

## Creating a Truth and Reconciliation Commission for Lynching

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*It is the nucleus of ordinary men that continually gives the mob  
its initial and awful impetus.*

W.E.B. DuBois<sup>1</sup>

*The violence of apartheid was aimed less at individuals than  
at entire communities.*

Mahmood Mamdani<sup>2</sup>

### Introduction

Lynching has been called "America's national crime."<sup>3</sup> Although people of all races have been the victims of lynching,<sup>4</sup> it

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1. W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA* 678 (Russell & Russell 1962) (1935).

2. Mahmood Mamdani, *A Diminished Truth*, *SIYAYA!*, Spring 1998, at 38.

3. See FITZHUGH W. BRUNDAGE, *LYNCING IN THE NEW SOUTH: GEORGIA AND VIRGINIA 1880-1930* 1 (1993) (quoting James Cutler). Frank Shay has described lynching as being "as American as apple pie." FRANK SHAY, *JUDGE LYNCH: HIS FIRST HUNDRED YEARS* 99 (Patterson Smith 1969) (1938). W.E.B. DuBois noted, "the [American] South reached the extraordinary distinction of being the only modern civilized country where human beings were publicly burned alive." DuBois, *supra* note 1, at 700.

4. In the early years of the century, white immigrants were also lynched. See WALTER WHITE, *ROPE AND FAGGOT* 207-08 (Univ. of Notre Dame Press 2001) (1929) (noting that mobs had lynched "Italians, Chinese, Japanese, Bohemians, Mexicans, and citizens of Great Britain and Switzerland"). The United States paid reparations to foreign governments for the lynching of their nationals. *Id.* In the western states of California, Colorado, Wyoming, Washington, Oregon and Idaho, whites were most often the victims of lynching. See SHAY, *supra* note 3, at 141-47. Jews were also the victims of lynching. One of the most infamous lynchings was that of Leo Frank in 1913. Frank was a Jewish northerner, who went South to take a job managing a pencil factory. When a local girl was found dead in the basement of the factory, Frank and Newt Lee, a black janitor who found the girl's body, were accused of the murder. Lee was exonerated, but Frank was tried and

is the systematic and virtually unchecked lynching of blacks during the first half of the twentieth century that continues to resonate in America's racial consciousness.<sup>5</sup> Between 1895 and 1968, nearly 3,500 blacks were lynched in the United States.<sup>6</sup> The vast majority of those lynched were men, although some of the most grisly lynchings on record involved black women.<sup>7</sup> The recent lynchings of James Byrd in Jasper, Texas,<sup>8</sup> Garnett P. Johnson, Jr. in Elk Ridge, Virginia,<sup>9</sup> and Matthew Shepherd in

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sentenced to death in a proceeding dominated by the presence of a mob. Although convicted, Frank appealed the conviction on due process grounds to the U.S. Supreme Court. See *Frank v. Mangum*, 237 U.S. 309, 309-10 (1915). The Court deferred the interpretation of the procedural issue to the state supreme court. The Governor of Georgia commuted Frank's sentence to life in prison. But while recovering from a knife attack in prison, Lee was taken from the penitentiary by a mob and hung from a tree. A local newspaper praised the mob's "sentence of law on the Jew who raped and murdered the little Gentile girl, Mary Phagan." SHAY, *supra* note 3, at 153-59.

5. See *infra* notes 19-21 and accompanying text (describing contemporary responses to the tragic history of lynching in the United States).

6. *U.S. Lynchings by Race and by Year* (providing Tuskegee Institute statistical data about the number of lynchings per year, per race from 1882 to 1968), available at <http://www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html> (last visited Apr. 14, 2003).

7. See IDA B. WELLS-BARNETT, *SELECTED WORKS OF IDA B. WELLS-BARNETT* 77-78 (Trudier Harris ed., 1991) (describing the lynching of black women). See also WHITE, *supra* note 4, at 35-36 (recounting lynching of Luther Holbert and his wife in Mississippi in 1904). Black women who were lynched were lynched along with, or in place of, their husbands, sons, or brothers. The lynching of Mary Turner in Georgia is perhaps the most gruesome ever reported. A pregnant Mrs. Turner was lynched for protesting the lynching of her husband. Mr. Turner had been lynched after being accused of murdering a white employer with whom he had a dispute about wages. Mrs. Turner apparently threatened to "swear out warrants for the arrest of her husband's murderers." When her threats were made known to her husband's murderers, the pregnant Mrs. Turner was reportedly hung from a tree and burned alive. The still-living fetus was cut from her stomach and stomped to death by members of the crowd. *Id.* at 27-29.

8. See Carol Marie Cropper, *Black Man Fatally Dragged in a Possible Racial Killing*, N.Y. TIMES, June 10, 1998, at A16. While walking home late one evening in June 1998, Charles Byrd was offered a ride by three white men who later beat him, chained him to their pickup truck, and dragged him to his death. Byrd's body was found in pieces along a rural road in Jasper. The three whites that killed Byrd, two of whom were avowed white supremacists, were later convicted and sentenced to death. *Id.*

9. See Mike Allen, *Human Tragedy or Inhuman Cruelty?; Virginia Town Struggles With Possibility of Racism in Alleged Killing of Black Man*, WASH. POST, Aug. 3, 1997, at B1. In the summer of 1997, Garnett P. Johnson was burned and beheaded by two white acquaintances with whom he'd spent a night of drinking and taking drugs in rural Virginia. The two lynchers used racial slurs and told Johnson that they were going to burn him on a white cross located outside their trailer home. As they dragged him outside, Johnson reportedly pleaded with his killers to "go ahead and shoot me and get it over with." *Torched Man Begged to Die, Jury Told*, NEWSDAY, Nov. 3, 1998, at A15.

Laramie, Wyoming,<sup>10</sup> have revived memories of lynching as the ultimate hate crime.<sup>11</sup> The strong public reaction to these contemporary lynchings reveals that our history of lynching evokes strong and deep emotions in black communities throughout the United States.<sup>12</sup> In fact, these contemporary lynchings demonstrate that lynching as a powerful symbol of white supremacy<sup>13</sup> remains a largely unhealed wound in many American communities.

Despite movements during the 1990s to recognize and confront racial massacres such as those in Rosewood, Florida,<sup>14</sup>

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10. See Tom Kenworthy, *Gay College Student Who Was Beaten Dies*, CHI. SUN-TIMES, Oct. 13, 1998, at 20, available at LEXIS, News File, Chicago Sun-Times File. In the fall of 1998, Matthew Shephard, a gay college student, was severely beaten, tied to a fence, and left to die in Laramie, Wyoming. The two men who beat Shephard were later tried and convicted of his murder. *Id.*

11. See *Three Are Charged in Attack Attributed to Neo-Nazi Gang*, N.Y. TIMES, Nov. 21, 1988, at A16; *Skinhead Mayhem*, TIME, Nov. 28, 1988, at 29. In 1988, racist skinheads in Portland, Oregon beat Mulgeta Seraw, a 28-year-old Ethiopian immigrant, to death with a baseball bat. See also Richard E. Meyer, *The Long Crusade: Morris Dees Has Battled the Klan for More Than a Decade*, L.A. TIMES, Dec. 3, 1989, at 14. In March 1981, members of the United Klan of America killed Michael Donald, a black 19-year-old. The Klansmen went on a "hunt" looking for a black man to kill. They lured Donald to his car, drove him to a secluded area, beat him, strangled him with a rope, cut his throat, and hung Donald's body from a camphor tree. *Id.* See generally Kevin J. Strom, *Hate Crimes Reported in NIBRS, 1997-99*, U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 8 (2001) (discussing figures from the U.S. Department of Justice establishing that nearly 10,000 hate crimes are committed each year). More than 30% of hate crimes are committed against blacks. *Id.* at 4.

12. See ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES 171-73* (1998) (recounting the divergent reactions of Jasper residents to the lynching of Byrd). See also Mitch Mitchell, *Dragging Dead: Texas Town Tries to Fend Off "Racist" Label*, ATLANTA J. & CONST., June 11, 1998, at 4A; Allen, *supra* note 9, at B1, B8. In Virginia, where Garnett Johnson was lynched, the reactions of blacks and whites were starkly different. The views of interviewed whites mirrored those offered by the Grayson County Sheriff, who "did not consider the death a hate crime because the victim and suspects had hung out together for several weeks." Another white resident insisted "[w]e're all peaceful here .... Black people are here. We're all familiar with them." Black residents viewed the murder somewhat differently. Rose Jackson remarked, "[t]here's always going to be hate among some of the white." The executive director of the local NAACP remarked "[w]e haven't seen a killing like this since the '20s. This isn't just a racial incident. This is a crime against humanity." *Id.* at B8.

13. For purposes of this article, white supremacy means the creation, promotion, and maintenance of systems designed to ensure white control of the political, social and economic processes. White supremacy, particularly in communities where racial violence flourished, often included the maintenance of white heterosexism as well as Christian fundamentalist patriarchy.

14. The Florida Legislature passed a bill providing compensation for victims of a racial massacre in the community of Rosewood in 1923. See C. Jeanne Bagget, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One Year Old Injury*, 22 FLA. ST. U. L. REV. 503 (1994), cited in Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black*

and Tulsa, Oklahoma,<sup>15</sup> and more recent organized legal efforts to obtain reparations for slavery,<sup>16</sup> few public efforts have been launched to address the devastating history of lynching in the United States.<sup>17</sup> More importantly, even where lynching is the subject of interest and reflection, efforts to address it have not been spearheaded by local governments, but by individuals.<sup>18</sup> For instance, an exhibit of lynching "artifacts" made its debut in New York City in 2000, and in Atlanta in 2002.<sup>19</sup> In Duluth, Minnesota, some community members have tried to come to grips with a hideous lynching in 1920 where three black men were hung from lampposts while a crowd of 10,000 whites watched.<sup>20</sup> Community members in Duluth marched, sponsored discussions and speeches, and created a commemorative plaque that they hope to permanently enshrine at the site where the young men were taken to their deaths.<sup>21</sup> However, state and local governments and local institutions like the press, the church, and the criminal justice system that played a central role in fostering and condoning lynching, are remarkably absent from organized efforts to spearhead anti-lynching reconciliation activities.

Furthermore, when local governments have addressed historic incidences of racial violence, the focus has most often been on identifying, trying, and convicting perpetrators of high-profile racial killings.<sup>22</sup> Without question, these efforts should be encouraged. A movement to prosecute well-known racist

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*Reparations?*, 40 B.C. L. REV. 429, 436 n.22 (1998).

15. In March 2001, the Oklahoma Legislature considered the recommendation of a commission assigned to explore reparation for victims of the 1921 Tulsa Race Riot. A mob of whites who shot black men and burned down black businesses and homes in the black county of Tulsa. See Randy Krehbiel, *Riot - Reparation Report Wraps Up*, TULSA WORLD, Mar. 1, 2001, at 7.

16. See Tamar Lewin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at A15 (describing meetings among prominent lawyers to map out a strategy for reparations litigation).

17. See *infra* notes 19-21 and accompanying text (describing contemporary responses to the tragic history of lynching in the United States).

18. See *infra* notes 19-21 and accompanying text.

19. See generally WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (James Allen et al. eds., 2000) [hereinafter WITHOUT SANCTUARY] (depicting images of lynchings in the United States).

20. See generally *All Things Considered: Duluth, Minnesota Pays Tribute to Three Black Men Lynched in 1920* (National Public Radio, June 8, 2001), available at LEXIS, News File, National Public Radio File.

21. See Larry Oaks, *Marches Honor Duluth Lynching Victims*, STAR TRIB. MINNEAPOLIS, June 16, 2001, at B1.

22. See *Belated Justice in Birmingham*, N.Y. TIMES, May 23, 2002, at A30 (discussing the 2001 conviction of Bobby Frank Cherry in connection with the 1963 bombing of the Sixth Street Baptist Church in Birmingham, Alabama).

murderers is a critical step in uncovering and reversing the complicity of the state justice systems that have failed to punish these perpetrators.<sup>23</sup>

However, lynching raises a different and more difficult confrontation with America's history of racial violence. The lynching of black men, from the turn of the century until the late 1950s, was a crime targeted not only at individual victims, but at entire communities.<sup>24</sup> Lynching aided in the political, social, and economic oppression of blacks in communities throughout the United States and served as an important tool of white supremacy.<sup>25</sup> Moreover, although lynching was a crime perpetrated by several murderers, it was often observed, cheered, and assisted by hundreds or thousands of white participants.<sup>26</sup>

Millions of whites in communities throughout the country are implicated in the crime of lynching.<sup>27</sup> Some of those individuals were active participants.<sup>28</sup> Many were passive observers or active facilitators.<sup>29</sup> In several places, witnesses refused to come forward to identify lynchings.<sup>30</sup> In some communities, mobs attacked or threatened journalists who sought to report on lynchings.<sup>31</sup> In other cases, journalists contributed to the violent climate that

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23. *See id.*

24. *See supra* notes 4 and 15 and accompanying text (discussing precedents for lynching reparations). The U.S. government regularly provided monetary reparation to foreign governments when their nationals were lynched in the United States. *See WHITE, supra* note 4, at 207-08.

25. *See infra* notes 64-135 and 245-318 and accompanying text (discussing the ramifications of lynching on black Americans' efforts to be treated as political and economic equals).

26. Historian David Roediger claims that "it would seem beyond questions that several million early twentieth century whites witnessed a lynching or touched its relics." David R. Roediger, *Introduction* to BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE 16 (David R. Roediger ed., 1998).

27. *See infra* notes 168-169 and 245-318 and accompanying text (recounting specific stories of lynchings that drew thousands of whites as spectators).

28. *See infra* notes 136-177 and 245-318 and accompanying text (describing the participation of individual whites in lynchings as torturers and murderers).

29. *See infra* notes 136-177 and 245-318 and accompanying text.

30. Inquests following lynchings regularly concluded that the victims died "at the hands of parties unknown." WHITE, *supra* note 4, at 27, 32. *See generally* 100 YEARS OF LYNCHINGS (Ralph Ginzburg ed., Black Classic Press 1988) (1962) [hereinafter 100 YEARS] (publishing articles from 1880 to 1961 dealing with lynching activities in the United States). In 1933, nearly 3,000 people attended the lynching of George Armwood in Princess Anne County, Maryland, yet witnesses at the subsequent inquest refused to identify any part of the mob. *21 Lynching Witnesses Sighted Only Strangers*, N.Y. HERALD-TRIB., Oct. 25, 1933, *reprinted in* 100 YEARS, *supra*, at 202-03.

31. *Reporter Describes Escape From Maryland Lynch Mob*, N.Y. HERALD-TRIB., Nov. 29, 1933, *reprinted in* 100 YEARS, at 204 (describing an attack by a mob on reporters who witnessed and reported a lynching).

resulted in lynchings.<sup>32</sup> In addition, state actors played a unique and key role in these events.<sup>33</sup> The tacit approval or passive acceptance of lynching by police officers, prosecutors, judges, and elected officials permitted lynching to flourish in many communities.<sup>34</sup> In this sense, neither state actors nor white individuals living in communities where lynching occurred can claim that they are innocent or free from the responsibility to address lynching.

Given the nature of lynching as a widespread systematic assault on black communities<sup>35</sup> and the complicity of local institutions and governments,<sup>36</sup> as well as hundreds and thousands of white spectators and participants in lynchings,<sup>37</sup> it is alarming that little organized effort has been focused on addressing, engaging, and reconciling communities that experienced historical lynchings.<sup>38</sup> Black communities were victimized by a powerful message of terror.<sup>39</sup> Public reaction to the Rosewood, Florida and the Tulsa Race Riots demonstrate that racially victimized communities do not forget, but instead continue to suffer the scars caused by racial terror and vigilantism.<sup>40</sup> What messages about America and its Constitutional promise of equality have been transmitted to black communities by the history of lynching? What messages are conveyed by contemporary lynchings and by federal and state responses to proposed "hate crime" legislation?<sup>41</sup>

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32. See, e.g., PHILLIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 199, 226-28 (2002).

33. See *infra* notes 271-318 and accompanying text (detailing the role of many law enforcement agents and local politicians in lynchings).

34. See *infra* notes 271-318 and accompanying text.

35. See *infra* notes 63-177 and accompanying text (describing how lynchings created an environment of fear that prevented black Americans from attempting to make political and economic advancements).

36. See *infra* notes 271-297 and accompanying text (explaining how neither the judicial system nor the political system provided any recourse for lynching victims).

