A Presumption of Guilt

Bryan Stevenson
JULY 13, 2017 ISSUE

Late one night several years ago, I got out of my car on a dark midtown Atlanta street when a man standing fifteen feet away pointed a gun at me and threatened to "blow my head off." I'd been parked outside my new apartment in a racially mixed but mostly white neighborhood that I didn't consider a high-crime area. As the man repeated the threat, I suppressed my first instinct to run and fearfully raised my hands in helpless submission. I begged the man not to shoot me, repeating over and over again, "It's all right, it's okay."

The man was a uniformed police officer. As a criminal defense attorney, I knew that my survival required careful, strategic thinking. I had to stay calm. I'd just returned home from my law office in a car filled with legal papers, but I knew the officer holding the gun had not stopped me because he thought I was a young professional. Since I was a young, bearded black man dressed casually in jeans, most people would not assume I was a lawyer with a Harvard Law School degree. To the officer threatening to shoot me I looked like someone dangerous and guilty.

I had been sitting in my beat-up Honda Civic for over a quarter of an hour listening to music that could not be heard outside the vehicle. There was a Sly and the Family Stone retrospective playing on a local radio station that had so engaged me I couldn't turn the radio off. It had been a long day at work. A neighbor must have been alarmed by the sight of a black man sitting in his car and called the police. My getting out of my car to explain to the police officer that this was my home and nothing criminal was taking place prompted him to pull his weapon.

Museum of Modern Art, New York/© 2017 The Jacob and Gwendolyn Knight Lawrence Foundation, Seattle/Artists Rights Society (ARS), New York

'The migration gained in momentum'; painting by Jacob Lawrence from his Migration *series, 1940–1941*

Having drawn his weapon, the officer and his partner justified their threat of lethal force by dramatizing their fears and suspicions about me. They threw me on the back of my car, searched it illegally, and kept me on the street for fifteen humiliating minutes while neighbors gathered to view the dangerous criminal in their midst. When no crime was discovered and nothing incriminating turned up in a computerized background check on me, I was told by the two officers to consider myself lucky. While this was said as a taunt, they were right: I was lucky.

People of color in the United States, particularly young black men, are often assumed to be guilty and dangerous. In too many situations, black men are considered offenders incapable of being victims themselves. As a consequence of this country's failure to address effectively its legacy of racial inequality, this presumption of guilt and the history that created it have significantly shaped every institution in American society, especially our criminal justice system.

At the Civil War's end, black autonomy expanded but white supremacy remained deeply rooted. States began to look to the criminal justice system to construct policies and strategies to maintain the subordination of African-Americans. Convict leasing, the practice of "selling" the labor of state and local prisoners to private interests for state profit, used the criminal justice system to take away their political rights. State legislatures passed the Black Codes, which created new criminal offenses such as "vagrancy" and "loitering" and led to the mass arrest of black people. Then, relying on language in the Thirteenth Amendment that prohibits slavery and involuntary servitude "except as punishment for crime," lawmakers authorized white-controlled governments to exploit the labor of African-Americans in private lease contracts or on state-owned farms.[1] The legal scholar Jennifer Rae Taylor has observed:

> While a black prisoner was a rarity during the slavery era (when slave masters were individually empowered to administer "discipline" to their human property), the solution to the free black population had become criminalization. In turn, the most common fate facing black convicts was to be sold into forced labor for the profit of the state.

Beginning as early as 1866 in states like Texas, Mississippi, and Georgia, convict leasing spread throughout the South and continued through the late nineteenth and early twentieth centuries. Leased black convicts faced deplorable, unsafe working conditions and brutal violence when they attempted to resist or escape bondage. An 1887 report by the Hinds County, Mississippi, grand jury recorded that six months after 204 convicts were leased to a man named McDonald, twenty were dead, nineteen had escaped, and twenty-three had been returned to the penitentiary disabled, ill, and near death. The penitentiary hospital was filled with sick and dying black men whose bodies bore "marks of the most inhuman and brutal treatment…so poor and emaciated that their bones almost come through the skin."[2]

The explicit use of race to codify different kinds of offenses and punishments was challenged as unconstitutional, and criminal statutes were modified to avoid direct racial references, but the enforcement of the law didn't change.

Black people were routinely charged with a wide range of "offenses," some of which whites were never charged with. African-Americans endured these challenges and humiliations and continued to rise up from slavery by seeking education and working hard under difficult conditions, but their refusal to act like slaves seemed only to provoke and agitate their white neighbors. This tension led to an era of lynching and violence that traumatized black people for decades.

