

# **CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE**

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## **Class One - Part Two**

### **A BRIEF HISTORICAL PERSPECTIVE**

The death penalty, the criminal justice system and today's mass incarceration must be viewed in the context of the role that the criminal justice system has played with regard to race throughout American history – maintaining slavery; permitting convict leasing, which perpetuated slavery well into the twentieth century; terrorism (lynchings and other racial violence) and Jim Crow Justice.

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### **RESOLUTIONS PROPOSED FOR ANTI-CAPITAL PUNISHMENT MEETING**

October 7, 1858, Rochester, New York

Resolved, That life is the great primary and most precious and comprehensive of all human rights – that whether it be coupled with virtue, honor, or happiness, or with sin, disgrace and misery, the continued possession of it is rightfully not a matter of volition; that it is neither deliberately nor voluntarily assumed, nor to be deliberately or voluntarily destroyed, either by individuals separately, or combined in what is called Government; that it is a right derived solely and directly from God – the source of all goodness and the center of all authority – and is most manifestly designed by Him to be held, esteemed, and revered among men as the most sacred, solemn and inviolable of all his gifts to man.

Resolved, That the love of man as manifested in his actions to his fellows, whether in his public or private relations, has ever been the surest test of the presence of God in the soul; that the degree in which the sacredness of human life has been exemplified in all ages of the world, has been the truest index of the measure of human progress; that in proportion as the tide of barbarism has receded, a higher regard has been manifested for the God-given right to life, its inviolability has been strengthened in proportion to the development of the intellect and moral sentiments, and that conscience, reason and revelation unite their testimony against the continuance of a custom, barbarous in its origin, antichristian in its continuance, vindictive in its character, and demoralizing in its tendencies.

Resolved, That any settled custom, precept, example or law, the observance of which necessarily tends to cheapen human life, or in any measure serves to diminish and weaken man's respect for it, is a custom, precept, example and law utterly inconsistent with the law of eternal goodness written on the constitution of man by his Maker, and is diametrically opposed to the safety, welfare and happiness of mankind; and that however ancient and honorable such laws and customs may be in the eyes of prejudice, superstition and bigotry, they ought to be discountenanced, abolished, and supplanted by a higher civilization and a holier and more merciful Christianity.

Resolved, That in the opinion of this meeting, when a criminal is firmly secured in the iron grasp of the government, and on that account can no

longer endanger the peace and safety of society; that when he is wasted and emaciated by heavy chains and horrid thoughts, and long confinement in a gloomy cell – when, as is often the case, he is completely transformed, both in temper and spirit – the execution of the death penalty on such an one is an act of cold blooded and barbarous enormity, and is as cowardly as it is cruel, and that instead of repressing and preventing the horrid crime of murder, it really serves by shocking and blunting the finer and better feelings of human nature, to undermine respect of human life, and leads directly to the perpetration of the crime which it would extinguish.

Resolved, That the time to advance opinions and principles is when those opinions and principles are upon trial, and threatened with outrage; and that while we have respectfully remained silent till the ends of justice have been served in fixing the guilt of the criminal, we now come in the sacred office of humanity and benevolence, to appeal for mercy at the hands of his Excellency, Governor King, on behalf of young Ira Stout, and to ask that his punishment shall be commuted from being capitally executed to imprisonment for life.

Resolved, That punishment as such, is a form of revenge, wreaks upon the criminal the pain he has inflicted on another, wrong in principle and pernicious in practice; arises out of the lowest propensities of human nature, and is opposed to the highest civilization; that it has no sanction in the spirit and teachings of Christ, which everywhere abound in loving kindness and forgiveness.

Resolved, That rather than visit the crime upon the head of the criminal, thus descending to his level, we ought to place him in a position to develop his higher nature; and instead of descending to a spirit of revenge, and degrading ourselves on the one hand, and the criminal on the other, we should urge a thorough reform in our criminal laws – basing them on the truly Christian principle of love and good will towards man, and to reject forever the cold blooded and barbarous principle of retaliation.

Resolved, That a copy of the foregoing resolutions, and the proceedings of this meeting, be transmitted to his Excellency, Governor King, as an expression of the sense of this meeting, and that the same be subscribed by the Chairman and Secretary thereof.

Frederick Douglass, Chairman.  
J. Bower, Secretary.  
*The Liberator*, October 22, 1858.

### **38 Dakota Indians executed in 1862 in largest mass execution**

The largest mass execution in United States history occurred on December 26, 1862, when thirty-eight Dakota Indians were hanged in Mankato, Minnesota for killing approximately 490 settlers, including women and children, in raids along the Minnesota frontier. They were followers of the Dakota leader Little Crow, according to the federal government.

The raids came after tensions between the Dakota, historically called the Sioux, and the settlers. Among other things, the Dakota did not receive food and supplies promised in a series of broken peace treaties. Brig. Gen. Henry Hastings Sibley rounded up over 400 Dakota and “mixed blood” men. A military court sentence 303 to death, but President Lincoln fully pardoned or commuted the sentences of 265.

One of those whose sentences was commuted, We-Chank-Wash-ta-don-pee, often called Chaska (pronounced chas-KAY), was nevertheless executed. It is unclear whether this was the result of mistaken identity – that he had been confused with another Dakota named Chaskey-don or Chaskey-etay, who had been condemned for murdering a pregnant woman – or rumors that he was romantically involved with a white woman.

He had captured and held Sarah Wakefield and her children during the Dakota War, but Wakefield defended him at his military tribunal, testifying that Chaska protected her and her

children and kept them from certain death at the hands of his fellow tribesmen. Wakefield believed that Chaska was executed in retaliation for her testimony and in reaction to the rumors of their relationship. She denied an intimate relationship, later writing, "I loved not the man, but his kindly acts."<sup>1</sup>

## Denial of Equal Protection After the Civil War

No state shall . . . deprive any person of life, liberty, or property, without due process of law; deny to any person the equal protection of the laws.

- Amendment XIV, Constitution  
of the United States (ratified 1868)

After the Civil War, adoption of the Fourteenth and Fifteenth Amendments to the Constitution guaranteed equal protection and voting rights for blacks, but voting rights were not obtained until the 1960s and the struggle for equal protection continues.

Congress enacted the first Civil Rights Act in 1866 (overriding President Johnson's veto on April 9), guaranteeing blacks and whites the same rights to make contracts and own property. But concern about its constitutionality prompted sponsorship of the Fourteenth Amendment. Section 1 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.

Section 5 gives Congress the power to enforce the amendment through "appropriate legislation." Following ratification in 1870 of the Fifteenth Amendment providing that the right to vote was not to be denied "on account of race, color, or previous condition of servitude," Congress passed the Enforcement Act which made criminal the intimidation and conspiracies to deny the right to vote as well as conspiracies to hinder the "free exercise and enjoyment of any right or privilege guaranteed or secured . . . by the Constitution or laws of the United States."

These provisions required state and local governments to provide legal procedure before depriving any person of life, liberty or property. "[I]t forbade the system of quasi-formalized mob justice that had been the chief means of enforcing southern orthodoxy on race."<sup>1</sup> The equal protection clause dealt with the failure of state officials to protect black citizens as had occurred in two massacres in 1866.

A riot in Memphis, May 1-3, ended on the third day after federal troops were sent to quell the violence. A subsequent [report](#) by a joint Congressional Committee found that blacks suffered most of the injuries and deaths: 46 blacks and 2 whites were killed, 75 blacks injured, over 100 black persons were robbed, five black women were raped, and 91 homes, four churches and eight schools burned in the black community. A large portion of the city's white police officers and firemen were among the perpetrators.<sup>2</sup>

Two months later, blacks marching in New Orleans toward the state's constitutional convention in support of black suffrage and

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1. Sarah F. Wakefield, *SIX WEEKS IN THE SIOUX TEPEES: A NARRATIVE OF INDIAN CAPTIVITY* (edited, annotated and with an introduction by June Namias, 1864); see also Robert K. Elder, *Execution 150 Years Ago Spurs Calls for Pardon*, N.Y. TIMES, Dec. 14, 2010 at A18.

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1. See William J. Stuntz, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 103-04 (2011).

2. See Eric Foner, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* at 261-62 (1989).

disenfranchisement of former Confederate officials were attacked by whites who threw bricks at them. Some marchers then fired into the white crowd. White police officers responded by attacking the marchers, killing 34 blacks and wounding over 100. Four white were killed.<sup>3</sup>

Eight years after the Fourteenth Amendment was ratified to prevent such violence against African Americans, the Supreme Court severely limited the scope of the equal protection clause and the statutory protections that accompanied it.

In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court reversed the convictions of some of the perpetrators of the Colfax Massacre in 1873. Approximately 150 blacks occupied the courthouse in Colfax, Louisiana, along with the white sheriff and judge, as part of a struggle between blacks and white for control of the county government. The sheriff deputized the black men to protect the county property before leaving with the judge.

On Eastern Sunday – April 13, 1873 – whites attacked the courthouse, set it on fire and shot blacks as they fled the building. Between 62 to 81 blacks were killed, many of them while surrendering or attempting to do so.<sup>4</sup> The U.S. Attorney obtained 98 indictments, but only nine people were arrested and tried. At the first trial, one defendant was acquitted and the jury could not reach a verdict with regard to the others. At the second trial, five were acquitted and three were convicted. In considering their appeals, the Court held that the Fourteenth Amendment applied only to government officials and did not authorize laws prohibiting acts of violence or discrimination by private citizens. *Cruikshank*, 92 U.S. at 554-55. The Court later struck down Reconstruction-era civil rights legislation barring

discrimination in public accommodations on the same basis – that the Fourteenth Amendment applied only to government officials – in the Civil Rights Cases, 109 U.S. 3 (1883).

In *United States v. Reese*, 92 U.S. 214 (1876), decided the same day as *Cruikshank*, the Court reversed the convictions of officials who refused to register blacks to vote in violation of the Fifteenth Amendment. The Court held that the prosecution was required not only to prove intent to do the challenged acts, but also to prove the defendant's conduct was *racially motivated*. *Reese*, 92 U.S. at 217-22. It is difficult to prove motive or specific intent to discriminate since it is usually difficult to reliably discern why a person acted in a certain way.

The Supreme Court thus eviscerated these constitutional protections at a time when southern blacks most desperately needed them.<sup>5</sup> By 1929, blacks were barred from the polls, locked in third-rate schools, excluded from white neighborhoods and consigned to menial jobs with restrictions such as not allowing them to leave their jobs and giving their employers the right to use physical punishments to discipline them. African Americans were denied due process in the criminal courts and equal protection in the enforcement of laws, the most egregious example being the failure to prosecute people who carried out lynchings and engaged in other acts of terrorism against blacks. In many states, particularly in the South, racial discrimination was not only allowed and practiced, discrimination was required by law. The Supreme Court repeatedly found that its complicity was required by the Constitution. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the constitutionality of state laws requiring racial segregation in public facilities under the doctrine of “separate but equal”).

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3. *Id.* at 262-63; James J. Hollandsworth, Jr. AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866, at 140-41 (2001).

4. Charles Lane, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT AND THE BETRAYAL OF RECONSTRUCTION (2008).

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5. See William J. Stuntz, *supra*, 99-119 (2011).

## Extra-judicial executions, states' rights and "federal interference"

Why do they lynch Negroes, anyhow? With a white judge, a white jury, white public sentiment, white officers of the law, it is just as impossible for a Negro accused of a crime, or even suspected of crime, to escape the white man's vengeance or his justice as it would be for a fawn to escape that wanders accidentally into a den of hungry lions. So why not give him the semblance of a trial?<sup>1</sup>

Terrorism – nightriders, Ku Klux Klan raids, race riots, lynchings and torture – was a tactic widely employed in resisting and overcoming Reconstruction governments after the Civil War, restoring white supremacy, maintaining the oppression of African Americans (denying them the vote, education, opportunity and justice), and – above all with regard to lynching – protecting white womanhood from the black man as bestial rapist.

Lynchings had previously occurred in the Far West and Midwest and most of the victims had been white, along with Indians, Latino, Asians and blacks, "[b]ut in the late 1890s, lynching and sadistic torture rapidly became exclusive public rituals of the South, with black men and women as the primary victims."<sup>2</sup> Lynchings occurred all over the country, but 90% occurred in the South. White people were also lynched, as were members of other racial groups, but three-fourths of those lynched were black.