37. See *infra* note 168 and accompanying text (noting the large number of spectators who attended lynchings).

38. See *supra* notes 19-21 and accompanying text (describing contemporary responses to the tragic history of lynching in the United States).

39. See *infra* notes Parts II, III.

40. See *supra* notes 14-15 and accompanying text (describing the effects of the race riots in Tulsa and Rosewood, Florida).

41. Paul Duggan, *Texas Hate-Crimes Bill Dies in Bitter Legislative Standoff*, THE WASH. POST, May 16, 1999, at A6. In Texas, where James Byrd was murdered, a Senate Committee stalled the James Byrd Jr. Hate Crimes Act after it was passed in the Texas House of Representatives. The measure was not supported by the former Texas Governor and current President George W. Bush. Melissa Williams, *Bush: It's Not All About Politics: Hate Crimes Bill's Demise Wasn't About*

The effect of lynching on white communities is also an important area of study and is a focus of contemporary racial reconciliatory efforts. Passive spectators played a key role in the success of lynching by observing without protest the acts of murder and torture.<sup>42</sup> The shared participation in these acts of unspeakable violence and brutality deeply scarred white communities.<sup>43</sup> Also, white children who witnessed lynchings were undoubtedly psychologically scarred in ways that may have affected generations of white families.<sup>44</sup>

In this Article, I contend that given the power of lynching as a tool for white supremacy<sup>45</sup> and its important role in shaping the relationships between and within black and white communities in towns throughout the United States, efforts should be made to uncover and dismantle the legacy of lynching.<sup>46</sup> That lynchings continue to occur, albeit sporadically, presents reason enough to look more closely at its historical origins and significance. Even if there are no more lynchings ever again, the specter of past lynchings remains such a powerful source of deep distrust, disconnection, and cynicism within and between blacks and whites.<sup>47</sup> The complicity of hundreds and thousands of whites in lynchings<sup>48</sup> continues to generate profound uncertainty among blacks about forging alliances with whites. It is quite probable that the scope of white complicity in lynching in some communities has affected the ability of whites to reconcile themselves to their role in racial oppression.

It is a particularly appropriate time to address the legacy of lynching. Contemporary lynchings and incidents of racial violence have resulted in renewed efforts to pass federal hate crime

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*Presidency, He Says*, AUSTIN AM.-STATESMAN, May 16, 1999, at B1, available at LEXIS, News File, The Austin American-Statesman File.

42. See *infra* notes 136-177 and 245-318 and accompanying text (describing the ritualized elements of a lynching, including torture, a public murder, and a complicit crowd of white spectators).

43. See *infra* notes 268-270 and accompanying text (offering a personal account of how one man who witnessed a lynching as a child and is still deeply affected by the memory of the brutality he witnessed).

44. See *infra* note 268 and accompanying text.

45. See *infra* Part II.A (discussing the fear created by lynchings and its effect on black voters).

46. See *infra* Part IV (outlining a plan to address the violent history of lynching in the United States through the use of a Truth and Reconciliation Commission).

47. See e.g., James Brooke, *Memories of Lynching Divide a Town*, N.Y. TIMES, Apr. 4, 1998, at A6 (describing the lingering effect of a 1925 lynching on blacks and whites in a small Utah town).

48. See *infra* Part III.B (describing the role of ordinary white people, white law enforcement agents, and white politicians in the perpetuation of lynchings).

legislation.<sup>49</sup> However, these recent efforts at both the national and state level continue to focus attention on the perpetrators of lynching and other hate murders, rather than on addressing the lasting effect of these crimes on communities. National "conversations on race"<sup>50</sup> convened by President Clinton, local leaders, and interfaith groups failed to target lynching and its effect on black and white communities as a specific subject for reconciliatory efforts.<sup>51</sup> Renewed interest in a legal effort to obtain reparations for slavery has also re-focused attention on addressing and redressing past racial injustices.<sup>52</sup>

The efforts of other countries to come to terms with their own history of racial and ethnic violence has sparked an international conversation about reconciliation and reparations. For example, while "conversations about race"<sup>53</sup> were taking place in the United States, South Africa engaged in its own ambitious efforts to face and reconcile its past of systematic racial oppression and violence against the black population. Apartheid, the system of violently enforced white supremacy in South Africa, was finally toppled in 1994.<sup>54</sup> The release of political prisoner Nelson Mandela, the fall of apartheid, and the transition of the African National Congress from outlaw liberation group to ruling political party had the potential to transform South Africa from a racist authoritarian

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49. See, e.g., Scott Shepard, *Senate Republicans Block Hate Crime Vote*, ATLANTA J. CONST., June 12, 2002, at 19A (describing a bill backed by Senate Democrats to extend existing federal hate crime laws to cover gays, lesbians, and disabled persons); Paul Duggan, *Texas Senate Passes Hate Crimes Bill: Similar Legislation, Opposed by Conservatives, Failed During Bush's Governorship*, THE WASH. POST, May 8, 2001, at A6 (describing a hate crimes bill passed by the Texas State Senate after the dragging death of James Byrd).

50. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON, 1995, BOOK II, 1600-10 (1995). See also RACE INITIATIVE ADVISORY BD., THE PRESIDENT'S INITIATIVE FOR ONE AMERICA (1997), available at <http://clinton4.nara.gov/Initiatives/OneAmerica/pirsummary.html>.

51. Ironically, President Clinton's hometown of Hot Springs, Arkansas, lynched more black men than any other major town in Arkansas. See SHAY, *supra* note 3, at 126. See also *Quarrel Over Black's Right to Cup Ends in Lynching*, MEMPHIS COM. APPEAL, July 29, 1922, reprinted in 100 YEARS, *supra* note 30, at 165. In 1892, in Texarkana, Arkansas, 15,000 people reportedly watched a black man burned to death for having sex with a white woman. See WELLS-BARNETT, *supra* note 7, at 205.

52. See *supra* note 16 and accompanying text (describing public efforts to obtain reparations for slavery).

53. See *supra* note 50 and accompanying text (discussing President Clinton's Initiative for One America).

54. See PATTI WALDMEIR, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA xvi (1997) (recounting the events leading to the end of white controlled apartheid regime in South Africa and the rise of the democratically elected African National Congress).



regime into a democratic state.<sup>55</sup>

However, years of brutal repression, terrorism, and murder by the white minority regime in South Africa could not simply be ignored or forgotten.<sup>56</sup> Black South Africans sought an opportunity to expose and punish the perpetrators of violence, murder, and repression.<sup>57</sup> They sought answers to questions surrounding the disappearances of loved ones and, quite rightly, demanded a public accounting for crimes the State had committed against black South Africans for nearly a century.<sup>58</sup> Whites largely feared that an "accounting" of apartheid crimes would condemn them as a pariah class and subject them to violent retribution at the hands of blacks.<sup>59</sup> To address this problem, the leaders of the new South African government arrived at a compromise called the Truth and Reconciliation Commission (TRC).<sup>60</sup> The TRC process has been the subject of strong and compelling critiques by black South Africans.<sup>61</sup> Without question, the TRC process, and its ambitious effort to engage the entire country in an honest public discussion about racial violence and white supremacy, was extraordinary. At the very least, the TRC demonstrated that state-sponsored mechanisms for racial dialogue can assist communities in forging a path toward meaningful reconciliation.

As a potential vehicle to address the effect of lynching on communities, I offer a process modeled on South Africa's Truth and Reconciliation Commission.<sup>62</sup> Lynching TRCs, however, would be deliberately directed away from a pursuit of lynching perpetrators. Instead, the focus would be on the responsibility of individuals and local institutions that promoted, condoned, or tolerated lynching. Such commissions would be convened locally,

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55. See ALEX BORAINÉ, *A COUNTRY UNMASKED* 13, 177-79 (2000).

56. See *id.*

57. See *id.* at 9.

58. See *id.*

59. See *id.*

60. Promotion of National Unity and Reconciliation Act 34 of 1995, ch. 2, § 3(1)(a)-(d) (codified as amended at 1 JSRSA 1-182 (2001)). Persons already tried and convicted of apartheid era crimes were eligible for amnesty. *Id.* at ch. 4, § 20(8)(b).

61. Black liberation groups and the son of murdered black activist Steve Biko challenged the TRC amnesty provisions as unconstitutional on the grounds that the provisions denied the right of victims to pursue civil remedies against perpetrators of human rights violations, and on the grounds that the Constitution vested sole authority to institute criminal proceedings in the Attorney General. Both claims were rejected by the South African Constitutional Court. See *Azanian Peoples' Org. v. President of the Republic of So. Afr.*, 1996 (4) SALR 671 (CC).

62. See *infra* Part IV.

funded by state and local jurisdictions, and organized in partnership with local community groups and leaders. The commissions would provide a means for ordinary people who actively or passively condoned lynching, and those whose communities were terrorized by lynching, to explore opportunities for community healing, truth-telling, and reparation. Even in towns where lynching participants are no longer alive, blacks and whites must confront the legacy of lynching and its lingering effect on relationships between blacks and whites. Without such a process, the history of lynching in towns throughout the United States will continue to foment racial distrust and disconnection.

## II. Lynching's Attack on Black Citizenship

### A. *Post-Reconstruction Lynching: The Response to Black Economic Freedom and Political Enfranchisement*

Although the origins of lynching began during the Revolutionary War,<sup>63</sup> lynching did not take on its identity as a racial or hate crime until the aftermath of the Civil War.<sup>64</sup> During this time, southern whites used both legal and violent means to reverse the citizenship gains of newly freed blacks.<sup>65</sup> Southern states enacted Black Codes, laws designed "to make Negroes slaves in everything but name."<sup>66</sup> The Black Codes created a labor contract system that forced blacks and their children into indentured servitude, limited their access to the justice system, and restricted their movement.<sup>67</sup> Vagrancy laws and "apprenticeships" ensured that blacks could be essentially enslaved for minor infractions.<sup>68</sup>

Violent and savage attacks on the newly-freed blacks were another means through which southern whites sought to hold back

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63. Lynching was named for Charles Lynch, a Virginia-born colonel who, during the Revolutionary War, undertook to impose a system of judgment and punishment for ordinary criminals who committed criminal acts with impunity. SHAY, *supra* note 3, at 15-22. The crime at issue was usually horse-stealing and the accused were most often Tories who sold the stolen horses to the British army. Lynch's court was seen as "a war-time measure" that could mete out "summary justice" in the absence of a functioning legal system. Along with several other men as "associate justices", Lynch's "court" created a crude trial process in which the accused could face their accusers. Punishment could include whipping or being strung up by the thumbs until one declared "Liberty forever!" *Id.* at 23.

64. *See id.* at 70-76.

65. *See id.*

66. DUBOIS, *supra* note 1, at 167.

67. *See id.* at 167-79 (examining Black Codes in various southern states).

68. *See id.* at 173-75.

black citizenship. Derrick Bell has argued that in the years following the Civil War, "[e]conomic and political suppression [of blacks] would have been ineffective had it not been for the wholesale and brutal violence that rendered thousands of ex-slaves literally unable to know on which side of emancipation they have fared worst."<sup>69</sup> During this period, violence and murder were means of resisting the new political, economic, and educational opportunities for blacks.<sup>70</sup>

However, despite the widespread violence against ex-slaves, Reconstruction ushered in a period of tremendous economic and educational advancement and widespread political participation by blacks. The Freedman's Bureau assisted blacks in processing their claims for land.<sup>71</sup> The Bureau undertook a massive program to provide education for blacks.<sup>72</sup> W.E.B. DuBois called the Freedman's Bureau "the most extraordinary and far-reaching institution of social uplift that America has ever attempted."<sup>73</sup> Although short-lived and never adequately funded, the Freedman's Bureau provided subsistence living, educational institutions, and critical farming assistance for blacks.<sup>74</sup>

Blacks also made tremendous political gains during this period.<sup>75</sup> Thousands of blacks were registered to vote after the 1870 passage of the Fifteenth Amendment.<sup>76</sup> It is estimated that 700,000 blacks voted in the 1872 presidential election, and that fifteen percent of all public officials in the South were black by 1870.<sup>77</sup> Black delegates outnumbered whites in the state constitutional convention in South Carolina in 1868, and were half the delegates in Louisiana.<sup>78</sup> Following the dismantling of the Freedmen's Bureau and the removal of the last federal troops from

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69. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 40 (3d ed. 1992).

70. See *infra* notes 87-100 and accompanying text (describing attempts by whites in Yazoo County, Mississippi and Colfax, Louisiana to prevent blacks from voting though the use of intimidation).

71. See An Act to Establish a Bureau of Freedmen, Refugees, and Abandoned Lands, ch. 90, 13 Stat. 507 (1865). See also GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN'S BUREAU* 87 (Octagon Books 1970) (1955) (discussing the importance of the Act's land provisions).

72. See BENTLEY, *supra* note 71, at 171-73.

73. DUBOIS, *supra* note 1, at 219.

74. See *id.* at 224-27.

75. See *infra* notes 76-78 and accompanying text (offering specific information about the large number of black voters and public officials in the Reconstruction era South).

76. BELL, *supra* note 69, at 44.

77. See *id.*

78. DUBOIS, *supra* note 1, at 372.

the South after the disputed 1876 presidential election,<sup>79</sup> Southerners unleashed a wave of repression against the now unprotected blacks.<sup>80</sup> New laws were created to disenfranchise black voters and to reverse gains made during Reconstruction.<sup>81</sup> White mob violence was yet another means by which blacks were disenfranchised.<sup>82</sup> According to DuBois, "lawlessness which, in 1865-1868, was still spasmodic and episodic, now became organized."<sup>83</sup> White terrorists groups such as the Knights of the White Camellias and the Ku Klux Klan subjected blacks to indiscriminate killing, burnings, and beatings.<sup>84</sup> Blacks were attacked for any behavior that was deemed threatening to white supremacy.<sup>85</sup> As DuBois argued, blacks were subjected to white mob violence, "because they were Republican; they were radical; they had attempted to hold elections; they were carrying arms; they were 'niggers'; they were 'damn niggers'; they boasted that they would own land ...."<sup>86</sup>

Restricting black participation in the political process was the principal goal of these violent attacks.<sup>87</sup> White attacks on black voters and elected officials reversed the political gains made by blacks in many southern states in the period immediately following the Civil War.<sup>88</sup> In 1875 in Yazoo County, Mississippi, white Democrats used harassment, mob violence, and murder to intimidate black voters and politicians.<sup>89</sup> The campaign of violence and intimidation against blacks in Yazoo was so successful that no black person held political office again in that

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79. After the disputed presidential election of 1876, Southern Democrats and Northern Republicans reached a political compromise that resulted in the removal of federal troops from the South. The effect of this withdrawal was to further expose blacks to exploitation by whites. See DUBOIS, *supra* note 1, at 691-92. See also BELL, *supra* note 69, at 32-33 (discussing the hotly disputed presidential election of 1876).

80. See *infra* notes 81-85 and accompanying text (describing attempts by whites to prevent blacks from voting; this was accomplished by drafting restrictive laws and by the use of mob violence).

81. DUBOIS, *supra* note 1, at 674.

82. See *id.*

83. See *id.*

84. See *id.* at 676-83.

85. See *id.* at 676-77.

86. See *id.*

87. See *id.* at 681-88.

88. See *id.*

89. See HARRIET DECELL & JOANNE PRITCHARD, *YAZOO, ITS LEGENDS AND LEGACIES* 342-45 (1976) (providing specific accounts of efforts by white Democrats to influence the results of the 1875 election).

county until 1979.<sup>90</sup>

Perhaps the most brutal and well-known of these violent responses to black empowerment took place in Colfax, Louisiana in 1873. There, a posse of black deputies assisted a white sheriff in protecting a local courthouse.<sup>91</sup> A mob of whites massacred the black deputies and burned down the local courthouse.<sup>92</sup> After the Justice Department prosecuted members of the white mob under the Civil Rights Enforcement Act of 1870,<sup>93</sup> the Supreme Court overturned their convictions, holding that the Act did not outlaw actions taken by individuals that interfered with the constitutional rights of other individuals.<sup>94</sup>

The patterns of violent intimidation against black voters and politicians in Yazoo County and Colfax, Louisiana were repeated throughout the South.<sup>95</sup> The results were dramatic. Black voter registration and political participation fell to levels that would never fully rebound.<sup>96</sup> While blacks were a majority of the registered voter population in Mississippi in 1868,<sup>97</sup> only six percent of eligible blacks were registered to vote in that state in 1890.<sup>98</sup> In Louisiana, where the Colfax massacre took place, the number of black registered voters dropped from 130,344 in 1896 to 5,320 in 1900.<sup>99</sup>

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90. ARMAND DERFNER ET AL., LITIGATION UNDER THE VOTING RIGHTS ACT OF 1965 A-82 (Morton Stavis ed., 1986).

