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Turning the Constitution Around: Black Liberation and the Rule of Law in the Last Century

THE FALL OF Reconstruction was also the fall of the rule of law in the South. After the 1877 deal that put Rutherford B Hayes in the White House and ended active executive branch involvement in Reconstruction, white terrorist ‘Redeemers’ seized and maintained political control of the South by using violence to keep Black citizens away from the voting booth and then, having taken control of the governments, building blatantly unfair institutions such as poll taxes and literacy tests in order to keep them out and keeping lynchers on hand to ensure that none of their victims resisted too vigorously. This ushered in the long darkness of Jim Crow.

There’s a plausible (albeit contestable) interpretation of the Redemption period that directly lays the blame at the feet of the judiciary. Southern white terror began before the election of 1876, and the Supreme Court directly impeded the federal government’s efforts under President Grant to prevent it. The deed was done in *United States v Cruikshank*, which, in Foner’s words, ‘gave a green light to acts of terror where local officials either could not or would not enforce the law’.¹ The immediate licence was granted not by the Supreme Court’s opinion, but the earlier ruling of a single justice, sitting in at the circuit level, two years beforehand: Justice Bradley’s opinion letting the terrorists off scot-free was widely publicised, and was immediately taken by white paramilitaries as declaring open season and leading to numerous violent assaults on Black officeholders across the South.² Thereafter the Supreme Court’s opinion resonated through the generations to undermine the use of the Reconstruction Amendments to actually secure the rule of law.

¹ E Foner, *Reconstruction: America’s Unfinished Revolution, 1863–1877*, updated edn (Harper Perennial, 2014) 531. *United States v Cruikshank* 92 US 542 (1876).

² J Gray Pope, ‘Snubbed Landmark: Why *United States v. Cruikshank* (1876) Belongs at the Heart of the American Constitutional Canon’ (2014) 49 *Harvard Civil Rights-Civil Liberties Law Review* 385, 412–15; GC Rable, *But There Was No Peace: The Role of Violence in the Politics of Reconstruction* (University of Georgia Press, 2007) 129. Justice Bradley’s opinion was *United States v Cruikshank* 1 Woods 308, 13 Am Law Reg (NS) 630, 25 FCas 707 (Circuit Ct, D LA, 1874).

Arguably, *Cruikshank* directly set off the fall of Reconstruction by facilitating the violent suppression of Black votes in the election of 1876. Here's how such an attribution could be defended. After the votes were cast, Republican electoral boards in the South refused to certify the election results based on the (eminently plausible) claim that Southern white terrorists had violently impeded Black electoral participation, and the (perhaps less plausible) claim that the terrorism swung the election in Tilden's favour.³ This was the dispute which was resolved in the compromise in which Hayes agreed to end federal involvement in Reconstruction. If the federal government been permitted back in 1874 to punish some terrorists, it may have been able to protect Black voters; accordingly, the election might have come out decisively in Hayes's favour, and Reconstruction might have continued. That being said, any such hypothesis is more than a little speculative, and we should remember that there were many political forces pushing against the use of federal troops to protect Black voters as well – thanks to an economic collapse, the Republicans had been badly hurt even in the North in the 1874 elections, and there was a widespread uproar against General Sheridan's proposal to have the white terrorists declared 'banditti' and put down by military commission; as a whole the political tide in the North seemed to be turning against Reconstruction.⁴ So it may be that the Republicans would have lost even without the terrorist suppression of Black votes, or that the federal government would have failed to protect Black voters even in the absence of *Cruikshank*, or that Hayes would have put a stop to Reconstruction even without the deal to resolve the election. We cannot know. Still, *Cruikshank* did not help matters, and could have been the precipitating factor.

Cruikshank's factual background should have signalled to the Court that it needed to defend federal power to secure the bare minimum of lawful governance in the South. The case came out of the infamous Colfax massacre, in which Grant Parish, Louisiana was taken over by an armed coup led by the white sheriff (or at least the white Democrat who claimed to be sheriff and ended up in control of the office at the end of the bloodshed) against the Black Republicans who had won control of the rest of the government of the parish.⁵ The Supreme Court refused to permit the government to convict the perpetrators under a section of Enforcement Act of 1870 which the Court quoted as follows:

That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision

³Foner (n 1) 574–76.

⁴ibid 523–28, 554–55; N Lemann, *Redemption: The Last Battle of the Civil War*, 1st edn (Farrar, Straus and Giroux, 2006) 79, 93–94; D Kato, *Liberalizing Lynching: Building a New Racialized State* (Oxford University Press, 2016) 45–46.

⁵Lemann (n 4) 3–26, describes the massacre. For some of the political background in terms of disputes over the rightful government of Louisiana, see Rable (n 2) ch 8. A 'parish' is Louisiana's version of a county.

of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court – the fine not to exceed \$5,000, and the imprisonment not to exceed ten years – and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.⁶

Part of the problem came from indictments which the Court read narrowly – and perhaps the government could have avoided some of the case’s worst implications by more carefully drafting them. But doctrinally the important part of *Cruikshank* for the crippling of the federal government’s efforts to stop the Redeemers was its interpretation of the Fourteenth Amendment, which the court claimed did not grant Congress the power to punish ‘private’ murders within a state.⁷ As Pope cogently argues, *Cruikshank* pioneered a number of important (and bad) doctrines in the course of its dismissal of the indictment against participants in the white coup: not only the ‘state action doctrine’ just mentioned, but also the exemption of the Fourteenth Amendment from the broad freedom of choice given Congress to choose the means necessary to effectuate the rest of its enumerated powers, and the narrow interpretation of what kinds of acts would constitute constitutionally cognizable race discrimination; in particular, to limit that interpretation to provably *intentional* acts.⁸