Between the Civil War and World War II, thousands of African-Americans were lynched in the United States. Lynchings were brutal public murders that were tolerated by state and federal officials. These racially motivated acts, meant to bypass legal institutions in order to intimidate entire populations, became a form of terrorism. Lynching had a profound effect on race relations in the United States and defined the geographic, political, social, and economic conditions of African-Americans in ways that are still evident today.

Of the hundreds of black people lynched after being accused of rape and murder, very few were legally convicted of a crime, and many were demonstrably innocent. In 1918, for example, after a white woman was raped in Lewiston, North Carolina, a black suspect named Peter Bazemore was lynched by a mob before an investigation revealed that the real perpetrator had been a white man wearing blackface makeup.[3] Hundreds more black people were lynched based on accusations of far less serious crimes, like arson, robbery, nonsexual assault, and vagrancy, many of which would not have been punishable by death even if the defendants had been convicted in a court of law. In addition, African-Americans were frequently lynched for not conforming to social customs or racial expectations, such as speaking to white people with less respect or formality than observers believed due.[4]

Many African-Americans were lynched not because they had been accused of committing a crime or social infraction, but simply because they were black and present when the preferred party could not be located. In 1901, Ballie Crutchfield's brother allegedly found a lost wallet containing $120 and kept the money. He was arrested and about to be lynched by a mob in Smith County, Tennessee, when, at the last moment, he was able to break free and escape. Thwarted in their attempt to kill him, the mob turned their attention to his sister and lynched her instead, though she was not even alleged to have been involved in the theft.

New research continues to reveal the extent of lynching in America. The extraordinary documentation compiled by Professor Monroe Work (1866–1945) at Tuskegee University has been an invaluable historical resource for scholars, as has the joint work of sociologists Stewart Tolnay and E.M. Beck. These two sources are widely viewed as the most comprehensive collections of data on the subject in America. They have uncovered over three thousand instances of lynching between the end of Reconstruction in 1877 and 1950 in the twelve states that had the most lynchings: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

Recently, the Equal Justice Initiative (EJI) in Montgomery, Alabama—of which I am the founder and executive director—spent five years and hundreds of hours reviewing this research and other documentation, including local newspapers, historical archives, court records, interviews, and reports in

African-American newspapers. Our research documented more than four thousand racial terror lynchings between 1877 and 1950 in those twelve states, eight hundred more than had been previously reported. We distinguished "racial terror lynchings" from hangings or mob violence that followed some sort of criminal trial or were committed against nonminorities. However heinous, this second category of killings was a crude form of punishment. By contrast, racial terror lynchings were directed specifically at black people, with little bearing on an actual crime; the aim was to maintain white supremacy and political and economic racial subordination.

We also distinguished terror lynchings from other racial violence and hate crimes that were prosecuted as criminal acts, although prosecution for hate crimes committed against black people was rare before World War II. The lynchings we documented were acts of terrorism because they were murders carried out with impunity—sometimes in broad daylight, as Sherrilyn Ifill explains in her important book on the subject, *On the Courthouse Lawn* (2007)—whose perpetrators were never held accountable. These killings were not examples of "frontier justice," because they generally took place in communities where there was a functioning criminal justice system that was deemed too good for African-Americans. Some "public spectacle lynchings" were even attended by the entire local white population and conducted as celebratory acts of racial control and domination.

Records show that racial terror lynchings from Reconstruction until World War II had six particularly common motivations: (1) a wildly distorted fear of interracial sex; (2) as a response to casual social transgressions; (3) after allegations of serious violent crime; (4) as public spectacle, which could be precipitated by any of the allegations named above; (5) as terroristic violence against the African-American population as a whole; and (6) as retribution for sharecroppers, ministers, and other community leaders who resisted mistreatment—the last becoming common between 1915 and 1945.

Our research confirmed that many victims of terror lynchings were murdered without being accused of any crime; they were killed for minor social transgressions or for asserting basic rights. Our conversations with survivors of lynchings also confirmed how directly lynching and racial terror motivated the forced migration of millions of black Americans out of the South. Thousands of people fled north for fear that a social misstep in an encounter with a white person might provoke a mob to show up and take their lives. Parents and spouses suffered what they characterized as "near-lynchings" and sent their loved ones away in frantic, desperate acts of protection.

The decline of lynching in America coincided with the increased use of capital punishment often following accelerated, unreliable legal processes in state courts. By the end of the 1930s, court-ordered executions outpaced lynchings in the former slave states for the first time. Two thirds of those executed that decade were black, and the trend continued: as African-Americans fell to just 22 percent of the southern population between 1910 and 1950, they constituted 75 percent of those executed.