91. See BELL, *supra* note 69, at 293 n.4. See also HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE 74-76 (1973) (describing the Colfax massacre).

92. See BELL, *supra* note 69, at 293 n.4.

93. *Id.* See also Civil Rights Act of 1870, ch. 114 § 6, 6 Stat. 140 (1870) (codified as amended at 18 U.S.C. § 241 (2000)).

94. See BELL, *supra* note 69, at 293 n.4 (citing *United States v. Cruikshank*, 92 U.S. 542 (1876)).

95. See DUBOIS, *supra* note 1, at 680-87.

96. See *infra* notes 97-99 and accompanying text (recounting the dramatic decrease in the number of blacks registered to vote in Mississippi and Louisiana after an increase in white mob violence).

97. See DUBOIS, *supra* note 1, at 371 (presenting estimated figures of the registered voting population).

98. Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING 11 (Bernard Grofman & Chandler Davidson eds., 1992). It took over 100 years for southern blacks to recover from the effects of this disenfranchisement. Although 15% of southern office holders were black in 1870, fewer than 3% were black in 1979. James M. McPherson, *Comparing the Two Reconstructions*, PRINCETON ALUMNI WEEKLY 16, 18 (Feb. 26, 1979), cited in BELL, *supra* note 69, at 43.

99. BELL, *supra* note 69, at 296 n.12 (citing Justice Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 11 (1985)). DuBois also attributed the decline in black political participation to “the situation when Booker T. Washington became the leader of the Negro race and advised them to depend upon industrial education

By the 1890s, lynching had become a familiar tool to control blacks who sought to participate in politics, advance economically, or exercise social freedoms. Moreover, the Supreme Court's restrictive interpretation of Congress' authority to enforce the protections contained in these acts further licensed violent reprisals against blacks seeking to exercise their constitutional rights.<sup>100</sup>

*B. 20th Century Lynching: Setting the Boundaries of Black Citizenship*

By the turn of the century and for decades thereafter, lynching played a critical role in establishing and maintaining the economic, political, and social subordination of blacks. While historical reports suggest that most lynchings were motivated by white mob anger against black men accused (often falsely) of raping or assaulting a white woman,<sup>101</sup> lynchings were in fact a tool used to regulate and restrict all aspects of black advancement, independence, and citizenship. Most lynchings were not related to the familiar interracial sex taboo.<sup>102</sup>

Most lynchings involved accusations of homicide in which blacks were accused of killing whites.<sup>103</sup> In many other instances, the reasons offered for lynching ranged from the serious to the trivial.<sup>104</sup> Black men were lynched for refusing to remove an Army

and work rather than politics." DUBOIS, *supra* note 1, at 694.

100. See *supra* note 97 and accompanying text (discussing *United States v. Cruikshank*, 92 U.S. 542 (1876)).

101. See MARY FRANCES BERRY, *THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE* 203-15 (1999). There is no record of white men having been lynched for the rape of a black woman, although by all accounts attacks on black women by white men were not uncommon. It may be that the prevalence of these attacks formed part of the basis of white southerners' obsession with black men raping white women. Nor were black men lynched for raping black women. Prosecutions and convictions for the rape of black women by men of any race were extremely rare during the first half of the twentieth century. The rape of black women continues to be prosecuted less frequently and punished less severely than that of white women. See Shelby A.D. Moore, *Battered Woman's Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 333 n.201 (1995) (citing *Race Tilts the Scales of Justice, Study: Dallas Punishes Attacks on Whites More Harshly*, DALLAS TIMES HERALD, Aug. 19, 1990, at A1).

102. See *infra* notes 103-115 and accompanying text (listing examples of both serious and trivial reasons that whites offered to justify lynchings).

103. See ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950* 8 (1980). According to NAACP figures, accusations of homicide were most often the reported cause of lynching. *Id.* From reports of lynchings it appears that in almost all of these cases blacks were accused of killing whites. See generally 100 YEARS, *supra* note 30.

104. See *infra* notes 105-115 and accompanying text (listing examples of reasons that whites offered to justify lynchings).

uniform,<sup>105</sup> for “passing” as white,<sup>106</sup> for hiring a lawyer to protect title to property,<sup>107</sup> for stealing meat,<sup>108</sup> for intending to steal chickens,<sup>109</sup> for recruiting black sharecroppers to go to Africa,<sup>110</sup> for being outspoken about racial equality,<sup>111</sup> or for testifying on behalf of a black defendant.<sup>112</sup> Engaging in civil rights activities was also a frequent provocation for lynching.<sup>113</sup> On one occasion, a Pullman porter was reportedly lynched for failing to “promptly” arrange a white female passenger’s berth on a train.<sup>114</sup> In many cases, blacks were lynched for unknown reasons.<sup>115</sup>

Still, for many years, the lore surrounding lynching as a consequence for rape of a white woman effectively masked the pivotal role it played in maintaining the white political and economic power structure in communities throughout the South. Filmmaker D.W. Griffith’s *Birth of a Nation*<sup>116</sup> presented mass audiences the now familiar mythology of lynching.<sup>117</sup> The image of

105. *Negro Veterans Lynched for Refusing to Doff Uniform*, CHI. DEFENDER, Apr. 15, 1919, reprinted in 100 YEARS, *supra* note 30, at 118.

106. *Klan Hangs Oklahoma Negro for ‘Passing as White Man’*, ST. LOUIS ARGUS, Nov. 9, 1923, reprinted in 100 YEARS, *supra* note 30, at 172.

107. *Miss. Minister Lynched*, N.Y. AMSTERDAM NEWS, Aug. 26, 1944, reprinted in 100 YEARS, *supra* note 30, at 236 (describing the lynching of Rev. Isaac Simmons after a title dispute with whites when oil was discovered on his land).

108. *Charged with Stealing Meat*, ATLANTA CONST., Apr. 18, 1915, reprinted in 100 YEARS, *supra* note 30, at 95.

109. *Would-Be Chicken Thief*, N.Y. HERALD, Dec. 6, 1914, reprinted in 100 YEARS, *supra* note 30, at 93.

110. *African Recruiter Lynched*, Editorial, SAVANNAH TRIB., May 4, 1912, reprinted in 100 YEARS, *supra* note 30, at 76.

111. *Outspoken Negro Killed*, ST. LOUIS ARGUS, June 15, 1923, reprinted in 100 YEARS, *supra* note 30, at 170; *Church Burnings Follow Negro Agitator’s Lynching*, CHI. DEFENDER, Sept. 6, 1919, reprinted in 100 YEARS, *supra* note 30, at 124 (describing lynching of Eli Cooper in Georgia).

112. *Lynch Negro Who Testified for Another Negro*, NEW ORLEANS TIMES-DEMOCRAT, March 24, 1900, reprinted in 100 YEARS, *supra* note 30, at 31.

113. *Negro Is Hanged by Heels, K’s Are Cut into His Body*, BIRMINGHAM (ALA.) NEWS, March 8, 1960, reprinted in 100 YEARS, *supra* note 30, at 245 (describing lynching of 27-year-old black worker as reprisal for lunch counter sit-ins by Texas Southern University students); *4,733 Mob Action Victims Since ‘82, Tuskegee Reports*, MONTGOMERY ADVERTISER, April 26, 1959, reprinted in 100 YEARS, *supra* note 30, at 244 (describing killing of George Lee who “refused to withdraw his name from [the] voting list” and Lamar D. Smith, who was killed in retaliation for “encouraging others of his race to qualify as voters”).

114. *Woman’s Impatience Revealed As Cause of Porter’s Death*, N.Y. NEGRO WORLD, May 29, 1920, reprinted in 100 YEARS, *supra* note 30, at 130.

115. *Boy Lynched at McGhee for No Special Cause*, ST. LOUIS ARGUS, May 27, 1921, reprinted in 100 YEARS, *supra* note 30, at 150.

116. BIRTH OF A NATION (D.W. Griffith 1915).

117. For an excellent and detailed account of how the film BIRTH OF A NATION influenced white public opinion about lynching see DRAY, *supra* note 32, at 190-207.

the virtuous white woman, the rapacious and bestial black man, and honorable avenging white men, defined lynching in white consciousness throughout the first half of the twentieth century.<sup>118</sup> By presenting lynching as retribution for a crime against the honor of white womanhood, rather than as a deliberate act of political and economic oppression, Griffith's film contributed to the view that lynching was a mob-enforced form of criminal justice.<sup>119</sup>

Indeed, even where lynching was a response to allegations of rape, the act of lynching was a clear assault on black male citizenship generally, rather than a retributive act of violence directed at an individual.<sup>120</sup> As Robyn Wiegman argues, the act of castration that often preceded or followed the murder of a lynching victim accused of raping a white woman was itself a grisly attack on black male citizenship.<sup>121</sup>

Ida B. Wells-Barnett, a journalist and great anti-lynching activist, recognized and sought to publicize the political nature of lynching.<sup>122</sup> In her view, rape as a justification for lynching was a deliberately manipulative tactic designed to "rob ... us of the sympathy of the world."<sup>123</sup> Her studies revealed that accusations of "murder" often masked intensely political or economic disputes between blacks and whites.<sup>124</sup> Moreover, many blacks accused of murder killed whites in self-defense.<sup>125</sup> For example:

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118. See *supra* note 116 and accompanying text (describing the way in which lynching was presented to the public in BIRTH OF A NATION).

119. Many scholars define lynching in ways that suggest an "outlaw justice" character to lynching. For example, Frank Shay, in his important work, JUDGE LYNCH, defines lynching as "the execution without process of the law, by a mob, of any individual suspected or convicted of a crime or accused of an offense against the prevailing social customs." SHAY, *supra* note 3, at 7.

120. Robyn Wiegman, *The Anatomy of Lynching*, 3 J. OF THE HIST. OF SEXUALITY 445, 446 (1993).

121. See *id.* (describing "the perversity of dismemberment" as an attempt to "sever the black male from ... his (masculine) potentiality for citizenship").

122. See *infra* notes 123-124 and accompanying text (discussing Ida B. Wells-Barnett's assertion that lynching was actually about whites' attempts to hold on to their political and economic power).

123. See WELLS-BARNETT, *supra* note 7, at 74. Wells-Barnett remarked "for the first fifteen years of his freedom [black men were] murdered by masked mobs for trying to vote. Public opinion having made lynching for that cause unpopular, a new reason is given to justify the murders." *Id.*

124. See *infra* notes 126-127, 129 and accompanying text (offering specific accounts of economic disputes between blacks and whites that turned violent).

125. See *infra* note 128 and accompanying text (offering a specific account of a dispute between a black man and a white man that turned violent). See also *Was Powerless to Aid Sister Who Was Raped and Lynched*, N.Y. AGE, Apr. 30, 1914, reprinted in 100 YEARS, *supra* note 30, at 90-91; *Negress Taken From Jail and Riddled With Bullets*, ATLANTA CONST., Oct. 9, 1916, reprinted in 100 YEARS, *supra* note 30, at 110 (reporting lynching of Mary Conley, who was killed after her son



Henry Lowry, a Negro of Nodena, had been held in virtual peonage for more than two years by a white landowner. When Lowry, on Christmas Day, 1920, demanded payment of wages due him, he was cursed and struck by the landlord and shot by the landlord's son. Lowry thereupon drew his own gun and killed the landlord and his daughter, who stood near him.<sup>126</sup>

On July 6, two colored boys, Irving and Herman Arthur, 19 and 28 years of age respectively, were lynched by a mob and their bodies burned, when they were accused of shooting their landlord following a dispute over settlement for a crop.<sup>127</sup>

Jim Roland, Negro, was lynched near here yesterday after shooting Jason I. Harvel, a white man, who had held a pistol on him and ordered him to dance. Both men were well-to-do farmers.<sup>128</sup>

David Wyatt, a negro schoolteacher, who made an attempt to assassinate Charles Hertel, County Superintendent, in his office last evening, had been taken from a supposedly impregnable jail, hanged to a telegraph pole in the centre of the public square and his body burned ... Wyatt's crime was provoked by the refusal of Superintendent Hertel to renew his teaching certificate. The negro demanded favorable action, and on its refusal fired one shot at the superintendent while he was sitting at his desk.<sup>129</sup>

Thus, reports listing the "causes" of lynchings often failed to capture the intensely political and economic nature of the conduct at issue.<sup>130</sup> As Walter White observed, "lynching is much more an expression of Southern fear of Negro progress than of Negro crime."<sup>131</sup>

In sum, lynching was designed to send messages to the black community about how to behave, about whom to associate with, about whether blacks should vote, serve in the armed forces, make

defended her from attack by a white employer).

126. WHITE, *supra* note 4, at 23.

127. *Letter from Texas Reveals Lynching's Ironic Facts*, N.Y. NEGRO WORLD, Aug. 22, 1920, reprinted in 100 YEARS, *supra* note 30, at 139.

128. *Lynched After Refusing to Dance on White's Command*, KNOXVILLE E. TENN. NEWS, Feb. 3, 1921, reprinted in 100 YEARS, *supra* note 30, at 146.

129. *Negro Dragged from Cell and Tortured to Death*, N.Y. HERALD, June 8, 1903, reprinted in 100 YEARS, *supra* note 30, at 48-49.

130. See *supra* note 124 and accompanying text (discussing Ida B. Wells-Barnett's assertion that lynching was actually about whites' attempts to hold on to their political and economic power).

131. WHITE, *supra* note 4, at 11.

a living, be independent, or have dignity. In essence, lynchings were used as a tool to punish any form of black behavior that threatened white supremacy.<sup>132</sup> In this way, lynching identified and marked the parameters of black citizenship and freedom. As one scholar explains, "lynching bec[ame] ... an increasingly routine response to black attempts at education, personal and communal government, suffrage, and other indicators of cultural inclusion and equality."<sup>133</sup> South Carolina Senator Benjamin Tillman described the use of lynching as a tool of regulating black behavior.<sup>134</sup> When Booker T. Washington visited the White House to meet with President Theodore Roosevelt, Tillman remarked, "[n]ow that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their places."<sup>135</sup>

### C. *The Nature of Lynching: Delivering the Message of Terror*

Lynching in the twentieth century took on a familiar and stylized pattern. The torture,<sup>136</sup> the public murder,<sup>137</sup> and the complicit and delighted crowd<sup>138</sup> collectively came to define lynching. These elements constituted a pattern, which regularized the practice of lynching in communities throughout the South.<sup>139</sup> This pattern reinforced lynching's power to regulate black behavior.

The "pattern" of lynching took on a gruesome familiarity. In most cases, lynching victims were accused of a crime or act of racial insubordination, such as murdering a white person, or "insulting," "assaulting,"<sup>140</sup> or raping a white woman. The black

132. See *supra* notes 105-115 and accompanying text (listing examples of reasons that whites offered to justify lynchings).

133. Wiegman, *supra* note 120, at 455.

134. Hon. A. Leon Higginbotham, Jr., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593, 1609 (1994) (citing WILLIAM A. SINCLAIR, *THE AFTERMATH OF SLAVERY* 187 (2d ed. 1905)).

135. *Id.*

136. See *infra* notes 149-155 and accompanying text (describing specific acts of mutilation suffered by lynching victims, such as castration and being set on fire while still alive).

137. See *infra* notes 159-166 and accompanying text (detailing the methods Whites used to convey a violent message to blacks).

138. See *infra* notes 167-173 and accompanying text (describing the large crowds of men, women, and children that gathered at lynchings and the crowds' reactions to these atrocities).

139. See *infra* notes 140-143 and accompanying text (discussing the elements that composed the "pattern" of lynching).

140. These terms were used quite loosely. Two black men were reportedly lynched for having said "hello" to a white woman. *Blacks Lynched for Remark*

man or boy<sup>141</sup> accused of such an act was generally hung, shot, or burned alive by a mob of white men, while hundreds of other men and women looked on.<sup>142</sup> The victim was often tortured before death, or his body was mutilated following death.<sup>143</sup>

In a slightly varied pattern, a black man accused of a crime against a white person (usually murder or rape) was arrested and brought to the local jail.<sup>144</sup> On his first evening in jail, an armed mob would demand that the local sheriff release the prisoner to them, or the mob would overpower the sheriff and remove the prisoner themselves.<sup>145</sup> In some of these cases, local sheriffs fought off mobs and protected their prisoners.<sup>146</sup> In others, local law enforcement moved the prisoners to alternative locations to ensure their safety.<sup>147</sup> But in far too many cases, local law enforcement looked the other way, or permitted mobs to remove prisoners from jail.<sup>148</sup>

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*Which May Have Been "Hello"*, PHILADELPHIA ENQUIRER, Jan. 3, 1916, reprinted in 100 YEARS, *supra* note 30, at 98. Another was accused of assaulting a white woman after he bumped into her. *Bumps into Girl; Is Lynched*, BIRMINGHAM VOICE OF THE PEOPLE, Apr. 1, 1916, reprinted in 100 YEARS, *supra* note 30, at 102.

