Marshall, in concurrence in *Batson*, applauded the majority opinion as "a historic step"⁴⁶⁸ toward eliminating discriminatory jury selection practices. Marshall warned, however, that the Court's remedy might be "illusory" because "any prosecutor can easily assert facially neutral reasons for striking a juror and trial courts are ill equipped to second-guess those reasons."⁴⁶⁹

Since *Batson*, Justice Marshall's fears have been confirmed: the *Batson* remedy has proven to be ineffective against prosecutors whose trial strategy involves the elimination of prospective black jurors. Although the *Batson* Court intended to create new judicial protection for accused African-Americans, prosecutors have discovered a variety of "neutral reasons" for peremptory dismissal. The prosecutor's peremptory challenge remains a practice that permits "those

tion, and have not required a prosecutor to provide a "neutral reason" when the prosecutor allowed some black jurors to serve on the trial jury. See, e.g., *United States v. Lane*, 866 F.2d 103 (4th Cir. 1989) (prosecutor's reason for striking a prospective black juror upheld where prosecutor had accepted two other black jurors); *United States v. Lance*, 853 F.2d 1177 (5th Cir. 1989) (prosecutor's use of peremptory challenges to exclude two black persons from jury upheld; court referred to the selection of the black jurors and an alternate); *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) (court upheld prosecutor's challenge of five black jurors where four others were selected, stating there were objective reasons for excusing at least some of the jurors); *United States v. Montgomery*, 819 F.2d 847, 851 (8th Cir. 1987) ("The fact that the government accepted a jury which included two blacks, when it could have used its remaining peremptory challenges to strike those potential jurors, shows that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury.")

Professor Alschuler's warning that these cases suggest that prosecutors may be permitted one or two "free" shots at striking black jurors before a court finds a prima facie case has apparently been heeded. See Alschuler, *supra* note 5, at 172 n.79 (1989). In *Alvarado v. United States*, 110 S. Ct. 2995 (1990), the Supreme Court held that *Batson* claims are permitted even where the trial jury selected satisfied sixth amendment fair cross-section rights. *Alvarado* is consistent with state and federal court decisions that had required prosecutors to supply a race-neutral reason whenever they peremptorily excused a black juror, regardless of whether black jurors had been previously selected. See, e.g., *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987) ("the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated"); *Fleming v. Kemp*, 794 F.2d 1478 (11th Cir. 1986); *State v. Holloway*, 44 Crim. L. Rptr. 2390 (Conn. 1989); *Stanley v. State*, 542 A.2d 1267 (Md. Ct. App. 1988); *State v. Jones*, 293 S.C. 54, 56, 358 S.E.2d 701, 704 (1987); *People v. Jenkins*, 75 N.Y.2d 550, 558 (1990).

⁴⁶⁷ *Batson*, 476 U.S. at 92.

⁴⁶⁸ *Id.* at 102 (Marshall, J., concurring).

⁴⁶⁹ *Id.* at 106. For cases supporting Justice Marshall's concern, see *supra* note 466.

to discriminate who are of a mind to discriminate."⁴⁷⁰

Trial courts have rejected defendants' *Batson* challenges and upheld prosecutors' peremptory challenges because the potential black juror was young and single,⁴⁷¹ was "of age and married but was too pregnant,"⁴⁷² or had a last name similar to the defendant's last name.⁴⁷³ Other courts have accepted a wide range of explanations for the peremptory dismissal of black jurors: they were either unemployed⁴⁷⁴ or underemployed;⁴⁷⁵ they worked as social workers,⁴⁷⁶ federal employees,⁴⁷⁷ scientists,⁴⁷⁸ or associates of radio or

⁴⁷⁰ *Avery v. Georgia*, 345 U.S. 559, 562 (1953). Although courts have frequently upheld a prosecutor's "neutral" explanation based on a juror sharing a common characteristic with a defendant, *see infra* notes 471-82 and accompanying text, some appellate courts have rejected similar explanations. *United States v. Hughes*, 880 F.2d 101 (8th Cir. 1989) (court found "there is not a sufficient, independent reason, other than race, for the striking of [three] jurors," and remanded the case to determine if a legally sufficient reason existed for exclusion); *United States v. Wilson*, 853 F.2d 606 (8th Cir.) (court rejected explanations for dismissal of four black jurors, stating that "we will not accept these racist assumptions and stereotypical reasoning in justifying the Government's jury selection"), *reh'g granted*, 861 F.2d 514 (1988); *State v. Tomlin*, 299 S.C. 294, 384 S.E.2d 707, 708 (1989) (South Carolina's Supreme Court disallowed a prosecutor's disqualification of a black juror because the juror "shucked and jived" while walking to the jury box); NAT'L L.J., Sept. 18, 1989, at 6; *see also cases cited infra* note 479.

⁴⁷¹ *United States v. Lance*, 853 F.2d 1177, 1180 (5th Cir. 1988) (two black jurors excluded who were "young, single, and without children or substantial stake in community"; each "appeared inattentive . . . during voir dire"); *United States v. Clemon*, 843 F.2d 741, 744 (3d Cir.) (striking of two black jurors upheld based on prosecutor's trial strategy in which he struck "every single person who was nonmarried [sic] and young"), *cert. denied*, 488 U.S. 835 (1988); *United States v. Cartlidge*, 808 F.2d 1064, 1070 (5th Cir. 1987).

⁴⁷² *United States v. David*, 844 F.2d 767, 768 (11th Cir. 1988).

⁴⁷³ *United States v. Tindle*, 860 F.2d 125, 129 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3176 (1989).

⁴⁷⁴ *Cartlidge*, 808 F.2d at 1070.

⁴⁷⁵ *Id.* at 1071 (prosecutor struck an alternate juror because "she was divorced and appeared to have a low income occupation").

⁴⁷⁶ *Williams v. State*, 507 N.E.2d 997, 999 (Ind. Ct. App. 1987) (the prosecutor explained that a black prospective juror "might have a liberal view of sexual behavior and might not be fair and impartial because of her employment as a social worker").

⁴⁷⁷ *United States v. David*, 662 F. Supp. 244, 245 (N.D. Ga. 1987) (trial court upheld a prosecutor's challenge of a federal worker on the grounds that "government employees tended to be naive").

⁴⁷⁸ *Branch v. State*, 526 So. 2d 605, 606-07 (Ala. Crim. App. 1986). *Branch* is frequently cited as an early example of "the danger that *Batson* may not change very much." *Alschuler, supra* note 5, at 176 n.96 (citing William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97). Pizzi summarized the appellate court's ruling in *Branch*, which upheld a wide range of prosecutorial "neutral" explanations for peremptorily challenging six prospective black jurors:

One juror was challenged because he was a scientist and it was feared that his background would put too much pressure on the prosecution. A second juror was challenged because he was similar in age and appearance to the defendant and he might have had a relationship to a person arrested in an unrelated criminal case several months earlier. The third juror was struck because she had been unemployed and had a kind of "dumbfounded or bewildered look on her face" as if uncertain about

television stations that aired programs considered to be anti-law-enforcement.⁴⁷⁹ Courts have also upheld prosecutors' disqualifications of black jurors living in the same neighborhood or similar "high crime" district⁴⁸⁰ as the accused⁴⁸¹ or for not having graduated from high school.⁴⁸² The Supreme Court's recent refusal to establish a constitutional standard for determining race neutrality in jury selection ensured that trial courts will continue to sanction a broad array of prosecutorial explanations for peremptorily eliminating black jurors.⁴⁸³

Justice Marshall's deep reservation about the effectiveness of

what she was supposed to do. The fourth juror was struck because she was a single female about the same age as the defendant and it was feared that she "might feel as though she were a sister . . . and have some pity on the [defendant]." The fifth juror was struck because it was the prosecutor's general experience that employees of the company where the juror worked had not been attentive as jurors and some employees at the company were being investigated for a variety of crimes. Finally, the sixth juror was struck because he was unkempt in appearance and gruff in manner, which might place him at odds with other jurors.

Pizzi, supra, at 136 (footnotes omitted); see also *Wallace v. State*, 530 So. 2d 849, 851-52 (Ala. Crim. App. 1987) (upholding prosecution reasons for challenging six jurors because one was a homemaker, another a student, a third was a "grandmother" type, the fourth wore a beard, the fifth was unemployed and the sixth was about the age of the defendant's mother), *cert denied*, 530 So. 2d 856 (Ala. 1988).

⁴⁷⁹ *Chisolm v. State*, 529 So. 2d 635, 638 (Miss. 1988). *But cf. Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987) (trial court rejected a prosecutor's explanation for challenging two African-American school teachers because their occupation suggested "liberalism"), *cert denied*, 487 U.S. 1219 (1988); *State v. Butler*, 731 S.W.2d 265, 272 (Mo. Ct. App. 1987) (Prosecutor removed nurse from jury because "it was the prosecutor's experience that nurses were compassionate and thus inclined to feel sorry for defendants." Citing *Batson*, the court held that "the prosecutor's prior experience is not a reason 'related to the case to be tried.'").

⁴⁸⁰ *Taitano v. Commonwealth*, 4 Va. App. 342, 358 S.E.2d 590, 592-93 (1987).

⁴⁸¹ *United States v. Thompson*, 827 F.2d 1254, 1256 n.1 (9th Cir. 1987). In *Thompson*, the prosecutor challenged a black juror because the juror lived in the defendant's neighborhood, and wore blue jeans to court, which demonstrated the juror's lack of "respect for the system." *Id.* at 1256. The Ninth Circuit did not rule on the *Batson* challenge, but indicated, in dicta, that these reasons seemed proper under *Batson*. *Id.* at 1260.

⁴⁸² *United States v. Lane*, 866 F.2d 103, 106 (4th Cir. 1989) (African-American juror peremptorily challenged because he had not completed high school and the prosecutor was "looking for a jury that is all in all a little more educated").

⁴⁸³ In *Tompkins v. Texas*, 109 S. Ct. 2180 (1989), an equally divided court declined to review the legal sufficiency of a prosecutor's "neutral" explanation for excluding 13 prospective black jurors. Among those excluded was a black federal postal employee who was excused because the prosecutor indicated that he had not "had very good luck with postal employees." *Tompkins v. State*, 774 S.W.2d 195, 205 (Tex. Crim. App. 1987), *cert. granted*, 486 U.S. 1004, *order amended*, 486 U.S. 1053 (1988).

During the 1990-91 Term, the Supreme Court's decision to review the sufficiency of a prosecutor's explanation for excluding Spanish-speaking jurors serving in the case of a Hispanic defendant may provide greater clarity for lower courts applying *Batson's* equal protection standard. *People v. Hernandez*, 75 N.Y.2d 350, 553 N.Y.S.2d 85, 552 N.E.2d 621 (1990), *cert. granted*, *Hernandez v. New York*, 59 U.S.L.W. 3275 (U.S. Oct 9, 1990) (No. 89-7645).

the *Batson* remedy went beyond the prosecutor who deliberately challenges prospective African-American jurors. He also feared that a prosecutor's or judge's "unconscious racism" might result in a black juror's peremptory dismissal.⁴⁸⁴ As an illustration, Justice Marshall referred to a prosecutor who might perceive a black juror, but not a white juror to be "sullen" or "distant," and to a judge whose "own conscious or unconscious racism may lead him to accept such an explanation as well supported."⁴⁸⁵

At least for some prosecutors and judges, Marshall's prediction of "unconscious racism" has proven accurate. The reasons asserted by prosecutors and accepted by trial courts read like a litany of racial stereotypes. For example, courts have approved prosecutors' dismissal of black jurors who had a "poor attitude,"⁴⁸⁶ were inattentive,⁴⁸⁷ appeared "indifferent and hostile,"⁴⁸⁸ had a kind of "dumbfounded or bewildered look,"⁴⁸⁹ "avoided eye contact,"⁴⁹⁰ had poor "posture and demeanor,"⁴⁹¹ or were "fidgeting and looking around."⁴⁹² Thus, the idea that blacks are inferior jurors survives *Batson*, and perpetuates the elimination of most blacks from the jury panel.

