

CONSTRUCTING SEPARATE AND UNEQUAL COURTROOMS

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Federal reform transformed civil and criminal litigation in the early 1940s. The new civil rules sought to achieve adversarial balance as it afforded litigants, virtually all white, with powerful discovery tools. In contrast, the new criminal rules denied defendants, often litigants of color, any power to discover information. Instead, the new criminal rules emboldened the prosecutor to bring charges and control what facts to withhold from or share with the defendant. An essential feature of the criminal template's design—to insert a white gatekeeper with unreviewable discretion who could distribute benefits and burdens across racial lines—was an established Jim Crow strategy to maintain the racial order.

This Article explores the significance of drafting the rules of procedure within the social and political forces of Jim Crow. In this assessment, the Article finds that the most influential of the criminal template's authors embraced Jim Crow norms: one lectured that Black people were predisposed to criminality; one authored a state supreme court decision that opined whites, but not Black people, had respect for the law; and one issued judicial opinions lauded by segregationists.

This Article contends that federal reform, deeply influenced by the entrenched norms of the time, wrote race into procedure and contributed to the construction of separate and unequal courtrooms. The Article finally observes that our state and federal courtrooms still operate pursuant to key features of this Jim Crow blueprint.

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INTRODUCTION

During Jim Crow, the Supreme Court transformed how courtrooms dispense justice, creating a procedural roadmap that still deeply influences how we resolve disputes. On the eve of federal reform in 1938, civil and criminal cases shared a similar design that drew criticism for being mired in technicalities. Congress first directed the Court to draft civil rules. The Court appointed a Civil Committee that sought to bring litigation into modernity by easing access to the courthouse, permitting claim consolidation, and introducing pretrial discovery.¹ These changes were intended to improve the factual record, and in theory, the outcome. Following a widespread and positive reception, Congress directed the Court to reform criminal procedure.² The Court, in 1941, tasked a small staff to prepare a draft for the newly appointed Criminal Committee.³ This first draft mirrored the civil template, in effect unifying civil and criminal practice.⁴ Yet the Criminal Committee in its first full meeting revised the template to reflect a dramatically different vision. In contrast to the civil template that attempted to find balance within the competing interests of adversarial parties, the new criminal rules empowered just one party—the prosecutor—to exercise dominion over a case. As this reform inspired and shaped state reforms, two separate, disparate, and racially segregated courtrooms—one for civil litigants and one for criminal litigants—emerged across the United States. They still exist today.

1. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 923–34 (1987).

2. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 706–07 (2017).

3. *Id.* at 709–12.

4. *Id.*

The disparate racial impact of this new regime was stark. In the civil courtroom, parties and lawyers were white.⁵ There, the new rules afforded parties the power to discover information and interrogate witnesses. In contrast, the new criminal rules gave the prosecutor—always white—unchecked discretion over what the defendant was entitled to know. The criminal defendant was thus the only litigant procedurally deemed a passive participant. The criminal defendant was also often a litigant of color.⁶ At a structural level, reform in this way influenced who exercised agency in litigation along racially significant lines. By the 1930s, Khalil Muhammad contended in *The Condemnation of Blackness*, “[We] wrote crime into race.”⁷ By the 1940s, this Article contends, we wrote procedure into race.

That the federal effort would serve to reinforce racial oppression was, in some ways, a foregone conclusion. Reform occurred in a society that adhered to racial hierarchy and that linked Blackness to criminality, used criminal law to maintain white racial privilege, and employed procedure to legitimate law’s racial ordering. These entrenched norms would be expected to and did shape the procedural design of the criminal rules. The members of the Criminal Committee might have attempted to resist these forces. And yet the writings of its most influential members reveal a lack of resistance to prevailing racial politics: one lectured that Black people were predisposed to criminality; another asserted that whites respected the law, but Black people did not; and another would issue judicial opinions lauded by segregationists as advancing their cause.⁸

In the end, the Court supervised the Criminal Committee. In revealing the Court’s accommodation of the criminal law’s racial objectives, this Article destabilizes heroic accounts of the Court’s emerging due process doctrine during Jim Crow, often portrayed as a defining moment of confrontation with a racist Southern justice system. This Article exposes a contradiction in the account: if the Court announced a due process doctrine that made criminal defendants less susceptible to the abuse of State power in a few cases,⁹ the Court also superintended a project that rendered defendants more vulnerable to State power in every case. The contradiction, however, washes out under recent efforts to critically revisit the Court’s due process intervention.¹⁰ These accounts contend the Court’s