141. Several cases report black lynching victims as young teens. Emmett Till, who was killed for whistling at a white store clerk, was fifteen years old at the time he was murdered. See *15-Year-Old is Lynched; Wolf-Whistled at White*, WASH. POST-TIMES-HERALD, Sept. 1, 1955, reprinted in 100 YEARS, *supra* note 30, at 240-41.

142. See *infra* notes 167-173 and accompanying text (describing the presence of spectators at lynchings and the part they played in the "ritual").

143. See *infra* notes 149-158 and accompanying text (discussing the role of torture, rape, and mutilation in lynchings, especially their role in sending messages to the black community or serving as part of the "ritual" being performed by the lynch mobs).

144. See, e.g., *Garfield King is Lynched: The Negro Who Fatally Shot Kenney Taken From The Jail and Strung Up a Maple Tree*, WICOMICO NEWS, May 26, 1898, at 1 (describing the events surrounding the arrest and lynching of a black man accused of killing a white man).

145. See *id.*

146. *Sheriff Staves Off Mob*, MONTGOMERY ADVERTISER, Aug. 9, 1913, reprinted in 100 YEARS, *supra* note 30, at 83. See also *Maryland Witnesses Wildest Lynching Orgy in History*, N.Y. TIMES, Oct. 19, 1933, reprinted in 100 YEARS, *supra* note 30, at 200 (reporting that "[f]ifty State policemen and deputies battled vainly with the crowd in front of the jail, tossing tear bombs in an effort to disperse it. Five policemen were beaten to the ground and the others were swept aside by the fury of townsmen and farmers ..."); *Sheriff Nearly Lynched*, PROVIDENCE BULLETIN, Aug. 31, 1916, reprinted in 100 YEARS, *supra* note 30, at 107 ("The mob seized the Sheriff, stripped him of his clothes, kicked, beat and cut him, dragged him to the principal street corner ... and tied a noose around his neck threatening to hang him to a trolley pole unless he told where he had hidden the Negro.").

147. GAIL WILLIAMS O'BRIEN, *THE COLOR OF THE LAW: RACE, VIOLENCE, AND JUSTICE IN THE POST-WORLD WAR II SOUTH* 245 (1999).

148. See, e.g., *Hoosiers Hang Negro Killer*, CHI. RECORD, Feb. 27, 1901, reprinted in 100 YEARS, *supra* note 30, at 37 ("Policemen stood on the river bank and watched the men and boys about the fire for an hour or more. Outside the jail a

Lynching victims were often tortured or dismembered either before or after they were murdered.<sup>149</sup> Indeed, torture became a kind of regular lynching feature in the South.<sup>150</sup> Castration and mutilation of the genitals of black males were prevalent practices,<sup>151</sup> particularly when allegations of rape were at issue.<sup>152</sup> In other instances, lynching victims were severely beaten or burned in order to produce a confession.<sup>153</sup> When Mr. and Mrs. Luther Holbert were lynched in Mississippi, their ears were severed and one of Mr. Holbert's eyes was "knocked out with a stick [and] hung by a shred from the socket."<sup>154</sup> Nelson Nash reportedly had his tongue cut out before he was hung and shot in Louisiana in 1933.<sup>155</sup>

Lynchings often involved torture, mutilation, and the dismemberment of the victims or corpses to drive the message of repression home in the most graphic way possible.<sup>156</sup> The

number of policemen tried to persuade the crowd to disperse, but when a man would not move on no further effort was made."); WHITE, *supra* note 4, at 25 (writing that there was no attempt to stop a widely advertised lynching, sparking a local sheriff to remark "[n]early every man, woman and child in our county wanted the Negro lynched. When public sentiment is that way, there isn't much chance left for the officers.").

149. See, e.g., *Sam Holt Burned at Stake*, KISSIMMEE VALLEY (FL) GAZETTE, Apr. 28, 1899, reprinted in 100 YEARS, *supra* note 30, at 10 ("Fully 2,000 people ... saw his body mutilated by knives ..."); *Negros Fleeing for Lives*, BIRMINGHAM NEWS, Aug. 4, 1910, reprinted in 100 YEARS, *supra* note 30, at 71 ("[H]is body was shot almost to pieces."); *Huge Mob Tortures Negro to Avenge Brutal Slaying*, ATLANTA J., June 21, 1920, reprinted in 100 YEARS, *supra* note 30, at 132 ("After his body had been mutilated, while he was alive, the negro was saturated with gasoline and burned, and while he was burning his body was literally riddled with bullets and buckshot.").

150. See WHITE, *supra* note 4, at 19-39 (discussing the increasing rates of torture in incidents of lynching).

151. See, e.g., *Lynching Carried Off Almost as Advertised*, BIRMINGHAM (ALA.) POST, Oct. 27, 1934, reprinted in 100 YEARS, *supra* note 30, at 223 ("First they cut off his penis. He was made to eat it. Then they cut off his testicles and made him eat them and say he liked it.").

152. See, e.g., DRAY, *supra* note 32, at 82 (discussing the acts committed upon alleged rapists); BRUNDAGE, *supra* note 3, at 58-72 (discussing the links between lynching and sex crimes).

153. See, e.g., *Tie, Beat Suspect: Say Agonizing Torture Forced Axe Confession*, BALTIMORE AFRO-AMERICAN, Oct. 24, 1931, at 1 (describing beating and subsequent confession of Orphan Jones); *An Innocent Man Lynched*, N.Y. TIMES, June 11, 1900, reprinted in 100 YEARS, *supra* note 30, at 31 (lynching victim was first "tortured with fire to extort a confession").

154. *Lynched Negro and Wife Were First Mutilated*, VICKSBURG EVENING POST, Feb. 8, 1904, reprinted in 100 YEARS, *supra* note 30, at 63.

155. *Lynched for Killing Banker, Negro Was the Wrong Man*, INDIANAPOLIS RECORDER, Mar. 4, 1933, reprinted in 100 YEARS, *supra* note 30, at 197.

156. See *supra* notes 149-155 and accompanying text (describing the horrific torture and murder of the Holberts in 1930s Mississippi). See generally Leon Litwack, *Hellhounds*, in WITHOUT SANCTUARY, *supra* note 19, at 8-37 (discussing

mutilation of lynching victims also served some perverse form of carnal entertainment in some communities.<sup>157</sup> The piercing and dismemberment of lynching victims, as well as the collection and hoarding of the body parts of lynching victims, also reflect the role of lynching as a bizarre form of religious ritual sacrifice in some communities.<sup>158</sup>

The message of lynching was underscored by the display of the mutilated body. In almost all cases, the body of the lynching victim was left hanging on display overnight, or for several days.<sup>159</sup> Sometimes the body was dragged through the streets.<sup>160</sup> In some instances, explicit notes were affixed to the lynching victim's body as a warning to the black community.<sup>161</sup>

lynching as a method of reinforcing white supremacy).

157. See, e.g., DRAY, *supra* note 32, at 82 (describing lynchings as "sexual events"). Walter White examined several reasons for the links between sex and lynching in southern states. WHITE, *supra* note 4, at 54-81. Among these reasons, White speculated that lynching provided a socially acceptable outlet for restrictive and repressive fundamentalist religious societies. *Id.* at 56. See also BRUNDAGE, *supra* note 3, at 65 (discussing "the barely submerged sexual impulses that surfaced in many lynchings").

158. DRAY, *supra* note 32, at 30, 82 (stating that "branding, eye gouging, and the cutting off of ears" are part of the "lynching ritual" and that "there was also a religious aspect to the taking of souvenirs from the remains of the punished victim"). See also *id.* at 79 (discussing the extent of lynching's "ritual" and "tribal sacrifice" implicated by "the use of fire, the sacredness of objects associated with the killing, the symbolic taking of trophies of the victim's remains, the sense of celebratory anticipation and then the lingering importance participants placed on such events"); PATTERSON, *supra* note 12, at 202-08 (discussing "the profound religious significance that these sacrificial murders had for Southerners").

159. See, e.g., *Negro Dragged from Trial and Lynched by Miss. Mob*, ATLANTA CONST., Nov. 24, 1920, reprinted in 100 YEARS, *supra* note 30, at 141-42 (recounting that a rope around Harry Jacobs' neck "was tied to the axle of an automobile, which dragged him" through town and "[a]fter the body had been hanged to the tree it was left there for several hours"); *Mob Violence Dealt to Pair*, BIRMINGHAM (ALA.) POST, June 9, 1934, reprinted in 100 YEARS, *supra* note 30, at 215 ("The bodies were left hanging all night on orders of Greek Rice, district attorney.").

160. See, e.g., *15,000 Witness Burning of Negro in Public Square*, N.Y. WORLD, May 16, 1916, reprinted in 100 YEARS, *supra* note 30, at 103 (describing how Jesse Washington's "charred body was put in a sack and was dragged behind an automobile to Robinson, where it was hanged to a telephone pole for the colored populace to gaze upon"); *Heart and Genitals Carved From Lynched Negro's Corpse*, N.Y. WORLD-TELEGRAM, Dec. 8, 1933, reprinted in 100 YEARS, *supra* note 30, at 212 ("[T]ied [the body] behind an automobile with chains, and dragged it for thirty-five minutes through the Negro section of Kountze to terrorize the negro population").

161. See *Negro Burned Alive in Florida; Second Negro Then Hanged*, SPRINGFIELD (MASS.) WEEKLY REPUBLICAN, Apr. 28, 1899, reprinted in 100 YEARS, *supra* note 30, at 15-17 (describing the lynching of a black preacher in Georgia). According to the news report:

[o]n the chest of the negro was a piece of blood-stained paper, attached by an ordinary pin. On one side of this paper was written: We must protect our ladies. The other side of the paper contained a warning to the negroes

For whites, the display of the murdered and mutilated black body reinforced an image of power during a time of economic and political insecurity.<sup>162</sup> The lynched body also reminded whites that their interests would be protected by using any and all means. Lynchers, spectators, and ordinary community members were bound together by their active or passive complicity in the lynching. The display of the lynched body served as a reminder to townspeople of those ties. Lynching also served to reinforce socially acceptable racial behavior for the white community.<sup>163</sup> For example, allegations of a black man's sexual assault on a white woman were often circulated to justify lynching.<sup>164</sup> The mutilated body of an alleged black rapist displayed before the white community, therefore, drove home the consequences of this sexual taboo to white women. This message was an important one to convey because clandestine consensual sexual relationships between white women and black men continued to thrive in the South despite the threat of violent retaliation.<sup>165</sup> Thus, lynching warned whites that a particular racial hegemony must be preserved.<sup>166</sup>

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of the neighborhood: Beware all darkies! You will be treated the same way.

*Id.* at 15. See also *Midnight Terrorists Lynch Negro Brakeman on the Y&MV*, MEMPHIS TIMES-SCIMITAR, Mar. 18, 1921, reprinted in 100 YEARS, *supra* note 30, at 147 ("The following note was found in [the lynching victim's] overalls: 'Take this as a warning to all nigger railroad men.'").

162. See BRUNDAGE, *supra* note 3, at 10 (describing the belief of some scholars that lynching "was a barometer of the economic frustration of white southerners"); Sherwood Anderson, *Look Out, Brown Man*, 131 THE NATION 579, 579 (1930). In an essay describing the connection between the economic condition of whites during the Great Depression and the rise of racial violence, Anderson wrote in 1930, "These aren't good times for a Negro man to be too proud, step too high. There are a lot of white men hard up. There are a lot of white men out of work. They won't be wanting to see a big proud black man getting along. There'll be lynchings now." *Id.*

163. See, e.g., BRUNDAGE, *supra* note 3, at 61-64 (discussing the consequences of consensual sexual relations between white women and black men during the lynching era).

164. See *id.* at 58 ("Ignoring statistics that showed that sexual offenses did not spark most lynchings, white southerners maintained that rape was the key to lynching.").

165. See WELLS-BARNETT, *supra* note 7, at 21-26 (describing specific accounts of consensual sexual relationships between southern white women and black men).

166. In Salisbury, Maryland, for example, Matthew Williams was taken from his hospital bed and lynched on the courthouse lawn. GEORGE H. CORDDRY, WICOMICO COUNTY HISTORY 56-59 (1981). The location of the lynching was itself a message. In two earlier incidents that year, local judges had ordered the removal of black criminal suspects to Baltimore City in order to avoid lynch mobs. See *id.* at 56-61. By lynching Williams on the courthouse lawn, the lynch mob conveyed the message in no uncertain terms, that they, not the local legal apparatus, were in control of justice in Salisbury.

The participation of spectators was also part of the lynching ritual.<sup>167</sup> Lynchings were often observed, assisted, or attended by hundreds and sometimes thousands of people.<sup>168</sup> One particular lynching reportedly drew a crowd of 15,000 people.<sup>169</sup> These crowds often convened because advance word that a lynching would take place was spread by word of mouth, in local newspapers, or on the radio.<sup>170</sup> Attendees at lynchings included men, women, and children.<sup>171</sup> In photos, their faces are sometimes smiling, sometimes self-important, and often uncannily vacant.<sup>172</sup> In some of the most chilling photos, children are given a front row position in front of the victim.<sup>173</sup>

Perhaps the most grisly and bizarre aspect of lynching was the collection of the victims' body parts by members of the crowd.<sup>174</sup> These so-called souvenirs were hoarded by some whites

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167. See, e.g., DRAY, *supra* note 32, at 81 ("As at a cookout, human victims were also butchered and roasted, often with members of the crowd offering suggestions on technique.").

168. See, e.g., *Negro Intruder Lynched*, VICKSBURG HERALD, May 15, 1999, reprinted in 100 YEARS, *supra* note 30, at 120 (stating that "[a] mob of between 800 and 1,000 men and women" attended the lynching of Lloyd Clay); *Maryland Witnesses Wildest Lynching Orgy in History*, *supra* note 146 (reporting that "a frenzied mob of 3,000 men, women and children" attended the lynching of George Armwood); *Suspect Hanged from Oak on Bastrop Public Square*, NEW ORLEANS TRIB., July 10, 1934, reprinted in 100 YEARS, *supra* note 30, at 219 (reporting that 3,000 participated in the lynching of Andrew McCloud).

169. *15,000 Witness Burning of Negro in Public Square*, *supra* note 160.

170. See, e.g., *Big Prep Made for Lynching Tonight*, MACON (GA.) TELEGRAPH, Oct. 26, 1934, reprinted in 100 YEARS, *supra* note 30, at 221 (describing radio announcements advertising the planned lynching of Claude Neal); *Burn a Negro By System*, CHI. RECORD-HERALD, Sept. 29, 1902, reprinted in 100 YEARS, *supra* note 30, at 46 (describing newspaper bulletin attracting hundreds arriving by train).

171. See, e.g., DRAY, *supra* note 32, at 78 (reporting a lynching witness' account that "Fathers ... took their children to teach them how to dispose of negro criminals"); *Roasted Alive*, N.Y. WORLD, Dec. 7, 1899, reprinted in 100 YEARS, *supra* note 30, at 24 (describing "the presence of thousands of men and hundreds of women and children" at the lynching of Richard Coleman). See generally 100 YEARS, *supra* note 30 (containing newspaper accounts of lynchings, many including descriptions of the crowds).

172. See Litwack, *supra* note 156, at 10-11 (describing lynching photographs). See generally WITHOUT SANCTUARY, *supra* note 19 (presenting a collection of lynching photos).

173. See WITHOUT SANCTUARY, *supra* note 19. See also DRAY, *supra* note 32, at 242-43 (showing a picture of white children admiring the hanging body of lynching victim Rubin Stacy).