The narrow interpretation of the Fourteenth Amendment (and the strict reading of the indictments under the statute) seems to rest on an unwillingness to admit that the acts of the murderers were, in fact, forms of state action, as they manifestly were. How else ought we to characterise the actions of people who claim that they’re the lawful government of a jurisdiction, seize the reins of that government by force, and then, having seized the government, kill those who resisted them? If that isn’t state action, nothing is. Attending to those basic facts would have reaffirmed rather than undermined the federal government’s power to deter similar coups in other Southern jurisdictions. And *Cruikshank*’s legacy of federal abandonment echoed throughout the centuries: even as late as the civil rights movement, federal officials appealed to the idea that it wasn’t their job to prevent local violence to justify their refusal to prevent attacks on Freedom Riders and other activists that were patently carried out by or in collaboration with the state.⁹

In view of the plain purpose of the Reconstruction Amendments to raise Black Americans to full citizenship, and, indeed, the specific history of the

⁶ *United States v Cruikshank* 92 US 542, 548 (1875).

⁷ The variety of holdings on the 16 counts of the indictment the Court considered can be somewhat confusing; WR Huhn, ‘The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation’ (2009) 42 *Akron Law Review* 1051, 1071–74, gives a very helpful explanation.

⁸ Pope (n 2) 388–89.

⁹ H Zinn, *SNCC: The New Abolitionists* (Haymarket Books, 2013) 197–98.

enactment of the Fourteenth Amendment through Black suffrage which was established via military force, it required a kind of wilful blindness to suppose that Congress could not rectify a state's failure to protect its Black citizens in that right under the enforcement provisions of the three Reconstruction Amendments.¹⁰

More fundamentally, the idea of the state action doctrine doesn't really work in the context of the white supremacist politics of the period, because that politics radically undermined the boundaries between private and public action. Mobs of redeemers had clear political purposes for their violence, and their victories achieved political, indeed, governmental, ends. Perhaps the best analogy is to a contemporary failed state that dissolves into the battles of competing warlords: at a certain point, those warlords are all the state there is, and the law ought to attend to that fact.

The state action doctrine and the requirement that race discrimination under the Fourteenth Amendment be intentional work together in contemporary doctrine. Their joint operation shields from constitutional control private persons who use tools provided by the state to engage in race discrimination, except insofar as someone within the state can be proven to have intended that those tools be used that way. The conjoining of those two *Cruikshank* doctrines even today vexes efforts to pursue racial legal equality by ignoring the merger between state and private agency, most importantly by serving as an impediment to efforts to remedy the effects of residential racial segregation through practices like affirmative school integration plans.

Consider *Milliken v Bradley*, a case in which the Supreme Court reversed a school desegregation order covering the entire Detroit metropolitan area on the grounds that the district court had ordered students bused across school district lines despite the (alleged) absence of any evidence that the suburban school districts had intentionally done anything to bring about the existing segregation.¹¹ Of course, we know the reality of the relationship between state action, municipal boundaries, and school segregation is far more complicated: municipal boundaries may encourage private action, for example, by creating districts to which 'white flight' may occur; and the creation of municipal boundaries may also be motivated by the desire to avoid school integration.¹²

¹⁰ There might also be a case to be made that Congress had the power to do so under the Guarantee Clause.

¹¹ *Milliken v Bradley* 418 US 717 (1974).

¹² eg, GR Weiher, 'Public Policy and Patterns of Residential Segregation' (1989) 42 *Western Political Quarterly* 651, 672, argues that legal developments, including *Milliken* itself, 'have increased the salience of political boundaries for racially motivated settlers', ie, themselves facilitating white flight. N Burns, *The Formation of American Local Governments: Private Values in Public Institutions* (Oxford University Press, 1994), has traced out the conjunction of economic and racial motivations in the creation of new municipal governments for the purposes of hoarding resources. Justice Marshall, at least, could recognise state-sponsored residential racial segregation when he saw it, as in his opinion in *Memphis v Greene* 451 US 100 (1981), a case in which a local government shut

Nonetheless, the Court turned a blind eye to the complex intermixture of public and private action that led to allegedly de facto school segregation – a blind eye exemplified by the concurring opinion of Justice Stuart, who dismissed the underlying residential segregation that led to the school segregation as ‘caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears’. Such blithe dismissals of reality are only possible within the framework of a strict state action doctrine according to which a federal court may remedy public racial injustice only if it can identify a specific individual with a government employee ID card who provably intended to create that racial injustice – an idea whose origins trace right back to *Cruikshank*.

Further reinforcing the core theses of this book, the most important case in which the state action doctrine gave way was *Shelley v Kraemer*, a case prohibiting the judicial enforcement of private racially restrictive covenants in real estate sales – yet again illustrating the way in which the protections of America’s rule of law become much stronger when property rights, and especially property rights in land, are involved.¹³ As I have been arguing throughout this volume, the American conception of the rule of law is centred around the protection of such property interests, so it should be unsurprising that Black Americans could win the protections of law for their exercise of rights associated with real estate ownership long before even more basic protections such as the protection against being lynched would take hold.¹⁴

Actually, property rights took the driver’s seat in an even earlier case: in 1917, the Supreme Court struck down an ordinance prohibiting the sale of land in a designated area to Black people – not on the grounds that race discrimination was unconstitutional as such – but because that the law unjustifiably barred the alienability of property.¹⁵ The Court explicitly disclaimed the ambition to remedy race discrimination, saying: ‘The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.’ Other than, however, the rare case where the Supreme Court is willing to recognise the intertwined nature of private and state action to protect property interests, we to this day labour under the legacy of

down a street between the Black and the white neighbourhoods to bar ‘undesirable traffic’. But, alas, Justice Marshall’s opinion was a dissent. For further discussion of the racial character of municipal boundaries see P Gowder, ‘Racial Classification and Ascriptive Injury’ (2015) 92 *Washington University Law Review* 325, 373–90.