5. In civil courtrooms in southern states, where Black people predominantly lived, over 99% of civil cases were between white parties. MELISSA LAMBERT MILEWSKI, *LITIGATING ACROSS THE COLOR LINE: CIVIL CASES BETWEEN BLACK AND WHITE SOUTHERNERS FROM THE END OF SLAVERY TO CIVIL RIGHTS* 207 (2018).

6. In the South, criminal defendants of color were over-represented, and in the North, the conviction rate in the Black community was estimated to be 600%–1000% higher than in the white community. *See infra* Section I.A.

7. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 51 (2010).

8. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 130–34 (1974).

9. William Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2075 (2002).

10. *See, e.g.*, William G. Ross, *The Constitutional Significance of the Scottsboro Cases*, 28 CUMB. L. REV. 591, 592 (1998) (stating *Scottsboro* “had profound political and constitutional impact” and led to the “expansion of criminal procedural rights and civil

interventions during Jim Crow served to stabilize the racial hierarchy. This Article contends that the Court's endorsement of a template for criminal procedure that further diminished defendants' agency corroborates this emerging view. This Article is thus situated within scholarship that identifies how due process narratives can obscure the persistence of practices that reproduce inequality.¹¹ This Article also reveals how the new rules operated in concert with existing structural inequalities, contributing to scholarship that views the criminal system as a mechanism of social control.¹²

Part I surveys the federal reform process that transformed litigation, revealing how a new design of procedure mapped onto and reinforced existing racial disparities. An examination of how criminal law in particular was used to enforce racial hierarchy and how criminal procedure was used to legitimize that enforcement brings into focus historical features that can be identified in the architecture of federal procedure. Part II relies on archival documents to interrogate views of the Criminal Committee's most influential members, a study that suggests alignment with the prevailing racial views of Jim Crow. Part III situates debates over the Court's role in disrupting—or as this Article argues, reinforcing—the racial ordering of the period within the criminal law arena.

liberties generally, and also constituted a turning point in the Court's attitude toward racial discrimination"). Acknowledgment of criminal procedure in the 1930s was "pervaded by concerns about race discrimination," Michael J. Klarman, *The Racial Origin of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 (2000), but nevertheless criticized a heroic account.

11. See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 3 (1999); RISA LAUREN GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 252 (2007); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 435 (2018); Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425–26 (2016); Frank R. Cooper, *The Spirit of 1968: Toward Abolishing the Terry Doctrine*, 31 N.Y.U. REV. L. & SOC. CHANGE 539, 541 (2007); Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-CL. L. REV. 1, 12 (2011); Tracy L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 165–66 (2015).

12. See, e.g., IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (observing how law reaffirms racial order); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2017) (discussing how civil procedure reaffirms the interests of privileged litigants); Maria Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693 (2006); Cheryl L. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 272 (2018); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1368 (2012) (contending the misdemeanor process is "a practice of social control in search of a justification"); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1303 (2004) (observing criminal process is "built on a foundation of nonindividualized assessments of guilt").

I. A NEW ERA OF LITIGATION

Before federal reform of procedure in 1938 (civil) and 1946 (criminal), common law rules prevailed. Under the common law, civil and criminal parties received similar treatment.¹³ This shared experience gave rise to calls for reform. A moving party (a plaintiff or a prosecutor) was often stopped at the courthouse door by a judge who could end a case before it started.¹⁴ Technicalities held the merits hostage; a thicket of procedures prevented access to courts, undermining the intent and fulfillment of substantive law.¹⁵ Litigants able to pass through the procedural gauntlet advanced directly to trial. There, they would unveil untested trial narratives, an ordeal characterized by surprise witnesses and lost opportunities to interrogate the factual integrity of claims and defenses. For administrative reasons, the U.S. Department of Justice (“DOJ”) was also predisposed to reform. Federal attorneys were subject not only to common law technicalities but also to variances found in 48 states; the Conformity Act provided that federal practice be governed by location, i.e., a federal court in Mississippi would apply Mississippi procedure.¹⁶ The wave of criticism over the common law’s infatuation with technical obstacles, the DOJ’s mounting frustration with procedure by a thousand cuts, and a New Deal ethos of national intervention provided impetus for federal reform.¹⁷