174. See, e.g., *Negro Burned Alive in Florida; Second Negro Then Hanged*, *supra* note 161 (describing the lynching crowd's struggle to collect souvenir pieces of the victim's dismembered body); *Roasted Alive*, *supra* note 171 ("Relic-hunters visited the scene and carried away pieces of flesh and the negro's teeth. Others got pieces of fingers and toes and proudly exhibit the ghastly souvenirs to-night [sic]."); *Hoosiers Hang Negro Killer*, *supra* note 148 (describing young boys removing the lynching victim's toes to sell to the crowd).

to be displayed in public.<sup>175</sup> Whites often sent postcards of lynching photos to the their friends.<sup>176</sup>

The gathering of the mob, the public execution, the grisly display of the body, and the participation of hundreds or thousands of spectators were deliberately public acts of violence and terrorism. Lynchers wore no hoods or masks.<sup>177</sup> They did not seek to conceal the murdered body, or to leave the scene of the crime.<sup>178</sup> These aspects distinguish lynching from ordinary murder. Instead, lynchings were conducted as public ceremonies of white supremacy. It is this communal and deliberately public aspect of lynching that sets it apart from bombings, church burnings, and other acts of racial terrorism.

### III. Black and White Community Responses to Lynching

#### A. *The Black Community's Response to Lynching*

##### 1. The Harm

Lynching affected black communities in several ways. In some instances, black communities disbanded as blacks fled the town after a lynching took place.<sup>179</sup> In other cases, white mobs mobilized for a lynching continued their destruction by burning black homes and churches, and decimating whole neighborhoods.<sup>180</sup>

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175. See DRAY, *supra* note 32, at 233 (describing the display of lynching victim's head).

176. See James E. Allen, *Strange Fruit: A Collector's Pickings Recall Days of Barbarism*, BALTIMORE SUN, Feb. 15, 1998, at 1H. Allen has collected more than sixty lynching postcards and photos that were sent by lynchers and participants to friends and family in other states. *Id.*

177. WELLS-BARNETT, *supra* note 7, at 75 ("[M]asks have long since been thrown aside and the lynchings of the present day take place in broad daylight.").

178. See *supra* notes 159-160.

179. See, e.g., BEN GREEN, *BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE* 85 (1999) (recounting that in response to reports of planned lynchings, Blacks in Groveland, Florida, were evacuated to Orlando). See also *Mass Exodus of Negroes*, WASH. EAGLE, Aug. 11, 1923, reprinted in 100 YEARS, *supra* note 30, at 171 (discussing the flight of thousands of blacks from Yazoo City, Mississippi, following the lynching of Willie Minniefield); *Pierce City Mob Drives Negroes Out, Burns Homes*, CHI. RECORD-HERALD, Aug. 21, 1901, reprinted in 100 YEARS, *supra* note 30, at 42-43 (describing how white mobs drove blacks out of their homes after lynching Will Godley, who was accused of killing a white woman, declaring "no negro can hereafter live in Pierce City or pass through the place on pain of death").

180. See, e.g., *Pierce City Mob Drives Negroes Out, Burns Homes*, *supra* note 179 ("With the exception of a few car porters, who are know to be respectable, there is not a negro in this town."); *Texas Mob Runs Amuck; Burns Blocks of Negro Homes*, N.Y. SUN, May 10, 1930, reprinted in 100 YEARS, *supra* note 30, at 183; *Church*



It is important to remember that since the late 1800s, lynchings were a fairly regular occurrence in some states.<sup>181</sup> In fact, according to the Tuskegee Institute's lynching archives, which begin in 1882,<sup>182</sup> "[n]ot until 1952 did a year pass without a single recorded lynching."<sup>183</sup> For example, "[f]rom 1900 to 1930, Florida had the highest per capita rate of lynching in the South: 4.5 lynchings for every 10,000 blacks."<sup>184</sup> Mississippi led the states with eighty-eight lynchings from 1921 to 1946.<sup>185</sup> A 1914 article from Shreveport, Louisiana, reported five blacks were lynched in a ten-day period.<sup>186</sup> Five innocent black men were reportedly hung at the same time in Georgia in 1916,<sup>187</sup> bringing the local total to fourteen lynchings in five weeks.<sup>188</sup> In some years, over one hundred lynchings were reported nationally.<sup>189</sup>

The arbitrary nature of lynching also had a powerful effect on the lives of blacks.<sup>190</sup> Because any act perceived as racial insubordination could trigger violence,<sup>191</sup> lynching imposed social, educational, and political controls on black life. While laws restricting the civil rights of blacks were external prohibitions on black advancement, lynching encouraged blacks to curb their own behavior, to turn away from opportunities for advancement, and to restrict their own individual and community growth and development.<sup>192</sup>

The memory of lynchings was indelibly engraved onto the collective psyche of black communities for generations.<sup>193</sup> For

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*Burnings Follow Negro Agitator's Lynching*, *supra* note 111.

181. DRAY, *supra* note 32, at viii (discussing lynching statistics).

182. *Id.* at vii.

183. *Id.* at viii.

184. GREEN, *supra* note 179, at 45.

185. *Id.*

186. *La. Negro is Burned Alive Screaming 'I Didn't Do It'*, CLEVELAND GAZETTE, Dec. 13, 1914, reprinted in 100 YEARS, *supra* note 30, at 93.

187. *All Five Lynched Negroes Were Guiltless, Says Keith*, ATLANTA CONST., Feb. 23, 1916, reprinted in 100 YEARS, *supra* note 30, at 99.

188. *Five Lynched in Georgia*, N.Y. HERALD, Jan. 22, 1916, reprinted in 100 YEARS, *supra* note 30, at 99.

189. See WHITE, *supra* note 4, at 230-31 (including statistics for both black and white lynching victims).

190. See DRAY, *supra* note 32, at 83 (describing lynching as a "finely tuned spring-release trap" that "functioned automatically, simply, heedless of any surrounding doubt or complexity").

191. See CLAUDINE L. FERRELL, NIGHTMARE AND DREAM: ANTILYNCHING IN CONGRESS 1917-1922 77 (1986).

192. See *infra* notes 200-201, 223-231 and accompanying text (recounting how instances of political or economic success by members of the black community could trigger a lynching).

193. See DRAY, *supra* note 32, at xi.

example, during the 1950s, civil rights activists were reluctant to work on voter registration drives in Sunflower County, Mississippi, in part because of one hideous lynching that occurred during the early part of the century.<sup>194</sup> In 1904, Luther Holbert and his wife were brutally lynched in response to the murder of a white plantation owner.<sup>195</sup> While 1,000 spectators watched, their fingers and toes were cut off and large corkscrews were bored into their flesh.<sup>196</sup> Finally the Holberts were burned alive.<sup>197</sup> In addition to the Holberts, three other blacks were killed by the lynching mob.<sup>198</sup> For blacks in Sunflower County in the late 1950s, the 1904 Holbert lynching, among others, was sufficient justification to refrain from registering to vote or talking to federal officials investigating local civil rights violations.<sup>199</sup> The brutality of lynching paralyzed some black communities for decades, as exemplified by the experience of Sunflower County.

In some black communities, lynching provided a disincentive for blacks to seek to "get ahead" economically or educationally. The prosperity of blacks could trigger white jealousy and lynching fever. For example:

Rev. Isaac Simmons was going peacefully about the business of running his farm and had no trouble until it began to be suspected that there was oil on his land. Whites then tried to "muscle in" and take his property away. When they found he had consulted a lawyer, they got together a small mob and killed him in the presence of his son, who was later driven from the county.<sup>200</sup>

Another example of black economic success that sparked violence occurred when:

[A] Negro farmer in Tennessee, who had by his prosperity aroused the jealousy and enmity of poor whites, was ambushed as he drove to town with his daughters to sell a load of cotton. The three were killed, the two girls by hanging and the father by shooting; the wagon was driven under the tree on which the girls' bodies hung, and fire was set to it, burning the bodies to a crisp.<sup>201</sup>

Ida B. Wells-Barnett took up her lifelong anti-lynching

194. See KAY MILLS, *THIS LITTLE LIGHT OF MINE* 29 (1993).

195. *Id.* at 29-30.

196. *Negro and Wife Burned*, N.Y. PRESS, Feb. 8, 1904, reprinted in 100 YEARS, *supra* note 30, at 62-63; *Lynched Negro and Wife Were First Mutilated*, *supra* note 154.

197. *Lynched Negro and Wife Were First Mutilated*, *supra* note 154.

198. MILLS, *supra* note 194, at 30.

199. See *id.* at 29.

200. *Miss. Minister Lynched*, *supra* note 107.

201. WHITE, *supra* note 4, at 37.

crusade after three prosperous black businessmen – one of them a good friend of Barnett – were lynched in Memphis, Tennessee.<sup>202</sup> Their white business competitors simply found the black men “too prosperous.”<sup>203</sup> In these communities, black prosperity was itself a form of racial insubordination, which could provoke violent reprisals.

Black families were profoundly psychologically affected by lynchings. The continuous threat of physical violence undoubtedly affected interactions between community members.<sup>204</sup> Family members were prevented from seeking justice for the lynching of a loved one because of the threat that they too would be lynched.<sup>205</sup> Family members were often too frightened to attend the funeral of their lynched loved one.<sup>206</sup> They were often required to retrieve the mutilated bodies or ashes of their victimized loved ones from the lynching site.<sup>207</sup> Family members of lynching victims would have had the sights and smells of the charred and dismembered remains of their sons, fathers, brothers, and husbands imbedded in their memories.<sup>208</sup>

Black residents who observed the mutilated bodies of lynching victims must have been deeply traumatized by the image. Whites deliberately displayed lynching victims, or dragged their bodies through the black community.<sup>209</sup> In 1917, the decapitated head of lynching victim Ell Persons was left on Beale Street in Memphis, Tennessee.<sup>210</sup> In City Square in Waco, Texas, after

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202. See WELLS-BARNETT, *supra* note 7, at 5.

203. *Id.*

204. See BRUNDAGE, *supra* note 3, at 47 (describing pressure on black residents to downplay lynching or to publicly express support for the lynching of local blacks).

205. See, e.g., WHITE, *supra* note 4, at 28 (stating that Mary Turner was herself lynched in Georgia after threatening to seek the arrest of the men who lynched her husband).

206. See, e.g., *Relatives Shun Funeral of Negroes Lynched in Ga.*, N.Y. TIMES, July 29, 1946, reprinted in 100 YEARS, *supra* note 30, at 239-40 (“Close relatives of two of the four Negroes killed by a white mob here Thursday failed to appear at funeral services today and friends voice the belief that they were ‘too frightened’ to appear.”).

207. See, e.g., *Lynch Victim’s Father Called to Clear Away Son’s Ashes*, ST. LOUIS ARGUS, Nov. 25, 1921, reprinted in 100 YEARS, *supra* note 30, at 156 (“August Turner, father of the mob victim, was summoned to the park to remove his son’s charred remains.”).

208. See PATTERSON, *supra* note 12, at 171-232 (describing the strong correlation between smell and memory).

209. See *Heart and Genitals Carved From Lynched Negro’s Corpse*, *supra* note 160 (describing how the mutilated body of David Gregory was “tied ... behind an automobile with chains, and dragged ... for thirty-five minutes through the Negro section of Kountze to terrorize the negro population”).

210. *Grim Reminder, Picture Caption*, CHI. DEFENDER, Sept. 8, 1917, reprinted in

burning to death a black man convicted of murder, the mob reportedly put "the charred body ... in a sack and ... dragged [it] behind an automobile to Robinson, where it was hanged to a telephone pole for the colored populace to gaze upon."<sup>211</sup>

In many cases, blacks heard the lynchings as they happened.<sup>212</sup> White crowds numbering in the hundreds, often shouted their approval or cheered during the lynching.<sup>213</sup> Shooting hundreds of rounds of bullets at the victim's hanging body was a routine practice.<sup>214</sup> No doubt that in many instances, although shuttered in their homes during a lynching, blacks could hear the horrible cries of lynching victims who were tortured.<sup>215</sup> Descriptions of lynching torture rituals often described the victims' cries for mercy that could be heard from far away.<sup>216</sup> Certainly, the sickening smell of burning flesh would have reached blacks in

100 YEARS, *supra* note 30, at 112-13 (describing a picture of the head of lynching victim Ell Persons which was left on "the pavement of Beale Street, the principal business street of the Negro section"); *Negro Insults White Women; Is Shot and Strung Up*, MONTGOMERY ADVERTISER, Oct. 10, 1916, *reprinted in* 100 YEARS, *supra* note 30, at 111 (describing how Frank Dodd was "left hanging to a tree in a negro settlement on the outskirts of DeWitt [Arkansas]").

211. *15,000 Witness Burning of Negro in Public Square*, *supra* note 160.

212. *See infra* notes 213-216 and accompanying text (describing the horrible sounds that blacks must have heard during a lynching, such as gunshots and screams of terror).

213. *See, e.g., Lynch Victim's Father Called to Clear Away Son's Ashes*, *supra* note 207 ("[W]hite men hooted, yelled and perfected their markmanship by shooting at the almost disintegrated remains."); *Lynch Fever Running High*, COLUMBUS (GEORGIA) ENQUIRER-SUN, May 11, 1930, *reprinted in* 100 YEARS, *supra* note 30, at 183 ("[W]omen screamed and clapped their hands and a great cheer went up from the mob."); *15,000 Witness Burning of Negro in Public Square*, *supra* note 160 ("Burn him!" roared hundreds of voices all raised at once.).

214. *See, e.g., Mob Respects Woman's Request to Move Lynching From Lawn*, BALTIMORE AFRO-AM., Aug. 19, 1921, *reprinted in* 100 YEARS, *supra* note 30, at 154 (describing how after being hung the black lynching victim's body "was riddled by a thousand bullets, hundreds of them lodging in his flesh and bone"); *4 Negroes Lynched at Once*, MONTGOMERY ADVERTISER, Jan. 23, 1912, *reprinted in* 100 YEARS, *supra* note 30, at 75-76 (describing how "fully 300 shots" were fired at the bodies of the black men hung by the white mob); *Huge Mob Tortures Negro to Avenge Brutal Slaying*, *supra* note 149 ("After his body had been mutilated, while he was still alive, the Negro was saturated with gasoline and burned, and while he was burning his body was literally riddled with bullets and buckshot.").

215. *See, e.g., Blood-Curdling Lynching Witnessed by 2,000 Persons*, CHATTANOOGA TIMES, Feb. 13, 1918, *reprinted in* 100 YEARS, *supra* note 30, at 114-15 ("[H]is yells and cries for mercy could be heard in the town."); *Triple Lynching Follow Thrilling Tex. Man-Hunt*, BROOKLYN CITIZEN, May 6, 1922, *reprinted in* 100 YEARS, *supra* note 30, at 162-63 ("As the flames mounted about his body, his chant rose higher and higher until he could be heard throughout the downtown part of town.").

216. *See supra* note 215 and accompanying text (inferring that blacks must have heard the terrible noises associated with a lynching in their neighborhood).

their communities.<sup>217</sup>

The personal psychological effect on black individuals who witnessed or experienced lynching is immeasurable. Black children exposed to these images had the message of lynching indelibly imprinted on their psyche.<sup>218</sup> Child witnesses of violence often suffer lifelong psychiatric effects.<sup>219</sup> According to physicians specializing in the treatment of children and adolescents, "children who witness violence early in life, come to see the world as dangerous and unpredictable, and their own place in it as tenuous."<sup>220</sup> The problems these children suffer can affect their ability to function normally in their home and at school.<sup>221</sup> Sleep disturbances, flashbacks, and emotional detachment problems are all routinely reported symptoms of children who have been exposed to acts of violence.<sup>222</sup>

In addition to the severe psychological harm, black communities were often physically devastated by the widespread mob violence against them that sometimes accompanied a lynching.<sup>223</sup> White mobs – still in lynching fever following the murder – would burn black homes and decimate whole neighborhoods.<sup>224</sup> After lynching a black man in Streetman, Texas, a white mob "set fire to the Streetman Hotel, the only one owned by colored people in the city."<sup>225</sup> Whites burned a black

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217. See PATTERSON, *supra* note 12, at 201-02 (describing the power of the odor of burning flesh to encode memories).

218. See RICHARD KLUGER, *SIMPLE JUSTICE* 518 (Andre Deutsch Ltd. 1977) (1975) (describing civil rights lawyer James Nabrit's childhood experience seeing the burning body of a black man lynched for bragging about the victory of black boxing champion Jack Johnson over white challenger Jim Jeffries).

219. Betsy McAlister Groves, *How Does Exposure to Violence Affect Very Young Children?* 11 *HARV. MENTAL HEALTH LETTER* 7, 8 (1995).