¹³ *Shelley v Kraemer* 334 US 1 (1948). To be fair, the Court also permitted the state action doctrine to be compromised in the case of political parties that held ‘white primaries’ and were effectively merged with the state in the same period. See, eg, *Smith v Allwright* 321 US 649 (1944).

¹⁴ RD Godsfil, ‘Race Nuisance: The Politics of Law in the Jim Crow Era’ (2006) 105 *Michigan Law Review* 505, describes another iteration of the same property bias: the surprising tendency of courts to reject the abuse of nuisance laws to chase out Black landowners.

¹⁵ *Buchanan v Warley* 245 US 60 (1917).

Redemption jurisprudence – the core way that the court in *Cruikshank* operated the Fourteenth Amendment is, alas, still good law.¹⁶

Yet paradoxically, property rights and republicanism contributed to the loss of Reconstruction's promise. Heather Cox Richardson attributes the fall of Reconstruction to a growing northern perception that freedpeople's political empowerment was not consistent with the dominant 'free labour' ideology of the time. The free labour ideology understood regional, national, and individual progress to revolve around workers who, through productivity and thrift, rose to become small-scale capitalists (much like republicanism's yeoman farmers); the idea was that the freedpeople would advance themselves through the unlocking of their capacity to benefit from their own work, and in doing so promote economic development in the South.¹⁷

But free labour had an internal tension: it was a view inconsistent with land monopolisation, since land monopolisation meant there was no path to upward mobility for workers; Radical Republicans deployed free labour ideology to challenge plantation aristocrats. But when freedpeople acquired political power in the South and began to actually challenge those monopolies themselves, by increasing taxes on concentrated land and by creating avenues to easier land ownership for the freed, this allowed Democrats to invoke the ideology of property rights to turn free labour ideals – and rule of law ideals – around, and portray the Republicans and freedpeople as interested in 'corrupt' expropriation (especially after the terrifying spectre of the Paris Commune in 1871). Richardson convincingly argues that this contributed to the electoral defeat of the Republicans in 1874 and to Northern unwillingness to fight the violent assaults on Black suffrage and officeholding.

JUDGE LYNCH'S AFFRONT TO THE RULE OF LAW

After the redeemer coup, the white racists of the South continued to resort to terror to maintain their hold on power. Jim Crow was enforced not merely by laws such as poll taxes, literacy tests, segregation statutes combined with

¹⁶The property theme might also be discernible in Justice Bradley's early intervention in *Cruikshank*. Pope (n 2) 410–11, helpfully draws our attention to the fact that the circuit opinion hinted at yet another hypocritical assertion of rule of law interests as a reason to not protect Black people: that it would amount to class legislation in favour of Black Americans. Moreover, according to Pope, *ibid* 418–22, Bradley's motivations for writing the circuit opinion that led to the violence and to the errors inflicted on the law by the full Court later were all about the protection of property holders as a class – Bradley had supported the 'property' interests of planters before the Civil War on the basis of what Pope calls 'the commonality of interest and outlook among all businessmen, slave owners and employers of wage labor alike' – and his circuit ruling reflected the belief that the labouring classes – which in the South meant Black people – were appropriately under the rule of the owners of property (even if they were entitled to a vote to pick among those who were qualified to be their rulers).

¹⁷H Cox Richardson, *The Death of Reconstruction: Race, Labor, and Politics in the Post-Civil War North, 1865–1901* (Harvard University Press, 2001).

inferior public services (like schools), and the like, but also by Judge Lynch.¹⁸ As Ida B Wells-Barnett, the mother of the antilynching movement, explained, ‘The real purpose of these savage demonstrations is to teach the Negro that in the South he has no rights that the law will enforce.’¹⁹ Because the state routinely turned away from lynch mobs with a nod and a wink, the message that Wells-Barnett described was delivered quite clearly.²⁰

Other civil rights activists explicitly invoked the concept of the rule of law to capture the demand that the government act to prevent this terror. For example, Hayward Burns published an essay in *Commentary* with the title ‘The Rule of Law in the South’, which described organised efforts to impede Black enfranchisement as a ‘reign of violence and lawlessness’ and called for the deployment of federal force to ‘enforce law and foster a new atmosphere of public law and order’.²¹

Wells-Barnett and Burns realised that, contra *Cruikshank*, lynch mobs *were* the state. After the redeemers used terrorism to seize the state, their heirs used terrorism to hold onto it; just as the state de jure authorised the ‘private’ arbitrary violence of masters over slaves, it also de facto authorised the ‘private’ violence of lynchers over their victims. Lynchers knew that the arm of the state would not be extended to prevent or punish their behaviour, so long as they confined their violence to Black victims. Indeed, sometimes lynch mobs included members of the police or other state officials. And the state worked hand in hand with private mobs late into the civil rights era; in an infamous example, Bull Connor once agreed to hold the police back for 15 minutes to permit the Klan some unrestrained time to beat Freedom Riders before restoring order.²²

Black Americans first tried to solve this problem in Congress: they repeatedly asked it to use its Fourteenth Amendment powers (those powers denied by the Court in *Cruikshank*) to end lynching. But anti-lynching laws went down to defeat in Congress. Racist members of Congress didn’t bother to conceal the reasons: they opposed those laws to permit the violent private enforcement of the existing social hierarchy, and to prevent ‘social equality’ between the races, a term that at least partially seemed to be code for Black men being allowed to

¹⁸ To use the language of W White, *Rope & Faggot: A Biography of Judge Lynch* (Alfred A Knopf, 1929).

¹⁹ IB Wells-Barnett, *Lynch Law in Georgia* (Chicago Colored Citizens, 1899) 1.