Lynchings often involved torture, mutilation and vicious sadism as well as killing. Victims of lynchings were beaten, castrated, whipped

severely, shot or cut with knives before being hung; others had hot irons applied to parts of their bodies; some were roasted over fire or doused with gasoline and burned; and, on occasion, parts of the body were severed before or after death and distributed as souvenirs. "To kill the victim was not enough; the execution became public theater, a participatory ritual of torture and death, a voyeuristic spectacle prolonged as long as possible (once for seven hours) for the benefit of the crowd."<sup>3</sup>

Lynchings often took place in a carnival-like atmosphere, attended by children as well as adults, in crowds that ranged in size from three to 15,000. As described by historian Leon F. Litwack:

Newspapers on a number of occasions announced in advance the time and place of a lynching, special "excursion" trains transported spectators to the scene, employers sometimes released their workers to attend, parents sent notes to schools asking teachers to excuse their children for the event, and entire families attended, the children hoisted on their parents' shoulders to miss none of the action and accompanying festivities.<sup>4</sup>

Mob members rarely concealed their identities and newspapers reported the participation of prominent citizens of the community at some lynchings. Lynchers often posed for pictures with their victims. Pictures of many lynchings were made into postcards.<sup>5</sup> With few exceptions, until the late 1920s and 1930s, local sheriffs, dependent upon the mob's vote, made only half-hearted attempts to stop lynchings and sometimes cooperated in them, reporting that the mob had overtaken them, or that they dared not fire into the crowd due to the presence of women and children. Most sheriffs

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1. An anonymous black newspaper editor, quoted in John Hope Franklin, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 347 (5th ed. 1980).

2. Leon F. Litwack, *Hellhounds* in Allen, et al., *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* (2000) at 14. See also Leon F. Litwack, *TROUBLE IN THE MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* (1998).

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3. Litwack, *Hellhounds, supra*, at 13

4. *Id.*

5. A number of postcards as well as other photography of lynchings are collected by James Allen in *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* (2000).

were willing to testify under oath that they did not recognize a single person in the mob. Coroner's juries routinely returned a verdict of death "at the hands of parties unknown." As a result, fewer than one percent of lynchings were punished.

While many lynchings were in response to crimes, Walter White, author of *ROPE AND FAGGOT: A BIOGRAPHY OF JUDGE LYNCH* (1929), and articles on lynching, concluded "lynching is much more an expression of Southern fear of Negro progress than of Negro crime."<sup>6</sup> Another observer noted that the closer a black man got to the ballot box, the more he looked like a rapist.<sup>7</sup>

A black person could be lynched for almost any reason. "Writing an insulting letter," "Inflammatory language," and "Slapping a child" were some of the reasons given by lynchers. In the same month in which a man was lynched for "Refusing to give evidence." Two others were lynched for "Giving evidence." "Unpopularity," "Bad reputation," and "Mistaken identity," were given as justifications. And there was the often-present allegation of rape: "Attempted rape," "Alleged rape," "Elopement," "Miscegenation," "Insulting a white woman," "Complicity in rape," and "Rape."<sup>8</sup>

Frazier Baker was lynched after being named the first African American postmaster in Lake City, South Carolina. Frazier, a Republican, was one of several blacks appointed following the election of William McKinley as President in 1896. Some residents of Lake City complained that Frazier's presence made the post office "not a respectable place for white gentlemen, much less ladies."<sup>9</sup> Blacks in other towns had quit in

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6. Litwack, *Hellhounds, surpa*, at 29.

7. *Id.*

8 See Ida Wells-Barnet, *A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHINGS IN THE UNITED STATES, 1892, 1893, 1894 at 29-31 (1895).*

9. Paula J. Giddings, *IDA: A SWORD AMONG LIONS* 384-85 (2008), citing *CHICAGO TRIBUNE*, Feb. 24, 1898 at 23.

response to similar threats, but Baker would not. The post office was burned to the ground.

Baker moved the post office to his home, forcing residents to come to his living room for postal services. On the night of February 21, 1898, a mob of 200-300 men set the house afire. When Baker and his family fled the burning house, a hail of rifle shots met them. Frazier was shot to death at once; another bullet went through the arm of his wife, who was clutching their one-year-old infant daughter. The bullet exited her arm and killed the baby. Four other children, three daughters and a son, survived but were badly injured.<sup>10</sup>

Because the crimes were not only against Baker and his family, but also against the United States, the Department of Justice became involved in the prosecutions. Fifteen Lake City citizens were indicted, including many of its leading citizens: "a former editor of the local newspaper, a former deputy U.S. marshal, as well as merchants, druggists and farmers."<sup>11</sup> All were acquitted.<sup>12</sup>

After her husband was lynched, Mary Turner threatened to swear out warrants against the people who lynched him. Turner, eight months pregnant, and her unborn child were lynched by a mob in Valdosta, Georgia. She was hung by her feet from a tree, doused with gasoline, and her clothes burned off her. While still alive, her abdomen was cut open and the infant fell from her womb to the ground. A member of the mob crushed its head. The members of the mob then fired hundreds of bullets into Mary Turner.

The entire family of Daniel Barber was lynched in Monticello, Georgia, after they resisted arrest for bootlegging. After the Barbers were subdued, arrested and jailed, a mob of 200 stormed the jail and dragged Barber, his son and his two married daughters to a tree where they were hung one by one. Barber had to watch the

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10. Giddings, *supra*, at 385.

11. *Id.* at 404-405.

12. *Id.* at 413.

hanging of each of his children before the noose was tightened around his neck.

Although only 20 percent of those lynched were accused of rape, that crime was the primary justification associated with the lynching of black men. President Theodore Roosevelt, in his 1906 State of the Union Address, addressed “the epidemic of lynching and mob violence that springs up, now in one part of our country, now in another.” He stated:

The greatest existing cause of lynching is the perpetration, especially by black men, of the hideous crime of rape – the most abominable in all the category of crimes, even worse than murder. Mobs frequently avenge the commission of this crime by themselves torturing to death the man committing it; thus avenging in bestial fashion a bestial deed, and reducing themselves to a level with the criminal.

Lawlessness grows by what it feeds upon; and when mobs begin to lynch for rape they speedily extend the sphere of their operations and lynch for many other kinds of crimes, so that two-thirds of the lynchings are not for rape at all; while a considerable proportion of the individuals lynched are innocent of all crime. \* \* \*

\* \* \* There is but one safe rule in dealing with black men as with white men; it is the same rule that must be applied in dealing with rich men and poor men; that is, to treat each man, whatever his color, his creed, or his social position, with even-handed justice on his real worth as a man. \* \* \* There is no question of “social equality” or “negro domination” involved; only the question of relentlessly punishing bad men, and of securing to the good man the right to his life, his liberty, and the pursuit of his happiness as his own qualities of heart, head, and hand enable him to achieve it.

Every colored man should realize that the worst enemy of his race is the negro criminal, and above all the negro criminal who commits the dreadful crime of rape;

and it should be felt as in the highest degree an offense against the whole country, and against the colored race in particular[.] \* \* \*

The members of the white race on the other hand should understand that every lynching represents by just so much a loosening of the bands of civilization[.] \* \* \* No man can take part in the torture of a human being without having his own moral nature permanently lowered. Every lynching means just so much moral deterioration in all the children who have any knowledge of it, and therefore just so much additional trouble for the next generation of Americans. \* \* \*

\* \* \* The white man, if he is wise, will decline to allow the Negroes in a mass to grow to manhood and womanhood without education. Unquestionably education such as is obtained in our public schools does not do everything towards making a man a good citizen; but it does much. \* \* \* [T]he man who acquires education is usually lifted above mere brutal criminality. \* \* \*

The same year as President Roosevelt’s address, 1906, Ed Johnson was lynched in Chattanooga after the U.S. Supreme Court stayed his execution. Johnson, a black man, was sentenced to death by all-white jury at a mob-dominated trial for the rape of a white woman. The case against Johnson was weak, but public passions were strong. Mobs attacked the jail on the night of Johnson’s arrest and on two other occasions in the two weeks between his arrest and trial.

The trial lasted three days. The victim identified Johnson as her assailant saying, “I believe he is the man.”<sup>13</sup> Johnson was the only African American in the courtroom. Johnson testified about his activities on the day of the crime, stating that he had never seen the victim before in his life and “I never done what they

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13. Mark Curriden & Leroy Phillips, CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM 87 (1999) .

charged me with. If there's a God in heaven, I'm innocent." <sup>14</sup> Testimony that Johnson was elsewhere at the time of the crime caused so much concern among the jurors that they requested that the victim testify again. She was recalled and a juror asked if she could "state positively that this is the Negro that assaulted you?" She replied, "I will not swear that he is the man, but I believe he is the Negro who assaulted me." Another juror said, "In God's name, Miss Taylor, tell us positively – is that the guilty Negro? Can you say it? Can you swear it?" She responded: "Listen to me. I would not take the life of an innocent man. But before God, I believe this is the guilty Negro."<sup>15</sup>

The jury returned a verdict of guilty and Johnson was sentenced to death. His court-appointed lawyers advised him that he could either die "in an orderly, lawful manner" by accepting the verdict of the court, or "die horribly by the hands of the mob" if he appealed. After securing Johnson's agreement to let the lawyers do what they thought best, the lawyers announced that they would not appeal.

However, Johnson's father asked Noah Parden, one of two African-American lawyers practicing together in Chattanooga, to represent his son. He was unable to pay a fee. After discussing the consequences of taking the case, including the possibility of a lynch mob coming after them if they took it, Parden and his partner, Styles Hutchins, took the case. "Much has been given to us by God and Man," Hutchins said. "Now much is expected."<sup>16</sup>

They filed a petition for a writ of habeas corpus with a federal judge in Tennessee, challenging the fairness of the trial, the complete exclusion of African-Americans from jury service in Chattanooga, and the denial of an appeal when Johnson's lawyers abandoned him after trial. The district court denied relief. While Parden and Hutchins were working on the case,

there was an attempt to burn down their offices and shots were fired into Parden's house

Johnson's execution was set for March 20. Parden traveled by train to Washington and, on March 17, presented an argument for a stay of the execution to U.S. Supreme Court Justice John Marshall Harlan. After conferring with other members of the Court, who decided to accept the case for review, Justice Harlan granted the stay.<sup>17</sup>

Despite the expectation that people – upset with this unwanted "federal interference" – would try yet again to lynch Johnson, Sheriff Joseph F. Shipp refused to post extra men around the jail, did not seek assistance from the National Guard or city police. Instead, he gave his deputies the night off. This left a single elderly man as the only guard at the jail.

A mob broke into the jail, removed Johnson from his cell, took him to a downtown bridge over the Tennessee River. Just before he was hanged, Johnson said, "God bless you all. I am innocent." He was then hoisted up by his neck and men riddled his body with bullets. One bullet severed the rope and Johnson fell onto the bridge. A man put the barrel of his gun to Johnson's head and fired five times.<sup>18</sup>

After the lynching, Noah Parden and Styles Hutchins found it impossible to remain in Chattanooga. They experienced constant threats against their lives and their office and homes were attacked.<sup>19</sup> The Sunday following the lynching, an African-American minister preached a sermon against lynching. The following Saturday, his house was set on fire. A month after the lynching of Ed Johnson, Noah Parden and Styles Hutchins left Chattanooga and

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17. When Justice Harlan agreed that the Court would hear the appeal, he listed Parden as the lead lawyer who would present the argument to the Court. However, Parden never had the opportunity. The first African American to argue before the Court was J. Alexander Chiles, who argued on April 18, 1910.

18. *Id.* at 200-214.

19. *Id.* at 234

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14. *Id.* at 96

15. *Id.* at 108-09.

16. *Id.* at 107.

never returned.<sup>20</sup>

The United States Supreme Court responded to the lynching by citing the sheriff, other local law enforcement officials, and some members of the mob with contempt. The Court conducted the only criminal trial in its history. On November 15, 1909, Chief Justice Melville Weston Fuller announced verdicts of guilty with regard to Sheriff Shipp and some of the other defendants. The sheriff and two others were sentenced to 90 days in the jail in the District of Columbia. Two others were sentenced to 60 days.<sup>21</sup>

Shortly after serving his sentence Sheriff Shipp was reelected “by the largest margin of victory every recorded at that time”<sup>22</sup> a victory the *New York Times* described as “[a] vindication of the stand he took in the Johnson case against Negro criminals of Johnson’s type.”<sup>23</sup>

Ed Johnson, Noah Parden and Styles Hutchins were largely forgotten until almost a century later when Mark Curriden, a journalist, and Leroy Phillips, a Chattanooga trial attorney, told their story in the book, CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM, published in 1999. The following year, a Chattanooga trial court set aside Johnson’s conviction. The district attorney offered no resistance, saying “I have no doubt that the criminal justice system in place at that time failed Mr. Johnson and failed us all.”<sup>24</sup> Today, portraits

of Noah Parden and Styles Hutchins are displayed outside the courtroom of the Georgia Supreme Court.

The case of Leo Frank, a Jewish man from New York, reached the Supreme Court before he died at the hands of a mob in Marietta, Georgia.<sup>25</sup> Frank was convicted by a jury of the brutal murder of young Mary Phagan at a pencil factory where they both worked. The case against him was not strong and depended primarily on the testimony of the janitor at the factory, who was also suspected of the killing. Anti-Semitism, whipped up by Tom Watson, a former Georgia Congressman, vice presidential candidate and demagogue, contributed to public hostility toward Frank.

Near the end of trial, when the prosecutor entered the court, there was applause, stamping of feet and clapping of hands. The judge, observing a “probable danger of violence” if there was an acquittal or hung jury, suggested to Frank’s lawyer that it would be safer if he and his client were not in court when the verdict was announced. Frank and his lawyer followed this advice. When the verdict of guilty was announced, there was a roar of applause.