220. *Id.*

221. See Betsy McAlister Groves et al., *Silent Victims: Children Who Witness Violence*, 269 *JAMA* 262, 262-265 (1993). It should be noted that white children who observed lynchings were deeply traumatized by their early exposure to hideous acts of violence perpetrated by their family members and neighbors. See *infra* notes 266-270 and accompanying text (describing the potential effects of violence on young children).

222. Groves et al., *supra* note 221, at 262.

223. See *infra* notes 224-231 and accompanying text (detailing specific accounts of the destruction of black property by whites as a way to prevent black communities from becoming too successful).

224. See, e.g., *Pierce City Mob Drives Negroes Out, Burns Homes*, *supra* note 179 ("With the exception of a few car porters, who are know to be respectable, there is not a negro in this town."); *Texas Mob Runs Amuck; Burns Blocks of Negro Homes*, *supra* note 180; *Church Burnings Follow Negro Agitator's Lynching*, *supra* note 111.

225. *Tex. Mob Holds Lynching Bee*, *N.Y. NEWS*, Dec. 16, 1922, reprinted in 100 *YEARS*, *supra* note 30, at 167.

drug store, beauty shop, undertaker, and tailor.<sup>226</sup> “Virtually every store was ... looted and wrecked” in Sherman, Texas, after the lynching of George Hughes.<sup>227</sup> Three black churches and several lodges were burned in Georgia after a black farmer was lynched for speaking out against mob violence.<sup>228</sup> Brundage has documented “the connection between mass lynchings and anti-black pogroms” in Georgia.<sup>229</sup> In some cases, whites declared “whites only” towns after a lynching, driving blacks from their homes and businesses.<sup>230</sup> As a result of these post-lynching acts, black communities were physically dismantled or were compelled to leave town after a lynching.<sup>231</sup> In these cases, black families, already living on the economic margin, had to start their lives over in a new city or town.

## 2. Black Resistance

Despite the devastating effects of lynching, blacks fought back against lynching violence. In some cases, blacks engaged in armed resistance against lynching.<sup>232</sup> In most cases, however, blacks attempted to use the political process to fight against lynching. Although southern Congressmen repeatedly thwarted the efforts of black activists to pass federal anti-lynching legislation, such as the Dyer Bill in 1922<sup>233</sup> and the Costigan-Wagner Bill in 1934,<sup>234</sup> black anti-lynching activism was not in vain. Anti-lynching crusades politicized and mobilized blacks in many communities.<sup>235</sup> Efforts to pass anti-lynching legislation resulted in the creation of successful black organizing campaigns, and pushed anti-lynching crusaders into the national spotlight.<sup>236</sup> The emergence of new black leadership and the organization of the black community in response to lynching helped lay the groundwork for later campaigns during the Civil Rights

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226. See *Texas Mob Runs Amuck; Burns Blocks of Negro Homes*, *supra* note 180

227. See *id.*

228. See *Church Burnings Follow Negro Agitator's Lynching*, *supra* note 111.

229. BRUNDAGE, *supra* note 3, at 43-44.

230. See *Pierce City Mob Drives Negroes Out, Burns Homes*, *supra* note 179.

231. See *supra* notes 223-229 and accompanying text (detailing specific accounts of the destruction of black property by whites as a way to prevent black communities from becoming too successful).

232. See, e.g., BRUNDAGE, *supra* note 3, at 194.

233. See ZANGRANDO, *supra* note 103, at 69 (describing how threats of a filibuster by southern Congressmen persuaded Dyer Bill supporters to abandon the fight).

234. See *id.* at 119.

235. See *infra* notes 236-237 and accompanying text (discussing the effect of anti-lynching campaigns on black organizing efforts).

236. See ZANGRANDO, *supra* note 103, at 153-56.

Movement.<sup>237</sup>

One response of black communities to lynching was to “vote with their feet” and leave communities plagued by racial violence.<sup>238</sup> There is strong evidence to suggest that the Great Migration of blacks from the South to the northern industrial centers between World War I and World War II was fueled at least in part by lynchings and the threat of racial violence in southern communities.<sup>239</sup> A study of Georgia and South Carolina reveals that the black exodus from the South and migration to the North was heavier in those counties that experienced severe mob violence.<sup>240</sup> As Claudine Ferrell remarked, “[t]he North was no Garden of Eden ... but for many migrants it at least offered some hope of avoiding institutionalized violence.”<sup>241</sup>

Following the lynching of three black businessmen in Memphis, Ida B. Wells-Barnett called on blacks to “save our money and leave a town which will neither protect our lives and property, nor give us a fair trial in the courts, but takes us out and murders us in cold blood when accused by white persons.”<sup>242</sup> Reportedly, blacks left Memphis in the months following the lynching and Wells-Barnett’s call for a mass exodus.<sup>243</sup> But the encouragement of blacks to move north could by itself stir up lynching fever. For instance, in the case of the three black businessmen from Memphis, whites reportedly lynched one of them because he had “advised his fellow blacks to go West because there was no justice for them in Memphis.”<sup>244</sup>

### *B. White Community Complicity in Lynching*

The role of the White community in lynching is complex and deeply troubling. The existence of some white resistance to

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237. See Andor D. Skotnes, *The Black Freedom Movement & the Workers’ Movement in Baltimore, 1930-1939*, at 180-182 (1991) (unpublished dissertation, Rutgers University). The 1931 and 1933 lynchings of young black men on the Eastern Shore of Maryland helped inspire a young black college graduate, Juanita Jackson, to create the City-Wide Young People’s Forum in Baltimore City. The organization was an effective and well-regarded activist group that organized public anti-lynching demonstrations, and served as a breeding ground for some of Maryland’s most effective black leaders. *Id.*

238. See FERRELL, *supra* note 191, at 90.

239. See *infra* note 240 and accompanying text (describing the relationship of mob violence to increased movement north by many southern blacks).

240. See BRUNDAGE, *supra* note 3, at 228-29.

241. FERRELL, *supra* note 191, at 90.

242. WELLS-BARNETT, *supra* note 7, at 5-6.

243. See *id.* at 6.

244. *Id.* at 5.

lynching is beyond dispute.<sup>245</sup> However, the failure of many white institutions and individuals to stand firmly against lynching, or to support anti-lynching legislation, demonstrates the weakness of organized white resistance to lynching.

The attendance of hundreds or thousands of white people at lynchings implies that the white community supported and endorsed such activities. In many communities, lynching resulted in immediate economic and political benefits for whites.<sup>246</sup> This was particularly true in many southern communities where, without the threat of lynching, eligible blacks exercising their right to vote would have formed a significant voting block or the majority of the electorate.<sup>247</sup> Similarly, for white farming communities relying on an army of poorly paid sharecroppers to work large plantations, lynching maintained a compliant and available workforce, without which the traditional agrarian southern economy could not function.<sup>248</sup>

White complicity in lynching extended beyond those who were physically present. Lynching required the cooperation of educators, religious leaders, political leaders, law enforcement, shopkeepers, and countless others.<sup>249</sup> In many instances state and national leaders failed to effectively fight lynching. For example, the decades-long unsuccessful struggle to pass anti-lynching legislation in Congress suggests an infinitely larger and more troubling circle of complicity that warrants examination.<sup>250</sup>

245. See *infra* notes 261-263 and accompanying text (recounting specific instances in which ordinary white people protected potential victims from approaching lynch mobs).

246. See *infra* notes 247-248 and accompanying text (discussing how blacks made up the majority of the potential voting public and a large compliant workforce in many southern communities).

247. See J. Morgan Kousser, *The Voting Rights Act & the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 98, at 143 (showing that blacks constituted the majority of the population in twelve towns in the Deep South and formed significant voting blocs in support of the Republican party).

248. See WHITE, *supra* note 4, at 82 ("Lynching has always been the means for protection, not of white women, but of profits."). But see Editorial, *Lynching Bad for Business*, MEMPHIS COM.-APPEAL, Aug. 5, 1913, reprinted in 100 YEARS, *supra* note 30, at 82. The editorial condemned lynching in part because:

[T]he Negro is about the only dependable tiller of the soil in these parts. Competition for existence is not keen enough to force many white people into the harder work. The Negro also is very useful as a distributor of money. About all he gets goes through his fingers. Commercially, then, he is a very valuable asset. It is not good business to kill them.

*Id.*

249. See, e.g., *supra* notes 148, 248 and accompanying text (discussing the complicity of law enforcement officials and shopkeepers in lynching).

250. See *infra* notes 298-318 and accompanying text (describing attempts to pass anti-lynching legislation in Congress).



Lynching required the complicity of both white institutions and ordinary white individuals. The role of individual whites in supporting the apparatus of lynching should be examined. In *Hitler's Willing Executioners*,<sup>251</sup> Daniel Goldenhagen describes the role that ordinary Germans played as part of the machinery that produced the Holocaust. He argues that the complicity of ordinary Germans was an essential element to the perpetration of atrocities committed against the Jews.<sup>252</sup> Rather than focusing on the now-famous high-level members of Hitler's SS, Goldenhagen invites us to focus on average citizens, whose cooperation ensured the success of Nazi policies against the Jews.<sup>253</sup>

Confronting the legacy of lynching requires a similar look at the participation and complicity of "ordinary," "decent" people who upheld the apparatus of lynching. In this sense, the story of lynching must prominently feature the ordinary nature of lynchings' participants, in addition to the gruesome excesses of the most depraved actors. This focus is particularly appropriate given that lynching's power derived in large part from the knowledge that the most grisly acts against blacks would go uninterrupted and unpunished by ordinary citizens. Thus, what Hannah Arendt called "the banality of evil" in the context of Nazi Germany<sup>254</sup> remains the aspect of lynching which most urgently demands exploration.<sup>255</sup>

### 1. The Lynching Crowd and Other Ordinary People

Those who participated in, observed, or condoned lynching were joined together in a collective act of racial terrorism. Whether crowd members encouraged the lynching or were

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251. DANIEL JONAH GOLDENHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996).

252. *See id.* at 6.

253. *See id.* *See also* ROBERT GELLATELY, *BACKING HITLER: CONSENT AND COERCION IN NAZI GERMANY* (2001). The complicity of ordinary people in ethnic massacres is also the subject of Phillip Gourevitch's searing study of the 1994 genocide in Rwanda. *See generally* PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).

254. *See generally* HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

255. This concern lies at the center of much of the criticism leveled at South Africa's Truth and Reconciliation Commission. By exposing the most egregious actors in the apartheid regime, the TRC may serve to obscure the participation of most of South Africa's white population in supporting and sustaining apartheid. *See* Mahmood Mamdani, *A Diminished Truth*, in *AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA*, 58-61 (Wilmot James & Linda Van De Viver eds., Ohio Univ. Press 2001) (2000).

repulsed by it, they were nevertheless participants in the lynching act. As Brundage points out, although “[s]ome spectators may have been shocked and disgusted by the violence they witnessed ... it was their visible, explicit, public act of participation and not their ambiguous, private sentiment that bound the lynchers both socially and morally.”<sup>256</sup>

Lynching participation was not limited to a single segment of the white community. Although some accounts sought to portray lynchers and lynching spectators as poor marginalized whites, historical facts suggest otherwise. Respectable, mainstream, and educated members of the community were among lynchings’ participants, rather than merely the desperately poor and the marginalized.<sup>257</sup> The December 1931 lynching of Matthew Williams on the courthouse lawn in Wicomico County, Maryland, was observed by a publisher of the local newspaper who reportedly “saw prominent officials ... watching the action from the sidewalk in front of the Wicomico Hotel.”<sup>258</sup> Moreover, lynching participants included not only those who were physically present at the murder. Other community members such as hospital personnel, telegraph officers, journalists, and clergy persons who were not physically present at the lynching nevertheless participated in the crime.<sup>259</sup>

The importance of ordinary people in supporting lynching is

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256. BRUNDAGE, *supra* note 3, at 40.

257. BRUNDAGE, *supra* note 3, at 38. See *University Students Help Mob Lynch Janitor*, NEW YORK WORLD, Apr. 20, 1923, reprinted in 100 YEARS, *supra* note 30, at 169 (describing participation of male and female students at University of Missouri students in lynching of black man); DUBOIS, *supra* note 1, at 678 (“It is its nucleus of ordinary men that continually gives the mob its initial and awful impetus.”). Likewise, lynchings rarely took place in remote wooded areas or farms; they were performed in the town square, outside the courthouse, or in other central locations in the town. See BRUNDAGE, *supra* note 3, at 41 (noting that “whenever possible an easily accessible and highly visible location was chosen” for a lynching). This presents a more chilling and disturbing portrait of lynching than lore would suggest. It brings lynching into the heart of many white communities and suggests that ordinary townspeople played a critical role in perpetuating a culture in which lynching could flourish.

258. See CORDDRY, *supra* note 166, at 58.

259. See, e.g., *Nearly Dead Strike-Breaker Seized from Hospital, Hanged*, FORT WORTH TELEGRAM, Dec. 12, 1921, reprinted in 100 YEARS, *supra* note 30, at 157-58. In one instance, after a White mob came to a hospital to collect a severely beaten black man who was suspected of shooting two whites, a white nurse “led [the lynch mob] to the colored ward and showed the men where Fred Rouse was being treated.” Nurse Slaton scolded the lynchers for coming to the hospital, asking “[w]hy don’t you wait until he is well?” To her credit, Nurse Slaton promptly called the police after the lynchers left with Rouse. *Id.* In the 1931 Matthew Williams lynching in Maryland, Nurse Helen Wise advised the mob, “if you must take him, take him quietly.” CORDDRY, *supra* note 166, at 58.

perhaps best revealed by the accounts of those whose simple acts *prevented* lynchings.<sup>260</sup> For example, in one reported instance, a white doctor assisted a black man who was being pursued by a lynch mob by hiding him in his basement.<sup>261</sup> One newspaper account describes how white hotel employees and taxi drivers on the eastern shore of Maryland protected journalists from being lynched by a crowd of five hundred men that had participated earlier in the lynching of a black man.<sup>262</sup> In 1931, a sheriff's wife in Carroll County, Tennessee, reportedly held off a mob with a shotgun when an angry white crowd tried to storm the local jail to lynch a black man held as a criminal suspect.<sup>263</sup> These stories are shamefully few in contrast to the number of instances in which ordinary people observed or failed to actively resist lynching in their communities. Instead, the environment among ordinary people in towns where lynching occurred was one of tolerance, insularity, and tacit, if not overt, approval. One lyncher summed up this sentiment when he boasted that no police officer would identify an individual member of a crowd of lynchers in Union County, Mississippi because "[w]e're all neighbors and neighbors' neighbors."<sup>264</sup>

Lynching was so normal among townspeople that the presence of children was not outlawed. In some of the most chilling cases, children were willing participants, running to collect wood for the fire or helping to perform the torture ritual.<sup>265</sup>

Since the participation of white children was compelled by

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260. See *infra* notes 261-263 and accompanying text (recounting specific instances in which ordinary white people protected potential victims from approaching lynch mobs).

261. See *Doctor Rescues Negro Lad*, N.Y. HERALD-TRIB., Mar. 27, 1933, reprinted in 100 YEARS, *supra* note 30, at 197.

262. See *Reporter Describes Escape From Maryland Lynch Mob*, *supra* note 31.

263. See DRAY, *supra* note 32, at 281.

264. See WHITE, *supra* note 4, at 27. Through participation in national and statewide civic organizations such as the Association of Southern Women for the Prevention of Lynching and the American Civil Liberties Union, many whites worked vigorously to end lynching. See, e.g., Press release, ACLU (Nov. 3, 1933) (on file with author) (offering a reward for information leading to the conviction of members of a Maryland lynch mob); ASS'N OF S. WOMEN FOR THE PREVENTION OF LYNCHING, OBJECTIVES OF THE ASSOCIATION OF SOUTHERN WOMEN FOR THE PREVENTION OF LYNCHING (1934) (describing a grassroots campaign to build support for anti-lynching measures). This national activism contrasted with the nearly uniform complicity of whites in towns where lynchings occurred.

265. See *Roasted Alive*, *supra* note 171 ("little children from six to ten years of age carried dried grass and kindling wood and kept the fire burning"); *Boy Unsexes Negro Before Mob Lynches Him*, CHI. DEFENDER, Oct. 13, 1917, reprinted in 100 YEARS, *supra* note 30, at 113-14 (describing how a ten-year-old boy castrated a black man during a Texas lynching).

the pressure or expectations of their family members, white children were in the unique position of being both victims and participants in lynchings. These children, now as middle-aged adults, carry images of the most hideous and bestial racist acts.<sup>266</sup> Orlando Patterson argues: "It takes little imagination to understand, now, how the powerful – and for the children who were forced to watch, no doubt traumatic – experience of watching the torture, mutilation, and burning alive of the Afro-American victim would have become encoded forever..."<sup>267</sup>

A letter to the editor published in the wake of the James Byrd lynching in Jasper, Texas, offers a powerful example of lynching's effect on the white children who observed it:

As a boy of 12 growing up in Shreveport, La., in the summer of '56 I witnessed the dragging of a black man tied to the back of a pickup truck. This event took place because the black man was thought to be living with a white woman, a fact I can't affirm. It happened in a very small black community across a bayou from where I lived in a white neighborhood. I don't even know if the man survived the dragging, but I doubt it from what I saw.