Justice Marshall's concern regarding "the inherent potential of

⁴⁸⁴ "Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism . . . a challenge I doubt all of them can meet." *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring); see Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁴⁸⁵ *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

⁴⁸⁶ *United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987) ("Excluding jurors because of . . . a poor attitude . . . is wholly within the prosecutor's prerogative"); *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987) (prosecutor felt that the prospective juror had "a poor attitude in answering voir dire questions").

⁴⁸⁷ *United States v. Mathews*, 803 F.2d 325, 331 (7th Cir. 1986) (prosecutor struck juror who "did not seem to be attentive to the proceedings at hand"), *rev'd on other grounds*, 485 U.S. 58 (1988); see *United States v. Lance*, 853 F.2d 1177, 1180 (5th Cir. 1988) (prosecutor struck two jurors who "appeared inattentive to him during voir dire examination.").

⁴⁸⁸ *State v. Jackson*, 322 N.C. 251, 253, 368 S.E.2d 838, 839 (1988), *cert. denied*, 109 S. Ct. 3165 (1989); see *United States v. Forbes*, 816 F.2d 1006, 1009 (5th Cir. 1987); *Mathews*, 803 F.2d at 331 (prosecutor peremptorily dismissed a "rude" juror who "spent a very great deal of time in examining me in a way which I felt was in the end becoming rather hostile"); *Chambers v. State*, 724 S.W. 2d 440, 442 (Tex. Ct. App. 1987) (prosecutor stated "he had a feeling [the potential juror] was nodding . . . a little bit too much toward [defense counsel] and not enough towards me.").

⁴⁸⁹ *Branch v. State*, 326 So. 2d 605, 606 (Ala. Crim. App. 1986).

⁴⁹⁰ *United States v. Cartledge*, 808 F.2d 1064, 1071 (5th Cir. 1987).

⁴⁹¹ *Forbes*, 816 F.2d at 1010-11.

⁴⁹² *United States v. Power*, 881 F.2d 733, 740 (9th Cir. 1989) (prosecutor excused a juror who was "fidgeting and looking around as he sat in the jury box", which "made the prosecutor believe that the individual would not be an attentive juror."). *But cf.* *State v. Tomlin*, 299 S.C. 294, 384 S.E.2d 707 (1989) (prosecutor's claim that prospective juror "shucked and jived" held evidence of prosecutor's subjective intent to discriminate).

peremptory challenges to distort the jury process"⁴⁹³ led him to call for the abolition of the peremptory challenge in criminal cases. Abolition has appeal because the prosecutor's peremptory challenge has been the primary weapon used to disqualify black jurors for more than fifty years. Acknowledging this abuse—yet recognizing that the challenge was intended to protect the fair trial rights of the accused—may have led Justice Marshall to conclude that "the cost of eliminating the defendant's challenge as well as the prosecutor's . . . [would not be] too great a price to pay."⁴⁹⁴

Nevertheless, Justice Marshall's abolition proposal, with its focus on ending prosecutorial abuses, undermines the central role of the defendant's peremptory challenge as an effective safeguard against government stacking of a trial jury. Despite the often-heard criticism that jury selection is a wasteful, nonproductive use of scarce judicial resources,⁴⁹⁵ the defense challenge represents the best mechanism for guaranteeing an accused the right to be judged by impartial jurors.⁴⁹⁶ The peremptory challenge protects an African-American defendant's fair trial rights by eliminating at least some racially biased white jurors. For these reasons, a less drastic

⁴⁹³ *Batson*, 476 U.S. at 107.

⁴⁹⁴ *Id.* at 108.

⁴⁹⁵ ARTHUR LIMAN, RECOMMENDATIONS TO GOVERNOR HUGH L. CAREY—EXECUTIVE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE (1982), cited in *Voir Dire: Who Should Question Prospective Jurors 14* (CUNY Grad. Center, New York City, Mar. 1, 1984); *Half Step*, *supra* note 5, at 1044 ("[A]ttorneys have been criticized for abusing voir dire privileges by asking inappropriate questions."); Chambers, *Who Should Pick Jurors, Attorneys or the Judge*, N.Y. Times, June 13, 1984, § II, at 4, col. 3.

⁴⁹⁶ Saltzburg & Powers, *supra* note 4, at 341 ("The peremptory challenge . . . has been considered one of the most effective means of securing an impartial jury and of satisfying the defendant of that impartiality."); see Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenge: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 827-29, 837-40 (1989). Arguments favoring the use of peremptory challenges are considered in *Half Step*, *supra* note 5, at 1043; *Sixth Amendment Remedy*, *supra* note 8, at 384.

Some have advocated that the peremptory challenge be abolished altogether. See Alschuler, *supra* note 5; VAN DYKE, *supra* note 4, at 167-68; Comment, *Batson v. Kentucky: A Significant Step Toward Eliminating Discrimination in the Jury Selection Process*, 29 ARIZ. L. REV. 697 (1987) (authored by Sean Chapman); Note, *Discrimination by the Defense: Peremptory Challenge After Batson v. Kentucky*, 88 COLUM. L. REV. 355 (1986) (authored by E. Vaughn Dunningan); *Half Step*, *supra* note 5. Several of these commentators advocate replacing the defendant's peremptory with an expanded "for cause" challenge, and an attorney-conducted voir dire. See Alschuler, *supra* note 5, at 203-09; Note, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555 (1985) (authored by James H. Druff); *Half Step*, *supra* note 5, at 1043-46. Although these reforms will assure a fairer selection process, there is no reason to believe that trial judges will modify their longstanding practice of denying defense challenges for cause. See Babcock, *supra* note 3; Saltzburg & Powers, *supra* note 4, at 340; *Sixth Amendment Remedy*, *supra* note 8, at 384. A thirteenth amendment analysis eliminates race discrimination in jury selection in race-sensitive crimes, but preserves the peremptory challenge because of its irreplaceable value to protecting an accused's fair trial rights.

alternative than Marshall's abolition must be sought. Racial discrimination in jury selection can be reduced and ideally eliminated by excluding the use of the peremptory challenge whenever the exclusion of African-American jurors perpetuates a primary badge of the institution of slavery—the denial of justice.

V

THE THIRTEENTH AMENDMENT: THE CONSTITUTIONALITY
OF THE ALL-WHITE JURY

A. *Jones v. Alfred H. Mayer Co.*:⁴⁹⁷ The Amendment's
Resurrection

As discussed, the thirteenth amendment's promise of universal freedom and equal justice had hardly been sealed when doubts arose as to the constitutionality of the Civil Rights Act of 1866.⁴⁹⁸ Fearing that a future Congress might repeal the Act's guarantees, civil rights proponents included an equal protection clause in the first section of the fourteenth amendment.⁴⁹⁹ Since some legislators continued to question the effect of the thirteenth amendment, pro-civil rights congressmen turned to the newly enacted fourteenth amendment as the constitutional basis for passing subsequent civil rights legislation.⁵⁰⁰

The Supreme Court's 1872 ruling in *Blyew v. United States*⁵⁰¹ did little to change the legislative uncertainty regarding the thirteenth amendment's reach. Even though the Court in *Blyew* upheld the constitutionality of the 1866 Civil Rights Act, its narrow interpretation of the federal removal statute defeated Congress' intent to provide blacks with legal security against violence by whites.⁵⁰² Eleven years later, in the *Civil Rights Cases*,⁵⁰³ the Supreme Court rendered a second, devastating blow to the thirteenth amendment when it declared the public accommodation positions of the Civil Rights Act of 1875⁵⁰⁴ unconstitutional. The Court ruled that the amendment's prohibition against badges and incidents of slavery did not embrace all forms of racial discrimination. In 1896, the Court in *Plessy v. Fer-*

⁴⁹⁷ 392 U.S. 409 (1968).

⁴⁹⁸ Gressman, *supra* note 184, at 1329; *supra* note 227 and accompanying text.

⁴⁹⁹ See *supra* note 227 and accompanying text.

⁵⁰⁰ The fourteenth amendment's equal protection clause was the primary basis for the Enforcement Act of 1870, ch. 114, 16 Stat. 140; the Enforcement Act of 1871, ch. 99, 16 Stat. 433; and the Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

⁵⁰¹ 80 U.S. 581 (1872).

⁵⁰² See *supra* notes 266-81 and accompanying text.

⁵⁰³ 109 U.S. 3 (1883); for a discussion of the *Civil Rights Cases*, see *supra* notes 346-67 and accompanying text.

⁵⁰⁴ See *supra* notes 350-60 and accompanying text.

guson⁵⁰⁵ completed the evisceration of the thirteenth amendment. For the next seventy years, the amendment's protection was applied only to cases involving labor exploitation.

Thus, throughout most of its controversial history, the thirteenth amendment's liberating potential remained unfulfilled in the face of narrow judicial decision-making and legislative paralysis. It was not until 1954, in *Brown v. Board of Education*,⁵⁰⁶ that the Supreme Court began to breathe life back into the amendment's original guarantee of universal freedom. Although the *Brown* Court relied on the fourteenth amendment,⁵⁰⁷ the decision inspired the blossoming civil rights movement to press forward in its demand that African-Americans be freed under the original expansive terms of the thirteenth amendment. White supremacists, safely protected by local immunity custom, responded to *Brown* by engaging in renewed anti-black and anti-civil rights violence.⁵⁰⁸ The civil rights movement had reawakened the national conscience, and by the mid-1960s, the federal government was forced to reassert its interventionist role as a guarantor of civil rights.⁵⁰⁹

⁵⁰⁵ 163 U.S. 537 (1896); *supra* notes 368-76 and accompanying text.

⁵⁰⁶ 347 U.S. 483 (1954). For a discussion of the political considerations that led the Justice Department to seek reversal of *Plessy's* "separate-but-equal" doctrine in *Brown v. Board of Education*, see Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN L. REV. 61 (1988).

⁵⁰⁷ The Court avoided references to the history of equal protection rights for African-American people that legislators addressed during the debates accompanying passage of the thirteenth and fourteenth amendments and the 1866 Civil Rights Act. See *supra* notes 150-51 & 208-28. It dodged the historical circumstances surrounding adoption of the post-Civil War amendments by referring to the legislative history as inconclusive. Jay I. Sabin, *Clio and the Court Redux: Toward a Dynamic Mode of Interpreting Reconstruction Era Civil Rights Laws*, 23 COLUM. J.L. & SOC. PROBS. 369, 378 (1990).

⁵⁰⁸ See JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* (1987).

⁵⁰⁹ During the 80-year period following the Supreme Court decisions in the Civil Rights Cases, 109 U.S. 3 (1883), and *United States v. Harris*, 106 U.S. 629 (1883), the federal government maintained a nonintervention policy, despite the southern states' refusal to prosecute whites for acts of violence against African-Americans. See KENNETH O'REILLY, *RACIAL MATTERS: THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972* (1989). Following an all-white Mississippi jury's acquittal of those charged with murdering civil rights workers James Chaney, Michael Schwerner, and Andrew Goodman in 1964, federal prosecutors charged three law enforcement officials and 15 white individuals with federal criminal violations. In *United States v. Price*, 383 U.S. 787 (1966), the Supreme Court upheld federal authority to prosecute private individuals and state officials under the Civil Rights Acts of 1866 and 1870 (codified at 18 U.S.C. §§ 241, 242 (1988)). "We think that history leaves no doubt that, if we are to give § 241 the scope that its origins dictate, we must accord it a sweep as broad as its language. . . . [P]articularly since the violent denial of legal process was one of the reasons motivating enactment of the section." *Price*, 383 U.S. at 801 (footnote omitted).

As the Justice Department modified its prosecutorial policy, Congress passed major civil rights legislation in 1964 and 1968 barring discrimination in housing, employment, and voting rights. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1988));

As Congress and the Executive Branch were re-evaluating the nation's commitment to racial equality, the Supreme Court's 1968 decision in *Jones v. Alfred H. Mayer Co.*⁵¹⁰ resurrected the thirteenth amendment's promise of freedom from the constitutional graveyard. In *Jones*, a black family that was denied the opportunity to buy a house because of its race sued a private housing developer under the almost-forgotten Civil Rights Act of 1866.