After his conviction and death sentence were upheld on appeal, Frank sought federal habeas corpus relief arguing that the trial was dominated by a mob in violation of his right to due process. The Supreme Court rejected his argument, holding, under its very narrow view of habeas corpus jurisdiction at the time, that because Georgia gave Frank an appeal in the state courts “[m]ere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus.” *Frank v. Mangum*, 237 U.S. 309, 326 (1915). Justice Holmes,

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20. *Id.* at 234, 348-49

21. *United States v. Shipp*, 214 U.S. 386 (1909).

22. Curriden & Phillips, CONTEMPT OF COURT, at 233.

23. *Re-Elect Sheriff Shipp to Indorse [sic.] Lynching*, N.Y. TIMES, Aug. 3, 1906, at 1. Shipp was defeated in his effort to be elected to a third term in 1908 and never held elected office again, but was appointed to several prestigious state positions and spent his later years promoting the history of the Confederacy. Curriden & Phillips, CONTEMPT OF COURT, at 318, 338.

24. Emily Yellin, *Lynching Victim is Cleared of Rape, 100 Years Later*, N.Y. TIMES, Feb. 27, 2000, at

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25. See Steve Oney, *AND THE DEAD SHALL RISE* (2003), for an exhaustive account of the Frank case. See also Charles Pou, *The Leo Frank Case*, available at <http://web.archive.org/web/20000815214419/http://www.cviog.uga.edu/Projects/gainfo/leofrank.htm>. This account is drawn from those and other sources.

joined by Justice Hughes, dissented, stating:

Whatever disagreement there may be as to the scope of the phrase “due process of law,” there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury.

237 U.S. at 347. He urged the Court to “declare lynch law as little valid when practised by a regularly drawn jury as when administered by one elected by a mob intent on death.” *Id.* at 350.

Frank petitioned for commutation of his sentence to the Georgia State Prison Commission, which recommended by a vote of 2-1 that clemency in granted. Gov. John M. Slaton further investigated the case, including visiting the scene. Slaton was interested in running for the United States Senate. However, convinced of Frank’s innocence, he commuted Frank’s death sentence, thereby ending his political career.

Frank was placed in a prison 175 miles from Cobb County, where the murder and trial occurred. Although the Governor ordered extra security at the prison, 25 men had little difficulty in storming the prison, removing Frank from his cell and taking him by car to Cobb County, arriving early in the morning, August 17, 1915. After making a last request that his wedding ring be returned to his wife, Frank, 31, was bound, lifted onto a table and a noose placed around his neck.

One of the organizers of the abduction and lynching, Newton Augustus Morris, a trial judge before and after the lynching, kicked the table out from under Frank. Almost 3,000 people came to see Frank’s body hanging from the tree. People tore shreds of his clothing and cut pieces of rope for souvenirs. When the crowd began to attack the body, Judge Morris, with some difficulty, persuaded it to stop. An undertaker, who had been standing by during the lynching, took the body away from the scene. Frank was buried in New York.

Long after his death, the case remains

controversial. The Georgia Board of Pardons and Paroles refused to grant a posthumous pardon in 1983, but granted one three years later, citing the state’s failure to protect him or prosecute his killers, though it did not declare him innocent.

Stephen Goldfarb, an Atlanta librarian and former history professor, published on January 7, 2000 a list of the lynchers on his website.<sup>26</sup> The list includes prominent citizens – Herbert Clay, the prosecutor in Cobb County, a former governor, the son of a senator, a Methodist minister, a state legislator, a former state Superior Court judge and other politicians, lawyers and businessmen. Some of their names match those on Marietta’s street signs, office buildings, shopping centers, and law offices today.

A year later, Jesse Washington, a 17-year old intellectually disabled farm worker accused of the rape and murder of a white woman in Waco, Texas, was burned alive before “a crowd of 15,000 men, women and children, including the Mayor and Chief of Police of Waco.”<sup>27</sup> Officials sought to negotiate a bargain with Waco citizens whereby Washington would not be lynched so long as he was promptly tried, and agreed to waive his right to seek a change of venue and to appeal. Newspapers reported that citizens had agreed to “let the law take its course.” Washington was given a short trial on May 15, 1916, just a week after the crimes. The jury deliberated just three minutes before returning a verdict of guilty and sentencing Washington to be hanged. When the verdict was announced, the court reporter, judge and sheriff quietly slipped from the courtroom as a spectator yelled “Get the nigger!” The crowd enveloped Washington and carried him to the town square where he burned.

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26. See Stephen Goldfarb, *Leo Frank Lynchers*, <http://web.archive.org/web/20000815214425/www.leofranklynchers.com/index.html>.

27. See Patricia Bernstein, *THE FIRST WACO HORROR: THE LYNCHING OF JESSE WASHINGTON AND THE RISE OF THE NAACP* (Tex. A&M Press 2006); Wade Goodwyn, *Waco Recalls a 90-Year-Old ‘Horror,’* National Public Radio, May 13, 2006; *Topic of the Times*, N.Y. TIMES May 17, 1916.

Ida B. Wells (who became Wells-Barnett after her marriage in 1895), was born into slavery in Mississippi in 1862, but led a campaign against lynching throughout her life. She spoke throughout the United States and England about lynching, wrote articles and essays, and published a newspaper. Her article, "The Truth About Lynching," ran in the *New York Age* in June, 1892, and was later published as a pamphlet, *Southern Horrors*, with an introduction by Frederick Douglass, and widely circulated.<sup>28</sup> In early 1895, Wells published THE RED RECORD, made up of ten chapters, which included narratives and photographs of lynchings, statistics, and the names of persons lynched and dates of their lynchings.<sup>29</sup>

The NAACP published a 30-year report on lynchings in 1919, which documented newspaper accounts of lynchings beginning in 1889. The study featured accounts of blacks lynched for "talking back to white persons," and "not driving out of the road to let white persons pass."<sup>30</sup> It included 50 lynchings of women during the period. The next year the NAACP published a pamphlet, "Burnings At Stake In The United States: A Record Of The Public Burning Of Five Men By Mobs During The First Five Months Of 1919 In the States Of Arkansas, Florida, Georgia, Mississippi And Texas." The NAACP reported on the number of lynchings each year in its annual reports.<sup>31</sup>

These and other efforts brought international condemnation upon the Southern states and

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28. See Paula J. Giddings, *IDA: A SWORD AMONG LIONS* 220-31, 236-39 (2008).

29. *Id.* at 346-47; Ida Wells Barnett, *A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHINGS IN THE UNITED STATES, 1892, 1893, 1894* (1895).

30. National Association for the Advancement of Colored People, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918* (1919).

31. National Association for the Advancement of Colored People, *ANNUAL REPORTS 1909-1968* (1909-1968).

disapproval from some in the North. Cheap black labor was fleeing to the North. Embarrassment over the practice of lynching, and burning in particular, led many elite whites and newspapers to distance themselves from the mob and call for compliance with the law. Railroads, which had often provided special trains with free transportation for those who wished to view a lynching, began to withdraw their support of the spectacle. As one historian observed:

Southerners . . . discovered that lynchings were untidy and created a bad press. . . . [L]ynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob's demand. Responsible officials begged would-be lynchers to "let the law take its course," thus tacitly promising that there would be a quick trial and the death penalty . . . . [S]uch proceedings "retained the essence of mob murder, shedding only its outward forms".<sup>32</sup>

The number of lynchings decreased in the 1940s and 50s. However, in 1955, Emmett Till, a 14-year old black child from Chicago who was visiting relatives in Mississippi, was lynched for supposedly flirting with a white woman.

When his body was brought back to Chicago for burial, his mother, Mamie Till, insisted upon a glass casket so that the public could see what had been done to her son. "Have you ever sent a loved son on vacation and had him returned to you in a pine box so horribly battered and waterlogged that someone needs to tell you this sickening sight is your son?" she asked at the time. Thousands of people viewed the body. The result was worldwide outrage at what had happened to Till and was happening to Black people in the South. "His bloated face was the ugliness of American racism looking us right in the eye," said Clenora Hudson-Weems, author of *EMMETT TILL: SACRIFICIAL LAMB OF THE CIVIL RIGHTS MOVEMENT* (2006). Two white men tried for the murder were acquitted.<sup>33</sup>

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32. Dan T. Carter, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 115 (rev. ed. 1992).

33. See also Stephen J. Whitfield, *A DEATH IN THE*

In the summer of 1964, people from throughout the country went to Mississippi to participate in "Freedom Summer," a project of several civil rights organizations to register African American voters. At the time, 90 percent of blacks in Mississippi were not registered to vote. Two white civil rights activists from the north, Michael Schwerner, 24, and Andrew Goodman, 20, and an African American from Meridian, Mississippi, James E. Chaney, 21, participated in the project. They were arrested while investigating the burning of the Mount Zion Church in Neshoba County. The black congregation of the church had agreed that it could be the site of a "freedom school." It was one of 37 churches burned or bombed that summer. Schwerner, Goodman and Chaney were detained but then released by officers in Neshoba County. They disappeared after their release.

Within hours of their disappearance, President Lyndon B. Johnson ordered the Justice Department to begin an investigation. Over 100 FBI agents were sent to dredge rivers and comb the swamps. The bodies were eventually found buried at a dam site on a farm in the county. It was not until 51 years later, in early 2005, that Edgar Ray Killeen, a Klan member and an ordained Baptist minister, was convicted in the Mississippi courts of orchestrating the murders.<sup>34</sup>

McComb, Mississippi, was referred to in the early 1960s as the bombing capital of the world and Birmingham was called "Bombingham." One of the bombs that exploded in Birmingham killed four little girls at the Sixteenth Street Baptist Church in 1963. The home of Rev. Fred Shuttlesworth was bombed on December 25, 1956. Shuttlesworth somehow escaped unhurt even though his house was heavily damaged. The next year, after they tried to enroll their children in the all-white public school, a mob

beat Shuttlesworth with chains and brass knuckles in the street while someone stabbed his wife. Shuttlesworth drove himself and his wife to the hospital where he told his kids to always forgive.

The total number of lynchings that have been carried out in the United States is unknown. Before 1881, no government agency, organization or person kept a comprehensive record of all lynchings. While most lynchings received a great deal of public attention, some occurred in isolated areas without local attention; some people were killed and their bodies were disposed of in rivers or swamps or other ways and were not found or, if found, the cause of death could not be determined.

The Tuskegee Institute in Alabama, created a department in 1881 to collect data on lynchings and publish an annual lynching report. It documented 4,743 lynchings in 44 states between 1882 and 1964. The prisoner death toll from convict leasing nationwide was about 30,000 – roughly six times the number of people lynched. Of the lynchings it documented, more than 90 percent took place in the South. Mississippi had the most lynchings, followed by Georgia. Three-fourths of the victims, 3,446, were black. In more than 55 percent of the lynchings in the South, the mob took the victim from police custody or local jails. The records show that lynchings were three times more likely to happen in the summer than any other time of year.

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DELTA: THE STORY OF EMMETT TILL (1991).

34. Shaila Dewan, *Former Klansman Guilty of Manslaughter in 1964 Deaths*, N. Y. TIMES, June 22, 2005.

## Convict Leasing

Following the Civil War and the end of Reconstruction, the criminal justice system served to exploit black workers during the South's recovery from the War while terrorizing free blacks into acceptance of their subordinate role in the economy and society. Blacks could be arrested for almost any reason on vague charges such as "vagrancy" or failure to have "papers" and leased to railroads, coal mines, turpentine camps, plantations and other entities. The South remained overwhelmingly dependent on its ability to coerce African Americans to work under slave conditions for white owned farms and businesses. Convict labor – neoslavery – played a prominent role in the South's post-bellum economic development. When the abuses of convict leasing became well known it was replaced by the chain gang and plantation prisons, such as Mississippi's *Parchman Farm* and the Louisiana State Penitentiary, usually referred to as "Angola."

## Chain Gangs

Another brutal form of forced labor was the chain gang. The chain gangs originated as a part of a massive road development project in Georgia in the 1890s. Chains were wrapped around the ankles of prisoners, shackling five together while they worked, ate, and slept. Armed guards observed them. Following Georgia's example, the use of chain gangs spread rapidly throughout the South.<sup>1</sup>

Eventually, the brutality and violence associated with chain gang labor in the United States gained worldwide attention. "The chain gang of mostly black convicts working the roads of the Deep South came to exemplify the brutality of southern race relations, the repressive aspect of its labor relations, and the moral and economic backwardsness of the region in general."<sup>2</sup>

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1. Alex Lichtenstein, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 159-185, 188-90 (1996)

2. *Id.* at 188.

Robert Elliot Burns brought Georgia's use of the chain gang to national attention with the publication of his book, *I AM A FUGITIVE FROM THE GEORGIA CHAIN GANG!* in 1932. A popular movie was made based on the book. (Both are still available today.) Burns, a businessman, was one of the small number of whites sentenced to the chain gang. At the time, there were 916 white prisoners, 27% of the prison population, up from only 322 white prisoners in 1908, when the state's white population was 1.4 million.<sup>3</sup> Nevertheless, the chain gang continued to be used into the 1950s. Georgia was the last state to abandon the practice at that time.<sup>4</sup>

Bayard Rustin, the civil rights leader who would later organize the March on Washington in 1963, also brought attention to the chain gang after spending 22 days on one in 1947 for sitting in the white section of a bus in North Carolina. After being released, Rustin wrote a five-part series about his experiences titled "22 Days on a Chain Gang," which was published by the *New York Post*. The series and his recommendations for change led to the abolition of the chain gang in North Carolina. The series is available from the Yale Law Library. *See*

<http://documents.law.yale.edu/sites/default/files/Official-report-chain-gang.pdf>.)