I had a friend, a year younger than I and black, who would help me cut yards in my neighborhood. After this happened, I was terrified to be seen with my black friend, not fully understanding the situation, for fear they would come after me or my friend. I was also the neighborhood paperboy and the next morning there was not a word of any kind about what had happened.

...All these years later I can still see those four men in that truck and I am still terrified by that scene.<sup>268</sup>

The writer's description of his own experience demonstrates that white children may have deeply internalized the message of lynching in ways that continue to have a traumatic effect on their psyche. This is certainly true for children who not only watched but were forced to actively participate in the grisly events.<sup>269</sup> When Bert Smith, a black oil-field worker struck a white man who insulted Smith's sister, "a number of oil drillers ... immediately attacked Smith and placed a rope around his neck, hammered his

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266. See *infra* notes 268-270 and accompanying text (offering a personal account of how one man who witnessed a lynching as a child is still deeply affected by the memory of the brutality he witnessed).

267. See PATTERSON, *supra* note 12, at 201 ("[W]arping of the minds of Southern children is by far the worst aspect of lynching."). See also WHITE, *supra* note 4, at 3.

268. Dennis D. Smith, Letters to the Editor, *Shreveport, the summer of '56*, THE DALLAS MORNING NEWS, Feb. 2, 1999, at 30a, available at 1999 WL 4103225.

269. *Boy Unsexes Negro Before Mob Lynches Him*, *supra* note 265.

mouth in with a sledge and pierced his body with sharp instruments, and then forced a 10 year-old white lad who carried water around the camp to take a large butcher knife and unsex him."<sup>270</sup> A child in this situation can only be expected to carry the legacy of brutality and violence with him throughout his life.

## 2. Institutional Actors: Law Enforcement and Local Politicians

Law enforcement officials often played key roles in lynching. Many lynchings involved the abduction of a suspect who had been arrested and was in police custody.<sup>271</sup> The stance of law enforcement officials when approached by lynch mobs often meant the difference between the life and death of the potential victim.

Without question, many sheriffs and police officers resisted the efforts of lynch mobs and vigorously protected black suspects held in their custody.<sup>272</sup> These law enforcement officials used a variety of tactics to stave off mobs, ranging from humor<sup>273</sup> to threats of violence.<sup>274</sup> Sheriff W. J. White in Spartanburg County, South Carolina, reportedly announced to a lynch mob, "Gentlemen, I hate to do it, but so help me God, I am going to kill the first man that enters that gate!"<sup>275</sup> In some cases, officers were overcome by lynchers and beaten, and in other instances, murdered by the lynch mob.<sup>276</sup> In one case, a local sheriff was almost lynched for refusing to reveal where a black prisoner accused of assaulting a white woman was being held.<sup>277</sup> Some officers and local district attorneys made frantic calls to state

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270. *Id.*

271. See *Maryland Witnesses Wildest Lynching Orgy in History*, *supra* note 146.

272. See *infra* notes 273-278 and accompanying text (offering specific accounts of ways that white law enforcement officials resisted public pressure and protected the black victims in their custody).

273. See, e.g., *Mob Disbands After Talk By Glib Police Captain*, ATLANTA CONST., Sept. 10, 1930, reprinted in 100 YEARS, *supra* note 30, at 188-90.

274. *Sheriff Staves Off Mob*, MONTGOMERY ADVERTISER, *supra* note 146.

275. *Id.*

276. See, e.g., *Sheriff and Negro Killed, 6 Deputies Wounded By Mob*, N.Y. SUN, June 14, 1932, reprinted in 100 YEARS, *supra* note 30, at 195; *Sheriff Nearly Lynched*, *supra* note 146; *Maryland Witnesses Wildest Lynching Orgy in History*, *supra* note 146 ("Fifty State policemen and deputies battled vainly with the crowd in front of the jail, tossing tear bombs in an effort to disperse it. Five policemen were beaten to the ground and the others were swept aside by the fury of townsmen and farmers.").

277. *Sheriff Nearly Lynched*, *supra* note 146 ("The mob seized the Sheriff, stripped him of his clothes, kicked, beat and cut him, dragged him to the principal street corner ... and tied a noose around his neck threatening to hang him to a trolley pole unless he told where he had hidden the negro.").

governors requesting National Guard or other additional law enforcement assistance.<sup>278</sup>

However, in far too many instances, officers offered token resistance, or did not interfere with lynchers.<sup>279</sup> Sheriff Dwight H. Blackwood of Mississippi County reportedly remarked after one lynching, "Nearly every man, woman and child in our county wanted the Negro lynched. When public sentiment is that way, there isn't much chance left for the officers...."<sup>280</sup> Police were routinely more solicitous of the feelings of lynch mob members than they were of the life of a black suspect.<sup>281</sup> Leaving a prisoner accused of raping a white woman at the jail with no guard virtually ensured that he would be abducted by the lynch mob.<sup>282</sup> Likewise, failing to remove or keep a black prisoner out of a jurisdiction where lynch mobs were known to gather could also be expected to result in a mob attack on the prison and the murder of the black suspect.<sup>283</sup> Other police officers actively assisted lynchers<sup>284</sup> or were part of the mob.<sup>285</sup> Local law enforcement routinely failed to participate in efforts to identify and try lynchers for their crimes.<sup>286</sup>

Similarly, local coroners and citizens serving on coroners'

278. See, e.g., *Sheriff Rescues Negro After Holding Back Mob*, BIRMINGHAM NEWS, Aug. 21, 1913, reprinted in 100 YEARS, *supra* note 30, at 84; *Maryland Witnesses Wildest Lynching Orgy in History*, *supra* note 146.

279. See, e.g., *Hoosiers Hang Negro Killer*, *supra* note 148 ("Policemen stood on the river bank and watched the men and boys about the fire for an hour or more. Outside the jail a number of policemen tried to persuade the crowd to disperse, but when a man would not move on no further effort was made.").

280. WHITE, *supra* note 4, at 25.

281. See, e.g., *Belleville is Complacent Over Horrible Lynching*, N.Y. HERALD, June 9, 1903, reprinted in 100 YEARS, *supra* note 30, at 50-52 ("Police and officials say they could have held the jail if they had used their revolvers, but they did not do so because they were 'afraid somebody would be hurt.'").

282. See, e.g., WHITE, *supra* note 4, at 78-79.

283. *Tie, Beat Suspect: Say Agonizing Torture Forces Axe Confession*, *supra* note 153 (describing how Orphan Jones, a sixty-year-old black man accused of killing a white family in Maryland, was only saved from a lynch mob because authorities "hustled" him out of the courthouse "under heavy guard to prevent a possible lynching" to a secure jail in Baltimore).

284. See, e.g., *S. C. Lynchers Slay Negro: One Tells of Police Help*, N.Y. HERALD-TRIB., Oct. 10, 1932, reprinted in 100 YEARS, *supra* note 30, at 199 ("The [Chief of Police] told us to wait until dark and we would find the jail unlocked.").

285. See, e.g., *Survivor of Louisiana Lynching Tells of His Ordeal*, N.Y. WORLD-TELEGRAM, Dec. 26, 1933, reprinted in 100 YEARS, *supra* note 30, at 212-13 ("The Sheriff Ferdinand Richards, was leadin' the mob an' when Ah doan put on mah clothes fast enough the Sheriff he beats me with his gun.").

286. See, e.g., *Two Blacks Strung Up; Grave Doubt of Their Guilt*, HOUSTON POST, June 11, 1900, reprinted in 100 YEARS, *supra* note 30, at 32-33 ("Sheriff Ramsey and Marshal Moseley saw the members of the mob, but ... 'were unable to recognize them on account of the trees casting shadows on their faces.'").

juries routinely refused to indict lynchers for their crimes.<sup>287</sup> Instead, in case after case in which inquests were held to determine the cause of a lynching victim's death, coroners and juries returned verdicts of "death at the hands of unknown persons."<sup>288</sup> In one case, a coroner's jury returned a verdict of "suicide" after a local black farmer was found riddled with bullets.<sup>289</sup> The black victim had been visited by a white mob earlier that day.<sup>290</sup>

Thus, the justice system failed to enforce the rule of law in ensuring that blacks accused of crimes would receive due process rather than mob violence. At the very least, officials in the justice system played a role in maintaining the practices of racial exclusion and outright racism that contributed to lynching. Presiding over a system in which blacks were systematically excluded from participating on juries, condoning ill-treatment of black witnesses, and refusing to order the removal of trials from jurisdictions where lynching fever and mob violence prevailed are some of the ways that judges contributed to the conditions in which lynching flourished.<sup>291</sup> Prosecutors condoned lynching by refusing to vigorously prosecute lynching cases.<sup>292</sup> In this sense, the justice system played a critical role in perpetuating lynching. Although mob murder was purportedly illegal criminal activity, lynching effectively became a "legal" crime in many communities.

Similarly, the political system provided little or no avenue of relief to black communities beset by lynch mobs.<sup>293</sup> Instead, many

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287. See *infra* notes 288-290 and accompanying text (describing a specific case of a coroner's jury that refused to find the death of one lynching victim to be anything other than "suicide").

288. See *21 Lynching Witnesses Sighted Only "Strangers"*, *supra* note 30. See generally DRAY, *supra* note 32.

289. See *Visited by Mob and Shot; Jury Rules It "Suicide"*, BALTIMORE AFRO-AMERICAN, Apr. 27, 1935, reprinted in 100 YEARS, *supra* note 30, at 227.

290. See *id.*

291. See, e.g., *Lee v. State*, 161 Md. 284, 286 (1932) (finding no Constitutional problem with deliberate exclusion of blacks from a jury); MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM 164-65 (1999) (describing challenge to failure to include blacks on juries in Chattanooga, Tennessee); *Lee v. Maryland*, 157 A. 723, 727-28 (1931) (admonishing the lower court for refusing to move the venue of an interracial murder trial despite a lynching in a nearby town).

292. See, e.g., Dewey Fleming, *Lane Wins Applause for Lynching Data Given Senate Group*, BALTIMORE SUN, Feb. 22, 1934, at A1 (reporting the Attorney General of Maryland's presentation to the Congressional Committee, in which he introduced strong evidence that local prosecutors refused to push for the indictment of known lynching perpetrators).

293. See *infra* notes 294-297 and accompanying text (offering examples of methods used by white politicians to cater to the demands of their white

local politicians contributed to the perpetuation of lynching by being more concerned with placating the bloodthirsty crowd than with protecting the life of a black suspect or preserving the rule of law.<sup>294</sup> For instance, when fifteen-year-old Emmett Till was murdered in Money, Mississippi in 1954, reportedly for whistling at a white woman, the Governor, in dismissive terms, ignored requests from the NAACP for his intervention.<sup>295</sup> Often, statements issued by Governors, ostensibly to condemn lynching, focused instead on the "unspeakable act" of interracial rape of which the black victim was accused. After the gruesome dismemberment and lynching of Sam Holt in Palmetto, Georgia, the Governor of that state declared:

The whole thing is deplorable, and Holt's crime, the horrible details of which have been published and are too horrible for publication, is the most diabolical in the annals of crime. The negroes of the community lost the best opportunity they will ever have to elevate themselves in the estimation of their white neighbors. But they lost the opportunity, and it is a deplorable fact that, while scores of intelligent negroes, leaders of their race, have talked to me about the Palmetto lynching, not one of them has ever in the remotest way alluded to the diabolical crime of Holt which provoked the lynching. I do not believe these men sympathized with Holt but they can see but one side of the question and are blinded by race prejudices.<sup>296</sup>

In one particularly egregious case of official support for lynching, the Governor of South Carolina declared that rather than stop the perpetrators of a recent lynching he would have "resigned the office and come to Honea Path and led the mob myself."<sup>297</sup>

### 3. Congress and the Federal Government

Despite the decades-long efforts of activists such as Ida B. Wells-Barnett, Mary Church Terrell, Walter White, James Weldon Johnson, and Paul Robeson, the federal government never took concerted action against lynching.<sup>298</sup> Over 100 anti-lynching bills

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constituencies instead of protecting the lives of black lynching victims).

294. See, e.g., *Belleville is Complacent Over Horrible Lynching*, *supra* note 281 ("Mayor Kern, State's Attorney ... and former judge ... consulted and agreed that to oppose the crowd with force would not be good policy. A suggestion was made that the fire department turn water on the crowd. Mayor Kern opposed this on the ground that it would make the people angry.")

295. See *15-Year-Old is Lynched; Wolf-Whistled at White*, *supra* note 141.

296. *Negro Burned Alive in Florida; Second Negro Then Hanged*, *supra* note 161.

297. *Governor Commends Lynchers*, BIRMINGHAM NEWS, Nov. 13, 1911, reprinted in 100 YEARS, *supra* note 30, at 75.

298. See ZANGRANDO, *supra* note 103, at 210-16.



were proposed in Congress between 1882 and 1951.<sup>299</sup> However, anti-lynching legislation never passed in both houses of Congress in spite of the persistent efforts of activists.<sup>300</sup> The principal argument of southern Congressmen against passing such legislation was a concern for "state's rights."<sup>301</sup> Yet, as one scholar has noted, Congress' interest in "state's rights" was not consistently expressed in its legislative enactments.<sup>302</sup> Barbara Holden-Smith's study of legislation passed during the Progressive Era reveals that while refusing to pass anti-lynching legislation, Congress passed the Mann Act in 1910 (also known as the White Slave Traffic Act), and a law banning the interstate shipment of films showing black heavyweight champion Jack Johnson.<sup>303</sup>

The passage of each of these Acts implicated states' rights. For example, states had already been regulating the distribution of prize fight films prior to any federal Congressional action.<sup>304</sup> By 1911, however, whites had increasingly become infuriated by the success of black boxing great Jack Johnson. Films showing Jack Johnson standing victoriously over a battered white opponent aroused white anger.<sup>305</sup> This anger spilled over after Johnson's defeat in 1910 of "Great White Hope" Jim Jeffries.<sup>306</sup> Johnson's show of physical superiority in dispatching Jeffries reportedly provoked race riots in some areas.<sup>307</sup> Johnson's succession of open and flagrant romances with white women was even more galling.<sup>308</sup> Holden-Smith suggests that Congress passed the law designed to bar the showing of Johnson's fight films in time to ensure that crowds would not view Johnson's subsequent victory

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299. See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 44 n.73 (1996) ("Many of the anti-lynching bills introduced in Congress between 1882 and 1951 were responses to the lynchings of aliens, a problem ... for which the United States had to pay considerable sums in damages to the countries from which the aliens had come.").

300. See *id.* at 44.

301. See *id.* at 45.

302. See *id.* at 45 n.76.

303. *Id.* at 60-77.

304. See *id.* at 76.

305. See DRAY, *supra* note 32, at 193 (after knocking out his white opponent Johnson "stood by nonchalantly, hand on hip, looking down at his prostrate opponent as the referee counted .... This image went around the world like a shot.").

306. See Holden-Smith, *supra* note 299, at 73 (writing how Johnson reportedly subjected Jeffries to "fifteen rounds of jeering, taunting and laughing" before knocking him to the canvas twice in the fifteenth round).

307. See *id.* at 73.

308. See *id.* at 74; DRAY, *supra* note 32, at 193-94.

over yet another white opponent.<sup>309</sup> Holden-Smith argues that during this period racial concerns affected Congress' decision to pass other legislation that imposed federal regulation on areas traditionally left to the states.<sup>310</sup>

As Holden-Smith demonstrates, Congress' passage of these laws and its concurrent failure to pass anti-lynching legislation may reflect two consistent congressional positions during this period, paternalism towards white women and strong hostility to interracial sexual relations.<sup>311</sup> These concerns were sufficient to overcome congressional concerns about states' rights. In contrast, the widespread kidnapping, torture, and murder of black men did not sufficiently arouse Congress' concerns to overcome the states' rights argument.<sup>312</sup>

The efforts of anti-lynching activists to provoke Presidential leadership on the lynching issue were similarly unsuccessful. Although Ida B. Wells-Barnett regularly petitioned American presidents for their attentiveness to the lynching issue, no president ever took an impassioned and consistent public stand against lynching.<sup>313</sup> President Harding was reportedly inducted into the Ku Klux Klan by founder William Simon on a visit to the White House.<sup>314</sup> When asked by Paul Robeson, the activist-singer-actor and president of the American Crusade to End Lynching, to issue "a formal public statement" about lynching, President Truman reportedly "indicated that political matters made it difficult to issue a statement of his views at this time."<sup>315</sup> When Robeson criticized the legitimacy of America's stand against fascism in the Nuremberg trials given the reality of domestic racial oppression against blacks, President Truman cautioned that "loyal Americans should not mix domestic problems like lynching

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309. Holden-Smith, *supra* note 299, at 75.