The Supreme Court's opinion in *Jones* relied heavily upon the century-old legislative debates that led to the passage of the thirteenth amendment and the Civil Rights Act of 1866. In a decision "[r]ivaling *Brown* in historical import,"⁵¹¹ the Court ruled that the refusal to sell a home to a black family was among the "badges and incidents of slavery" proscribed by the Act.⁵¹² The majority reasoned that the thirteenth amendment's guarantee

[a]t the very least . . . includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.⁵¹³

For the first time since the *Civil Rights Cases*, the Supreme Court reaffirmed Congress's power to "determine what are the badges and the incidents of slavery,"⁵¹⁴ and to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."⁵¹⁵ The *Jones* Court highlighted the original meaning placed on the enabling clause by Illinois Senator Trumbull, who as Chair of the Judiciary Committee introduced the thirteenth amendment and was the floor manager for the 1866 Civil Rights Act. Trumbull stated:

I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendments amount to nothing. It

Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at scattered sections of 18 U.S.C., 25 U.S.C., and 42 U.S.C.). For a bibliography on the period referred to as "America's Second Reconstruction", see J. FRANKLIN, *supra* note 57, at 684-86.

⁵¹⁰ 392 U.S. 409 (1968).

⁵¹¹ *Anti-Discrimination Laws*, *supra* note 10, at 1019.

⁵¹² *Jones*, 392 U.S. at 441.

⁵¹³ *Id.* at 443. The Court stated that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Id.* at 442-43.

⁵¹⁴ *Id.* at 440.

⁵¹⁵ *Id.* at 439 (quoting the *Civil Rights Cases*, 109 U.S. 3, 20 (1883)). Justice Douglas, concurring in *Jones*, referred to blacks' exclusion from juries "solely on account of their race" as one of many examples of slavery's badges existing at the time of the court's opinion. *Id.* at 445 (Douglas, J., concurring).

was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.⁵¹⁶

Thus, in *Jones*, the Court rejected nearly a century of prior Supreme Court jurisprudence that had severely restricted congressional power under the amendment's enabling clause.

The *Jones* Court did not merely declare that civil rights legislation, based on thirteenth amendment guarantees, was constitutional. Significantly, the Court revived a meaning of freedom that went far beyond simply releasing African-Americans from the shackles of slavery. No longer would "the Thirteenth Amendment merely authorize[] Congress to dissolve the legal bond by which the Negro slave was held to his master."⁵¹⁷ Instead, the Court reminded the nation that the thirteenth amendment "[b]y its own unaided force and effect . . . abolished slavery, and established . . . universal freedom."⁵¹⁸ The Supreme Court found it unnecessary to probe further to discover "[w]hether or not the Amendment *itself* did any more. . . [because this was] a question not involved in this case"⁵¹⁹

Nevertheless, scholars greeted the decision with jubilation, because they knew that thirteenth amendment guarantees were "undoubtedly self-executing without any ancillary legislation"⁵²⁰ and therefore represented the most "powerful weapon . . . for fighting the inequities of racial discrimination."⁵²¹ Seizing upon the Court's

⁵¹⁶ *Id.* at 440 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866)).

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* at 439 (quoting the Civil Rights Cases, 109 U.S. at 20).

⁵¹⁹ *Id.*

⁵²⁰ The Civil Rights Cases, 109 U.S. at 20.

⁵²¹ Professor Arthur Kinoy expressed the sentiment of those who viewed *Jones* as a landmark historical and constitutional breakthrough:

[I]t is impossible . . . to overstate the potentially profound importance of this first formal recognition by the Court that the most pressing domestic problems today, erupting from the cauldrons which are our urban and rural ghettos, are "relics" of the slave system and the results of the continued existence of "badges and indicia" of the supposedly banned way of life.

Arthur Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 475, 479 (1969) (referring to slavery's relics in the areas of "housing, employment and a minimum income"); see also Robert L. Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272, 300 (1969) ("the legislative history clearly justifies the Court's application of the Act . . . [B]y using the legislative history properly, the Court could have extended the Act still further," and authorized federal prosecutions against private individuals who violate another's civil

unelaborated reference to the thirteenth amendment's unkept "promise" of freedom, these scholars speculated about the "relics of slavery" that "ha[ve] remained in the minds and hearts of many white men"⁵²² and were now ripe for congressional action and constitutional challenge. At the same time, other commentators decried the Supreme Court's opinion for overreaching its proper constitutional role,⁵²³ a criticism also directed at the Court's decision in *Brown v. Board of Education*.⁵²⁴

For twenty years after *Jones*, the Supreme Court recognized "the broad and sweeping nature of the protection meant to be afforded by section one of the Civil Rights Act of 1866,"⁵²⁵ and consistently upheld civil rights claims of race discrimination. During the 1988-89 term, however, a newly reconstituted Supreme Court, one markedly hostile to civil rights, decided to review the historical underpin-

rights absent the need to establish state action); Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29 (1980); Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541 (1989); *Anti-Discrimination Laws*, *supra* note 10, at 1023, 1026-27 (suggesting that slavery's badges and incidents might also extend to African-Americans' "unemployment, poor schools and housing, and lack of a place in the body politic. . . . [The thirteenth amendment might] empower the national government to guarantee other elements of a decent life to all Americans, such as education, employment and a minimum income").

⁵²² *Jones*, 392 U.S. at 445 (Douglas, J., concurring).

⁵²³ Articles critical of the Supreme Court's decision in *Jones* include Sam J. Ervin, Jr., *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485, 502 (1969) ("When all is said, *Jones* illustrates judicial activism run riot. It is, indeed, enough to make historical, linguistic, and constitutional angels weep."); Louis Henkin, *The Supreme Court—1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968); *A Preliminary Analysis*, *supra* note 10.

⁵²⁴ After *Brown v. Board of Education*, 347 U.S. 483 (1954), was decided, Professor Wechsler criticized the Court for not following a "neutral principles" approach in justifying its decision. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959). For a response to Wechsler, see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960).

⁵²⁵ *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (upholding a § 1982 claim based on a corporation's refusal to approve an assignment of membership granting access to recreational facilities solely on account of race); *see also* *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (broadening scope of § 1982 to encompass a Jewish congregation's claim against individuals who sprayed racist graffiti on the walls of the congregation's synagogue); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) (protecting a black homeowner's right to purchase a community swimming pool membership under §§ 1982 and 1981).

Prior to *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), Supreme Court decisions relied on *Jones* and recognized § 1981 race discrimination claims based on the making and enforcement of private contracts. *See* E. Richard Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56 (1972); *see also* *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (prohibiting discrimination in labor unions); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (extending protections of § 1981 to include Arab-Americans); *Runyon v. McCrary*, 427 U.S. 160 (1976) (prohibiting racial discrimination by private schools); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) (discrimination in private employment on the basis of race).

nings of *Jones*. In *Patterson v. McLean Credit Union*,⁵²⁶ this Court reconsidered whether the 1866 Act protected against private discrimination in the making and enforcement of contracts.⁵²⁷ Even though the *Patterson* Court created an "ingenious analytical instrument" to limit the protection of the 1866 Act,⁵²⁸ *Jones* was one of the few precedents that survived intact during the spring 1989 term.⁵²⁹ Thus, the *Jones* recital of reconstruction history remains "good law," despite the Supreme Court's recent assault on established civil rights doctrine.

Prior to the present constellation of Justices, the Supreme Court refrained from expanding the *Jones* thirteenth amendment analysis to encompass other situations which could be classified as "relics of slavery." Since *Jones*, the Court has explicitly rejected thirteenth amendment badge-and-incident arguments in the two cases presenting this issue: *Palmer v. Thompson*⁵³⁰ and *City of Memphis v. Greene*.⁵³¹

⁵²⁶ 109 S. Ct. 2363 (1989).

⁵²⁷ In *Runyon v. McCrary*, 427 U.S. 160 (1976), Justice White argued in dissent that § 16 of the Voting Rights Act of 1870, the basis for § 1981, applies only to state action, and not individual discrimination. *Id.* at 195-201. In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), the Supreme Court asked the parties to address whether *Runyon v. McCrary*, and thus the legislative and historical analysis developed in *Jones*, had been wrongly decided. Sixty Senators, 47 state attorneys general, the American Bar Association, prominent historians, and over 100 civil rights, religious, and civic groups filed amicus briefs and urged the Court *not* to overrule *Runyon*. N.Y. Times, June 24, 1988, at 1, col. 4. On June 18, 1989, the Court unanimously upheld *Runyon*, but severely limited § 1981 protection.

⁵²⁸ In *Patterson*, the Supreme Court ruled that § 1981 applies only to the initial formation of employment contracts, and does not cover racial harassment in the workplace. *Patterson*, 109 S. Ct. at 2372. The Court held open the possibility that such discrimination may be prohibited in instances of promotion involving a "new and distinct relation between the employee and the employer . . ." *Id.* at 2377.

⁵²⁹ The Supreme Court decided several cases during the 1988-89 term that represent a substantial rollback of civil rights gains since the 1964 Civil Rights Act was passed: *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989) (municipal and state governments not liable under § 1981 for their employees' discriminatory actions); *Lorance v. AT&T Technologies*, 109 S. Ct. 2261 (1989) (plaintiffs must file a challenge to a facially neutral seniority system when the system is first adopted, not when they learn of its adverse effects); *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (white firefighters, not parties to the original lawsuit, may collaterally attack a consent decree calling for equal hiring and promotion of black and white firefighters); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (limiting the use of statistical analysis in establishing a disparate impact under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), thereby making it more difficult for plaintiffs to establish a prima facie case of employment discrimination, and placing burden of persuasion on an employee to establish that there was no legitimate business justification for an employer's racially discriminatory practice); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (city affirmative action plan for minority-owned businesses held unconstitutional and strict scrutiny standard established to determine constitutionality of non-federal affirmative action legislation).

⁵³⁰ 403 U.S. 217 (1971).

⁵³¹ 451 U.S. 100 (1981).

In the 1970 *Palmer* case, Jackson, Mississippi closed its swimming pools to avoid implementing a court desegregation order. The plaintiff argued that denying blacks the right to swim with whites was a badge or incident of slavery and thus violated the thirteenth amendment. The Supreme Court affirmed Congress's thirteenth amendment power to pass anti-discrimination laws, but in the absence of relevant federal legislation, rejected the argument that maintaining public swimming pools was within the meaning of universal freedom. "To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history . . . [it would grant the Court] law-making power far beyond the imagination of the amendment's authors."⁵³²

Similarly, in the 1981 case of *Greene*, African-American residents and civic associations brought suit against the city of Memphis when it closed a street connecting an all-white community with a black neighborhood. The plaintiffs argued that the street closing was aimed at preventing black citizens from driving through the white neighborhood, and therefore constituted a badge of slavery. The City contended that its action was legitimate because it enhanced children's safety and neighborhood tranquility.

The Supreme Court rejected the plaintiffs' claim, stating that the street closing had only "symbolic significance"⁵³³ and was not "a form of stigma"⁵³⁴ within the meaning of the thirteenth amendment. Although acknowledging that black drivers would be most affected by the street closing, the Court stated that the "inconvenience cannot be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate."⁵³⁵ To declare the roadblock an incident of slavery "would trivialize the great purpose of that charter of freedom."⁵³⁶

In both *Greene* and *Palmer*, the Supreme Court narrowed the parameters of the badges and incidents of slavery which are prohibited by the thirteenth amendment in the absence of relevant federal legislation. Closing city streets or swimming pools did not alone constitute badges of slavery, even though the disparate impact on the

⁵³² *Palmer*, 403 U.S. at 226-27.

⁵³³ *Greene*, 451 U.S. at 128. Professor Charles Lawrence properly characterizes the wall that separated the black and white communities as "a symbol of [white] superiority," and a stigma of blacks' inferiority. Lawrence, *supra* note 484, at 357, 363-64.