## For Reflection

Consider the history of race relations in the United States with the comments of Bryan Stevenson that follow:

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3. *Id.* 189.

4. Mitchel P. Roth, *PRISONS AND PRISON SYSTEMS* 56–57 (2006). Alabama resumed using the chain gang in 1995, but ended it after about a year. Sheriff Joe Arpaio of Maricopa County, Arizona, also brought back the chain gang for sentenced inmates who volunteer for it as a way to work themselves out of long-term lockdown. The inmates wear the old-fashioned black and white striped uniforms and work in the desert heat on such jobs as cutting fire breaks, removing trash, and burying indigents in the county cemetery.

I was giving some lectures in Germany about the death penalty. It was fascinating because one of the scholars stood up after the presentation and said, “Well you know it’s deeply troubling to hear what you’re talking about.” He said, “We don’t have the death penalty in Germany. And of course, we can never have the death penalty in Germany.” And the room got very quiet, and this woman said, “There’s no way, with our history, we could ever engage in the systematic killing of human beings. It would be unconscionable for us to, in an intentional and deliberate way, set about executing people.”

And I thought about that. What would it feel like to be living in a world where the nation state of Germany was executing people, especially if they were disproportionately Jewish? I couldn’t bear it. It would be unconscionable.

And yet, in this country, in the states of the Old South, we execute people \* \* \* in the very states where there are buried in the ground the bodies of people who were lynched. And yet, there is this disconnect.

- Bryan Stevenson, TED Talk: We Need to Talk About an Injustice, March 2012

## THE SCOTTSBORO CASE

### Sexual relations between the races

From long before Thomas Jefferson fathered six children with Sally Hemings, a slave at Monticello, to long after segregationist Strom Thurmond’s sexual relationship at age 23 with his family’s 16-year-old maid, Carrie Butler, which produced a daughter,<sup>1</sup> white men having sexual

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1. Throughout a long political career that followed, which included 46 years as a United States Senator, Thurmond never acknowledged his daughter to the public. However, he saw her annually and provided her financial support. When his daughter was in her early 20’s, Thurmond broke with the Democratic Party to run for president in 1948 as a Dixiecrat to support segregation, saying that “all the laws of Washington and

relations with their slaves or servants has been a part of this country’s history. However, sexual relationships between black men and white women have not been tolerated to the point that even the possibility of a sexual relationship between a black man and a white woman could result in a lynching or imposition of the death penalty, as the following readings illustrate.

The following excerpts are from Dan Carter, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (LSU Press, rev. ed. 2007). Most footnotes have been omitted.

### *Interrupted Journeys*

[On March 25, 1931, responding to word of a fight among hoboes on a freight train, the sheriff of Jackson County, Alabama, directed deputies to stop the train and “capture every negro on the train and bring them to Scottsboro”, the county seat. The train was stopped in Paint Rock and nine African-American youths were taken into custody. The deputies also found two white women, Ruby Bates and Victoria Price, and one white man, Orville Gilley, on the train as well.]

The nine Negro youths who stood before [the deputies] were a ragged lot. \* \* \* At twenty, Charlie Weems was the only one who was not in his teens. [The others were: Ozzie Powell, Haywood Patterson, Clarence Norris, Olen Montgomery; Willie Roberson, brothers Andrew and Leroy Wright, and Eugene Williams. Leroy White was 13. Eugene Williams appeared to be about the same age.] \* \* \*

While [a deputy sheriff] tied the nine together with a length of plow line, the two girls sat under a sweet gum and talked with several women who had gathered at the station. About twenty minutes after the train stopped, the younger girl, identifying

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all the bayonets of the Army cannot force the Negro into our homes, our schools, our churches and our places of recreation.” Thurmond’s daughter became a vocational education teacher. At age 78, after the Thurmond’s death and her retirement, she announced that she was his daughter. Her name at that time, Essie Mae Washington-Williams, reflected an aunt who helped raise her in Pennsylvania, Mary Washington, and her husband, Julius T. Williams.

herself as Ruby Bates of Huntsville, asked to see the deputy. \* \* \* Ruby told [the deputy] that she and her girl friend, Victoria Price, had been raped by the nine boys. \* \* \*

When the Negro boys and the two girls arrived in Scottsboro, the Jackson County seat, an hour later, Sheriff M. L. Wann sent the two women downtown for an examination by two local physicians; but he made no effort to keep the charge confidential, and news of the alleged attacks spread throughout and beyond Scottsboro within the hour. Each person retelling the story added new embellishments. By late afternoon, townspeople solemnly asserted that the “black brutes” had chewed off one of the breasts of Ruby Bates.

In Jackson County – as over all the South – a substantial number of persons agreed with the character in the Irvin Cobb story who thought a Negro rapist hanged and burned by a mob “got off awful light.” Farmers from the nearby hills began gathering, and by dusk a crowd of several hundred stood in front of the two-story jail. Sheriff Wann pleaded with the men to leave and “let the law take its due course,” but the crowd had become a mob and was in no mood to listen to pleas for law and order. \* \* \*

\* \* \*

By 8:30 p.m. Sheriff Wann was convinced that the mob might rush the jail at any moment, and he decided to make a run to a sturdier lockup in nearby Etowah. Three deputies brought their cars to the back door of the jail and then put the boys together in groups of three. The nine feebly protested, certain that this was only preparatory to a lynching. \* \* \* As the boys waited inside the door, one of the deputies started his car and pulled the headlamp switch. The narrow alley ahead remained dark, for members of the crowd had cut the wires of all three cars. That was enough for the sheriff of Jackson County. He hurried to his telephone and placed a long distance call to the governor in Montgomery.

\* \* \* Governor Benjamin Meeks Miller \* \* \* had been elected governor of Alabama in 1930 on a platform attacking the “Klan domination” of the previous Bibb Graves administration. He argued that he was for a government which was neither pro-Klan nor anti-Klan, and he assailed the hooded order throughout the campaign on the grounds that Klansmen were wasteful and extravagant. \* \* \*

\* \* \* The governor did not hesitate when Wann explained the situation; he had taken a firm stand against lynching throughout his political career. He requested the state’s adjutant general to call Major Joseph Starnes of Guntersville, site of the National Guard Armory nearest Scottsboro. By 11 p.m. Starnes was leading a caravan of cars with twenty-five armed men over the twenty-mile road.

Even as Starnes mobilized his men, the mob subsided. In part this was because of the threats of the sheriff; in part, because of the fact that neither of the girls was from Jackson County. \* \* \* What was perhaps more important, not one person volunteered to lead a charge on the jail[.] \* \* \* [W]hen Major Starnes and his men arrived at midnight, there were only twenty or thirty men sitting quietly in their automobiles out in front of the county jail. Just before dawn the nine boys finally dropped off to restless sleep. It was a night they would never forget.

### *In an Alabama Courtroom*

In the spring of 1931 a visitor described Scottsboro as a “charming Southern village . . . situated in the midst of pleasant, rolling hills.” \* \* \* By 1931 there were 3,500 people living within the town limits. \* \* \*

\* \* \*

\* \* \* The incident could not have occurred at a more advantageous time for the *Jackson County Sentinel* and the *Scottsboro Progressive Age* [the county’s two weekly newspapers]. The two papers had gone to press on the evening of the arrest and though neither included an account of the attempted lynching, both gave full coverage to the events on the freight car. The *Progressive Age*

noted modestly that “the details of the crime coming from the lips of the two girls, Victoria Price and Ruby Bates, are too revolting to be printed and they are being treated by local physicians for injuries sustained when attacked and assaulted by these Negroes.” The *Jackson County Sentinel*, not so reticent, ran a banner headline: “All Negroes Positively Identified by Girls and One White Boy Who Was Held Prisoner with Pistol and Knives While Nine Black Fiends Committed Revolting Crime.” Editor P. W. Campbell told his readers that “some of the Negroes held the two white girls [while] others of the fiends raped them, holding knives at their throats and beating them when they struggled.” The two were “found in the [freight] car in a terrible condition mentally and physically after their unspeakable experience at the hands of the black brutes.”

\* \* \*

Victoria told how she and Ruby found a job at the Standard-Coosa-Thatcher Mill in Chattahoochee and then decided to hitch a ride back to Huntsville in order to collect their belongings. \* \* \* At Stevenson they had climbed into a gondola half-filled with chert. Seven white boys were already in the car[.] \* \* \* As the train started out from Stevenson, \* \* \* it happened: “A whole bunch of Negroes suddenly jumped into the gondola, two of them shooting pistols and the others showing knives.” Within minutes, said Victoria, the gang had thrown all the white boys but one from the moving train. “I started to jump. But a Negro grabbed my leg and threw me down into the car. Another pinched me in the mouth.” With a knife at her throat, she desperately looked to Ruby for help, but “a Negro had a knife at her throat, too, and another was holding her down.” She lowered her eyes modestly. “I guess you heard the rest. Mister, I never had a ‘break’ in my life.” The Negroes had ruined her and Ruby forever. “The only thing I ask is that they give them all the law allows.” \* \* \*

\* \* \*

The nine boys did not fare so well with the press. Some of the first reports declared that all but one had admitted the assault. In fact, what had happened was that Roy Wright – when accused by Orville Gilley [the white man who had been on the train] in the presence of newsmen – began insisting that he and his three friends were innocent; the other five had assaulted the girls. All the boys other than Wright remained silent, except to deny any part in raping the girls. The impression which the news media gave, however, was that several of the group had admitted taking part in attacking the girls.

All day Thursday tension continued to mount in the town as rumors inflamed public opinion to the boiling point. \* \* \* Late in the afternoon Judge Alfred E. Hawkins met with the circuit solicitor, H. G. Bailey. After a conference Hawkins announced to waiting newsmen that he would reconvene the grand jury which had adjourned only a week before. The grand jury would meet again on Monday, he said, and its sole purpose would be to consider an indictment against the nine boys. Solicitor Bailey declared that he would demand the death penalty for all nine. \* \* \*

As the *Progressive Age* put it, “The general temper of the public seems to be that the Negroes will be given a fair and lawful trial in the courts and that the ends of justice can be met best in this manner, although the case charged against the Negroes appears to be the most revolting in the criminal records of our state, and certainly of our county.” Citizens of the county were convinced, in the words of the *Sentinel*, “that the evidence against the Negroes was so conclusive as to be almost perfect.” \* \* \*

Judge Hawkins \* \* \* was well aware that in cases involving capital punishment, it was the obligation of the court to see that the accused were represented by counsel. Hawkins, therefore, assigned all seven members of the Scottsboro bar to represent the boys. But one by one the town’s lawyers found excuses to withdraw from the case. Local citizens retained three of the seven \* \* \* to assist Solicitor Bailey. [Another] requested and

received permission to withdraw. Finally only one man remained who seemed at all interested in taking the case, Milo C. Moody.

Milo Moody was only two months short of his seventieth birthday and he was, as someone put it charitably, getting a bit forgetful. One person who met him at the time described him as a “doddering, extremely unreliable, senile individual who is losing whatever ability he once had.” \* \* \* [H]e confined himself to the kind of minor court cases which were the lot of most small town Southern lawyers. \* \* \*

[African American ministers in Chattanooga, sixty miles away, became concerned upon reading about the case and learning that Mrs. Ada Wright, mother of Andrew and Leroy Wright, attended one of their churches. They raised \$50.08.]

It was a small retainer with which to approach any attorney, but \* \* \* one lawyer who might be willing to take the case [was] Stephen R. Roddy, a Chattanooga attorney, [who] spent most of his time checking real estate titles or doing minor police court work, but he had taken cases for local Negroes on a number of occasions. Roddy’s modest legal abilities were further limited by his inability to remain sober. Local police officials tried to overlook his periodic bouts of drinking, but he had been jailed in June of 1930 on a charge of public drunkenness. \* \* \* [Roddy] agreed to take the case and see what could be done for a total fee of \$120. \* \* \*

\* \* \*

\* \* \* [On Tuesday, March 31,] the grand jury returned formal indictments and Judge Hawkins set trial for the following Monday, April 6.

\* \* \* By 7 a.m., [the morning of trial,] there were several thousand people clamoring for admission through the National Guard picket lines. On orders from Judge Hawkins, however, the guardsmen kept the crowd pushed back one hundred feet from the building. The throng became so packed that many moved to the roofs of

surrounding buildings in order to get a better view. \* \* \* Four machine guns guarded the doors of the building and gave the scene the appearance of a fort under siege. \* \* \*

Stephen Roddy had the misfortune to arrive at the courthouse when the crowd was most unfriendly. The firm resolve which he had expressed in Chattanooga faded when several onlookers openly cursed him as he walked into the courtroom. One of the special assistants to the prosecution noted that Roddy had liberally fortified himself with strong spirits against such a contingency. He was so “stewed,” said J. K. Thompson he “could scarcely walk straight.” The Chattanooga attorney nervously took a seat at the front of the courtroom and just before 9 a.m., Judge Hawkins called the courtroom to order for Alabama’s most famous criminal trials of the decade.