310. *Id.* at 77 (arguing that the "desire and ability [of Congress] to make the showing of prize-fight films a federal crime while failing to criminalize lynching illustrates how 'official' debates regarding federalism often masked the more heated issues involving race and gender relations").

311. *Id.* at 33.

312. See DRAY, *supra* note 32, at 279 (describing how members of Congress were, on occasion, openly receptive to notorious racists). In 1921, for example, William Simon, the founder of the Ku Klux Klan reportedly testified before a House Committee in defense of the Klan. Upon completing two days of testimony, Simon was given a standing ovation by the assembled Congressmen. *Id.*

313. See ZANGRANDO, *supra* note 103, at 122-38, 159, 175-78.

314. See DRAY, *supra* note 32, at 279.

315. Robeson to President Truman - "Government Must Act Against Lynching or the Negroes Will", N.Y. TIMES, Sept. 24, 1946, reprinted in PAUL ROBESON SPEAKS: WRITINGS, SPEECHES, INTERVIEWS 173 (Phillip S. Foner ed., 1978) [hereinafter PAUL ROBESON SPEAKS].

with foreign policy.”<sup>316</sup>

Even President Franklin Roosevelt – despite pressure from his wife Eleanor – failed to publicly and forcefully support the passage of anti-lynching legislation.<sup>317</sup> Despite his close relationship with Eleanor Roosevelt, NAACP leader Walter White resigned as a member of President Roosevelt’s Advisory Council for the Government of the Virgin Islands in protest of President Roosevelt’s failure to “make a public pronouncement ... giving [his] open endorsement to the anti-lynching bill.”<sup>318</sup>

#### IV. Creating a Process of Truth and Reconciliation for Lynching

##### A. South Africa and Its Truth and Reconciliation Commission

The South African TRC was comprised of three committees: the Human Rights Violation Committee, the Amnesty Committee, and the Reparation and Rehabilitation Committee.<sup>319</sup> The principal function of the Human Rights Committee was to hear the stories of victims of gross violations of human rights.<sup>320</sup> The Amnesty Committee would hear and review applications for amnesty of anyone who voluntarily came forward to fully disclose their participation in a human rights violation.<sup>321</sup> Amnesty would be granted to those who committed the criminal acts as part of a political objective and disclosed the truth about their crimes.<sup>322</sup> The Reparations Committee would ostensibly identify those victims deserving of reparations and would provide assistance needed for the rehabilitation of victims.<sup>323</sup>

The TRC was the subject of strong criticism from both blacks and whites, from both the right and the left.<sup>324</sup> Indeed, as a

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316. *Robeson Tells Truman: Do Something About Lynchings or Negroes Will*, PHILADELPHIA TRIB., Sept. 24, 1946, reprinted in PAUL ROBESON SPEAKS, *supra* note 315, at 174.

317. DRAY, *supra* note 32, at 343-44.

318. ZANGRANDO, *supra* note 103, at 129.

319. Promotion of National Unity and Reconciliation Act 34 of 1995, ch. 2, § 3(1)(a)-(d) (codified as amended at 1 JSRSA 1-182 (2001)).

320. *Id.* at ch. 2, § 4(a)(i).

321. *Id.* at ch. 20, § 1.

322. *Id.* at ch. 19-20.

323. *Id.* at ch. 20, § 1(a)-(c).

324. See Paul Lansing & Julie C. Kink, *South Africa’s Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT’L & COMP. L. 753, 778-80 (1998).

substitute for the prosecution of admitted murderers and government terrorists, the TRC mechanism is both morally and politically problematic. It offered amnesty to those who committed unspeakable acts of brutality and repression and it denied individual victims the right to seek civil legal penalties against perpetrators who were granted amnesty.<sup>325</sup> The strategy of reconciliation and forgiveness was subject to much criticism, given the breadth of state-sponsored murder and terrorism visited on the black population for generations.<sup>326</sup> Nevertheless, the TRC process was a real and ambitious attempt to provide a state-sponsored forum to address and confront the effect of racial terrorism on the lives of its victims.

Over the course of two years, the TRC heard over 50,000 cases of gross violations of human rights.<sup>327</sup> There was a seemingly endless barrage of women and men who came forward to tell of unspeakable acts that had been committed against them.<sup>328</sup> The Amnesty Committee conducted hearings where mostly white South Africans came forward to tell of their involvement in violating human rights.<sup>329</sup> These South Africans were most often police officers, who were employed by the State to use any and all means necessary to repress the black population.<sup>330</sup>

In these "institutional" hearings, the business community,<sup>331</sup> the health community,<sup>332</sup> the legal community,<sup>333</sup> and the media<sup>334</sup> came before the TRC to testify about their participation in apartheid.<sup>335</sup> While many institutional actors refused to

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325. See 1 TRUTH & RECONCILIATION COMM'N. OF SOUTH AFRICA REP., ch. 5, ¶ 53-79 (1999) [hereinafter TRC REP.].

326. *Id.* at ch. 1, ¶ 33-67.

327. *Id.* at ch. 6, ¶ 3.

328. See generally *id.*; 2 TRC REP. (recording personal accounts of kidnapping, rape, murder, torture, forced eviction, etc).

329. See BORAINÉ, *supra* note 55, at 116.

330. See *id.* at 123 (noting that many applicants for Amnesty were state security police or worked for the armed forces). See also *id.* at 126-28, 133-34 (describing increasingly violent and repressive means used by the state to maintain white supremacy in South Africa).

331. 4 TRC REP., ch. 2.

332. *Id.* at ch. 5.

333. *Id.* at ch. 4.

334. *Id.* at ch. 6.

335. See *id.* at ch. 2. For an excellent analysis of the role of apartheid-era judges in fostering the abuses of that period, see generally DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION & THE APARTHEID LEGAL ORDER* (1998).

participate,<sup>336</sup> the very act of convening these hearings and the ample testimony provided by institutional and other witnesses was a compelling demonstration of the institutional nature of apartheid.

Yet, in the TRC process, very little was heard from average South Africans: black miners, domestic workers, shop women, mothers, hostel workers, and school children who suffered the indignities each day living as third-class “non-citizens” in their own land.<sup>337</sup> In a poem entitled “Leave Me Alone,” Gladys Thomas poignantly describes the pain apartheid inflicted on domestic workers:

I tear my hungry babe from my breast  
To come and care for yours  
Yours grow up fine  
But, oh God, not mine  
From school and beach yours I fetch  
And wonder if mine school did reach<sup>338</sup>

By focusing on gross human rights abuses, the TRC left no room for women like the domestic worker in Thomas’ poem to participate in the reconciliatory process.

Nor did the TRC provide an opportunity for the employer of the fictional domestic worker in Thomas’ poem to join the process of truth-telling. Little was heard from average white South Africans who supported and benefited each day from a societal structure that guaranteed that the best of South Africa’s economic, social, and political rewards were reserved for them. Yet, it may be that the most important reconciliatory work needs to happen between black domestic workers and their white employers, between white shopkeepers and their black patrons, and between white landowners and black field workers.

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336. For example, the vast majority of apartheid-era judges refused to participate in hearings on the role of the legal community in fostering apartheid. See 4 TRC REP., *supra* note 325, at. ch. 4, ¶ 2. Even though some may refuse to participate, the process of truth-telling can nevertheless transform an entire community. As Daly found with the TRC process, “the stories [told by victims] resonated in the public consciousness, thus involving the general public in the curative experience of the TRC – whether or not they wanted to participate.” Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73, 140 (2002). Moreover, given the trauma suffered by white children who observed lynching, there may be a broad spectrum of individuals in a community who need to reconcile themselves with the local history of racial violence.

337. For an excellent documentary film showing the effect of apartheid on the lives of five South African women see SOUTH AFRICA BELONGS TO US (California Newsreel 1980).

338. Gladys Thomas, “Leave Me Alone” (1972), *cited in* A POETICS OF RESISTENCE: WOMEN WRITING IN EL SALVADOR, SOUTH AFRICA, AND THE UNITED STATES 170 (1994).

South Africa's apartheid laws invaded almost every aspect of life for both blacks and whites. Every black person was affected in significant and painful ways by the restrictions and repression of the apartheid state.<sup>339</sup> Similarly, it was impossible for a white person to be unaware that the majority of the population was prohibited from exercising rights deemed fundamental in many other countries.<sup>340</sup> Average white citizens, who turned a blind eye towards police brutality, murder, forced removals, and the banning of the black population, were not required to take responsibility for their complicity in supporting the violence of white supremacy. Thus, the participation and testimony of ordinary whites and blacks in the TRC process was disregarded. It is within this area that the opportunity for meaningful reconciliation lies.

Professor Mahmood Mamdani has centered much of his critique of the TRC on its narrow focus on "the experience of a tiny minority: on the one hand, perpetrators, being state agents, and, on the other, victims, being political activists," rather than on the broader communities of beneficiaries and victims of the apartheid system.<sup>341</sup> The failure of the TRC process to demand accountability from these participants in the violence of apartheid left a gaping hole in the fabric of the reconciliation process. In doing so, the crime of apartheid was necessarily narrowly defined as one of gross and brutal "excesses," rather than as one characterized by everyday acts of oppression and callousness committed by ordinary people. In this way, the TRC process failed to identify the culpability of ordinary white people who condoned and benefited from the violence of the apartheid system. Yet as Alex Boraine argued, "the process [of reconciliation] will not be

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339. For harrowing accounts of how South Africa's complex web of racist laws affected the lives of blacks, see T.R.H. DAVENPORT, *SOUTH AFRICA: A MODERN HISTORY* 345-50 (2d ed. 1977) (describing the effect of pass laws regulating the movement of blacks within the country and the effect of segregated education). See also KENNETH S. BROUN, *BLACK LAWYERS, WHITE COURTS: THE SOUL OF SOUTH AFRICAN LAW* 15-18 (2000) (detailing the effect of pass laws, curfews, and racial discrimination in the courthouse on the life of black lawyers); *id.* at 37-38 (describing the effect of segregated and under-resourced educational opportunities for blacks); *id.* at 50-59 (providing individual accounts of how inferior education for blacks affected the lives and careers of children growing up in South Africa under apartheid). See generally 2, 3 TRC REP., *supra* note 325 (describing the effect of violence, murder, and torture against black activists).

340. See BORAINÉ, *supra* note 55, at 21 (recounting the TRC Vice Chair's expression of disbelief at repeated assertions by former South African Prime Minister F. W. DeKlerk that he had not known about apartheid-era policies that harmed black South Africans).

341. Mamdani, *supra* note 2, at 38.

completed until all South Africans who benefitted from apartheid confront the reality of the past, accept the uncomfortable truth of complicity, give practical expression to remorse, and commit themselves to a way of life which accepts and offers the dignity of humanness."<sup>342</sup>

### B. A TRC for Lynching in America

Americans must begin to confront the history of lynching and its continued effect on blacks and whites in communities throughout the United States. Such an examination should be focused principally on the role of local institutions, state officials, and ordinary people in condoning and promoting the public torture, killing, and dismemberment of thousands of black people. Most importantly, in towns where lynchings occurred, such a process should provide blacks and whites with the opportunity to find appropriate forms of reparation and avenues toward reconciliation.

I propose the creation of local TRCs designed to address lynching. These TRCs would provide opportunities for community members to face the legacy of lynching. The local, rather than national, scope of these TRCs is important. In response to national reparations or affirmative action efforts, whites often argue that "their ancestors had nothing to do with enslavement of blacks,"<sup>343</sup> but in fact, lynching involved the active or passive participation of entire communities of whites.<sup>344</sup> A specific lynching in a particular community implicates that entire community. Simply put, the argument of "innocence" is a difficult one to sustain given the reality of the scope of community complicity in lynching.

More importantly, lynching TRCs should focus on the role of local institutions in fostering, promoting, and condoning lynching and racial violence. In this regard, the lynching TRCs would be modeled on the South African TRC's "institutional hearings." The institutional hearings provide a model for a process that identifies and confronts the reality of institutional complicity in racial oppression and would be an essential part of a truth and reconciliation process for lynching.

Local TRCs would also afford the opportunity for community

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342. BORAINE, *supra* note 55, at 9.

343. Westley, *supra* note 14, at 472.

344. See *supra* notes 245-297 and accompanying text (describing the role of ordinary white people, white law enforcement agents, and white politicians in the perpetuation of lynchings).

residents to identify and adopt reparation measures. While in some instances, appropriate reparation might include monetary reparation to the descendents of lynching victims or to families that lost businesses and homes as a result of lynching. In other cases, communities might choose additional or different forms of reparation such as the funding of local education and business development programs designed to assist the black community. The erection of monuments and plaques or the creation of peaceful park spaces at sites where lynchings occurred in the community might be another important form of reparation. Re-opening investigations into lynchings or clearing the names of blacks wrongly accused of crimes said to "provoke" lynchings might also be part of a locally created reconciliatory process. Apology is another reparative measure that some communities might find critical to their particular reconciliation process. Educating police officers, prosecutors, and judges about the historical role of local law enforcement and legal institutions in lynching may be a form of reparation, especially if such educational seminars are made a mandatory part of the training of public officials.

The importance of providing a locally conceptualized reparation structure cannot be over-emphasized. The South African TRC lost a great deal of support and credibility among black victims of apartheid when it was unable to deliver on the promise of reparation.<sup>345</sup> In any case, the identification of appropriate forms of reparation is best left to community members engaged collectively in the TRC process.<sup>346</sup> Such a local, organic process is consistent with the contextual nature of reconciliation efforts.<sup>347</sup>

Lynching TRCs could provide opportunities for both institutional and individual accountability. The ultimate goal of the lynching TRCs is to support and encourage communities to grapple with the traumatic effects of lynching on black and white

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345. See Dumisa Ntsebeza, *A Lot More to Live For*, in AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA, *supra* note 255, at 105.

346. The most thorough and critical examination of reconciliation efforts and techniques in this area can be found in ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999).

347. See Daly, *supra* note 336, at 92. As Daly notes, "what counts as reconciliation in one society may be different from what is required in another situation." *Id.* See also WOLE SOYINKA, *THE BURDEN OF MEMORY, THE MUSE OF FORGIVENESS* 13 (1999) (referring to the banishment of the character Okonkwo in Chinua Achebe's *THINGS FALL APART* (1959), Soyinka notes that "[m]ost African traditional societies have established modalities that guarantee the restoration of harmony after serious infraction").



communities. By so doing, black and white communities may be better equipped to participate in community-building and reconciliation efforts. Disregarding lynching as a major historical source of distrust and tension between blacks and whites undermines our ability to engage in truthful and meaningful “conversations” about race.

Like the South African TRC, lynching TRCs would begin the process of transforming communities that live with the shared memory and collateral effects of historic racial terrorism. A transformative justice process “must foster change in the society, leaving it qualitatively different.”<sup>348</sup> In the context of transforming societies plagued by a history of violent white supremacy, some of the elements of that transformation are readily identifiable: “Victims become survivors; perpetrators become good neighbors; powerful people learn to wield their authority responsibly or become less powerful.”<sup>349</sup> Local conveners of lynching TRCs should not simply follow the script set out by the South African TRC, but instead call on other transformative and restorative justice models in fashioning local TRCs for lynching.

## V. Conclusion

America’s history of lynching cannot be ignored. Instead, lynching must be recognized as an aspect of American history that continues to affect perspectives and relationships between blacks and whites. Contemporary lynchings in Texas, Wyoming, and Virginia evoke strong emotions because they call on memories of a painful past – memories not-so-long buried and still powerful. Our efforts to engage in conversations about race and to define the scope of reparations for racial violence provide a unique opportunity to remember and confront lynching and its continued hold on America’s racial psyche.

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348. DALY, *supra* note 347, at 84.

349. *Id.* at 83.