Congress instructed the U.S. Supreme Court to propose a template for civil litigation.¹⁸ The Court appointed a Civil Committee.¹⁹ Committee member William Mitchell observed a key objective would be to “provide a model for the states.”²⁰ Proponents believed a federal template would improve state procedures.²¹ U.S. Attorney General Homer Cummings, for example, thought federal guidance would have “a powerful and corrective effect upon the practice in the several states.”²² To

13. See WILLIAM L. CLARK, *HANDBOOK OF CRIMINAL PROCEDURE* 158 (William E. Mikell ed., 2d ed. 1918) (1895) (“[T]he rules and principles of [civil] pleading . . . are applicable to [a criminal] indictment,” and “where the criminal law is silent as to the form of an indictment,” a litigant could look to “civil actions.”); Meyn, *supra* note 2, at 701–03.

14. Meyn, *supra* note 2, at 702; see, e.g., *Stubblefield v. Commonwealth*, 246 S.W. 444, 445 (Ky. 1923) (remarking on the common law’s “extreme technical exactness”).

15. Hugh E. Willis, *Proposed Procedural Reform*, 5 ILL. L.Q. 17, 20 (1922).

16. HOMER S. CUMMINGS, *SELECTED PAPERS OF HOMER CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, 1933–1939*, at 181 (Carl Brent Swisher ed., 1939). The Conformity Act required that federal practices should “conform, as near as may be” to the state law in which the federal court resided. 28 U.S.C. § 724 (1872).

17. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 438 n.2 (2011); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272 (1989); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1271 (1997). In 1934, Cummings “renewed the [ABA’s] struggle for procedural reform” and persuaded Congress to establish a uniform code of federal procedure. CUMMINGS, *supra* note 16.

18. 28 U.S.C. § 723(b)–(c) (1934) (current version at 28 U.S.C. § 2072 (2018)).

19. Meyn, *supra* note 2, at 705.

20. William Mitchell, *Uniform State and Federal Practice: A New Demand for More Efficient Judicial Procedure*, 24 A.B.A. J. 981, 981 (1938); 91 CONG. REC. 17 (1945).

21. *The Bar Favors Uniform State and Federal Rules of Civil Procedure*, 18 TEMP. L.Q. 145, 147 (1943) [hereinafter *Bar Favors Uniform State and Federal Rules*].

22. CUMMINGS, *supra* note 16, at 182

secure state buy-in, the Committee solicited views of local and state bar associations, seeking opinions of “the profession” that would reveal best practices reflecting national consensus.²³ Cummings later noted the civil proposal was “endorsed by 46 state bar associations.”²⁴

What emerged transformed litigation. The Civil Committee viewed rules of litigation as an ecosystem, a view influenced by George Ragland, who had written that “none of the interrelated processes can exist unto themselves.”²⁵ To Ragland and the Committee, discovery would serve the promise to get at the merits.²⁶ Anchored by the interrogative potential of a discovery phase, the Committee eased pleading requirements and permitted the joinder of claims and parties. To encourage individualization of cases, the Committee provided for noticed, motion-based, court-refereed deliberation of pretrial issues.²⁷ Where common law had denied access to court, the new rules eased a party’s ability to initiate a case.²⁸ Where the common law left parties in pretrial factual darkness, the new rules gave civil litigants power to search for and test information before a trial commenced.

Noting a broad and positive reception, Congress instructed the Court to propose rules of criminal procedure.²⁹ Many commentators thought criminal rules should mirror a substantial portion of the civil template; Yale Law Professor Jerome Hall wrote that the new civil rules “are always suggestive and sometimes can be