Hawkins told the defense counsel to step down to the front inside the railing. Roddy replied he was not there as employed counsel, but at the request of “people who are interested in them.” Judge Hawkins told Roddy: “If you appear for these defendants, then I will not appoint counsel; if local counsel are willing to appear and assist you under the circumstances, all right, but I will not appoint them.” \* \* \*

Despite requests from the bench, Roddy would neither clarify his position nor say that he was counsel. \* \* \* The trial seemed hopelessly stalled until Milo Moody stepped inside the rail and told Judge Hawkins: “I am willing to go ahead and help Mr. Roddy in anything I can do about it under the circumstances.” This was satisfactory to Judge Hawkins, who told the rest of the Jackson County bar that they no longer had to appear on behalf of the defendants. Thus, with no preparation, with less than a half-hour interview with their lawyers, nine Negro youths went on trial for their lives.

Roddy opened the defense with a half-hearted petition for a change of venue. He relied in his petition on the inflammatory news – stories in the *Jackson County Sentinel* and the *Scottsboro*

*Progressive Age*, and on the fact that Sheriff Wann had asked for National Guardsmen. The state easily disposed of the news items by pointing out that Roddy had not introduced any witnesses to show that these stories affected public opinion. Roddy did call to the stand Sheriff M. L. Wann to support his contention that Jackson County citizens were so enraged they almost lynched the nine. A week before, the sheriff had told newsmen of the dire threat of mob violence and modestly described his own role in safeguarding the lives of the nine defendants. Apparently he had changed his mind during the week. The prosecutor asked if he could recall “threats or anything in the way of the population taking charge of the trial?” Wann replied firmly, “None whatever.” In response to other questions he agreed with the prosecutor that the defendants would receive a fair and impartial trial in Jackson County, and likewise that there was no more sentiment against the nine “than naturally arises” on the charge of rape.

Major Starnes proved even less helpful than Sheriff Wann. He readily admitted that he had thought it necessary to have over one hundred enlisted men and officers on duty for the trial, and that at least thirty men had been with the defendants at every stage of the proceedings. But he told the court he had heard no threats against any of the defendants and he attributed the presence of the huge crowd to “curiosity,” not hostility. It came as no surprise to anyone in the court when Judge Hawkins overruled the petition for a change of venue.

Circuit Solicitor Bailey had expected the defense lawyers to request a severance for all nine of the defendants, but Roddy told the court he was willing to have all nine tried at the same time. Bailey, however, for reasons which later became clear, moved to try Clarence Norris, Charley Weems, and Roy Wright. Roddy objected to including Wright in this group because he was a juvenile; rather than argue the motion, Bailey decided to try Norris and Weems and to discuss the question of Wright’s age later. The noon recess interrupted proceedings; but the selection of the jury went smoothly, and shortly after 2:30

in the afternoon Victoria Price took the stand for the prosecution. Eight of the jurors were farmers, three were merchants, and one was a mechanic. [All 12 were white men.]

\* \* \*

[Victoria Price testified that she and her friend Ruby Bates had gone to Chattanooga looking for work in the mills there. After failing to find employment, she testified, they caught the freight train to return home.]

\* \* \* Less than five minutes out of Stevenson, Victoria looked up to see twelve Negroes leaping over the top of the adjacent boxcar and into the gondola; two of them brandished pistols and “every one” had his knife open. One of the twelve she was not sure which shouted, “All you sons of bitches unload.” Then he knocked one of the white boys in the head and threw him over the side. One by one the rest of the white boys jumped. \* \* \* [However, as] the train had picked up considerable speed[,] \* \* \* the Negroes decided not to eject [Orville] Gilley, who sat helplessly in one corner of the gondola.

According to Mrs. Price, Clarence Norris came straight to the point: “Are you going to put out?” He shouted above the roar of the train. She explained that she knew the meaning of this term and told him politely: “No, sir, I am not.” At this point, six of the defendants overpowered her. \* \* \* She gave an explicit description to the jury and all-male spectators of how one of the nine had held her legs and another a knife to her throat while a third removed her overalls and tore off her “step-ins.” One by one, she pointed out the six she said raped her: Charley Weems, Clarence Norris, Roy and Andy Wright, Haywood Patterson, and Olen Montgomery. Roddy suggested that she might be mistaken about Patterson, but she was adamant. “I know his old mug,” she snapped. \* \* \*

Roddy’s strategy was to show that Victoria Price was a woman of less than exemplary character, but the court quickly indicated that it would not tolerate this line of questioning. Victoria

admitted that she had been married twice and was separated from her second husband, and that she had always gone by her maiden name, even when she was married; but when Roddy asked her how long she had “known” her husband before she married him, Bailey objected and Judge Hawkins sustained the objection. Roddy asked if she had ever been in jail. Again the court sustained the objection by the prosecution. The defense attorney said he thought that was all and shortly after 3 p.m. Victoria stepped down from the witness chair. She had been on the stand less than fifty minutes.

\* \* \* Solicitor Bailey called to the stand Dr. R. R. Bridges, one of the two doctors who examined the girls within an hour and thirty minutes after the alleged rape. \* \* \*

Dr. Bridges testified tersely on the results of his examination. The most important thing he revealed at the outset: Victoria Price had participated in sexual intercourse at some time previous to his examination. Even more damaging was his remark that he found “a great amount” of semen in the vagina of Ruby Bates. But beyond this his testimony did not bear out Victoria’s assertion that she had been violently manhandled. She had small bruises about the top of her hips and a few “short scratches” on the left arm, but he emphasized that these were minor. When he examined her genital organs he found neither bruises nor tears. “She was not lacerated at all. She was not bloody, neither was the other girl.” \* \* \* Nevertheless, he said in reply to Solicitor Bailey’s direct question, it was “possible” that six men, one right after the other, could have had intercourse with her without lacerations.

Roddy and Milo Moody made no effort to ask the doctor about the medical evidence. To support their earlier questioning, they tried to get Dr. Bridges to say that the girls admitted they customarily had intercourse indiscriminately. The court, however, sustained repeated objections from the solicitor on this point, although Roddy managed to get across to the jury the purpose of his questioning. Judge Hawkins likewise would

not allow the defense attorneys to inquire as to whether either of the girls had gonorrhea or syphilis.

Dr. Marvin Lynch \* \* \* recalled that they had found a good amount of semen in the vagina of Ruby Bates, but they had had to use a cotton swab in order to obtain a sample for Victoria Price. \* \* \* He emphasized that the “vagina was in good condition on both of the girls. There was nothing to indicate any violence about the vagina.”

\* \* \*

[On] Tuesday, \* \* \* it was apparent by 8 a.m. that the crowd would number fewer than three thousand. Nevertheless, the guardsmen kept machine guns at each entrance and carefully searched all who entered the courtroom. The state did not charge that either of the two defendants on trial had raped Ruby Bates, but they called her to the stand as the first witness of the day in order to dispel any doubts about the premeditated nature of the attack. \* \* \* But she lacked her companion’s verve and self-confidence. Where Victoria had snapped her answers back firmly and without hesitation, Ruby appeared hesitant and unsure. She often paused for long periods in her account of the events, and the solicitor had to prod to elicit the details Ms. Price had spontaneously offered. \* \* \*

Ruby’s account of the fight also differed from that of her friend. Victoria gave a colorful description of a desperate struggle with guns blazing, a pistol-whipping, and ending with the white boys leaving in an effort to save their lives. According to Ruby, two Negroes stepped down into the gondola and began arguing with several of the white youths. When several other Negroes came into the car a few minutes later, they told the white boys to unload. Only three put up any struggle; the other four simply jumped. She tersely described the rape that followed. \* \* \* Roddy did not press her on the ways that her account differed from Victoria’s.

The state rested. \* \* \* Roddy called Charley Weems to the stand. Weems was one of two

surviving from a family of ten. His mother, father, four sisters, and two brothers had died by the time he was a teenager. \* \* \* Like most of the other boys on trial he could barely read and write. \* \* \*

Weems answered Roddy's questions clearly and without hesitation. \* \* \* According to Weems, it wasn't much of a fight. Haywood hit one of the boys and without protesting too much, they began jumping off the train. \* \* \*

Solicitor Bailey was a kindly looking man, tall and rather distinguished in appearance, with gray hair and blue eyes. In his cross-examination of Weems, however, he showed only grim determination. In rapid succession he fired question after question in an effort to confuse the young Negro. But Weems held his ground. He denied vehemently that there were even any girls in the gondola where the fight took place. "I don't know where the girls were," he declared. "There wasn't a soul in that car with me and Patterson except those Negroes and one white boy. Several of the Negroes on the train jumped off and he did not see them again, he said, suggesting that they might have molested the girls. At the end of the cross-examination, he still asserted his innocence. "I never saw no girls in this gondola which we were in at all. . . . I had nothing to do with the raping of the girls. I never saw anything done to the girls."

Although Weems had contributed no proof other than his unsupported word, Roddy and Moody had no other evidence to offer and they decided to put Norris on the stand. \* \* \*

On the witness stand, he confirmed Weems's account of the fight. \* \* \* Solicitor Bailey sat for a moment and then walked in front of the witness chair where Norris sat fidgeting. It took only three questions to unnerve Norris completely. Within five minutes Bailey elicited from him the admission that "every one of them have [had] something to do with those girls after they put the white boys off the train." Norris described the scene, with Roy Wright holding a knife on one victim while the other seven took turns raping the

girls. "They all raped her, everyone of them," he shouted. He insisted that he alone was innocent.

Roddy watched in disbelief while Norris shattered the flimsy defense he had tried to construct. When Roddy's objections failed to halt Norris in his head-long accusations, the defense attorney requested and received a brief recess. During the break, Roddy pleaded with Bailey to accept a guilty plea with a guarantee of life imprisonment instead of death for the two boys. Solicitor Bailey, confident of a conviction, spurned any compromise.

\* \* \*

If Norris had hoped to save himself, he got little cooperation from the prosecution. As soon as he stepped down from the witness chair, Bailey called Arthur Woodall for rebuttal testimony. Woodall told the court he "searched all of these darkies" and removed a knife from Norris. Back on the stand again, Victoria Price examined it carefully, looked up, and said: "That is my knife. I had it on my person at the time of this trouble on the train." Norris, she charged, had taken it from her along with \$1.50 in coins and a pocket handkerchief. The state rested. \* \* \* To Roddy and Moody the case seemed hopeless. They told Judge Hawkins they did not care to argue the case before the jury.

\* \* \* Speaking for the state, Attorney Snodgrass urged the jury to bring in the death penalty for both defendants. After Snodgrass had completed his summation, Roddy said that he and Moody objected to any further statements by the state, on the grounds that since the defense had declined to make a summation, "any further argument on behalf of the counsel for the State to the jury would be contrary to the law . . . and would be harmful and prejudicial to the interest of the defendants." The court overruled him, and Solicitor Bailey spoke to the jury for another thirty minutes.

\* \* \*

Before the jury had cleared the room, the selection of a venire to try the next case began, and

within less than an hour, Haywood Patterson went on trial alone. Once again, Victoria Price testified for the state, and her memory seemed to have improved. \* \* \* [S]he recalled precisely that it was Haywood Patterson who had one of the guns, a .38 caliber pistol, and Weems who had the other, a .45. She also remembered that the two had fired once, possibly twice, over the gondola where she sat. While she was no longer positive that every one of the twelve had knives, she was sure that it “looked like all of them had knives; I never saw the like in my life.” Most of all she was certain that Patterson was one of the defendants whose “private parts penetrated my private parts.”

Roddy doggedly continued his efforts to attack Mrs. Price’s reputation and though the state successfully interposed objections, Victoria insisted on answering Roddy’s insinuations concerning her reputation. When Roddy asked her if she had ever practiced prostitution, she replied angrily: “I don’t know what you are talking about. I do not know what prostitution means. I have not made it a practice to have intercourse with any white man but my husband; I want you to distinctly understand that.”

Bailey called Ruby to the stand to confirm Victoria’s charge of rape by Patterson, but Miss Bates was indecisive on this point. \* \* \*

Just after Ruby stepped down from the witness chair, the bailiff stepped up to the bench and whispered to Judge Hawkins that the jury for the case of Norris and Weems had reached a verdict. Hawkins ordered Patterson’s jury taken into the jury room. \* \* \* The foreman handed a folded piece of paper to the circuit court clerk who read the verdict firmly and loudly: “We find the defendants guilty of rape and fix their sentence at death in . . .” A roar of applause drowned his last words as the spectators leaped to their feet, many of them rushing through the doors to tell those who could not get into the courtroom. The waiting crowd, fifteen hundred strong, burst into shouts and cheers. Hawkins futilely pounded the bench for order, but the noise of the crowd drowned the sound of the banging gavel. Finally he ordered the

guardsmen to remove those who could not restrain their enthusiasm, and the soldiers ejected eight spectators before a measure of calm returned to the courtroom. Throughout the demonstration, Norris and Weems stared straight ahead without expression.