⁵³⁴ *Greene*, 451 U.S. at 128.

⁵³⁵ *Id.* Finding insufficient evidence of a discriminatory motive, or a contrived or pretextual reason for the city's actions, the Court concluded that legitimate interests were served and that the disparate impact on black citizens was a "routine burden of citizenship." *Id.* at 129.

⁵³⁶ *Id.* at 128.

black citizenry was significant. In *Greene*, the Supreme Court noted that two other roads connected the black community with the white neighborhood, and characterized the street closing as merely symbolically important. In *Palmer*, the Supreme Court recognized the racially inspired consequences of a city closing its only public swimming pools, yet found there was an insufficient nexus between this form of racial discrimination and the institution of slavery. Thus, in the absence of both federal legislation and a clear historical nexus between slavery and access to swimming pools, the Court refused to accept the thirteenth amendment analysis.

The prohibition against the all-white jury fits neatly within the *Jones-Palmer-Greene* parameters. There is a link between the all-white jury and the badge of slavery that denied African-Americans recourse to legal justice. This badge of slavery effectively branded blacks inferior and unsuitable to serve as jurors; surely, that link is neither tenuous nor symbolic. The all-white jury's origins are clearly traceable to the institutionalization of slavery and its denial of legal justice to slaves. In passing the Civil Rights Act of 1866, Congress recognized that the denial of legal process and access to courtroom justice were "inseparable concomitants"⁵³⁷ of the institution of slavery. Congress explicitly intended that the thirteenth amendment encompass access to justice for African-Americans by guaranteeing that they receive the "full and equal benefit of all laws and proceedings for the security of person and property."⁵³⁸

In our legal system, access to justice depends on the impartiality of the jury verdict. When a citizen's personal liberty or security is at stake, whether as an accused or as a victim, all other guarantees of justice are meaningless if the trier of fact is biased. Throughout this country's history, the all-white jury has prevented impartial verdicts from being rendered to African-American defendants and crime victims. Recent sociological studies also offer direct evidence that when African-American jurors are dismissed from jury duty in interracial cases, impartial jury verdicts are virtually unattainable.⁵³⁹ Yet, as the more blatant barriers to justice have been declared unconstitutional, the racially discriminatory peremptory challenge has become the primary means for perpetuating the all-white jury.⁵⁴⁰

The all-white jury also differs from the street closing in *Greene* in that it acts as an absolute bar to justice and leaves open no alternative routes. Impartial justice is so fundamental to our ordered system of liberty that tainted verdicts *are* the type of "restraint on . . .

⁵³⁷ The Civil Rights Cases, 109 U.S. at 25.

⁵³⁸ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866).

⁵³⁹ See *infra* notes 548-64 and accompanying text.

⁵⁴⁰ See *supra* notes 474, 481, 486-92 and accompanying text.

liberty . . . that is . . . comparable to the odious practice the Thirteenth Amendment was designed to eradicate."⁵⁴¹ Even if there had not been congressional action on this score, the thirteenth amendment should operate through the courts to prohibit all-white juries. Unlike the Supreme Court's conclusions in *Palmer* and *Greene* concerning swimming pool and street closings, the denial of crucial liberty interests must be seen as "doing violence" to the thirteenth amendment's central theme of freedom and equal rights.

In a 1984 Fifth Circuit opinion, the thirteenth amendment's affirmative powers were recognized to apply to employment discrimination against blacks today. In *Williams v. City of New Orleans*,⁵⁴² six judges advanced a thirteenth amendment analysis in joining an *en banc* plurality opinion that upheld affirmative hiring and promoting of black police officers. Although the plurality upheld the district court's consent decree solely on Title VII grounds,⁵⁴³ these six judges concluded that the thirteenth amendment also upheld the decree.⁵⁴⁴ In a separate opinion, they reviewed the city's historical practice of preventing African-Americans from becoming police officers, and found that the current "under-representation of blacks on the force . . . is a badge of slavery: it is a sign, readily visible in the community, that attaches a stigma upon the black race."⁵⁴⁵

The judges' thirteenth amendment analysis first acknowledged slavery's denial of equal economic opportunities, which included disqualifying African-Americans from government jobs that required the exercise of authority. They proceeded to establish the

⁵⁴¹ *Greene*, 451 U.S. at 128.

⁵⁴² 729 F.2d 1554 (5th Cir. 1984).

⁵⁴³ In a 9-4 vote, the Fifth Circuit upheld the trial court's ruling that Title VII of the Civil Rights Act of 1964 permitted an affirmative, race-conscious consent decree and did not limit redress to actual victims of past employment discrimination. Judge Williams, writing for the plurality, rejected the Department of Justice's argument that affirmative group-based remedies are not permissible under Title VII. However, the plurality disagreed as to whether the district court abused its discretion by declining to uphold the promotional aspects of the consent decree. In a 7-6 vote, a majority ruled that the district court had not abused its discretion. See *infra* notes 544-46.

⁵⁴⁴ Judge Wisdom, writing on behalf of the six, argued that the consent decree's affirmative and color-conscious hiring and promotion guidelines were constitutional under a fourteenth amendment equal protection analysis as necessary "to remove the effects of prior inequality." *Williams*, 729 F.2d at 1573 (footnote omitted). The opinion also stated that:

[w]holly aside from the fourteenth amendment, the thirteenth amendment is an affirmative grant of power to eliminate slavery along with its "badges and incidents" and to establish universal civil freedom. . . . When a present discriminatory effect upon blacks as a class can be linked with a discriminatory practice against blacks as a race under the slavery system, the present effect may be eradicated under the auspices of the thirteenth amendment.

Id. at 1577 (footnote and citation omitted).

⁵⁴⁵ *Id.* at 1580.

connection between the New Orleans Police Department's current discriminatory policy and the period after the Civil War when African-Americans were disqualified from becoming New Orleans police officers.⁵⁴⁶ Thus, the link between the historical practice of excluding blacks from the police force and their current under-representation constituted the thirteenth amendment violation. The six judges also relied on Title VII of the Civil Rights Act of 1964, pointing out that Title VII "legislation is supportable . . . under the enabling clause of the thirteenth amendment."⁵⁴⁷ Specifically, they reasoned that because Congress had addressed race discrimination in employment, and because the practice of excluding African-Americans from the New Orleans police force was traceable to practices under slavery, the affirmative action plan represented an appropriate remedy to the thirteenth amendment violation.

The discriminatory use of the peremptory challenge to exclude African-American jurors clearly fits the *Jones* legislative criteria as elaborated in *Williams*. In *Williams*, Congress's potential powers under the thirteenth amendment's enabling clause were sufficient to justify judicial reliance on the amendment when it was not the actual basis for passing the Title VII legislation. Denying justice to African-Americans was a linchpin of the institution of slavery, and Congress directly addressed this linchpin by relying on its thirteenth amendment powers to pass the Civil Rights Act of 1866.

B. Empirical Evidence: The All-White Jury Is Not Always Impartial

As documented above, the all-white jury has played an historic role in denying justice to African-Americans unfairly accused of crimes or victimized by racial violence. In 1976, criminology began to provide direct statistical evidence of the effect that a jury's racial composition has on the outcome of trials involving African-Americans. Since that year, a substantial body of empirical evidence has developed which shows that all-white juries are not impartial when deciding cases involving interracial crimes.⁵⁴⁸ Indeed, Professor

⁵⁴⁶ Judge Wisdom reviewed the history of denying African-Americans equal economic opportunities during slavery, and the "close linkage between the discrimination against blacks in the New Orleans Police Department and the Black Codes and Jim Crowism, which were substituted for slavery." *Id.* at 1579.

⁵⁴⁷ *Id.* at 1577.

⁵⁴⁸ See Johnson, *supra* note 6. Professor Johnson reviews case studies of criminal trials in the 1950s and 1960s (few in number but "probative . . . when considered . . . with the outcomes of controlled experiments," *id.* at 1619), mock jury experiments ("the strongest evidence" of jury racial bias, *id.* at 1625), and conclusions from general research on racial prejudice, including Kalven and Zeisel's finding that trial jurors' views of black defendants were extremely unsympathetic, and had resulted in several unjust convictions. *Id.* at 1619-20 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN*

Sheri Lynn Johnson, the main legal scholar to interpret this data, concludes that a critical mass of at least three black jurors is necessary to ensure impartiality in such cases.⁵⁴⁹ This data, and its subsequent scholarly interpretation, significantly substantiate this Article's contention that all-white juries deny justice to black defendants or complainants, and thus function as lingering vestiges of slavery.

In a series of jury experiments, white subjects assumed the role of jurors in criminal cases and consistently returned more guilty verdicts against black defendants than they did when white defendants were charged with identical crimes.⁵⁵⁰ In one research study, white jurors' discrimination was identified as being most significant in

JURY 343-44 (1966)), 1639-40, 1643-50. Johnson relies less on death penalty studies, which she "caution[s] . . . ha[ve] a somewhat attenuated relationship to the question of whether *guilt determinations* are racially biased" as compared with a jury's decision to impose the death penalty. *Id.* at 1622 (emphasis added). A recent GAO Report concluded that a (white) victim's race influences the likelihood of a defendant being charged with capital murder or receiving the death penalty in 82% of 28 studies reviewed. UNITED STATES GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING (1990).

Professor Johnson argues that the intent to discriminate is proven when the defendant is African-American, Native-American, Hispanic-American or Asian-American, and the prosecutorial challenge is used to strike jurors of the defendant's race. *Id.* at 1695-99. She concludes that the defendant's fourteenth amendment right to equal protection prohibits the prosecutor's racially discriminatory use of the peremptory challenge in such cases. *Id.* at 1657.

⁵⁴⁹ *Id.* at 1694.

⁵⁵⁰ Johnson cites nine mock jury studies in which white jurors' racial bias resulted in higher conviction rates for a black or Hispanic defendant than for a white defendant. In each experiment, the subject reviewed either a trial transcript or a recorded videotape, and was asked to determine whether the defendant was guilty. The studies randomly changed the defendant's race while keeping other factors constant. The researcher then compared the subject's race and the judgment of guilt, and correlated for statistical significance.

The majority of the studies tested juror differences in cases involving a black and a white defendant. See J.L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 LAW & PSYCHOLOGY REV. 103 (1979); Hubert S. Field, *Rape Trials and Jurors' Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant and Case Characteristics*, 3 LAW & HUM. BEHAV. 261, 271 (1979); Linda A. Foley & Minor H. Chamblin, *The Effect of Race and Personality on Mock Jurors' Decisions*, 112 J. PSYCHOLOGY 47 (1982); Kitty Klein & Blanche Creech, *Race, Rape and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOLOGY 21 (1982); Richard P. McGlynn, James C. Megas & Daniel H. Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. PSYCHOLOGY 93 (1976); Marina Miller & Jay Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. SOC. PSYCHOLOGY 159 (1978); Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOLOGY 133 (1979).

One study focused exclusively on racial prejudice against a Hispanic defendant. Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAVIORAL SCI. 275 (1983). Another study tested juror reactions to a Cuban, a white American, and an African-American defendant accused of shoplifting, and found white subjects most often convicted the accused black defendants. J. Solernou & R. Bray, *Effect of Ethnic Group Membership on Attribution of Guilt, Sentence Length, and Liking for the Defendant* (unpublished dissertation).

cases where the evidence of guilt against a black defendant was "too close to call." It was in these crucial instances that the all-white jury refused to give the benefit of the doubt to a black defendant, but found the same evidence insufficient to convict a white person.⁵⁵¹ After analyzing the "convincing" results of these studies, Johnson concluded that when "a black defendant faces an all-white jury, he faces a substantial risk that the assessment of his guilt will be affected by his race."⁵⁵²

When black subjects were tested as trial jurors, their judgments were distinguishable from the white jurors' in two important respects. First, black jurors gave black defendants "the benefit of the doubt" in close cases.⁵⁵³ Second, the black jurors' identification with black crime victims resulted in a substantially higher conviction rate in black victim crimes regardless of the accused's race. In one study, for example, eighty percent of the black jurors convicted a black defendant of raping a black woman, compared with a thirty-two percent conviction rate by white jurors.⁵⁵⁴

These studies target race as a significant factor in jurors' verdicts against black criminal defendants. The results in other jury experiments suggest that the influence of race is minimized when an all-white jury is replaced by one that is racially mixed. In one mock jury experiment, five juries with varying racial compositions watched a videotaped trial in which the defendant, who was charged with assaulting a police officer, claimed he was a victim of police brutality and provocation.⁵⁵⁵ Prior to jury deliberation, individual white ju-

⁵⁵¹ Ugwuegbu found that 256 white, midwestern college students returned similar verdicts where the evidence of guilt was strong or near zero against a black or a white defendant, but acquitted only the white defendant when the evidence was less convincing. Ugwuegbu, *supra* note 550, at 138-39.