23. Mitchell, *supra* note 20, at 982. Many states adopted the federal template as their own. Jerold H. Israel, *On Recognizing Variations in State Criminal Procedure*, 15 MICH. J.L. REFORM 465, 485 (1982) and Roy McDonald, *The Procedure Curriculum in a Period of Reform*, 9 AM. L. SCH. REV. 1053, 1055 (1941) (noting resurgence in statewide assessment of procedure following federal reform), or were inspired by it. See Glenn R. Winters, *A Study of Rules 6, 7, 8, and 9 of the Federal Rules of Criminal Procedure with Particular Respect to Their Suitability for Adoption in State Criminal Procedure*, 25 OR. L. REV. 10, 10 (1945) (opining federal reform will “exert a beneficial influence upon the local procedure of the forty-eight states”); see also JAMES PIKE, SOME PRE-TRIAL DEVICES UNDER THE NEW FEDERAL RULES OF CIVIL PROCEDURE vi (1938) (observing federal reform provides a “workable progressive procedure” for “attorneys in every state in the Union—an impetus to procedural reform, along the lines of the new Rules, which will be ever present”). There was also protestation. *Bar Favours Uniform State and Federal Rules*, *supra* note 21, at 146 (noting the “hue and cry for and against the adoption of the Federal Rules for each of the states”).

24. CUMMINGS, *supra* note 16, at 184.

25. GEORGE RAGLAND, DISCOVERY BEFORE TRIAL 251 (1932); William Wherry, *Judicial Reform in America*, N.Y. TIMES, Mar. 26, 1933, at 19 (reviewing Mr. Ragland’s book, and remarking “[n]o more important contribution to reform of judicial procedure has been made than by this book”); Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 697 (1998).

26. “Full discovery” according to Ragland “had a salutary effect upon the whole tenor of the litigious process.” RAGLAND, *supra* note 25, at 251.

27. Subrin, *supra* note 1, at 916; Charles Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 164 (1956) (stating procedural innovations to the pretrial period were intended to facilitate the “individualization of the cases, so that [a case] may be separated for its own particular treatment from the vast grist of cases passing through our courts”).

28. Subrin, *supra* note 1, at 923–24.

29. Meyn, *supra* note 2, at 706–07. After civil reform, Rep. Frances Walter observed reform of criminal procedure was virtually inevitable. *Hearings Before Subcomm. No. 2 of the Comm. on the Judiciary H.R.*, 76th Cong. 8–9 (1939).

applied almost literally to criminal procedure.”³⁰ In fact, *federal civil* reform had an immediate influence on *state criminal* procedure.³¹ The federal effort to establish new criminal rules was, like its civil counterpart, viewed as an opportunity to shape state practices.³²

The first draft of the criminal rules, written by the Reporter and his staff, tracked the civil template in organization and substance, importing rules providing for notice pleading, joinder, and formal discovery.³³ The full Criminal Committee, however, in a confidential meeting in 1941, dramatically revised the template. Leading this revision was Alexander Holtzoff, second in command at the DOJ. Under his sway, the Committee struck any civil rule that advantaged the defendant, most significantly discovery rules. Committee members argued a defendant would abuse discovery to perpetrate perjury.³⁴ The thought that discovery might give rise to perjury was not novel; civil reformers worried over its prospect but agreed with Ragland that “full and equal discovery” was the best “preventative of perjury,” whereas “limited or unequal discovery” fostered “perjury, manufactured testimony, and kindred evils.”³⁵ But Holtzoff and key members of the Committee viewed it essential that a prosecutor exert unilateral control over the pretrial record, building in the very type of unequal access to information that for civil reformers presented a high risk for illegitimate outcomes.³⁶

In this revised template, prosecutorial self-interest was at play.³⁷ Holtzoff’s prior boss, Attorney General Cummings, had opined that Americans demanded the

30. Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 739 (1942); Meyn, *supra* note 2, at 708–09.

31. Chair Vanderbilt, for example, observed how *federal civil* practices were being imported into *state criminal* arenas. As to Civil Rule 11, “we have never had the slightest trouble with attorneys signing pleadings [in criminal matters], until this [civil] rule came along I cite that to show how the civil rule is being carried over into the criminal rules in my State, and perhaps in other States.” *Hearing Before the Advisory Comm. on Rules of Criminal Procedure*, U.S. Supreme Court 336 (1941) [hereinafter *Advisory Committee Hearing*] (statement of Arthur T. Vanderbilt, Chairman, Advisory Comm.) Transcripts maintained by Administrative Office of U.S. Courts.