Probably the most famous attempted "legal lynching" is the case of the "Scottsboro Boys," nine young African-Americans charged with raping two white women in Alabama in 1931. During the trial, white mobs outside the courtroom demanded the teens' executions. Represented by incompetent

lawyers, the nine were convicted by all-white, all-male juries within two days, and all but the youngest were sentenced to death. When the NAACP and others launched a national movement to challenge the cursory proceedings, the legal scholar Stephen Bright has written, "the [white] people of Scottsboro did not understand the reaction. After all, they did not lynch the accused; they gave them a trial."[5] In reality, many defendants of the era learned that the prospect of being executed rather than lynched did little to introduce fairness into the outcome.

Though northern states had abolished public executions by 1850, some in the South maintained the practice until 1938. The spectacles were more often intended to deter mob lynchings than crimes. Following Will Mack's execution by public hanging in Brandon, Mississippi, in 1909, the *Brandon News* reasoned:

> Public hangings are wrong, but under the circumstances, the quiet acquiescence of the people to submit to a legal trial, and their good behavior throughout, left no alternative to the board of supervisors but to grant the almost universal demand for a public execution.

Even in southern states that had outlawed public hangings much earlier, mobs often successfully demanded them.

In Sumterville, Florida, in 1902, a black man named Henry Wilson was convicted of murder in a trial that lasted just two hours and forty minutes. To mollify the mob of armed whites that filled the courtroom, the judge promised a death sentence that would be carried out by public hanging—despite state law prohibiting public executions. Even so, when the execution was set for a later date, the enraged mob threatened, "We'll hang him before sundown, governor or no governor." In response, Florida officials moved up the date, authorized Wilson to be hanged before the jeering mob, and congratulated themselves on having "avoided" a lynching.

In the 1940s and 1950s, the NAACP's Legal Defense Fund (LDF) began what would become a multidecade litigation strategy to challenge the American death penalty—which was used most actively in the South—as racially biased and unconstitutional. It won in *Furman* v. *Georgia* in 1972, when the Supreme Court struck down Georgia's death penalty statute, holding that capital punishment still too closely resembled "self-help, vigilante justice, and lynch law" and "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."

Southern opponents of the decision immediately decried it and set to writing new laws authorizing the death penalty. Following *Furman*, Mississippi Senator James O. Eastland accused the Court of "legislating" and "destroying our system of government," while Georgia's white supremacist lieutenant governor, Lester Maddox, called the decision "a license for anarchy, rape, and murder." In December 1972, Florida became the first state after *Furman* to enact a new death penalty statute, and within two years, thirty-five states had followed suit. Proponents of Georgia's new death penalty bill unapologetically borrowed the rhetoric of lynching, insisting, as Maddox put it:

> There should be more hangings. Put more nooses on the gallows. We've got to make it safe on the street again…. It wouldn't be too bad to hang some on the court house square, and let those who would plunder and destroy see.

State representative Guy Hill of Atlanta proposed a bill that would require death by hanging to take place "at or near the courthouse in the county in which the crime was committed." Georgia state representative James H. "Sloppy" Floyd remarked, "If people commit these crimes, they ought to burn." In 1976, in *Gregg* v. *Georgia*, the Supreme Court upheld Georgia's new statute and thus reinstated the American death penalty, capitulating to the claim that legal executions were needed to prevent vigilante mob violence.

Devin Allen

Protesters in Baltimore after the death of Freddie Gray, April 2015; photograph by Devin Allen from his new book, A Beautiful Ghetto. *It includes a foreword by Keeanga-Yamahtta Taylor and an introduction by D. Watkins, and has just been published by Haymarket Books.*

The new death penalty statutes continued to result in racial imbalance, and constitutional challenges persisted. In the 1987 case of *McCleskey* v. *Kemp*, the Supreme Court considered statistical evidence demonstrating that Georgia officials were more than four times as likely to impose a death sentence for the killing of a white person than a black person. Accepting the data as accurate, the Court conceded that racial disparities in sentencing "are an inevitable part of our criminal justice system" and upheld Warren McCleskey's death sentence because he had failed to identify "a constitutionally significant risk of racial bias" in his case.

Today, large racial disparities continue in capital sentencing. African-Americans make up less than 13 percent of the national population, but nearly 42 percent of those currently on death row and 34 percent of those executed since 1976. In 96 percent of states where researchers have examined the relationship between race and the death penalty, results reveal a pattern of discrimination based on the race of the victim, the race of the defendant, or both. Meanwhile, in capital trials today the accused is often the only person of color in the courtroom and illegal racial discrimination in jury selection continues to be widespread. In Houston County, Alabama, prosecutors have excluded 80 percent of qualified African-Americans from serving as jurors in death penalty cases.