²⁰ P Gowder, ‘Resisting the Rule of Men’ (2018) 62 *Saint Louis University Law Journal* 333, 347–48; P Gowder, *The Rule of Law in the Real World* (Cambridge University Press, 2016) 54–55; D Kato, ‘Strengthening the Weak State: Politicizing the American State’s “Weakness” on Racial Violence’ (2012) 9 *Du Bois Review: Social Science Research on Race* 457.

²¹ H Burns, ‘The Rule of Law in the South’ (1965) 40 *Commentary* 80.

²² C Deitle Leonardatos, ‘California’s Attempts to Disarm the Black Panthers’ (1999) 36 *San Diego Law Review* 947, 951; P Magnusson, ‘FBI Knew Policeman Was Leak to Klan on Freedom Riders’ (*Washington Post*, 20 August 1978), www.washingtonpost.com/archive/politics/1978/08/20/fbi-knew-policeman-was-leak-to-klan-on-freedom-riders/b7c9511b-8805-4ff6-a4dd-3da31a05f1af/.

date white women, but also seemed to refer to a broader upsetting of the racial hierarchy in the South.²³

The speechmaking was remarkably blatant. The following words (which I have excerpted to highlight the open racial hatred) were uttered by a Representative from Georgia by the name of Brand, in opposition to a bill which would have criminalised lynching, on the floor of Congress in 1922:

The truth is, this proposed legislation is partisan and political. It is a blow at the white people of the South – nothing more and nothing less. The bill was introduced and is being prosecuted in order to promote the welfare of many of the Republicans in this House. It was introduced and is being prosecuted at the instance of their Negro constituents, among others, and the Negro societies in the North, who are not so much interested in preventing lynching of Negroes for assaults upon our white women as they are for establishing social and political equality with the white people. This is the fruitage which they hope and pray may grow out of the agitation of the Negro question and be the result of the pending legislation. Human villany has sounded no lower depths than is here fathomed in this political effort to bring about such an infamous heritage. [...] Social equality may come to pass in the territory north of the Mason and Dixon Line, but the stars will cease to shine and the heavens will be rolled up as a scroll before this state of affairs will ever exist among white people of the South.²⁴

A Representative named Sisson from Mississippi said made matters even more explicit: what lynching really was about was interracial marriage:

Now, I know that there is not a man on this floor who has among the Negroes acquainted with him more friends than I have. I work them on a little plantation which I own. All these Negroes are my friends. But I will tell you what I do not want; I will tell you what I am not going to have; I will tell you what every good white man on this earth will not have-I do not want him as a son-in-law and I do not want her as a daughter-in-law.²⁵

A bit later in his diatribe, Sisson forgets his admission that he's really worried about his daughters having consensual relationships with Black men, and pretends that he's worried about rape; but in doing so he also manages to provide a backhanded faux-reluctant endorsement of the practice of lynching from the floor of Congress:

This problem has heretofore been looked upon as the problem of the South, and here fifty-odd years after the Civil War, when you have the power, you have not presented to us any measure to help us solve the problem, but are making it harder for us. The man who says lynching will be stopped by virtue of this law does not know the instincts of the Anglo-Saxon blood. Do you know when, the crime of lynching is

²³B Holden-Smith, 'Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era' (1996) 8 *Yale Journal of Law and Feminism* 31, 58.

²⁴62 Cong Rec 1703 (1922).

²⁵62 Cong Rec 1718 (1922).

going to stop in my country? It is going to stop when the beast shall cease to outrage white girls in the South, and thank God it will never stop until then. [...]

No good man in the South believes in lynching as a method of enforcing law. But as long as rape continues, lynching will continue. For this crime, and this crime alone, the South has not hesitated to administer swift and certain punishment. We have about broken up lynching in the South, and we are going to break it up, so help us God. We are going to protect our girls and womenfolk from these black brutes. When these black fiends keep their hands off the throats of the women of the South then lynching will stop, and it is never going to stop until that crime stops. [...]

Before God and high heaven this is the sacred truth. I would rather the whole black race of this world were lynched than for one of the fair daughters of the South to be ravished and torn by one of these black brutes. Now, if this be treason, make the most of it.²⁶

At the most homicidal parts of this speech, the Congressional Record reports that Sisson's open bloodlust was punctuated by '[Applause]'. And one need not wonder very long how, precisely, it was supposed to be the case that passing a federal law against mob homicides would lead to poor Mr. Sisson having to deal with the horrors of having the Black Americans whom he 'worked' (!!) on his plantation (no less) marrying his precious daughters: the arbitrary violence of the white mobs was deemed necessary in order to maintain the social condition of subordination between the races in the South. When this bill fell to a filibuster in the Senate, the federal government effectively chose to preserve that state of affairs.²⁷ Hence, we can easily see the reign of lynch terror as a deliberate choice about how to use the power of the government at both the state and the federal levels; as a choice that subjected all Black Americans to the terror of arbitrary violence, it, like slavery, was an unquestionable offence against the rule of law.

THE SECOND LIBERATION MOVEMENT: FROM ANTI-LYNCHING TO CRIMINAL JUSTICE

Unsurprisingly, a core concern of the twentieth century civil rights movement from the start was to bring an end to lynching. Recent work has emphasised, however, that the anti-lynching movement led to some of the great legal victories of the twentieth century. Political historian Megan Ming Francis has described how the early NAACP's work to end lynching shifted from Congress, where it achieved no real success – which should be utterly unsurprising, given the language just quoted – to the courts.²⁸ As a result of this effort, the development of procedural protections in the criminal justice system, including protections

²⁶ 62 Cong Rec 1720–21 (1922).

²⁷ Holden-Smith (n 23) 58.