⁵⁵² Johnson, *supra* note 6, at 1656, 1704.

⁵⁵³ *Id.* at 1627 (citing Ugwuegbu, *supra* note 550, at 142 (196 black undergraduates acquitted a black defendant more frequently than a white defendant in cases when the proof of guilt was "too close to call" and when the evidence against the black defendant was strong)).

⁵⁵⁴ Miller & Hewitt, *supra* note 550, at 159; see Foley & Chamblin, *supra* note 550, at 49 (black Florida college student jurors were more likely to convict a black defendant accused of sexually abusing an 11-year-old black child than were white jurors); Ugwuegbu, *supra* note 550, at 139, 141 (black jurors convicted a black defendant accused of a crime against a black person more frequently than white jurors). Although black jurors appear more ready to convict a black defendant when the crime victim is also black, the converse is also true: white jurors lean toward acquitting a white person charged with crimes against a black person but will convict when the victim is white. See Klein & Creech, *supra* note 550, at 24 (white jurors acquitted a white defendant far more frequently when accused of rape, murder, or burglary that involved a black complainant, but convicted when the complainant was white).

⁵⁵⁵ See Bernard, *supra* note 550. Bernard divided his subjects into five juries: one was all-white, another all-black, a third divided equally between white and black jurors, the fourth had 25% black and 75% white jurors, and the fifth consisted of 75% black

rors predictably found the black defendant guilty more frequently than they did the white defendant. When white jurors discussed the case with black jurors, however, many of their opinions changed: four of the six "mixed" juries acquitted both the white and black defendants, and the other two "mixed" juries could not reach a unanimous verdict. Perhaps most significantly, the only one of ten jury verdicts that found either defendant guilty was the all-white jury's conviction of the black defendant.⁵⁵⁶

In a second study, the mediating role of the racially mixed jury was the subject of a similar experiment involving juror evaluations of white and Hispanic defendants who faced identical charges.⁵⁵⁷ The researcher found that the white jurors' pre-deliberation hostility and distrust toward the Hispanic defendant was neutralized if they sat on integrated trial juries.⁵⁵⁸ In each of these studies, the racially mixed jury sharply lessened the influence of race on white jurors who judged a non-white defendant.

Thus, sociological research supports the historical evidence that all-white juries are not able to guarantee impartiality when black persons' freedom or personal security is at stake. In the reported studies, the all-white juries acted as insurmountable obstacles for the black defendant to overcome, and were not responsive to vindicating the black crime victim's rights. "The most obvious counterbalance to the bias of white jurors," according to Professor Johnson, "is the mandatory inclusion of black jurors in the decision-making process."⁵⁵⁹ Based on the dynamics involved in group decision-making, Johnson suggests that a minimum of three black jurors is necessary to guarantee a fair jury verdict in cases when the accused is black.⁵⁶⁰ According to several commentators, these ju-

and 25% white jurors. Each was asked to return two verdicts, one involving a black defendant and the other against a white defendant.

⁵⁵⁶ *Id.* at 110. In addition to the all-white jury's guilty verdict, 15% of the individual subject-jurors maintained a defendant's guilt after jury deliberations. They, too, were exclusively white, and their guilty determination involved the black defendant. *Id.* at 109.

⁵⁵⁷ Lipton, *supra* note 550. Lipton varied the composition of Hispanic and Anglo jurors in the six-person juries he created. Three juries had one Hispanic and five white jurors; three had five Hispanic and one white juror; and six were evenly divided. Each jury was asked to return verdict against a Hispanic and a white defendant.

⁵⁵⁸ Lipton found that white jurors' racial prejudice against the Hispanic defendant was reduced during jury deliberation. Conversely, after discussing the case with Hispanic jurors, white jurors appeared less biased in favor of the white defendant—many more found him guilty than they had prior to deliberations. *Id.* at 282.

⁵⁵⁹ Johnson, *supra* note 6, at 1694.

⁵⁶⁰ Johnson cites studies indicating that three racially similar jurors are necessary to withstand the group pressure of a nine-person white majority. *Id.* at 1698-99 (citing H. KALVEN & H. ZEISEL, *supra* note 548, at 463); see M. SAKS, JURY VERDICTS 16-18 (1977); S.E. ASCH, *Effect of Group Pressure Upon the Modification and Distortion of Judgments*, in GROUP DYNAMICS 151, 152-55 (Dorwin Cartwright ed. 1953); Dale W. Broeder, *The University of*

rors would bring "relevant insights" to juries' evaluations of the demeanor and credibility of the black defendant and witnesses.⁵⁶¹ The multiracial jury is the best guarantor of overcoming one legacy of slavery: the conclusive presumption that black persons' testimony is not worthy of belief.

In the few reported studies of cities that have increased the representation of blacks on trial juries, the "new, racially integrated jury" was reluctant to convict unless persuaded by a prosecutor's "hard evidence."⁵⁶² Unlike the predominantly white jury, the mixed

Chicago Jury Project, 38 NEB. L. REV. 744, 748 (1959); Rita James Simon & Prentice Marshall, *The Jury System*, in THE RIGHTS OF THE ACCUSED 211, 227 (Stuart S. Nagel ed. 1972). These studies found that one or even two jurors are unlikely to maintain their own "not guilty" verdict in the face of opposition by the remaining jurors, much less change the others' opinion (contrary to the Hollywood version that a single juror is able to convince his fellow jurors to reverse their original guilty verdicts, as Henry Fonda did in *Twelve Angry Men*. Sidney Lumet, the film's director, recently revealed that he "always felt *Twelve Angry Men* was romantic, and in a sense, unrealistic. I had no illusions even then. It's hard enough to find a jury with even a single unprejudiced person." N.Y. Times, Dec. 31, 1989, § 2, at 20, col. 4).

⁵⁶¹ Johnson cites psychological studies indicating that racially similar jurors are often better able to correctly interpret a defendant's demeanor than are jurors of a different race than the defendant. Johnson, *supra* note 6, at 1706; see Marianne LaFrance & Clara Mayo, *Racial Differences in Gaze Behavior During Conversations: Systematic Observational Studies*, 33 J. PERSONALITY & SOC. PSYCHOLOGY 547 (1976).

Commentators have recognized that an all-white jury is most likely to disbelieve a black defendant's witnesses when those witnesses are also black. Kuhn, *supra* note 4, at 241 n.30; S.W. Tucker, *Racial Discrimination in Jury Selection in Virginia*, 52 VA. L. REV. 736, 742-45 (1966). This perceived non-trustworthiness of the black witness is one of slavery's remaining vestiges in the courtroom today.

Van Dyke argues that black jurors may be happy to supply "relevant insights" about subcultural patters that are unavailable to an all-white jury. In one case, a black juror's explanation to his fellow jurors allowed them to understand the non-criminal circumstances in which a black defendant was found in a white neighborhood at four o'clock in the morning. J. VAN DYKE, *supra* note 4, at 33; see also *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (opinion of Marshall, J., joined by Douglas and Stewart, JJ.) ("When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."); VALERIE HANS & NEIL VIDMAR, *JUDGING THE JURY* 138-40 (1986); Ralph Davis & Barbara Lyles, *Black Jurors*, 30 GUILD PRAC. 111, 118-19 (1973); Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L. J. 1417, 1718-19 (1969) (authored by Jennie Rhone).

⁵⁶² J. VAN DYKE, *supra* note 4, at 34 (quoting a black Baltimore prosecutor who believed that African-American jurors required stronger evidence of guilt before convicting a criminal defendant). In 1969, Baltimore revised its jury selection procedures, and selected registered voters to serve as jurors instead of personally selecting "key-men." The difference increased black jury representation from 30% to 46.7% in the years 1969 to 1974. During this period, the prosecution's conviction dropped from over 80% to about 65%. *Id.* at 33-34, 375-79. In Los Angeles County, the selection of more black and Hispanic jurors between 1970 and 1972 significantly changed the trial jury's racial composition, which had been 85% white. During the one full year when the "new" integrated jury functioned, the conviction rate fell from 67% to below 50%. *Id.* at 34-35, 377-81; see *supra* note 577 (describing higher acquittal rate for Bronx, New York juries which usually have a majority of Black and Hispanic jurors).

jury questioned the strength of a prosecutor's case where the only evidence against the accused was the testimony of a police officer or a single eyewitness.⁵⁶³ Thus, the peremptory striking of black prospective jurors resulted in exclusively or predominantly white juries that drew unfavorable inferences against black victims or defendants. The following section explains why the racially inspired peremptory challenge violates the thirteenth amendment whether used by the prosecutor or the defense lawyer in a civil action involving civil rights violations.

C. The Unconstitutionality of the Racially Inspired Peremptory Challenge

The thirteenth amendment analysis in *Jones v. Alfred H. Mayer Co.*⁵⁶⁴ reveals that the peremptory challenge is unconstitutional whenever it is used to disqualify prospective black jurors from cases in which African-Americans either stand accused or seek vindication against white civil rights violators. Although the all-white jury is deeply embedded in our history and thus stands as the prototype of American justice, it has consistently acted to deny African-Americans equal justice and legal protection, particularly in cases of interracial violence.

As a result, the all-white jury's predictable verdict perpetuates one of slavery's core principles: the denial of justice to African-Americans. Although it is generally considered a sixth amendment right, the right to an impartial jury verdict intersects with a central theme of the thirteenth amendment—equal justice under the law. The legislative history of the thirteenth amendment and the 1866 Civil Rights Act emphasized that freedom encompassed the right to be judged fairly when accused, and to expect vindication when injured.⁵⁶⁵ In the 1866 Civil Rights Act, legislators specifically enumerated guarantees fundamental to the concept of freedom, including the right to "full and equal benefit of all law . . . for the security of person and property."⁵⁶⁶ As one scholar has said, it would be "child's play" to apply the Act's guarantee of "security of person and property" to the citizen who seeks an evenhanded, im-

⁵⁶³ J. VAN DYKE, *supra* note 4, at 34.

⁵⁶⁴ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

⁵⁶⁵ Proponents of the thirteenth amendment viewed equal justice under the law as one of the "new institutions of freedom" necessary to "upturn[] the roots of this poisonous plant to dry and wither." CONG. GLOBE, 38th Cong., 1st Sess. 1369 (1864) (statement of Sen. Clark); *see supra* notes 151-53, 175-77, 212-13 and accompanying text. The importance of providing legal redress for a black crime victim is explained in *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151) and in *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872) (dissenting opinion).

⁵⁶⁶ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866).

partial jury verdict.⁵⁶⁷

Despite these goals of the thirteenth amendment and the 1866 Act, the all-white jury maintained whites' legal immunity during the next century by acquitting virtually every white person charged with committing violence against African-Americans.⁵⁶⁸ The all-white jury also upheld slavery's tradition of summarily convicting black defendants on the accusation and testimony of whites. Consequently, all-white jury verdicts reinforced the stigma of black inferiority by denying African-Americans legal protection from physical attacks and criminal accusations by whites.