32. *See, e.g., Advisory Committee Hearing, supra* note 31, at 422 (Statement of John B. Waite, Member, Criminal Rules Comm.) (“Now, it may be that we do not need that power of depositions particularly where process runs throughout this whole country, but that is not true in the state courts, and I should very much like to see this set up as an example and a standard for the States to follow.”).

33. Meyn, *supra* note 2, at 704–06.

34. *Id.* at 721–22.

35. RAGLAND, *supra* note 25, at 251–52.

36. Meyn, *supra* note 2, at 723.

37. No identified defense attorney served on the Committee. *Id.* at 728–29. This arrangement would resonate with a DOJ so imbued by a sense of professionalism and commitment to public interest, many in the prosecutorial community doubted a need for a defense counsel at all. U.S. WICKERSHAM COMMISSION REPORTS, 14 U.S. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT 33 (1931) (stating that if “the prosecutor’s office were properly organized, probably no public defender would be required,” as a prosecutor considers the welfare of the State because the accused is a member of the State). In addition, many held a dim view of the defense bar. Shaun Ossei-Owusu, *The Sixth*

“efficient disposition of criminal cases.”³⁸ With expediency a priority, Holtzoff advocated for rules that made prosecution easier and quicker. As committee members predominantly came from state and federal prosecutor offices, Holtzoff found a receptive audience.³⁹ The Criminal Committee imported civil pleading rules that permitted the prosecutor, always the moving party, to initiate litigation in the absence of judicial interference.⁴⁰ In removing the judge as gatekeeper over a complaint’s legal or factual sufficiency, prosecutors could more assuredly initiate proceedings, even while omitting previously required disclosures to the defendant. The new rules also made the prosecutorial hammer heavier, as the importation of civil joinder rules permitted prosecutors to stack charges.⁴¹ And by rejecting a discovery phase, the new template permitted a prosecutor to shape the record by permitting the prosecutor to unilaterally judge the credibility, relevance, and materiality of facts, as well as determine what facts to withhold or share with the defendant. The consolidation of prosecutorial control permitted the prosecutor to operate free from the scrutiny of his adversary or the judge and to render mercy or punishment, regardless of the quality of the factual record, based on his predilections, however racially discriminatory.

This realignment of civil and criminal litigation—where the right to participate was afforded to civil parties and the prosecutor but not to criminal defendants—mapped onto racial demographics. Civil litigants as well as prosecutors were by and large white, whereas most participants of color in the litigation process were criminal defendants.⁴² Due to these structural features, the new rules further empowered a prosecutor to distribute information and charges in a racially discriminatory manner. In this way, federal reform anointed the prosecutor a fiduciary to the enforcement of racist norms. Indeed, the empowerment of a white gatekeeper to distribute entitlements along racial lines was a key feature of Jim Crow design.

To further understand how race and historical practice influenced the creation of these rules, this Article seeks to situate this moment of reform within the social and political crucible that maintained racial order during Jim Crow. As Laura Gómez and Haney López observe, “[L]aw not only constructs race, but race

Amendment Façade: The Racial Evolution of the Right to Counsel, 167 U. PA. L. REV. 1161, 1175–76 (2019).

38. CUMMINGS, *supra* note 16, at 199.

39. Meyn, *supra* note 2, 727–29.

40. See, e.g., *Advisory Committee Hearing*, *supra* note 31, at 376 (Statement of Alexander Holtzoff, Sec’y, Advisory Comm.) (“I was going to suggest that we might well eliminate that. I should hesitate to see the United States attorney lose control of the calendar.”).

41. For a discussion of charge-bargaining and its coercive features, see William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2559–60 (2004), and Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1304, 1305–06 (2018).

42. See *supra* Part I.

constructs law.”⁴³ Similarly, James Baldwin observed the constitutive power of historical forces:

[History] does not merely, or even principally, refer to the past. On the contrary, the great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally present in all that we do. It could scarcely be otherwise, since it is to history that we owe our frames of reference, our identities, and our aspirations.⁴⁴

The surrounding legal and social context is likewise constitutive of perception and prejudice. The legal framework works to:

construct races through legitimation, affirming the categories and images of popular racial beliefs and making it nearly impossible to imagine nonracialized ways of thinking about identity, belonging, and difference.⁴⁵

By situating the procedural template within the social, political, and historical forces of racial repression that had deployed law to distribute benefits and burdens along lines of race, this Article provides an important lens to understand the differences between civil and criminal procedure. The procedural design, however, cannot be fully appreciated without a discussion of the demographics of litigation and criminal law during federal reform of procedure.