²⁸ M Ming Francis, *Civil Rights and the Making of the Modern American State* (Cambridge University Press, 2014).

that represent the basic demands of the rule of law, can be traced directly to Black activism.

Francis identifies *Moore v Dempsey* as a key historical turning point in the development of American legal protections.²⁹ *Moore* was a case involving another of the main features of Lynch Law: it also corrupted the judicial process in the south by ensuring that Black defendants would be subject to rigged trials and brutal punishments, while whites who killed Black citizens would be able to get off scot-free. Judicial railroading of Black defendants was seen in the South not as an alternative to a fair trial but as an alternative to no trial at all and to death by lynching.³⁰ This is, of course, another example of how legal caste leads to procedural injustice: if Black Southerners were to receive fair trials for the crimes of which they were accused, they might sometimes be acquitted – their alleged victims might sometimes be revealed as liars – they might sometimes even get to stand tall in a courtroom and cross-examine whites and demand to be treated as free citizens under law. The racial hierarchy in Jim Crow could not permit such a thing, and so it could not offer fair trials.

Moore concerned the legal aftermath of mob violence in Arkansas, in which white residents, in cahoots with local law enforcement, massacred a number of Black citizens who were seeking to organise to oppose exploitative sharecropping practices; after the killing was done, the whites rubbed salt in the wound by charging and convicting several Black citizens of murder and putting them on death row.

The Supreme Court described the facts surrounding these convictions:

A Committee of Seven was appointed by the Governor in regard to what the committee called the 'insurrection' in the county. The newspapers daily published inflammatory articles. On the 7th, a statement by one of the committee was made public to the effect that the present trouble was 'a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the 'Progressive Farmers' and Household Union of America' established for the purpose of banding negroes together for the killing of white people.' According to the statement, the organization was started by a swindler to get money from the blacks.

Shortly after the arrest of the petitioners, a mob marched to the jail for the purpose of lynching them, but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that, if the mob would refrain, as the petition puts it, they would execute those found guilty in the form of law. The Committee's own statement was that the reason that the people refrained from mob violence was 'that this Committee gave our citizens their solemn promise that the law would be carried out.' According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, produced by the petitioners since the last decision of the Supreme Court hereafter

²⁹ *Moore v Dempsey* 261 US 86 (1923).

³⁰ MJ Klarman, 'The Racial Origins of Modern Criminal Procedure' (2000) 99 *Michigan Law Review* 48, 56–57.

mentioned, the Committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. However this may be, a grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks upon it, and, on the morning of the 29th, the indictment was returned. On November 3, the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel, and were placed on trial before a white jury – blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence, although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour, and in less than five minutes, the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits, there never was a chance for the petitioners to be acquitted; no jurymen could have voted for an acquittal and continued to live in Phillips County, and if any prisoner by any chance had been acquitted by a jury, he could not have escaped the mob.³¹

But even this brutal background did not guarantee that the Supreme Court would save the prisoners: the Court had recent precedent suggesting that it would not intervene in mob-dominated state criminal proceedings; it took the deliberate strategic advocacy of the NAACP to nonetheless bring the case before the Court, and to win new precedent that would lead to decades of further Court-directed reforms in American criminal procedure.³²

Michael Klarman traces out some of the repercussions of this civil rights effort for the later innovations of constitutional criminal procedure.³³ While the most famous decisions, such as *Miranda v Arizona* (coerced confessions), *Gideon v Wainwright* (right to counsel), and *Mapp v Ohio* (exclusionary rule) would not occur until the 1960s, it was the interwar period which saw the first steps by the Supreme Court to intervene in state criminal trials. As Klarman argues, these interventions were only possible – in the face of a baseline ideology of strong federalism which would have traditionally forbidden federal judicial interference in state prosecutions – because the prosecutions which got to the Court were so egregiously illegal. And the reason they were so egregiously illegal and provoked enough public outrage (at least in the North) to provide political support for the Supreme Court's interventions was because they were racist prosecutions by formerly Confederate states at the height of Jim Crow.

For example, *Powell v Alabama* arose from the infamous 'Scottsboro Boys' events, where a number of Black teenagers were accused of raping a white

³¹ *Moore v Dempsey* 261 US 86, 87–89 (1923) (internal paragraph breaks modified).

³² Francis (n 28) 6, 128–29.

³³ Klarman (n 30).

woman.³⁴ The teenagers were held in jail under military guard to protect them from the lynch mob that had formed and were not given access to counsel until the morning of trial. Even at trial, there was some ambiguity about the relationship between the lawyers and the defendants; the Court quoted a bizarre rambling conversation between counsel and the court where a lawyer hemmed and hawed about whether he was actually going to represent the defendants. The Court reversed several death penalty sentences and held that when the defendant in a capital case was unable to acquire a lawyer, the state was under an obligation to appoint one.

In *Brown v Mississippi*, another of Klarman's examples, the Court reversed an even more outrageous conviction. The Black defendants were sentenced to death for allegedly murdering their landlord; the sole evidence on the basis of which they were convicted was their confessions. These confessions were procured by extreme torture perpetrated by a deputy sheriff in combination with a mob of white private citizens. The Court quotes a description by a dissenting state judge which describes how one defendant was partially hanged (and the rope scars were still visible on his neck at trial) then carried out of state and whipped until he confessed; two others were beaten with 'a leather strap with buckles on it', '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'.³⁵ Moreover, the deputy who perpetrated these acts was called as a witness by the state and casually admitted that he had beaten one of the defendants 'not too much for a negro; not as much as I would have done if it were left to me'.