More than eight in ten American lynchings between 1889 and 1918 occurred in the South, and more than eight in ten of the more than 1,400 legal executions carried out in this country since 1976 have been in the South, where the legacy of the nation's embrace of slavery lingers. Today death sentences are disproportionately meted out to African-Americans accused of crimes against white victims; efforts to combat racial bias and create federal protection against it in death penalty cases remain thwarted by the familiar rhetoric of states' rights. Regional data demonstrate that the modern American death penalty has its origins in racial terror and is, in the words of Bright, the legal scholar, "a direct descendant of lynching."

In the face of this national ignominy, there is still an astonishing failure to acknowledge, discuss, or address the history of lynching. Many of the communities where lynchings took place have gone to great lengths to erect

markers and memorials to the Civil War, to the Confederacy, and to events and incidents in which local power was violently reclaimed by white people. These communities celebrate and honor the architects of racial subordination and political leaders known for their defense of white supremacy. But in these same communities there are very few, if any, significant monuments or memorials that address the history and legacy of the struggle for racial equality and of lynching in particular. Many people who live in these places today have no awareness that race relations in their histories included terror and lynching. As Ifill has argued, the absence of memorials to lynching has deepened the injury to African-Americans and left the rest of the nation ignorant of this central part of our history.

The Civil Rights Act of 1964, arguably the signal legal achievement of the civil rights movement, contained provisions designed to eliminate discrimination in voting, education, and employment, but did not address racial bias in criminal justice. Though it was the most insidious engine of the subordination of black people throughout the era of racial terror and its aftermath, the criminal justice system remains the institution in American life least affected by the civil rights movement. Mass incarceration in America today stands as a continuation of past abuses, still limiting opportunities for our nation's most vulnerable citizens.

We can't change our past, but we can acknowledge it and better shape our future. The United States is not the only country with a violent history of oppression. Many nations have been burdened by legacies of racial domination, foreign occupation, or tribal conflict resulting in pervasive human rights abuses or genocide. The commitment to truth and reconciliation in South Africa was critical to that nation's recovery. Rwanda has embraced transitional justice to heal and move forward. Today in Germany, besides a number of large memorials to the Holocaust, visitors encounter markers and stones at the homes of Jewish families who were taken to the concentration camps. But in America, we barely acknowledge the history and legacy of slavery, we have done nothing to recognize the era of lynching, and only in the last few years have a few monuments to the Confederacy been removed in the South.

The crucial question concerning capital punishment is not whether people deserve to die for the crimes they commit but rather whether we deserve to kill. Given the racial disparities that still exist in this country, we should eliminate the death penalty and expressly identify our history of lynching as a basis for its abolition. Confronting implicit bias in police departments should be seen as essential in twenty-first-century policing.

What threatened to kill me on the streets of Atlanta when I was a young attorney wasn't just a misguided police officer with a gun, it was the force of America's history of racial injustice and the presumption of guilt it created. In America, no child should be born with a presumption of guilt, burdened with expectations of failure and dangerousness because of the color of her or his skin or a parent's poverty. Black people in this nation should be afforded the same protection, safety, and opportunity to thrive as anyone else. But that won't happen until we look squarely at our history and commit to engaging the past that continues to haunt us.

Letters

How the Communists Helped the Scottsboro Boys July 27, 2017

1 "The Mississippi Black Codes were copied, sometimes word for word, by legislators in South Carolina, Georgia, Florida, Alabama, Louisiana and Texas," writes the historian David M. Oshinsky in *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (Simon and Schuster, 1996), p. 21. ↩

2 See "Prison Abuses in Mississippi: Under the Lease System Convicts Are Treated with Brutal Cruelty," *Chicago Daily Tribune*, July 11, 1887. ↩

3 See "Southern Farmers Lynch Peter Bazemore," *Chicago Defender*, March 30, 1918, and "Short Shrift for Negro," *Cincinnati Enquirer*, March 26, 1918. ↩

4 Stewart E. Tolnay and E. M. Beck, *A Festival of Violence: An Analysis of Souther Lynchings, 1882–1930* (University of Illinois Press, 1995), p. 47. ↩

5 Stephen B. Bright, "Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty," *Santa Clara Law Review*, Vol. 35, No. 2 (1995). ↩

RELATED

The Disgrace of Our Criminal Justice
David Cole

Why Innocent People Plead Guilty
Jed S. Rakoff

Our 'Broken System' of Criminal Justice
John Paul Stevens