Peremptory striking of prospective black jurors is a badge and incident of slavery because it perpetuates blacks' inferiority. Because the jury is considered the most democratic of American institutions,⁵⁶⁹ jury service is regarded as one of a citizen's highest duties. During the era of slavery in this country, blacks were viewed as intellectually and morally inferior to whites, and incapable of rendering judgments against them. The thirteenth amendment granted freedom for black slaves by promising equal protection and equal rights under the law.⁵⁷⁰ When the peremptory challenge is used to systematically strike black citizens from the jury box, however, the message that black citizenship is inferior to white citizenship is resoundingly clear: only white people are qualified to sit in judgment of others. The denial of justice and the badge of inferiority form the historical context in which the current use of the peremptory challenge must be analyzed.

The post-1935 reliance on the peremptory challenge to unseat black citizens from the jury box has been a subtler subterfuge than the sweeping disqualification practices previously used by legislators, prosecutors, and judges. Current usage of the peremptory challenge does not bar every African-American from serving as a juror, as slavery did for over 200 years. Nor does it prevent African-Americans from being included in the jury venire, unlike states' dis-

⁵⁶⁷ See *supra* note 229, referring to Professor Benno Schmidt who argued that an equal right to serve on juries is within the family of rights covered by the 1866 Act because it is essential to full and equal benefit of all laws providing for security of person and property.

⁵⁶⁸ See *supra* notes 366-67, 398, 432-34 and accompanying text.

⁵⁶⁹ J. VAN DYKE, *supra* note 4, at 1, 8-9. Lord Justice Patrick Devlin has called "trial by jury . . . more than an instrument of justice and more than one wheel of the constitution: It is the lamp that shows that freedom lives." SIR PATRICK DEVLIN, TRIAL BY JURY 164 (1956); see *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Smith v. Texas*, 311 U.S. 128, 130 (1940) ("For racial discrimination to result [in jury selection] . . . is at war with our basic concepts of a democratic society and a representative government"); Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1317-27 (1987).

⁵⁷⁰ See *supra* notes 151-83 and accompanying text.

enfranchisement laws and discriminatory selection practices that were first introduced during the post-Reconstruction period.

The peremptory challenge stands ready, however, to strike any individual black juror who reaches the jury box in a case involving a black person's rights. Used for this purpose, it is as effective a disqualifier of the African-American juror as the exclusionary methods it replaced. Since the peremptory challenge is a continuation of the colonial practice of excluding African-American jurors, it can be understood as an "inseparable concomitant"⁵⁷¹ of slavery subject to thirteenth amendment challenge. When African-Americans are included on a jury venire with an understanding that they will never serve as trial jurors, the humiliation of participating in this legal charade is as great "a stimulant to . . . race prejudice [and] an impediment to securing . . . equal justice"⁵⁷² as when black jurors were never even on the jury roll.

Eliminating potential black jurors means that the trial jury ultimately selected will never be "indifferently chosen"⁵⁷³ when the fate of a black defendant or crime victim is at stake. The peremptory challenge has been the primary weapon for maintaining the all-white jury system in today's race-sensitive cases. Unless black jurors are significantly represented on juries deciding these cases, the thirteenth amendment's intent to ensure equal justice for African-Americans and to eliminate the stigma of racial inferiority will remain just another "promise the Nation cannot keep."⁵⁷⁴

D. The Thirteenth Amendment's Prohibition of the Peremptory Challenge in Criminal and Civil Cases

There are three situations in which the peremptory challenge of prospective African-American jurors violates the thirteenth amendment: first, in criminal cases where the defendant is black and the prosecutor excuses black jurors ("defendant-centered"); second, in both criminal and civil cases where the victim is black and defense counsel for a white defendant seeks to eliminate black jurors ("victim-determinative"); and third, when a prosecutor or either civil party peremptorily strikes prospective black jurors, regardless of the defendant's race ("juror-focused").

In the first two examples, the thirteenth amendment's prohibi-

⁵⁷¹ The Civil Rights Cases, 109 U.S. 3, 25 (1883).

⁵⁷² *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). See *Peters v. Kiff*, 407 U.S. 493, 499 (1972) (exclusion "stigmatizes the whole class [of African-Americans], even those who do not wish to participate."); Laurie Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081, 1101 (1987) ("excluded jurors are branded with a stamp of inferiority").

⁵⁷³ 4 W. BLACKSTONE, COMMENTARIES 343 (1760).

⁵⁷⁴ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

tion against badges and incidents of slavery is triggered because of the all-white jury's present inability to assure impartial verdicts to African-Americans when they are accused, or have been victims, of crime. In the "defendant-centered" criminal model, the fair trial guarantees for accused blacks cannot be assured when they are judged by an all-white jury. The risk of racial bias is greatest when the crime victim is white or when the black defendant is charged with a crime regarded as heinous or a threat to state security. But it also exists when the defendant's accuser is black or of some other nonwhite race. In this case, an all-white jury's guilty verdict may reflect slavery's legacy of black people's dehumanization in which the life and freedom of black persons were regarded as less important than those of white persons. Consequently, whether the crime is interracial or intraracial, the thirteenth amendment should work in combination with the sixth amendment's guarantee of trial by an impartial jury of one's peers.⁵⁷⁵ This combination of constitutional rights assures that prosecutorial peremptory challenges will not be used to eliminate prospective black jurors solely for purposes of having an all-white jury determine the outcome.

In the victim-determinative criminal model, the peremptory challenge has become the white defendant's primary weapon for excluding prospective black jurors and for assuring that the all-white jury immunizes "crimes of the deepest dye" against the black citizenry. During slavery, whites were rarely prosecuted for committing crimes against blacks; from post-Reconstruction to the present, all-white juries have consistently rejected African-Americans' testimony and acquitted white defendants accused of interracial crimes.

Consequently, when the accused is a white person charged with a crime against a black person, the defense lawyer's peremptory challenge should not be used to disqualify prospective black jurors in order to create a predominantly white jury. Notwithstanding the peremptory challenge's historic importance in securing the accused an impartial jury,⁵⁷⁶ a white defendant's racially discriminatory use of the challenge violates the thirteenth amendment. The resulting all-white jury prevents a black crime victim from achieving vindication and communicates to whites that blacks are fair game as targets of crime.

This is an exception to the centuries-old sanctity of the criminal defendant's peremptory challenge. The thirteenth amendment prohibits badges and incidents of slavery, and the all-white jury's link to perpetuating injustice toward black crime victims is well documented. Consider, however, a situation where an African-American

⁵⁷⁵ See *supra* note 462.

⁵⁷⁶ See *supra* notes 27-42 and accompanying text.

defendant charged with crimes against whites peremptorily challenged prospective white jurors and selected a predominantly non-white jury.⁵⁷⁷ In this case, the thirteenth amendment would provide no support for a prosecutor seeking to prevent this defensive use of the peremptory challenge. Simply stated, no historical justification exists for the prosecution's intrusion on the black defendant's right to choose a jury he believes is impartial. The predominantly black jury was neither a badge or incident of slavery nor a symbol of whites' second-class citizenship; the white crime victim would find it extremely difficult to discover historical evidence showing that predominantly nonwhite juries have been unable to reach impartial verdicts.

In civil cases, the "defendant-centered" and "victim-determinative" thirteenth amendment models also apply when one of the parties is black and the other is white. A primary badge and incident of slavery prevented African-Americans from seeking judicial intervention to protect against a white person's mistreatment or civil breach.⁵⁷⁸ Although the 1866 Civil Rights Act guaranteed court access, the all-white jury remained an insurmountable obstacle for black litigants in civil proceedings involving a white person. In such cases, the thirteenth amendment precludes a white party's use of the peremptory challenge to strike prospective black jurors because it perpetuates the badge of slavery.

The third and final example of a thirteenth amendment violation in a criminal or civil case is "juror-focused": the constitutional violation centers on blacks' exclusion from sitting in judgment of a white defendant, and does not concern the all-white jury's inability to guarantee legal protection for African-Americans. In fact, this situation contemplates that neither the defendant nor the crime vic-

⁵⁷⁷ During jury selection in *People v. Larry Davis*, 142 Misc. 2d 881, 537 N.Y.S.2d 430 (Sup. Ct. Bronx 1988), defense lawyers used their peremptory challenges to dismiss eight white prospective jurors. The Judge ruled that *Batson v. Kennedy* applied to the defendant's peremptory challenges, as well as to the prosecution, and removed the six jurors already selected. He ordered a "completely fresh" trial, and required the defense attorneys to provide a race-neutral reason whenever striking a white juror. *N.Y. Times*, May 17, 1988, at B3, col. 1. The jury ultimately selected included African-American and Hispanic-American jurors. They returned a not guilty verdict on the attempted murder charges and convicted Davis of weapons possession, prompting a former police detective to accuse the Bronx jury of returning a "racist" verdict. *N.Y. Times*, Nov. 22, 1988, at B2, col. 3. New York Police Commissioner Ward also criticized the verdict because he believed that non-acceptance of police officer testimony was "a phenomenon occurring in this country." *Id.* According to Davis's attorney, Bronx juries are "'80% Black and Latino' . . . [and] are 'more understanding of defendants and the circumstances that bring them to court.'" Bronx juries' acquittal rate of 42% was significantly higher than the citywide average of 29%, and the 25% figure in the adjacent suburb of Westchester. *GUARDIAN*, June 15, 1988, at 7, col. 4; see *supra* notes 561-62.

⁵⁷⁸ See *supra* notes 74-84, 123-29, 209-13 and accompanying text.

tim is African-American. State law and custom traditionally regarded blacks as morally and intellectually unfit to render judgments against a white person. When the prosecutor peremptorily challenges most or all prospective black jurors in the trial of a white defendant, this reminder of blacks' subordinate status and inferiority is subject to the defendant's thirteenth amendment challenge through a *Batson*-type inquiry.⁵⁷⁹ Similarly, either civil party's challenge of black members of a trial venire may also be subject to a thirteenth amendment challenge.

E. The Remedy for a Thirteenth Amendment Violation

As discussed in *Batson*, Justice Marshall advocates abolishing the peremptory challenge in every criminal case as the "price" for eliminating the long-standing, racially discriminatory use of prosecutorial challenges. While Justice Marshall's frustration with prosecutorial practice is understandable, his suggestion that the defendant's peremptory challenge also be eliminated goes far beyond what is required to accomplish the goal of a racially neutral jury verdict. The defendant's peremptory challenge need only be eliminated when used to keep blacks from serving as jurors when the defendant is white and the crime victim is black. Marshall's remedy also fails to address the racially discriminatory use of the peremptory challenge in civil cases.⁵⁸⁰ Therefore, it falls short of assuring a

⁵⁷⁹ The prosecutor's peremptory challenge has been the primary method used to exclude African-Americans from jury duty. The stigma of racial inferiority is strongest when state policy affirmatively maintains the discriminatory practice against an entire group. Consequently, by requiring the prosecutor to explain the peremptory challenge of a black juror in every criminal case, the judiciary serves as a curb against perpetrating the prosecutor's racially discriminatory challenge.

The historic importance of the defendant's peremptory challenge to protect an accused's fair trial rights makes it immune from court scrutiny, except when used by a white defendant to eliminate black jurors from sitting in a criminal case when the victim was also a black person. See *supra* notes 26-41 and accompanying text. Although defense lawyers used the challenge to dismiss prospective African-American jurors, their reasons reflected, in part, the futility of placing a single African-American juror on a jury while segregation was the law of the land. In *United States ex. rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir. 1959), Judge Rives acknowledged "that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries 'because it would generate enormous public prejudice.'"

⁵⁸⁰ *Batson* did not address whether a civil litigant's use of peremptory challenges to exclude African-American jurors is subject to equal protection analysis. Some courts applying *Batson* have found that the state's involvement in the civil jury selection process demonstrates sufficient "state action" for fourteenth amendment purposes. See *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990); *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989); *Clark v. Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986); Comment, *Edmonson v. Leesville Concrete Company, Inc.: Can the "No State Action" Shibboleth Legitimize the Racist Use of Peremptory Challenges in Civil Action*, 23 J. MARSHALL L. REV. 271 (1990) (authored by David Pork); Comment, *Recent Cases*, 103 HARV. L. REV. 586-91

racially neutral jury verdict in a civil proceeding where one of the parties is black.