These cases were doctrinal predecessors for the 1960s Warren Court innovations. *Gideon* cited and depended on *Powell v Alabama*; while the Court does not rely on it, *Brown v Mississippi* is a clear predecessor for *Miranda*. These gains, of course, rebounded to the benefit of all of American society. Many of the rules of constitutional criminal procedure on which the current generation of criminal defendants depends arose as judicially crafted remedies for systematic police abuses, often though not exclusively against Black Americans, and in response in substantial part to an entire campaign of Black-led organising and litigation to achieve the rule of law against the depredations of Judge Lynch.

The claims of Black Americans, and racial injustice more generally, were also at the forefront in the Warren Court's reforms of criminal procedure. Thus, *Mapp v Ohio* involved the abusive search of a black woman's home by white police officers.³⁶ *Miranda* involved a Latino victim of police misconduct.³⁷

³⁴ *Powell v Alabama* 287 US 45 (1932).

³⁵ *Brown v Mississippi* 297 US 278, 281–82 (1936).

³⁶ B Capers, 'Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle' (2011) 46 *Harvard Civil Rights-Civil Liberties Law Review* 1, 7.

³⁷ *ibid.*

Duncan v Louisiana, involving the right to a jury trial, was another case infected with Southern racism, and directly involved criminal charges of a young Black man arising out of racial conflict.³⁸ Other cases where Black criminal defendants led the charge to successfully get the Warren court to continue its trend of ratcheting up federal scrutiny of the constitutionality of the misconduct of state law enforcement officials include *Thompson v City of Louisville*, striking down the conviction, on the basis of zero evidence whatsoever, of a Black man for 'loitering' and *Monroe v Pape*, permitting a civil rights claim for damages against police officers who conducted a blatantly illegal raid against a Black family; former ACLU lawyer Burt Neuborne describes these cases as evidence of a 'gravitational pull' of race on the Court.³⁹

Should you meet a veteran of the Civil Rights Movement, you may want to consider thanking them for helping protect you from coerced confessions, retaliatory searches, and rigged criminal trials.

From the Black Panthers to the Movement for Black Lives

The most famous, or perhaps notorious, of the Black organisations of the Civil Rights era is the Black Panther Party. To be more accurate, they ought to be called by their full name, the Black Panther Party for Self-Defense, for the key proposition for which they were and continue to be known was their advocacy for armed self-defence by Black Americans. Images of the Black Panthers universally show them carrying very large guns, and their continuing image in American culture revolves around perceptions of violent resistance to authority.

Yet from a different perspective we can understand the Panthers as a rule of law organisation, oriented around demanding that the police follow the law – even if, as Papke argued, that demand was in part 'cynical'.⁴⁰ The Black Panther Party began primarily as a movement against police brutality, spending the bulk of its early efforts patrolling Black neighbourhoods in Oakland to deter police misconduct – and carrying not just their famous guns but also (unspecified) lawbooks to use to remonstrate with the police.⁴¹ Indeed, the

³⁸ *ibid* 7–9.

³⁹ B Neuborne, 'The Gravitational Pull of Race on the Warren Court' (2011) 2010 *The Supreme Court Review* 59; see also HL Packer, 'The Courts, the Police, and the Rest of Us' (1966) 57 *The Journal of Criminal Law, Criminology, and Police Science* 238, 240. This may not have all been to the good: S Ossei-Owusu, 'The Sixth Amendment Facade: The Racial Evolution of the Right to Counsel' (2019) 167 *University of Pennsylvania Law Review* 1161, 1192–1202, thoughtfully argues that race actually 'impeded the development of indigent defense' because the egregious race cases allowed the Court to spend decades focusing on the distinctive vulnerability of the Black victims of Jim Crow justice rather than the broader right to counsel.

⁴⁰ D Ray Papke, 'The Black Panther Party's Narratives of Resistance' (1994) 18 *Vermont Law Review* 645, 662–71.

⁴¹ JA Courtright, 'Rhetoric of the Gun: An Analysis of the Rhetorical Modifications of the Black Panther Party' (1974) 4 *Journal of Black Studies* 249, 253.

material of the Party was replete with references to the Constitution and the Declaration of Independence, and its core message was that Black Americans, even in the course of engaging in armed self-defence against the police, would merely be resorting to arms in order to secure the legal rights which they were being denied by racist police.⁴²

In their famous Ten-Point Program, issued in 1967, there was only one mention of carrying arms, and it came accompanied directly with an appeal to law:

We believe we can end police brutality in our Black community by organizing Black self defense groups that are dedicated to defending our Black community from racist police oppression and brutality. The Second Amendment of the Constitution of the United States gives us a right to bear arms. We therefore believe that all Black people should arm themselves for self defense.⁴³

Other elements of the Ten-Point Program included demands focused on core rule of law issues of criminal procedure: the Panthers demanded the release of Black men from jail 'because they have not received a fair and impartial trial', for example. In other material the Party directly invoked the rule of law and its traditional contrast to the rule of men to capture the treatment of Black Americans by the police, complaining of 'rule of man over man instead of the rule of the laws of Human Rights and Justice'.⁴⁴ Their demands for institutional changes to remedy police brutality and discrimination were aimed to subject the police to more direct control from those over whom they used force.⁴⁵

Perhaps most interestingly, the Program articulated an alternative conception of what it might mean to offer a person a fair jury trial – one connected to the idea of a legal community of equals:

We want all black people when brought to trial to be tried in a court by a jury of their peer group or people from their black communities, as defined by the Constitution of the United States. We believe that the courts should follow the United States Constitution so that black people will receive fair trials. The Fourteenth Amendment of the U.S. Constitution gives a man the right to be tried by his peer group. A peer is a person from a similar economic, social, religious, geographical, environmental, historical and racial background. To do this the court will be forced to select a jury from the black community from which the black defendant came. We have been, and are being, tried by all-white juries that have no understanding of the 'average reasoning man' of the black community.⁴⁶

⁴² M Roman, 'The Black Panther Party and the Struggle for Human Rights' (2016) 5 *Spectrum: A Journal on Black Men* 7, 14–15.