It was the first break of the trials for the defendants, and Roddy capitalized on it. He called to the stand Major Starnes, who had been in the adjacent room with Patterson’s jury. On cross-examination, Starnes admitted that the jury which would decide Patterson’s fate had distinctly heard the frenzied reaction of the crowd to the guilty verdict of Norris and Weems.

This was a crucial point. In the 1919 Arkansas riot cases twelve Negroes had been sentenced to death and sixty-seven to long prison terms in a courtroom dominated by a shouting mob outside. Justice Oliver Wendell Holmes, speaking for the United States Supreme Court, had declared:

If the case is such that the whole proceeding is a mask; that counsel, jury and judge were swept to a fatal end by an irresistible waive of public passion . . . neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights.

The sentences of the seventy-nine were overturned.<sup>64</sup> \* \* \* To Roddy, this seemed clear

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64. *Moore v. Dempsey*, (1923), 261 U.S. 86. These cases began when a group of whites in Elaine, Arkansas, fired on a group of Negro sharecroppers who had met to organize a union. The Negroes returned the fire and when several whites were killed, seventy-nine Negroes were arrested and tried for murder. At first it appeared there would be a mass lynching, but a local vigilante committee promised the mob that if they would refrain from lynching the defendants they would “execute those founds guilty in the form of the law.” Witnesses for the defense were beaten and forced to testify against the defendants; the court-appointed counsel failed to ask for a change of venue and called no witnesses. The trial of

precedent for the Patterson case, but Hawkins denied his motion for a mistrial.

\* \* \*

As in the earlier trial, the defense opened with the testimony of the defendant, Haywood Patterson. \* \* \*

Contradictions and inconsistencies marked Patterson's testimony. \* \* \* In a confusing cross-examination, Patterson first said he had seen Weems and four of the other defendants "ravish that girl [Victoria]," although he and his three friends had not touched her. Within five minutes he denied that he had even seen the girls, let alone raped them. \* \* \* Patterson's testimony was so contradictory that the jury could only conclude he was hopelessly bewildered or consciously lying.

In an effort to buttress Patterson's shaky story, Roddy called his three friends to the stand. \* \* \* The fight was brief, [Roy Wright] said, and most of the boys bailed out without a struggle. \* \* \* But at another point in his testimony he declared that he had seen nine Negroes (excluding himself, Andy, Eugene, and Haywood) "down there with the girls and all had intercourse with them. I saw all of them have intercourse with them. . . . I saw that with my own eyes." With the conclusion of Roy Wright's testimony, the second day of the trial came to an end.

\* \* \*

On Wednesday the machine guns that had been mounted at the two entrances to the courthouse square were removed, for the crowd was now relatively small, numbering about two thousand. \* \* \* John B. Benson, the local Ford dealer, led a motor caravan of twenty-eight new A-Model Ford

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the entire seventy-nine men lasted less than an hour. The jury returned a verdict of guilty in less than five minutes. Although the Arkansas Supreme Court could find nothing wrong with these proceedings, the National Association for the Advancement of Colored People won a reversal in the Supreme Court. \* \* \*

trucks in and around Scottsboro with a phonograph and amplifier blaring music to the crowd. The sound was clearly audible inside the courtroom, as Patterson's trial continued.

Roy Wright's older brother, Andy, and Eugene Williams testified briefly. They told of a fight, but said they saw no one with a gun, and, unlike Haywood and Roy, they insisted they had not seen anyone raped. \* \* \*

Testifying in Patterson's behalf, Ozie Powell told the jury that he had followed a group of Negroes who said they planned to throw the white boys from the train, but by the time he got to the gondola, most of the white boys had already jumped. He said that he had not seen any knives or pistols, nor had he heard any shooting. He added that he walked from "one end to the other" of the gondola after the fight took place and he never saw any girls. Olen Montgomery also testified, but he told the jury that he had boarded the seventh car from the end of the train and had remained there until arrested at Paint Rock. He swore that he did not know how many Negroes or whites were on the train, did not know there had been a fight, did not know anything. As he put it: "I was by my lonesome."

As in the first trial, Roddy and Moody declined to make a summation, and after brief statements by Bailey and Snodgrass and a restatement by Judge Hawkins of his charge in the earlier case, the Patterson case went to the jury at 11 a.m. The trial of Ozie Powell, Willie Roberson, Andy Wright, Eugene Williams, and Olen Montgomery was underway within fifteen minutes.

\* \* \*

[Victoria Price testified that the] first one to "put his hands on me" was the one "with the sleepy eyes, Olen Montgomery." He was also the first to rape her, she said. \* \* \* Of the five defendants on trial, she swore that Olen Montgomery, Andy Wright, and Eugene Williams had raped her. Ozie Powell and Willie Roberson had raped Ruby, she said. She was sure that she "absolutely saw them

have intercourse with the other girl.”

Roddy shifted tactics in this trial and for the first time tried to shake Victoria’s testimony instead of making futile assaults on her reputation. She was an unyielding witness, however, and failed to retract a single statement. \* \* \*

As Judge Hawkins prepared to adjourn the court for lunch, word came that the Patterson jury – out less than twenty-five minutes – had already reached a decision. When the jury for the trial in process had filed out of the room and Patterson’s jury had been seated, Hawkins spoke to the crowd. He warned that “if a single person makes a demonstration whatever I want the officers to bring them around, I am going to send them to jail.” The courtroom, he declared, “is not like vaudeville or anything else – you cannot make any demonstration.” He added: “To do that is liable to make the case have to be tried over . . . .” He backed up his warning by stationing twenty-five guardsmen throughout the courtroom. The circuit court clerk read the verdict and to the surprise of no one, the jury found Patterson guilty and sentenced him to death. The crowd remained completely silent.

When the trial resumed shortly after 1 p.m., Ruby Bates took the stand for the state. \* \* \* She swore that the Negroes on trial had come into the gondola with guns and knives. Under cross-examination she said she had been raped six times and she thought “every one of the colored boys . . . had intercourse with me or with Victoria.” But she could not point out any of the defendants specifically as having raped her. \* \* \* I just know an intercourse was held with me.” If Powell and Roberson were to be convicted, it would have to be on the testimony of Mrs. Price alone.

\* \* \*

[Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery and Eugene Williams testified for the defense; an hour later a fourth jury retired to consider the case of 13-year old Roy Wright; Solicitor Bailey asked for life imprisonment in his

summation in view of Wright’s youth. The following day the jury returned verdicts of guilt for the five.]

\* \* \* At noon, however, the case of Roy Wright was still undecided and Judge Hawkins ordered the jury polled in open court. In spite of the fact that the state had asked only for life imprisonment, seven of the jurors insisted on the death penalty for the thirteen-year old boy. The foreman told the court that agreement was hopeless and Hawkins reluctantly ordered a mistrial. Late in the afternoon, the eight convicted men filed before the bench and the judge, his eyes wet with tears, pronounced the death sentence on each. These were the first capital sentences he had administered in his five years on the bench. The defendants stood before him, stoically calm throughout his remarks.

In what he intended as a postscript to his story, the correspondent for the Birmingham *Age-Herald* remarked that the sentencing of eight person to death on the same day for the same crime was “without parallel in the history of the nation, and certainly in Alabama.” \* \* \*

### **Further Developments**

Following the verdicts and sentences both the International Labor Defense (ILD) of the Community Party and the NAACP offered to provide representation to the defendants. After a struggle between the two organizations and the refusal of the NAACP to work with the ILD, the defendants agreed to be represented by the ILD.

Lawyers retained by the ILD presented arguments on appeal to the Alabama Supreme Court, urging reversal for denial of the motion to change venue, the lack of any time to prepare for trial, the exclusion of African Americans from the juries, and the failure to ask prospective jurors about any racial prejudice they might have. Attorney General Thomas G. Knight, the son of one of the Court’s justices, represented the State.

The Alabama Supreme Court upheld, by a vote

of 6-1, the convictions of all but one of the defendants.<sup>1</sup> In *Powell v. State*, the majority in an opinion written by Justice Knight, affirmed the denial of a change of venue saying in:

\* \* \* The record \* \* \* does not disclose a single act done by the populace to show a disposition to take the law into its own hand. If the record truly gives the facts in the case, \* \* \* the defendants at no time were in danger of mob violence, and it wholly fails to show that the court, jurors, or officers were inflamed against the defendants. \* \* \*

\* \* \*

\* \* \* The burden of proof was on the defendants to show to the reasonable satisfaction of the court that a fair and impartial trial could not be had in Jackson county. This burden of proof appellants did not, in our opinion, meet and discharge. The evidence fails to show that their trial was dominated by a mob or mob spirit, or that there was at any time any mob present at, or during, the trial, or that the jury was inflamed against the defendants to the point where they could not, or did not, give the defendants a fair and impartial trial; nor does the evidence show there was any violence, actual or threatened, against the defendants, from the time of their arrest to the conclusion of their trial.<sup>2</sup>

The Court rejected the claim that the defendants were not given time to prepare for trial: “No motion for a continuance appears in the record. Therefore, this contention cannot avail defendants[.]”<sup>3</sup> Later in its opinion, the Court

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1. *Patterson v. State*, 141 So. 195 (Ala. 1932); *Powell v. State*, 141 So. 201 (Ala. 1932); *Weems v. State*, 141 So. 215 (Ala. 1932). The Court vacated the conviction of Eugene Williams based on affidavits filed in support of his motion for a new trial that he was under 16 and thus subject to juvenile court jurisdiction. *Powell*, 141 So. at 221-23.

2. *Powell*, 141 So. at 208.

3. *Id.* at 210.

noted that the assassin of President McKinley was “placed on trial for his life” in Buffalo within 10 days of the burial of the President, found guilty by a the jury in less than an hour, and executed less than two months after the crime was committed.<sup>4</sup> “This verdict, sentence, and execution were approved by good citizens, north, south, east and west, in fact on both sides of the Atlantic.”<sup>5</sup>

The Court rejected claims that the prospective jurors were not asked about racial prejudice and that blacks were underrepresented in the jury pool. The Court noted that counsel did not raise either issue at trial, and expressed its confidence that if counsel had asked the trial court to allow them to question jurors about racial prejudice, the court would have allowed it.<sup>6</sup>

Chief Justice Anderson dissented. After observing that “[e]very step that was taken from the arrest and arraignment to the sentence was accompanied by the military[;]” that “[t]he court did not name or designate particular counsel, but appointed the entire Scottsboro bar, thus extending and enlarging the responsibility, and, in a sense, enabling each one to rely upon others[;]” “that notwithstanding the appointment of the entire bar, \* \* \* one of the leading, if not the leading, firm subsequently appear[ed] throughout [the trial] for the state[;]” that the representation by Roddy and Moody “was rather pro forma than zealous and active[;]” that after the verdict in the first case there was “great applause and demonstration of approval” that “was bound to have some influence” over the juries in the other cases; and that the juries were given a sentencing range of 10 years to death, but they imposed death on each of the defendants, “notwithstanding there may have been some facts, such as difference in age, leadership, etc., that would render the conduct of some less culpable than others,” the Chief Justice concluded that, while no single factor might have required reversal,

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4. *Id.* at 211.

5. *Id.*

6. *Id.*

“when considered in connection with each other, they must collectively impress the judicial mind with the conclusion that these defendants did not get that fair and impartial trial[.]”<sup>7</sup>

The ILD retained Walter Pollak, one of the nations most eminent constitutional attorneys at the time, to seek review in the United States Supreme Court. The Court granted review and announced its decision in the opinion that follows. At the time the Court reviewed the case, it had not made the provisions of the Sixth Amendment, which guarantees the right to counsel, applicable to the states. That would come 30 years later in *Gideon v. Wainwright*, 372 U.S. 355 (1963). Thus, the Court examined the case under the Due Process Clause of the Fourteenth Amendment.

**OZZIE POWELL et al.**

**v.**

**STATE OF ALABAMA.**

**HAYWOOD PATTERSON v. SAME.**

**CHARLEY WEEMS and CLARENCE  
NORRIS v. SAME.**

Supreme Court of the United States  
287 U.S. 45, 53 S.Ct. 55 (1932)

**Mr. Justice SUTHERLAND** delivered the opinion of the Court.

\* \* \*

The petitioners, hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls. The crime is said to have been committed on March 25, 1931. \* \* \*

\* \* \*

\* \* \* It does not sufficiently appear that the defendants were seriously threatened with, or that

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7. *Powell*, 141 So. at 214-15.

they were actually in danger of, mob violence; but it does appear that the attitude of the community was one of great hostility. The sheriff thought it necessary to call for the militia to assist in safeguarding the prisoners. Chief Justice Anderson[, dissenting in the Alabama Supreme Court,] pointed out in his opinion that every step taken from the arrest and arraignment to the sentence was accompanied by the military. \* \* \* It is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile, and excited public sentiment. \* \* \* [T]he record clearly indicates that most, if not all, of [the defendants] were youthful, and they are constantly referred to as “the boys.” They were ignorant and illiterate. All of them were residents of other states, where alone members of their families or friends resided.