Criminal defendants generally rely on the peremptory challenge to assure that the selected jurors will be fair and impartial.⁵⁸¹ Because of a strong, pro-prosecution bias among prospective jurors,⁵⁸² this is difficult to accomplish. Most prospective jurors enter the courtroom prepared to convict an accused, notwithstanding legal and evidentiary protections.⁵⁸³ Although a juror's bias, racial or otherwise, may be exposed during the voir dire,⁵⁸⁴ responses

(1989); Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 *RUTGERS L. REV.* 891, 949-55 (1988) (authored by Gerard G. Brew). Other courts and commentators have concluded that *Batson* is inapplicable in civil trials. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308 (5th Cir. 1988), *reh'g granted*, 895 F.2d 218 (1989) (en banc); *Esposito v. Buonome*, 642 F. Supp. 760 (D. Conn. 1986); Timothy Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 *TEX. TECH. L. REV.* 921, 929-30 (1988); Note, *Viitation of Peremptory Challenge in Civil Actions*, 61 *ST. JOHN'S L. REV.* 155, 163 (1986) (authored by David Kaston).

⁵⁸¹ J. VAN DYKE, *supra* note 4, at 139 ("[m]any attorneys believe that trials are frequently won or lost" during jury selection); see *Patton v. United States*, 281 U.S. 276, 296-97 ("right of trial by jury primarily for the protection of the accused"); *Pointer v. United States*, 151 U.S. 396, 408 (1894) ("one of the most important rights secured to the accused"); *Lewis v. United States*, 146 U.S. 370, 376 (1892) ("the right of [peremptory] challenges . . . has always been held essential to the fairness of trial by jury"); Hans Ziesel & Sheri Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdicts: An Experiment in a Federal District Court*, 30 *STAN. L. REV.* 491, 518-19 (1978).

⁵⁸² NATIONAL JURY PROJECT, *JURYWORK: SYSTEMATIC TECHNIQUES 3-5* (2d ed. 1987) (indicating that in a case where a black defendant was accused of assaulting a white police officer, half of 32 prospective jurors were predisposed to convict while only one prospective juror began with a pro-defendant bias).

⁵⁸³ NATIONAL JURY PROJECT AND NATIONAL LAWYERS GUILD, *THE JURY SYSTEM 2* (1975) (finding that 60% of prospective jurors were unable to follow court instructions that a defendant is presumed innocent and that the prosecution, not the defense, has the burden of proof in a criminal case).

⁵⁸⁴ Courts are not required to permit defense voir dire questioning of prospective jurors solely because a black defendant is charged with a crime against a white person. *Ristaino v. Ross*, 424 U.S. 589, 594-98 (1976). However, when the defendant claims the criminal charge is based on racial prejudice, and requests that such questioning be permitted, the court (not the defense) must conduct a voir dire. *Ham v. South Carolina*, 409 U.S. 524, 526 (1973). If the charge involves a violent, interracial crime, a federal court is required to make a similar inquiry. *Rosales-Lopez v. United States*, 451 U.S. 182, 189-92 (1981). In *Turner v. Murray*, 476 U.S. 28, 33-37 (1986), the Supreme Court slightly modified the *Ristaino* rule for state court criminal trials; a defendant accused of a capital crime is permitted to submit a single question on the issue of sentencing, but not on the issue of guilt.

It is unlikely that a court's limited inquiry will expose a juror's prejudice. For jury selection to be meaningful, the defense attorney must conduct the voir dire. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) ("voir dire play a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored"). In some situations, the juror inquiry should be held outside the presence of the remaining jurors and the defense attorney should be permitted to submit a pre-voir dire questionnaire before conducting the examination. *Developments, supra* note 5, at 1582-84.

given during this process are unlikely to result in a successful challenge for cause. In practice, trial judges commonly reject such challenges,⁵⁸⁵ and such a ruling is no less likely when the argument is based on a juror's perceived racial prejudice. If a judge is consciously or unconsciously racist, he or she will have even more difficulty identifying racial prejudice as a legally sufficient ground on which to disqualify a juror.⁵⁸⁶

It is unrealistic to expect that the challenge for cause could serve as an adequate replacement for the defendant's peremptory challenge of a juror who is believed to have prejudged guilt.⁵⁸⁷ If the defendant's peremptory challenge was abolished, an accused would be unable to disqualify someone whom she felt uneasy about because of that person's "looks and gestures,"⁵⁸⁸ and would be vulnerable to being judged by the first jurors called to jury duty. Peremptory challenges are necessary to protect the defendant's right to an impartial jury, and must remain immune from prosecutorial or judicial scrutiny in the ordinary criminal case.

Crimes allegedly committed by white people against African-Americans are not "ordinary crimes," however.⁵⁸⁹ When viewed

⁵⁸⁵ Babcock, *supra* note 3, at 549-50 (cause challenges are frequently denied when a juror says she will decide a case on the evidence; cause challenges rarely "screen . . . those who share biases and prejudices common to a racial or ethnic group" unless the jurors admit their biases). Van Dyke refers to "jurors [who] are likely to answer questions according to whether they want to serve or not, and may not admit to certain prejudices, especially race and religious prejudices." J. VAN DYKE, *supra* note 4, at 162-63. In *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert denied*, 461 U.S. 961 (1983), the New York Court of Appeals recognized the difficulty of demonstrating racial bias during jury selection:

First, jurors may be reluctant to admit their prejudices before spectators or others present during the voir dire. Second, certain prospective jurors may evade full disclosure of their prejudices in an effort to avoid being struck from the jury. Finally, other prospective jurors may simply be unaware of the existence of certain biases or prejudices they may harbor.

Id. at 547, 443 N.E.2d at 918, 457 N.Y.S.2d at 444.

⁵⁸⁶ *Batson v. Kennedy*, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring). Courts are generally reluctant to allow an extensive voir dire concerning a prospective juror's racial prejudice because they claim it takes too much court time and is too sensitive a subject for deeper inquiry. See *supra* notes 484-92 and accompanying text. It is also rare that a trial court will grant a challenge for cause based on a defendant's perception that a juror is racially biased. See *supra* notes 584-85; *infra* note 588.

⁵⁸⁷ See *supra* note 495.

⁵⁸⁸ Historically, the defendant's peremptory challenge has been necessary to excuse prospective jurors whom the accused believes has a pro-prosecution bias. See *supra* note 32 and accompanying text. In race-sensitive cases, many jurors rarely admit racial prejudice; others are unaware that they hold these attitudes. Because defense challenges for cause are ineffective in removing such jurors, the defendant's peremptory challenge is the only procedure for dismissing a white prospective juror who evidences racial hostility toward a defendant. See Jeffrey Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry Into Prejudice*, 48 U. COLO. L. REV. 522-25 (1977); Johnson, *supra* note 6, at 1675; Massaro, *supra* note 8, at 525.

⁵⁸⁹ In *United States v. Cruikshank*, 1 Woods 308, 25 F. Cas. 707 (C.C. La. 1874)

historically, they reflect a legacy of slavery in which "crimes of the deepest dye were committed by white men with immunity" against African-American people.⁵⁹⁰ When black jurors are peremptorily dismissed, the resulting white jury perpetuates this immunity policy by rarely convicting white defendants accused of crimes against the black citizenry. If the "war on race"⁵⁹¹ is to be won, and the legislative intent of the thirteenth amendment and subsequent civil rights legislation is to be realized,⁵⁹² African-Americans must be provided with legal protection against the criminality of whites. This can be achieved only by eliminating the racial use of the defendant's peremptory challenge.

The most common abuse of the peremptory challenge is by prosecutors who strike most, if not all, prospective black jurors, particularly when the defendant is African-American. Since *Swain* was decided in 1965, commentators and courts have "spilled much ink"⁵⁹³ denouncing this practice on equal protection and sixth amendment grounds. The thirteenth amendment also condemns the prosecutor's racially inspired peremptory challenge based upon its unconstitutionality, and thus requires a prosecutor to challenge African-American jurors only for a race-neutral cause.

When the criminal defendant is not African-American, however, prosecutors are not automatically prevented from peremptorily challenging black jurors. Such challenges may be subject to defense objections and judicial scrutiny under a *Batson*-type, juror-focused inquiry.⁵⁹⁴ According to this juror-focused model, criminal defendants may seek to establish a prima facie case of racial exclusion whenever prosecutors target black jurors for peremptory dismissal. If defendants meet this burden, prosecutors would be required to provide trial related, nonracial explanations for exclusion. In civil cases, the same procedure would apply: either party could challenge and require the other to provide a race-neutral basis for excusing prospective black jurors.

This thirteenth amendment analysis is less drastic than Justice

(No. 14,847), *aff'd*, 92 U.S. 542 (1875), Justice Bradley distinguished between a citizen's "ordinary crimes" and those he characterized as "crimes of race." In arguing that unredressed violence against African-Americans represented a badge and incident of slavery, Bradley argued that the thirteenth amendment provided federal jurisdiction for prosecuting crimes involving interracial violence. See *supra* notes 291-99 and accompanying text. In these race-sensitive cases, the thirteenth amendment and the 1866 Act require that the peremptory challenge be abolished to assure an impartial jury verdict. See *supra* note 297.

⁵⁹⁰ *United States v. Rhodes*, 1 Abb. 28, 27 F. Cas. 785, 787 (C.C. Ky. 1866).

⁵⁹¹ *Cruikshank*, 25 F. Cas. at 714.

⁵⁹² See *supra* notes 150-52, 566 and accompanying text.

⁵⁹³ *Batson v. Kentucky*, 476 U.S. 79, 95 (1986) (Marshall, J., concurring).

⁵⁹⁴ See *supra* note 579 and accompanying text.

Marshall's sweeping elimination of the peremptory challenge, and is finely tailored to the dimensions of the problem at issue. It maintains the peremptory challenge as a time honored, constitutional protection for an accused, while preventing its abuse in perpetuating two severe incidents of slavery—the denial of justice and the denial of jury participation.

Although barring the peremptory challenge in cases involving the rights of a black person is necessary to overcome the exclusion of prospective black jurors, it is only the first step in assuring an impartial jury verdict. By itself, disallowing the peremptory challenge will not remedy the constitutional violation. To guarantee race-neutral jury verdicts, one must combine the power of the sixth amendment with that of the thirteenth amendment to affirmatively assure that racially mixed juries are selected.

If "representativeness is the key to impartiality,"⁵⁹⁵ a race neutral verdict is achieved when at least three black jurors are selected to judge a criminal or civil case that involves the rights of a black person. According to studies in group behavior, a *minimum* of three people is required to withstand the combined pressures of the majority on a twelve person jury.⁵⁹⁶ While this article does not focus on specific mechanisms that might be used to accomplish this objective, a logical approach begins by reviewing jury selection measures. Reforms may be necessary to ensure that African-American juror candidates comprise at least twenty-five percent of venire panels. In counties where the African-American population is greater than twenty-five percent, the jury venire should reflect the actual population of African-Americans who are eligible for jury duty. This figure may then be used as the statistical yardstick⁵⁹⁷ for ensuring that "the

⁵⁹⁵ Developments, *supra* note 5, at 1587 ("If courts are to take seriously the mandate of eliminating racial bias in the criminal process, . . . a representative [jury] is required in every criminal case.").

⁵⁹⁶ See Johnson, *supra* note 6, at 1694.

⁵⁹⁷ In *Castaneda v. Partida*, 430 U.S. 482 (1977), the Supreme Court applied such a standard in finding that Mexican-Americans were underrepresented on grand jury panels. Noting that Mexican-Americans represented about 80% of the county population, but comprised only 40% of grand juries, the Court stated that "any underrepresentation of a cognizable radical group on a jury venire exceeding standard probability deviations establishes a prima facie case of discrimination." *Id.* at 496-97. A similar comparison between African-Americans' percentage of the local population and their relative numbers in the jury pool would reveal whether underrepresentation existed prior to jury selection and whether additional jurors should be included in the venire. Note, *Batson v. Kentucky*, *supra* note 5, at 755; Note, *The Peremptory Challenge and the Racially Impartial Jury*, 92 N. KY. L. REV. 91, 123-24 (1987).