⁴³ 'What We Want Now! What We Believe', reprinted in J Bloom and WE Martin, Jr, *Black Against Empire: The History and Politics of the Black Panther Party*, 2nd edn (University of California Press, 2016) 72.

⁴⁴ Roman (n 42) 14.

⁴⁵ *ibid* 22.

⁴⁶ Bloom and Martin, Jr (n 43) 72.

The proposition that a jury of one's peers requires a kind of social identification between the defendant and the members of the jury is somewhat unfamiliar to contemporary American law (and 'peers' does not appear in the Constitution – it comes from the Magna Carta). Nonetheless, the demand had some important historical fidelity. At least sometimes in the period between the Magna Carta and the nineteenth century, the notion of a jury of one's peers was taken seriously in both England and America. Efforts to assure a jury of one's peers to ethnic and national minorities included the notion of a 'mixed jury', in which efforts were made to ensure representation from the defendant's social group.⁴⁷ At least one Black defendant in Jim Crow had unsuccessfully tried to demand a jury *de medietate linguae* – containing representation from his own group – in 1887 in North Carolina.⁴⁸ And in the context of the framing-era idea that a jury could serve as a democratic guardian of the government's legal fidelity – as well as the Federalist 57 idea that democratic inclusion would be instrumental in achieving general law – the demand makes perfect sense.

The Black Panthers were also notable for directly challenging the property-oriented conception of the American rule of law. Much like contemporary Black Lives Matter activists argue that focusing on property destruction at protests rather than the killings by police that occasion the protests represents the placing of property rights over rights to live, the Panthers articulated a conception of the hated 'pig' as a police officer or other authority who valued property rights above human rights.⁴⁹

To be sure, the Black Panthers also produced rhetoric replete with calls for violent revolution, to 'off the pigs', and the like.⁵⁰ But I do not aim to offer a general defence of the Black Panther Party; rather, I offer it as an example of how we can find rule of law ideas embedded even in the most 'radical' of Black liberation organisations.

Indeed, the use of the law and the values captured by the law as a tool both of internal solidarity and of external solidarity – to appeal to shared values and simultaneously reveal the hypocrisy and corruption of the powerful – can be vividly seen

⁴⁷ C Davies and C Edwards, 'A Jury of Peers': A Comparative Analysis' (2004) 68 *The Journal of Criminal Law* 150, 151–53; M Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (University of Chicago Press, 1994); DA Ramirez, 'The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and Proposal for Change' (1994) 74 *Boston University Law Review* 777.

⁴⁸ Ramirez (n 47) 795.

⁴⁹ Roman (n 42) 12–13.

⁵⁰ No organisation is a monolith. Different members and sub-groups had different orientations toward the law and to violence. Indeed, there was a violent schism within the Party in 1971 precisely over this issue; later, individual leaders began to abandon the principles they advocated earlier and engage in outright criminal behaviour. DJ Garrow, 'Picking up the Books: The New Historiography of the Black Panther Party' (2007) 35 *Reviews in American History* 650, 657–59). But this does not change the character of the message embedded in their legal system advocacy.

in Bobby Seale's story of the Party. As he described it, Huey Newton drew on the law because of its capacity to be a basis for collective solidarity and action:

Huey used to teach the brothers on that; he wouldn't let them get around it, because Huey understood that the brothers had no guidelines about how to deal with the pigs. So Huey went off in the area of law and he found out the brothers respected law. Huey knew something about law, and he could use it to make it serve him. That's all he was doing, he was bringing them basic things in everyday life about law.⁵¹

That passage comes from a description of an exchange in which the police stopped a heavily-armed Huey Newton in front of the Black Panther headquarters.⁵² Newton stubbornly stood on his rights and refused to provide the police with any information or permission to search his car or inspect his weapons – simply handing over his driver's licence and invoking his Fifth, Fourth, and Second Amendment rights.⁵³

The police officer's exclamations of frustration come out in the repeated statement that Newton is 'turning the Constitution around' – an utterance that I can only interpret as reflecting the experience of an unsettled hierarchy. Seale quotes him: "You, you, you ..." the pig was mad. "You're just turning the Constitution around."⁵⁴ Evidently, in the officer's mind, the Constitution is supposed to be a tool for him and people like him, and the patriotic foundation of their authority – and he's clearly horrified by the upset status hierarchy, on Seale's telling, when he realises that it can be 'turned around' against him. In fact, Newton's provocation forces the police to reveal that they specifically associated the right to appeal to the Constitution with hierarchical status:

They were blabbing and oinking to each other about who in the hell we thought we were and, 'Constitution, my ass. They're just turning it around.' Then a pig said to Huey, 'Who in hell you think you are?'⁵⁵

When Seale recounts this story, he also recounts the way that a crowd of people formed to watch the police be humiliated by the pairing of law and arms, and that the incident provided a notable boost to their recruiting – because others in the community also wanted to stand up to the police by 'turning the Constitution around'. Such are the tactics of the radical demand for the rule of law in the face of oppression.

Radical Black movements in the period drew on the resources of the law in other ways as well. Another important tactic in challenging police behaviour was to draw directly on the fact that trials were public – a fact whose traditional

⁵¹ B Seale, *Seize the Time: The Story of the Black Panther Party* (Black Classic Press, 1991) 86.

⁵² *ibid* 85–93.

⁵³ Of course, being the Black Panthers, these assertions of legal right were also paired with threats to shoot back if the police escalated the situation to violence – but how different is that from the Lockean right to revolution and broader classical liberal right to self-defence that inspired the Framers?

⁵⁴ *ibid* 90.