However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial. \* \* \* The sole inquiry which we are permitted to make is whether the federal Constitution was contravened and as to that, we confine ourselves \* \* \* to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment.

*First.* The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. Apparently they were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with. That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that very soon after conviction, able counsel appeared in their behalf. \* \* \*

It is hardly necessary to say that the right to counsel being conceded, a defendant should be

afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This will be amply demonstrated by a brief review of the record.

\* \* \* When the first case was called, the court inquired whether the parties were ready for trial. The state's attorney replied that he was ready to proceed. No one answered for the defendants or appeared to represent or defend them. Mr. Roddy, a Tennessee lawyer not a member of the local bar, addressed the court, saying that he had not been employed, but that people who were interested had spoken to him about the case. He was asked by the court whether he intended to appear for the defendants, and answered that he would like to appear along with counsel that the court might appoint. The record then proceeds:

The Court: If you appear for these defendants, then I will not appoint counsel; if local counsel are willing to appear and assist you under the circumstances all right, but I will not appoint them.

Mr. Roddy: Your Honor has appointed counsel, is that correct?

The Court: I appointed all the members of the bar for the purpose of arraigning the defendants and then of course I anticipated them to continue to help them if no counsel appears.

Mr. Roddy: Then I don't appear then as counsel but I do want to stay in and not be ruled out in this case.

\* \* \*

And then, apparently addressing all the lawyers present, the court inquired:

\* \* \*

The Court: The thing, I did not want to impose on the members of the bar if counsel unqualifiedly appears; if you all feel like Mr. Roddy is only interested in a limited way to assist, then I don't care to appoint –

Mr. Parks: Your Honor, I don't feel like you ought to impose on any member of the local bar if the defendants are represented by counsel.

The Court: That is what I was trying to ascertain, Mr. Parks.

Mr. Parks: Of course if they have counsel, I don't see the necessity of the Court appointing anybody; if they haven't counsel, of course I think it is up to the Court to appoint counsel to represent them.

The Court: I think you are right about it Mr. Parks and that is the reason I was trying to get an expression from Mr. Roddy.

Mr. Roddy: I think Mr. Parks is entirely right about it, if I was paid down here and employed, it would be a different thing, but I have not prepared this case for trial and have only been called into it by people who are interested in these boys from Chattanooga. Now, they have not given me an opportunity to prepare the case and I am not familiar with the procedure in Alabama, but I merely came down here as a friend of the people who are interested and not as paid counsel, and certainly I haven't any money to pay them[.] \* \* \* I am merely here at the solicitation of people who have become interested in this case without any payment of fee and without any preparation for trial and I think the boys would be better off if I step entirely out of the case according to my way of looking at it and according to my lack of preparation for it and not being familiar with the procedure in Alabama . . .”

Mr. Roddy later observed:

If there is anything I can do to be of help to them, I will be glad to do it; I am interested to

that extent.

The Court: Well gentlemen, if Mr. Roddy only appears as assistant that way, I think it is proper that I appoint members of this bar to represent them, I expect that is right. If Mr. Roddy will appear, I wouldn't of course, I would not appoint anybody. I don't see, Mr. Roddy, how I can make a qualified appointment or a limited appointment. Of course, I don't mean to cut off your assistance in any way – Well gentlemen, I think you understand it.

Mr. Moody: I am willing to go ahead and help Mr. Roddy in anything I can do about it, under the circumstances.

\* \* \*

The Court: All right, all the lawyers that will, of course, I would not require a lawyer to appear if –

Mr. Moody: I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do.

The Court: All right.

And in this casual fashion the matter of counsel in a capital case was disposed of.

It thus will be seen that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had “appointed all the members of the bar” for the limited “purpose of arraigning the defendants.” Whether they would represent the defendants thereafter, if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. How many lawyers were members of the bar does not appear; but, in the

very nature of things, whether many or few, they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.

\* \* \* [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Nor do we think the situation was helped by what occurred on the morning of the trial. \* \* \* The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. \* \* \* Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. \* \* \*

\* \* \* The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and

prepare his defense. To do that is not to proceed promptly in the claim spirit of regulated justice but to go forward with the haste of the mob.

\* \* \*

[N]otice and hearing are preliminary steps essential to the passing of an enforceable judgment, and \* \* \* constitute basic elements of the constitutional requirement of due process of law.

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

In the light of the facts outlined in the forepart of this opinion – the ignorance and illiteracy of the defendants, their youth, the circumstances of

public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives – we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. \* \* \*

\* \* \*

**Mr. Justice BULTER**, dissenting. \* \* \*

\* \* \*

\* \* \* Instead of trying them en masse, the State gave four trials and so lessened the danger of mistake and injustice that inevitably attends an attempt in a single trial to ascertain the guilt or innocence of many accused. \* \* \* The convicted defendants took the three cases to the state Supreme Court, where the judgment as to Williams was reversed and those against the seven petitioners were affirmed.

\*\*\* The [Alabama Supreme Court] said: “\*\* \*  
\* Mr. Roddy \* \* \* asked to appear not as  
employed counsel, but to aid local counsel  
appointed by the court, and was permitted so to  
appear. The defendants were represented as  
shown by the record and pursuant to appointment  
of the court by Hon. Milo Moody, an able member  
of the local of long and successful experience in  
the trial of criminal as well as civil cases. We do  
not regard the representation of the accused by  
counsel as *pro forma*. A very rigorous and rigid  
cross-examination was made of the state’s  
witnesses, the alleged victims of rape, especially  
in the cases first tried. A reading of the records  
discloses why experienced counsel would not  
travel over all the same ground in each case.”

\* \* \* There is not the slightest ground to  
suppose that Roddy or Moody were by fear or in  
any manner restrained from full performance of  
their duties. \* \* \*

When the first case was called for trial  
defendants’ attorneys had already prepared and  
then submitted a motion for change of venue  
together with supporting papers. They were ready  
to and did at once introduce testimony of  
witnesses to sustain that demand. They had  
procured and were ready to offer evidence to  
show that the defendants Roy Wright and Eugene  
Williams were under age. The record shows that  
the State’s evidence was ample to warrant a  
conviction. And three defendants each, while  
asserting his own innocence, testified that he saw  
others accused commit the crime charged. When  
regard is had to these and other disclosures that  
may have been and probably were made by  
petitioners to Roddy and Moody before the trial it  
would be difficult to think of anything that  
counsel erroneously did or omitted for their  
defense.

If there had been any lack of opportunity for  
preparation, trial counsel would have applied to  
the court for postponement. No such application  
was made. There was no suggestion, at the trial or  
in the motion for a new trial which they made, that  
Mr. Roddy or Mr. Moody was denied such

opportunity or that they were not in fact fully  
prepared. \* \* \*

[T]he Court \* \* \* declare[s] that “the failure of  
the trial court to make an effective appointment of  
counsel was likewise a denial of due process within  
the meaning of the Fourteenth Amendment.” This  
is an extension of federal authority into a field  
hitherto occupied exclusively by the several States.  
Nothing before the Court calls for a consideration  
of the point. It was not suggested below and  
petitioners do not ask for its decision here. The  
Court, without being called upon to consider it,  
adjudges without a hearing an important  
constitutional question concerning criminal  
procedure in state courts.

\* \* \*

Mr. Justice McREYNOLDS concurs in this  
opinion.

### **Further Developments**

The cases were remanded to the trial court,  
which changed venue to Decatur, Morgan County,  
fifty miles west of Scottsboro. A prominent New  
York lawyer, Samuel Leibowitz, took on  
representation of the defendants. He challenged the  
underrepresentation of Africa Americans in the  
jury pools from which the grand jury that had  
indicted them in 1931 was selected, as well as the  
jury pools from which the trial jurors were drawn  
for the retrial in Morgan County. The trial court  
denied the motion and the defendants were again  
convicted and sentenced to death. The United  
States Supreme Court, concluding that there was  
discrimination in excluding blacks from the jury  
pools, reversed the convictions for a second time.  
*Norris v. Alabama*, 294 U.S. 587 (1935). For the  
complete history of the Scottsboro case, see Dan T.  
Carter, *SCOTTSBORO: A TRAGEDY OF THE  
AMERICAN SOUTH* (LSU Rev. ed 2007).

## **Other Developments Between the 1930s and 1972**

**BROWN et al.  
v.  
STATE OF MISSISSIPPI.**

Supreme Court of the United States  
297 U.S. 278, 56 S.Ct. 461 (1936).

**Mr. Chief Justice HUGHES** delivered the opinion of the Court:

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934, and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. Defendants then testified that the confessions were false and had been procured by physical torture. The case went to the jury with instructions, upon the request of defendants' counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and that they were not they were not to be considered as evidence. \* \* \*

The [Mississippi Supreme] [C]ourt entertained the suggestion of error, considered the federal question, and decided it against defendants' contentions. \* \* \*

\* \* \* The state court said: "After the state closed its case on the merits, the appellants, for

the first time, introduced evidence from which it appears that the confessions were not made voluntarily but were coerced." There is no dispute as to the facts upon this point, and as they are clearly and adequately stated in the dissenting opinion of Judge Griffith (with whom Judge Anderson concurred)[;] \* \* \*[W]e quote this part of his opinion in full, as follows:

The crime \* \* \* was discovered about 1 o'clock p.m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the state of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of

white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and, as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. \* \*

[T]he transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

\* \* \* [T]he next day, that is, on Monday, April 2, \* \* \* the two sheriffs, one of the county where the crime was committed, and the other of the county of the jail in which the prisoners were confined, came to the jail, accompanied by eight other persons, some of them deputies, there to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred that he had no personal knowledge of it. He admitted that one of the defendants, when brought before him to confess, was limping and did not sit down, and that this particular defendant then and there stated that he had been strapped so severely that he could not sit down, and, as already stated, the signs of the rope on the neck of another of the defendants were plainly visible to all. \* \* \* [The accused repeated the confessions to three people who testified at trial.]

\* \* \*

The defendants were brought to the courthouse of the county on the following morning, April 5th, and the so-called trial was opened, and was concluded on the next day, April 6, 1934, and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was the so-called confessions. \* \* \* The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse. \* \*

\* \* \*

The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” \* \* \* [The State] may [not] substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination – where the whole proceeding is but a mask – without supplying corrective process. \* \* \* Nor may a state \* \* \* contrive a conviction \* \* \* by the presentation of testimony known to be perjured.” And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. \* \*

\* It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

\* \* \*

### **Note: *Chambers v. Florida***

The Court relied on *Brown* in *Chambers v. Florida*, 309 U.S. 227 (1940), a case in which 25 to 40 African Americans were arrested without warrants, confined in jail, and questioned over a period of days about the murder and robbery of an elderly white man. Eventually, four of those questioned were charged with the crimes, convicted and sentenced to death. The Supreme Court of Florida observed in affirming the convictions of the four, “It was one of those crimes that induced an enraged community.”

The United States Supreme Court found a violation of due process in an opinion by Justice Black for a unanimous Court:

For five days petitioners were subjected to interrogations culminating in Saturday’s all night examination. Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings. Some were practical strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives – so far as these ignorant petitioners could know – in the balance. \* \* \* To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.

\* \* \*

The determination to preserve an accused’s right to procedural due process sprang in large

part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. \* \* \* And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

The Court also rejected the argument that failure to allow such interrogation methods would make it harder for law enforcement to deal with crime:

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. \* \* \* Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. \* \* \* No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution – of whatever race, creed or persuasion.

**AVERY**  
**v.**  
**STATE OF ALABAMA.**

United States Supreme Court  
308 U.S. 444, 60 S.Ct. 321 (1940)

**Mr. Justice BLACK** delivered the opinion of the Court.

Petitioner was convicted of murder in the Circuit Court of Bibb County, Alabama; he was sentenced to death and the State Supreme Court affirmed. The sole question presented is whether in violation of the Fourteenth Amendment, "petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial", because after competent counsel were duly appointed their motion for continuance was denied. Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led us to grant certiorari.

\* \* \*

Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. \* \* \*

But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

\* \* \* Consistently with the preservation of constitutional balance between State and Federal sovereignty, this Court must respect and is reluctant to interfere with the States' determination of local social policy. But where

denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that we scrupulously review the record.

The record shows –

Petitioner was convicted on an indictment filed in the Bibb County Circuit Court for murder alleged to have occurred in 1932. He was found and arrested in Pittsburg, Pennsylvania, shortly before March 21, 1938. On that date, Monday, he was arraigned at a regular term of the Court; two practicing attorneys of the local bar were appointed to defend him; pleas of not guilty and not guilty by reason of insanity were entered and the presiding judge set his trial for Wednesday, March 23. The case was not reached Wednesday, but was called Thursday, the 24th, at which time his attorneys filed a motion for continuance, on the ground that they had not had sufficient time and opportunity since their appointment to investigate and prepare his defense. Affidavits of both attorneys accompanied the motion.