In counties where African-Americans represent less than 25% of the population, jury venire selection procedures should target eligible African-American jurors in adjacent counties to be called for jury duty. Where this proves ineffective or unrealistic, trial courts should be receptive to granting a defendant's motion for a change of venue to a county with a more substantial black population.

makeup of individual juries [will] correspond reasonably with the community population."⁵⁹⁸

When African-Americans are adequately represented on the venire panel, a jury's verdict should reflect race-neutrality. In addition, African-Americans' participation in the administration of justice will help to eliminate the stigma of group racial inferiority.⁵⁹⁹ Finally, the racially mixed verdict would be a step toward legitimizing the criminal justice system in the eyes of the African-American community, which currently has little faith in the legal system's ability to be fair and to dispense evenhanded justice.⁶⁰⁰

CONCLUSION

[p]erhaps hereafter some explorer in our history shall find for the astonishment of his times, deep buried in the strata of political geology, a monster fossil more wonderful than the mastodon, and more terrible than the pterodactylus, which shall be recognized as the last vestige of African slavery.⁶⁰¹

One hundred twenty-five years have passed since New York Congressman Davis realized that in order to "make every race free and equal before the law . . . every vestige of African slavery [must be removed] from the American republic."⁶⁰² Legislators like Davis passed constitutional amendments and federal legislation to uproot the institution of slavery and to destroy the badge of African-Americans' legal inferiority.⁶⁰³ African-Americans soon discovered that many of these legal rights and protections were meaningless because all-white juries denied them impartial justice. Indeed, Leo Edwards probably spoke for many African-American defendants faced with an all-white jury at trial when he remarked, "You know how I felt when I saw the jury? I said, 'I'm dead.'"⁶⁰⁴

⁵⁹⁸ Developments, *supra* note 5, at 1587.

⁵⁹⁹ *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (harm "extends beyond that inflicted on the defendant . . . to touch the entire community").

⁶⁰⁰ *Batson* recognized that when African-American jurors are peremptorily disqualified from serving as jurors, their exclusion "undermines public confidence in the fairness of our system of justice." *Id.* at 87. In a recent national survey, 80% of the African-American community surveyed indicated that they believed that blacks are not treated equally in the criminal justice system. *N.Y. Times*, Jan. 12, 1989, at A18, col. 1.

⁶⁰¹ *CONG. GLOBE*, 38th Cong., 2d Sess. 155 (1865) (statement of Rep. Davis of New York).

⁶⁰² *Id.*

⁶⁰³ In the ten-year period between 1865 and 1875, Congress passed seven civil rights statutes and introduced the thirteenth, fourteenth and fifteenth amendments to the constitution.

⁶⁰⁴ *N.Y. Times*, June 22, 1989, at A14, col. 3. Leo Edwards was convicted by an all-white jury of participating in the shooting death of a white store owner, and was sentenced to death. Until the day he was executed in a Mississippi gas chamber, Edwards continually maintained his innocence.

As suggested by relevant sociological data, token representation of African-American jurors is not enough to ensure an impartial verdict.⁶⁰⁵ Poet Audrey Lorde captured the experience of a lone black juror who ultimately joined eleven white jurors and acquitted a white police officer for fatally shooting a ten-year-old black child:

Today, that 37 year-old white man with 13 years of police forcing has been set free by 11 white men who said they were satisfied Justice had been done and one black woman who said "They convinced me" meaning they had dragged her 4'10" black woman's frame over the hot coals of four centuries of white male approval until she let go the first real power she ever had and lined her own womb with cement to make a graveyard for our children.⁶⁰⁶

Prosecutors⁶⁰⁷ and defense lawyers⁶⁰⁸ continued use of the racially inspired peremptory challenge perpetuates a primary badge of

⁶⁰⁵ See *supra* notes 548-63 and accompanying text.

⁶⁰⁶ AUDREY LORDE, *Power*, in *THE BLACK UNICORN* 108-09 (1978).

⁶⁰⁷ Prior to *Batson*, prosecutorial use of the racially discriminatory peremptory challenge was accepted practice in states. See *supra* notes 459, 462. In *Batson*, Justice Marshall referred to Dallas prosecutors who systematically eliminated prospective black jurors in every case where the accused was also black. *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (quoting J. VAN DYKE, *supra* note 4, at 152). In 1983, this practice resulted in an armed robbery conviction of Lenell Greer, a black engineer who had never previously been arrested. Despite testimony by nine white coworkers that Greer was at his job when the robbery occurred, the all-white jury convicted Greer and sentenced him to life imprisonment. National and local media criticism ultimately led the Dallas prosecutor to reopen the case, and dismiss the charges against Greer. PAULA DiPIERNA, *JURIES ON TRIAL* 154-55 (1984).

In *Guilliard v. Mississippi*, 464 U.S. 867 (1983), Justice Marshall described the prosecution's common jury selection strategy in capital cases when a black defendant is charged with a crime against a white person:

The facts . . . follow a now familiar pattern: For-cause challenges by both defense counsel and the prosecution leave an integrated jury panel. The prosecution then resorts to peremptory challenges to remove Negro members of the panel. . . . The all-white jury proceeds to hear the case and sentence the Negro defendant to death.

Id. at 868.

⁶⁰⁸ In a number of highly publicized criminal cases this decade, defense lawyers have excused black jurors and selected only white jurors to judge cases involving white defendants and black crime victims. In the South, charges of whites' racially motivated violence against blacks surfaced in Miami, Florida; Chattanooga, Tennessee; Greensboro, North Carolina; and Hemphill, Texas. P. DiPIERNA, *supra* note 607, at 163-64, 171-73. Following all-white juries' acquittals of Miami police officers in 1980 and in 1984, the black community's response resulted in extensive personal injury and property damage. A Governor's Report identified the exclusion of black jurors, and the resulting all-white jury as a cause of the 1980 riot, and a reason why the African-American community had little trust in Miami's criminal justice system. *Andrews v. State*, 438 So. 2d 489, 492 n.4 (Fla. Dist. Ct. App. 1983) (Ferguson J., dissenting); James R. Jorgenson, *Back to the Laboratory with Peremptory Challenges: A Florida Response*, 12 FLA. ST. U.L. REV. 558 (1984); *Miami Times*, June 23, 1983, at 1, col. 1; *N.Y. Times*, Nov. 13, 1989, at 1, col. 1; *id.* at B6, col. 5. In 1989, Miami officials braced for a comparable reaction in the event that a trial jury acquitted a Hispanic officer accused of killing a black motorcyclist. However, the six-person jury, which included two African-Americans, convicted the officer and the

slavery—the denial of impartial justice for African-American defendants and crime victims. Even before the thirteenth amendment was passed, African-Americans knew that “justice” in the courtroom

African-American community celebrated the verdict. *See* N.Y. Times, Dec. 6, 1989, at 1, col. 1.

In November 1980, an all-white Greensboro jury acquitted eight Ku Klux Klan defendants of charges that they murdered five Communist Workers Party members who had been active in organizing black textile workers. Four years later, the defendants faced federal civil rights charges. They again peremptorily challenged every black juror, and were acquitted by the all-white federal jury. P. DiPIERNA, *supra* note 607, at 171-73.

In 1988, in Hemphill, Texas, 11 white jurors and one black juror (a housekeeper who worked for one of the white jurors) acquitted a police chief and two deputy sheriffs of civil rights violations in the killing of Loyal Garner, who had died after being taken into police custody. The jury rejected testimony of black witnesses who said that the defendants had repeatedly beaten Mr. Garner and refused to give him medical care. N.Y. Times, July 10, 1988, at 16, col. 4; N.Y. Times, July 17, 1988, at 14, col. 5.

The defense strategy of selecting an all-white jury has not always succeeded. When the Hemphill defendants were tried on murder charges in Tyler, Texas, an all-white jury found each guilty and sentenced them to 28, 14, and 10 years in prison. Officials indicated the defendants would serve only one year in ten if the conviction was affirmed. N.Y. Times, May 11, 1990, at A1, col. 4. And in 1988 an all-white jury convicted a white defendant of murdering (by hanging) African-American Michael Donald. During jury selection, the defense lawyers had struck each of the 21 potential black jurors. *See* *Alabama v. Cox*, 488 U.S. 1018 (1988).

Defense lawyers in the North have also relied on the peremptory challenge to eliminate prospective black jurors when defending a white person or police officer on charges of racially motivated violence. Unlike the pre-*Batson* southern trial jury, the northern jury in these cases typically included one, and sometimes two, black jurors. Although the northern jury has sometimes convicted white defendants who have committed violence against blacks, these defendants are always convicted on reduced charges. *People v. Bova*, 68 N.Y.2d 810, 499 N.E.2d 875, 507 N.Y.S.2d 1026 (1986) (defense peremptorily dismissed all thirteen prospective black jurors; all-white jury acquitted white defendant of murdering black transit worker Willie Turks, but convicted him of lesser charge of reckless manslaughter); *Holtzman v. Supreme Court*, 139 Misc.2d 109, 526 N.Y.S. 2d 892 (S. Ct. Westchester Co. 1988); *People v. Wiggins*, 70 N.Y.2d 878, 518 N.E.2d 16, 523 N.Y.S.2d 505 (1987) (defense peremptorily dismissed all nineteen prospective black jurors; all-white jury acquitted three white defendants in assault of three black Veterans Administration workers); *People v. Goetz*, 73 N.Y.2d 751, 532 N.E.2d 1273, 536 N.Y.S.2d 45 (1988) (defense struck all but two black prospective jurors; jury acquitted defendant of most serious attempted murder and assault charges in shooting of four black teenagers, and return conviction on unlawful weapon possession); *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990) (defense struck each prospective black juror until trial court applied *Batson* ruling to defense; the eleven person white, one person black jury acquitted three white defendants of murdering a black man in Howard Beach, N.Y. and convicted of less serious manslaughter and assault charge). For a fourteenth amendment argument that *Batson* should not apply to a defendant's use of peremptory challenges, see Goldwasser, *supra* note 496; *cf.* Comment, *Prosecution Right to Object to a Defendant's Abuse of Peremptory Challenges*, 93 DICK. L. REV. 143 (1989) (authored by Michael Sullivan).

The dramatic increase in racial violence suggests that, in race-sensitive cases in the 1990s, defense lawyers will continue to rely on the peremptory challenge to achieve an all-white, or predominantly white jury when defending a white person. *See Reports of Racial Violence on the Rise*, KLANWATCH INTELLIGENCE REPORT (Nov. 28, 1989); Jones, *supra* note 13; Matsuda, *supra* note 380; Note, *Bias Crimes: On Conscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845, 845-46 (1990) (authored by Tanya Hernandez).

and legal "protection" for themselves depended on black citizens serving as trial jurors.⁶⁰⁹ During Reconstruction, an Alabama black convention recognized that significant black representation on juries was necessary to ensure impartial jury verdicts. In 1874, it passed a resolution that guaranteed a black party to a lawsuit the right to demand a jury "composed of not less than one-half of his own race."⁶¹⁰

Peremptory challenges should be abolished in race-sensitive cases to permit meaningful representation by black trial jurors. Only then will the thirteenth amendment's promise be realized—impartial courtroom justice for *all* citizens.

⁶⁰⁹ See *supra* notes 171-74, 257-61 and accompanying text.

⁶¹⁰ E. FONER, *supra* note 14, at 539. Foner refers to black leaders who argued in 1873-74 that race, historically "the cause of exclusion", must now become a "ground of recognition until the scales are once more balanced."

Throughout this country's history, the presence of black jurors has almost always been required to gain justice for African-American victims of whites violence against them. See *supra* notes 254-63 and accompanying text (describing a three year period during Reconstruction—1870 to 1873—in which significant representation of African-American trial jurors resulted in successful prosecutions of Klan violence); see also *supra* notes 548-63 and accompanying text (describing studies in which the multi-racial jury is the best guarantor of impartial justice when African-American rights are at stake).