A. Racial Demographics of Litigation and Crime During Jim Crow

At the time of federal reform, demographics of litigation broke along racial lines. Civil litigation was a white world in 1941. The roots of racial exclusion from civil process ran deep, with origins in laws of slavery.⁴⁶ An enslaved person was denied protection of the common law (property, contract, or tort); any damage visited upon an enslaved person was recoverable by the owner (damage to property).⁴⁷ “Free” antebellum Black persons were largely barred from moving-

43. Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 488 (2010) (citing Ian Haney-López, *Introduction*, in RACE, LAW, AND SOCIETY xi–xxii (2007)). William Sewell observed historical context reveals the “functioning, reproduction, and transformation of social relations.” WILLIAM SEWELL, LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL TRANSFORMATION 2 (2005).

44. James Baldwin, *White Man’s Guilt*, EBONY, Spec. Ed. 1965, at 47.

45. IAN HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 87 (10th ed. 2006); see also Cheryl Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1764 (2001) (“The important consequence of the law’s construction and legitimation of race is that political choices are naturalized and given the dimension of order and routine, indeed, law itself.”).

46. WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS AND ILLUSTRATIVE FACTS 239 (1853) (stating that vis-à-vis the slaveholder, “as a horse or an ox cannot sue his owner, so neither can a slave”).

47. *Id.* at 295 (“A slave cannot be a party to a suit, except in the single case where a negro is held as a slave and he claims to be free.”).

party status.⁴⁸ Indicative of antebellum exclusions, the first Civil Rights Act granted common law rights to Black persons.⁴⁹ And yet even under protection of federal troops, putative Black plaintiffs rarely filed a claim. In Melissa Milewski’s effort to unearth instances of Black civilians litigating cases in the South—where over 90% of Black people lived following the Civil War—her findings reveal over 99% of civil cases were brought by white parties through 1940.⁵⁰

Lawyers were white.⁵¹ In 1930, “Alabama had 1,653 Black preachers and four [Black] lawyers.”⁵² After the ABA instituted strict entry standards for law schools in the 1920s, when on average there were around 50–75 Black law graduates per year, the number dropped to around 20 Black law graduates per year between 1930 and 1935.⁵³ In 1936, only four Black law students graduated in the nation.⁵⁴ Prospects were few for a Black law graduate facing exclusion from local and state bars.⁵⁵ In 1937, one observer noted a Black man’s bar admission depended on “the good graces of white folks,” and any Black lawyer who “spoke out against the status quo” would face consequences.⁵⁶ A Black lawyer navigated impossible terrain: “The [Black lawyer who] brings himself into ill-repute with the southern white man because of his fearlessness, daring courage, and intelligent insight, as well as denunciation of practices and customs . . . will soon find that he is feared and distrusted by his own people.”⁵⁷ Black lawyers were constrained to representing Black clients.⁵⁸ And if a Black person was a party, he was likely a criminal defendant.⁵⁹

48. In *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the Court’s denial of citizenship to any Black person who had an enslaved ancestor or was enslaved prohibited virtually all Black persons from bringing a federal lawsuit. States largely precluded Black litigants as well. MISS. FREE TRADER, Jan. 18, 1856.

49. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

50. MILEWSKI, *supra* note 5, at 207 (finding that the percentage of appellate cases involving Black civil litigants in the South, between 1865–1950, was on average 0.6%). Milewski demonstrated the courage of Black litigants who, despite extraordinary obstacles, litigated claims. *See generally* KIMBERLY M. WELCH, BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH (2018) (surfacing accounts of Black litigants using civil litigation to obtain relief).

51. GERALDINE R. SEGAL, BLACKS IN THE LAW, PHILADELPHIA AND THE NATION 19 (1983) (explaining that in the early 1940s, of 160,000 lawyers, only 1,230 were Black); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 4 (1993).

52. SMITH, *supra* note 51, at 4.

53. *Id.* at 6–7.

54. *Id.* at 7.