⁵⁵ *ibid* 89.

rule of law signification is that it permits the public to monitor the conduct of their officials – to highlight the lawless conduct of officials for the public and articulate oppositional accounts of legality. For example, Felber describes how the Nation of Islam combined highly-disciplined street-protest tactics with courtroom trials to demonstrate their organisational solidarity and build both legal and political credibility for the claim that police were simultaneously violating their property rights and their religious liberties.⁵⁶ As Felber characterises the tactic, the Nation ‘sought to shift the discourse of the trial through political theatre and community organising around a united platform against police brutality’.⁵⁷ Such techniques are both challenges to and affirmations of traditional conceptions of the rule of law – challenges because they refuse to permit the court to operate under normal order and deny that the issue of justice for an oppressed people can be conducted with the same de-politicised processes that we might use to adjudicate a dispute over a stock swap – thus, the Nation upset the conventional context of the courtroom by, for example, demanding that their religious beliefs be respected by seating Muslim women in a separate section and at one point even patrolling the hallways and denying white spectators admittance under the colour of the claim that the trial was not ‘public’ – yet affirmations in that they actually used the publicity of the trials to draw attention to their claims and invite the broader democratic community to judge the behaviour of the police, replicating the republican conception of the function of the jury in the public at large.⁵⁸

We can see the contemporary Movement for Black Lives as a continuation of the overall focus of Black liberation activists on fair criminal justice in the twentieth century, whether of the liberal and within-the-system orientation of the NAACP, or the radical and subversive orientation of the Black Panther Party and the Nation of Islam.⁵⁹ While Black activism was instrumental in challenging the worst policing abuses of the twentieth century, the struggle continues to this day.

The very first newsletter put out by the Black Panther Party, on 25 April 1967, accused the police of murdering Denzil Dowell, an unarmed Black man who was shot six times.⁶⁰ The same number of bullets struck Michael Brown, an unarmed Black man in Ferguson, Missouri in August 2014.⁶¹ During the late nineteenth

⁵⁶ G Felber, *Those Who Know Don't Say The Nation of Islam, the Black Freedom Movement, and the Carceral State* (2020) 99–103.

⁵⁷ *ibid* 124.

⁵⁸ *ibid* 100, 123.

⁵⁹ It is important not to stereotype the tactics either of civil-rights-era Black liberation activists or their contemporary heirs. As Hooker has argued, Americans tend to hold a harmfully romanticised image of the Civil Rights Movement and a pernicious tendency to use that romanticised image as an impossible ideal against which to criticise contemporary activists. J Hooker, ‘Black Lives Matter and the Paradoxes of U.S. Black Politics: From Democratic Sacrifice to Democratic Repair’ (2016) 44 *Political Theory* 448.

⁶⁰ Bloom and Martin, Jr (n 43) 162.

⁶¹ J Hafner, *Police Killings of Black Men in the U.S. and What Happened to the Officers*, (USA Today, 29 March 2018) www.usatoday.com/story/news/nation-now/2018/03/29/police-killings-black-men-us-and-what-happened-officers/469467002/.

and early twentieth century, Black Americans were financially exploited when they were brought into the criminal system, particularly through the infamous practice of ‘convict leasing’, where prisoners were rented out, effectively replicating slavery through the legal process.⁶² In Ferguson, the Department of Justice disclosed a pattern of abuses that amounted to a racially discriminatory police and court system being effectively run as a for-profit operation, extracting revenue from citizens with fines and fees.⁶³ Of course, Ferguson is not convict leasing, but the overall corruption of the criminal justice system, in which it is used not as a method for securing socially responsible behaviour from all citizens but for expropriating Black citizens, is similar between the two cases.⁶⁴ And the US continues to use extensive prison labour.⁶⁵

Much like the Nation of Islam, contemporary activists associated with the Movement for Black Lives have articulated important counterpublic challenges to the dominant conceptions of what the rule of law could be. Keeanga-Yamahatta Taylor’s analysis of the movement emphasises that the Black women who have been its most important leaders have framed it in terms of an account of what sort of things constitute ‘state violence’. This framing demands that we focus on the *state* as the agent rather than individual violent police officers, and hence calls the state itself to account for the failure to use its power consistent with the liberty and equality of Black Americans – precisely the analytic move that the Supreme Court missed in *Cruikshank*, and Wells-Barnett made in interpreting lynching. It also demands that we see the violent character of a broader array of racist and unequal state practices, such as mass incarceration, hierarchies of citizenship and lawful presence, and gender-based, sexuality-based, and disability-based discrimination – all of which are rooted in coercion which in turn is backed by the threat of violence.⁶⁶

To that contemporary identification of the rule of law failures at the heart of police violence against Black Americans, I would add that policing, in particular, also raises that other foundational concern of rule of law activists: the control of executive power. To this, the next chapter turns.

⁶²MJ Mancini, ‘Race, Economics, and The Abandonment of Convict Leasing’ (1978) 63 *The Journal of Negro History* 339.

⁶³Department of Justice, Investigation of the Ferguson Police Department (4 March 2015), www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. For a useful discussion of the historical thread from convict leasing to Ferguson, see D Murch, ‘Paying for Punishment’ (*Boston Review*, 1 August 2016) bostonreview.net/editors-picks-us/donna-murch-paying-punishment.

⁶⁴Contemporary activists recognise the continuity of the movement across time. For example, a leading Chicago movement focused on police abuse of youth adopted the name We Charge Genocide, in a conscious reference to the landmark 1951 petition in which the Civil Rights Congress called upon the United Nations to act against police abuse as well as lynching.

⁶⁵eg, P Goodman, ‘Hero and Inmate: Work, Prisons, and Punishment in California’s Fire Camps’ (2012) 15 *WorkingUSA* 353.

⁶⁶K-Y Taylor, *From #BlackLivesMatter to Black Liberation* (Haymarket Books, 2016) 166–67.