One attorney's affidavit alleged that he had not had time to investigate and prepare the defense because he had been actually engaged in another trial from the time of his appointment at 2 P.M., Monday, until 9 P.M. that evening; his presence had been required in the court room on Tuesday, March 22, due to employment in other cases set, but not actually tried; he had been detained in court Wednesday, March 23, waiting for petitioner's case to be called; but after his appointment he had talked with petitioner and "had serious doubts as to his sanity."

The affidavit by the other attorney stated that he too had not had proper time and opportunity to investigate petitioner's case because of his employment in other pending cases, some of which were not disposed of until Tuesday at 4:30 P.M.

No ruling on the motion for continuance appears in the record, but on Thursday, the 24th, the trial proceeded before a jury.

The foster parents of the person whose murder

was charged and another witness testified that on the day of the killing deceased petitioner's wife from whom he was then separated, had started to a nearby neighbor's house to get a washtub when petitioner approached her with a pistol in his right hand; words ensued; she turned and ran and he shot her twice in the back; she fell and he shot her three more times. Petitioner denied that these witnesses were at the time in a position to see what occurred. Admitting he had come some three miles from his home to see his wife, he insisted that he had no pistol but that when he spoke to her she had a bucket of water and something else; they quarrelled; she then drew a pistol from under her sweater and he "got to tussling with her over the pistol, trying to take it away from her"; "shot her, behind the shoulder, and through the back, tussling with her," and then ran away. There is no suggestion in the record that there were any witnesses to the killing other than those who testified. The plea of insanity apparently was withdrawn.

\* \* \*

\* \* \* [At the hearing on a motion for a new trial] [t]he two attorneys who had represented petitioner at the trial substantially repeated what they had set out in their original affidavits. In some detail they testified that: they had conferred with petitioner after their appointment on Monday, March 21, but he gave them no helpful information available as a defense or names of any witnesses; between their appointment and the trial they made inquiries of people who lived in the community in which the petitioner had lived prior to the crime with which he was charged and in which the killing occurred and none of those questioned, including a brother of petitioner, could offer information or assistance helpful to the defense; they (the attorneys) had not prior to the trial conferred with local doctors, of whom there were four, as to petitioner's mental condition, had neither summoned any medical experts or other witnesses nor asked for compulsory process guaranteed an accused \* \* \*. And in response to inquiries made by the trial judge they stated that they had not made any

request for leave of absence from the court to make further inquiry or investigation.

The motion for new trial was overruled.

\* \* \*

Under the particular circumstances appearing in this record, we do not think petitioner has been denied the benefit of assistance of counsel guaranteed to him by the Fourteenth Amendment. His appointed counsel, as the Supreme Court of Alabama recognized, have performed their "full duty intelligently and well." Not only did they present petitioner's defense in the trial court, but in conjunction with counsel later employed, they carried an appeal to the State Supreme Court, and then brought the matter here for our review. Their appointment and the representation rendered under it were not mere formalities, but petitioner's counsel have – as was their solemn duty – contested every step of the way leading to final disposition of the case. Petitioner has thus been afforded the assistance of zealous and earnest counsel from arraignment to final argument in this Court.

\* \* \* That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted.

\* \* \*

*Alabama executed Lonnie Avery by electrocution on March 15, 1940.*

### ***For discussion***

How do you distinguish *Avery* from *Powell v. Alabama*?

What deficiencies, if any, do you see in the representation provided to Avery by his lawyers?

Is *Avery* a product of its time? It is based on the due process of the Fourteenth Amendment. Is it a precedent that is relevant in assessing the right to counsel today?

## **PUBLIC EXECUTIONS**

The execution \* \* \* that ended the practice of public hanging in the United States, was that of Rainey Bethea, hanged for rape in Owensboro, Kentucky, in the summer of 1936. Estimates of the crowd ran between ten and twenty thousand. The town's hotels were so full that thousands had to camp out overnight at the execution site. Hot dog and drink vendors set up near the gallows. Spectators jeered throughout, even while Bethea prayed. As soon as the trap was sprung, before Bethea had been pronounced dead, souvenir hunters tore off pieces of the hood that covered his face. The event gave rise to a whirlwind of criticism in the national press. The headline in the *Philadelphia Record* read "They Ate Hot Dogs While a Man Died on the Gallows." The *Boston Daily Record* decried the "callous, carnival spirit" exhibited by spectators. "The revolting spectacle at Owensboro was not the hanging of Rainey Bethea," cried the *Cincinnati Enquirer*. "It was the crowd which found in a hanging grand entertainment." Indignant editorials from all over the country were reprinted in the local newspapers. A few days later officials in Covington, Kentucky, who had an imminent execution of their own, announced that it would be conducted in the jail, and that journalists would be barred from attending. Bethea's was the last public hanging in Kentucky. The state legislature abolished the practice in 1938. There have been no public executions in the United States since then.

Banner, *THE DEATH PENALTY* at 156.

## **Controversial Capital Cases**

There have been a number of other capital cases that, like the Scottsboro case, presented political and social issues as well as questions of guilt, innocence and punishment. Some cases attracted national or world-wide attention because they involved not only the death penalty but racial and ethnic prejudice, the labor movement, anarchy and communism,

### **The Haymarket Martyrs**

Illinois executed four anarchists in 1887 to, as one commentator put it, protect civilization from the eight-hour workday.

The four were part of a group of eight people arrested after a dynamite bomb was thrown at Chicago police breaking up a peaceful rally of several thousand people who had assembled on May, 4, 1886 at the Haymarket Square, where area farmers traditionally sold their produce, about eight blocks west of Chicago's City Hall. The purpose of the rally was to protest the killing of two workers the previous day by the police when they broke up a confrontation between locked-out union members and their replacements at the McCormick Harvesting Machine Co. on the city's Southwest Side. The rally occurred just days after nationwide strikes began on May 1, 1886, in support of the eight-hour day, led primarily by America's immigrant workers.

As the rally at Haymarket Square was nearing a close, about 180 police marched to the makeshift speakers' stand. Immediately after a police commander ordered the rally to disperse, someone threw the bomb into the ranks of the officers. The bomb killed one police officer. The police responded with indiscriminate shooting. Six more officers eventually died of wounds either caused by the bomb or the shooting and riot which followed.

The person who threw the bomb was never identified. Most of the eight arrested were not present when the bomb was thrown, but the eight were charged with conspiracy. The prosecution argued:

Law is upon trial. Anarchy is on trial. These men have been selected, picked out by the grand jury and indicted because they were leaders. They are no more guilty than the thousand who follow them. Gentlemen of the jury; convict these men, make examples of them, hang them and save our institutions, our society.

The mayor of Chicago, who had attended the meeting at which the bomb was thrown, testified at the trial as a witness for the defense. Nevertheless, the jury, which included a relative of the slain police officer, convicted the defendants and sentenced seven to death and the eight to 15 years in prison.

Governor Richard Oglesby commuted two of the death sentences to life in prison. The other five refused to ask for clemency on the grounds that because they were innocent, they would “demand either liberty or death.” One of the five, Louis Lingg avoided execution by taking his on life by setting off a blasting cap in his mouth the night before he was to be executed.

The others – Albert Parsons, August Spies, Adolph Fischer and George Engel, who became known as the “Haymarket martyrs” – were hanged together. In his last words, Parsons stated, “The time will come when our silence will be more powerful than the voices you are throttling today.” His words appears on a monument to the men at Waldheim Cemetery (later merged with Forest Home Cemetery) in Forest Park, a suburb of Chicago.

The *Chicago Tribune* described the execution:

Then begins a scene of horror that freezes the blood. The loosely-adjusted nooses remain behind the left ear and do not slip to the back of the neck. Not a single neck is broken, and the horrors of a death by strangulation begin.

Six years later, Illinois Gov. John Altgeld, after a careful study of the case, issued a lengthy statement analyzing the case and concluding that

the three who remained in prison “had been wrongfully convicted and were innocent of the crime,” that “the trial judge was either so prejudiced against the defendants, or else so determined to win the applause of a certain class in the community, that he could not and did not grant a fair trial[,]” and that it was “clearly [his] duty” to “grant an absolute pardons.” Altgeld lost his bid for reelection in 1896. The pardons ended his political career.

The 1938 Fair Labor Standards Act adopted the 40-hour workweek and imposed over-time pay requirements on employers for all work in excess of 40 hours.

### **Joe Hill**

The labor movement was also involved in and affected by the case of Swedish-born Joseph Hillstrom, known as Joe Hill, an organizer and songwriter for the Industrial Workers of the World (often called the “Wobblies”).

Hill was charged in Salt Lake City with being one of two men who shot and killer a grocer and his son as they were closing the business one evening. Hill claimed that he was innocent and he and the IWW argued that he was being framed.

IWW defense efforts turned the Hill case from an ordinary murder trial into the prospective lynching of a radical labor agitator. The prosecution’s tactics and the stories which appeared regularly in the Salt Lake press gave credence to IWW assertions. Prosecution and press constantly stressed Hill’s link to the IWW, the IWW’s commitment to direct action, sabotage, violence, and anarchy – arguing, in effect, that the dual murders had been a demonstration of Wobbly anarchy at work.<sup>1</sup>

It remains unclear whether Hill was guilty. The State never introduced a motive or called witnesses who could positively identify Hill, no bullet was

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1. Melvyn Dubofsky, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 309 (2d ed. 1988).

ever found, and no gun was ever located connecting Hill to the crime. On the other hand, Hill was treated for a gun-shot wound through the lungs on the night of the murder, was seen in possession of a pistol and did not establish his whereabouts at the time of the crime. After the conviction and sentence were affirmed on appeal, *State v. Hillstrom*, 150 P. 935, 942 (Utah 1915), appeals for clemency were made to the governor of Utah from throughout the world. Among those urging clemency were President Woodrow Wilson and the Swedish Minister to the United States.

Just prior to his execution, Hill wrote to IWW leader Big Bill Haywood, “I die like a true blue rebel. Don’t waste any time in mourning. Organize. . . Could you arrange to have my body hauled to the state line to be buried? I don’t want to be found dead in Utah.” On November 19, 1915, Hill was shot to death by a firing squad. His last word was “Fire!”

The night before his execution, a speaker at a rally in Salt Lake City proclaimed, “Joe Hill will never die.” In 1938, almost 20 years after his death, Earl Robinson and Alfred Hayes wrote the song “Joe Hill” in his memory. See the lyrics linked on the course page.

### **Leopold and Loeb**

Nathan Leopold and Richard Loeb were young, brilliant, and wealthy boys who kidnaped and killed an even younger boy, the unsuspecting Bobby Frank. They committed their crimes without provocation for the “experience” on May 21, 1924 after months of planning on how to commit the perfect, unsolvable crime.

The crime was promptly solved, however, and both Leopold and Loeb were arrested and confessed. The prosecution sought the death penalty. They were defended by Clarence Darrow, who saved 102 clients from death in his long career.<sup>2</sup>

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2. Robert Grant & Joseph Katz, *THE GREAT TRIALS OF THE TWENTIES: THE WATERSHED DECADE IN AMERICA’S COURTROOMS* 181 (1998).

Darrow’s defense strategy was unconventional – the defense surprised the court and the world by changing their plea to guilty only days before the trial began, waiving a jury and not advancing the insanity defense. Nevertheless, Darrow argued that while they were while they were technically sane and legally responsible, psychological problems had distorted the pair’s emotions, rendering them not entirely responsible for their behavior and undeserving of death. Darrow also emphasized Leopold’s and Loeb’s youth as a reason to grant life imprisonment rather than death. He connected this aspect of his defense to the psychiatric evidence, asserting that “youth itself is only relevant because it affects the condition of the mind.”<sup>3</sup>

Darrow’s argument also included a mighty plea against the death penalty. “If the state in which I live is not kinder, more humane, and more considerate than the mad act of these two boys, I am sorry I have lived so long,” he stated. Before concluding he argued:

\* \* \* I am pleading for life, understanding, charity, kindness, and the infinite mercy that considers all. I am pleading that we overcome cruelty with kindness, and hatred with love. I know the future is on my side.

Your honor stands between the past and the future. You may hang these boys; you may hang them by the neck until they are dead. But in doing so you will turn your face toward the past. \* \* \*

I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men. When we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.<sup>4</sup>

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3. *Id.* at 184.

4. Arthur Weinberg, ed., *ATTORNEY FOR THE DAMNED 86-87* (1957). The book contains closing arguments and speeches by Darrow.

Leopold and Loeb were sentenced to life in prison plus 99 years. Loeb was murdered in prison 12 years later. Leopold eventually won parole after serving 34 years and being an exemplary prisoner.

The life sentences in the cases resulted in a wave of public commentary on the relationship between the death penalty and moral responsibility for crime, as well as considerable criticism of the differential treatment of rich and poor criminals. Contemporary accounts suggest that the case caused many to question the propriety of capital punishment generally.<sup>5</sup>

### **Other prominent cases**

Massachusetts executed Nicola Sacco and Bartolomeo Vanzetti in 1927. They were widely thought to be innocent and the victims of politically motivated persecution.

New Jersey executed Bruno Hauptmann for the kidnaping and murder of Charles Lindberg's baby in 1936. His guilt was questioned at the time and has been ever since.

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5. Banner, THE DEATH PENALTY: AN AMERICAN HISTORY 225-226.