55. *Id.* at 9–10. A 1928 inquiry sent to Southern counties by Professor Charles Houston indicated widespread exclusion. In Florida, a response stated, “A Negro lawyer would be as much out of place here as a snow ball.” *Id.* Another response from Texas stated, “No Negro lawyer in this County, Thank God.” *Id.*

56. *Id.* at 9.

57. *Id.* at 14 (citation omitted).

58. KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 40 (2012).

59. *See* SMITH, *supra* note 51, at 12.

Criminal defendants were disproportionately persons of color. In the opening of the Progressive Era, in the North, Black people were 600%–1000% more likely than whites to be subject to the criminal system.⁶⁰ In the South, Black criminal defendants were significantly overrepresented.⁶¹ The Criminal Committee published (in a 1943 draft circulated to the public) these comments with the proposed rules: “most of the defendants in the criminal courts in the South belong to the Negro race” (from a federal judge at the Western District of Tennessee);⁶² and “I face a criminal docket of about one hundred and fifty to two hundred criminal cases . . . 95% of these are violations . . . by common ordinary corn field Negroes” (from a federal judge in Mississippi).⁶³ Indeed, the crime rate during the interwar period (1918–1939) reflected this overrepresentation of Black people.⁶⁴

These statistical disparities constituted proof to whites of a Black person’s propensity for criminal behavior. Though white society did not question the veracity of crime rates, it is important to establish what this disparity actually indicated: racial oppression and violence. Whites, for example, surveilled and arrested people of color at higher rates than whites.⁶⁵ Whites also imposed criminal laws that only applied to people of color. In the South, for example, post-Emancipation sanctions

60. See ALFRED HOLT STONE, *STUDIES IN THE AMERICAN RACE PROBLEM* 443–46 (1908).

61. The 1923 Prison Census shows that there were 13,402 Black people incarcerated in the South, as compared to 8,198 whites. U.S. CENSUS BUREAU, *DEP’T OF COMMERCE, PRISONERS: 1923* (1927). Yet approximately 70% of the population in the South was white. Campbell Gibson & Kay Jung, U.S. CENSUS BUREAU, *HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES* 22 (2002).

62. 5 *DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE* 50 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) [hereinafter *DRAFTING HISTORY OF THE FEDERAL RULES*].

63. *Id.* at 132.

64. See MUHAMMAD, *supra* note 7, at 271; STONE, *supra* note 60, at 443–48.

65. DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II*, at 65 (2009); LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 330 (1990). In the North, one also sees increased surveillance. In 1850, Sing Sing Prison’s Black population was 6% (when 1% of New York was Black); by 1880, it was 23% (when 1.2% of New York was Black). U.S. WICKERSHAM COMMISSION REPORTS, *supra* note 37, at 222; see also 1 U.S. CENSUS OF 1880, at 378 tbl.4 (1883).

targeted Black people: Vagrancy Codes,⁶⁶ “Pig Laws,”⁶⁷ Industrial-Slavery Courts,⁶⁸ and segregation laws.⁶⁹ In the West, California’s *Greaser Act*⁷⁰ and *Foreign Miner’s Tax* targeted Mexican residents.⁷¹ Finally, the crime rate inflated the number of Black defendants and minimized the counting of white perpetrators. White communities, for example, imposed criminal sanctions on Black civilians who crossed the color line—like succeeding in business or failing to conform to social rules—which resulted in lynching and incarceration of indicted but innocent Black civilians.⁷² These white-perpetrated crimes required coordination among white elected officials and law enforcement leaders, white owners of businesses and media, and white residents assisting in the intimidation, beating, capture, and murder of Black residents, as well as the looting and burning of Black businesses and homes.

66. The Mississippi Black Code, for example, subjected whites to the Vagrancy Statute, but only Black persons could be forced into labor for its violation. 1865–1866 Miss. Laws, § 5, at 82–93, 165–67 (providing that as to any Black person who “shall fail [to pay] for five days after the imposition of any fine . . . [it shall be] the duty of the sheriff . . . to hire out said freedman, free Negro, or mulatto to any person who will, for the shortest period of service, pay said fine”); see also RISA GOLUBOFF, VAGRANT NATION, POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 2 (2019) (observing vagrancy laws criminalized “status” (versus an act) and permitted unfettered enforcement discretion (by whites)).

67. These laws made stealing a farm animal grand larceny. See, e.g., Dorothy Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1956 (1993) (stating that within two years of Georgia passing its “Pig Law,” its prisons became predominantly Black, tripling the inmate population).

68. See BLACKMON, *supra* note 65, at 136–37 (describing John Pace, who extended “landholdings and his purchases of Black men in tandem proportions” by hiring his son-in-law who “became the on-site judge for Pace’s forced labor business” by using employees to issue false affidavits against Black men abducted by bounty hunters).

69. See WOODWARD, *supra* note 8, at 98–102.

70. See KEN GONZALES-DAY, LYNCHING IN THE WEST, 1850-1935, at 24 (2006).

71. *Id.*

72. As to being punished for success in business, see IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1893). Wells recounts that in Memphis, a white storeowner, in coordination with a white police force, had Black competitors arrested, then killed. *Id.* Police raided the Black neighborhood; Black men were arrested and convicted to long sentences, thousands of Black Memphians fled, and the white competitor took over the Black owner’s grocery. See LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 153 (1998) (citing to a Savannah newspaper observing that for a Black person, “[i]t is getting to be a dangerous thing to acquire property, to get an education, to own an automobile, to dress well, and to build a respectable home”). As to being punished for breaches of social convention, see, for example, *Emmett Till, Whose Martyrdom Launched the Civil Rights Movement*, N.Y. TIMES, Aug. 28, 2016; Shannon King, *A Murder in Central Park: Racial Violence and the Crime Wave in New York During the 1930s and 1940s*, in THE STRANGE CAREERS OF THE JIM CROW NORTH: SEGREGATION AND STRUGGLE OUTSIDE OF THE SOUTH 43, 56 (Brian Purnell & Jeanne Theoharis eds., 2019) [hereinafter THE STRANGE CAREERS OF THE JIM CROW NORTH] (recounting an editorial in New York during Jim Crow that advocated for the beating of Black youths who swear, as such behavior is indicative of criminal impulse).

In addition, the convict-leasing system literally manufactured Black crime, as many thousands of Black men were convicted at the hands of white perpetrators.⁷³ Between 1880 and 1940, a network of white bounty hunters abducted Black men (first white-perpetrated crime), fabricated a criminal accusation (second crime), and delivered victims to white judges conspiring with the bounty hunters (third crime). The judge would hold a trial—sometimes convened on the site of the very plantation or industrial concern that leased enslaved workers—and convict the Black victim on the perjured testimony of compensated white witnesses (fourth and fifth crime). White county officials leased the victim on false pretenses (sixth crime), subjecting an innocent person to involuntary servitude (seventh crime), and often, committing reckless homicide (eighth crime) (given the shocking mortality rates of leased convicts).⁷⁴ The impact of these practices on the Black crime rate was significant. In Shelby County, Alabama, for example, the annual post-Civil War crime rate hovered around 20 convictions a year. In the year after the county agreed to supply the surrounding iron works with “convict” labor, the county processed 240 Black prisoners per year—a 1,200% racially discriminatory spike in the area’s “crime rate.”⁷⁵

The crime rate thus reflected white society’s success in targeting people of color. Like race itself, the crime rate was socially constructed to serve white interests.⁷⁶ The crime rate—reflecting white-perpetrated terror—only justified the use of criminal sanctions to maintain racial oppression. Within this racial ordering, the “growth of the carceral state,” wrote Professor Jonathan Simon, would only “accelerate in the late nineteenth and early twentieth centuries.”⁷⁷ Indicative of the system’s disproportionate impact on people of color, legal aid charities organized around the provision of criminal defense due to concerns over lynching and the “needs of racial minorities.”⁷⁸

On the eve of federal reform, these racial demographics haunted the world of litigation. Racial discrimination blocked access to civil courts and subjected criminal defendants of color to the State’s hammer.⁷⁹ Though these demographic disparities provide context to the moment of reform, there remains more to unpack. The drafting of criminal procedure also occurred within a pervasive view that Black

73. After the Civil War, states could subject a person to involuntary servitude if that person was convicted of a crime. U.S. CONST. amend. XIII.

74. BLACKMON, *supra* note 65, at 55–56, 65–66 (stating that the “convict leasing system . . . significantly funded the operations of government by converting Black forced labor into funds for the counties and states”); *id.* at 69 (noting that “true crime was almost trivial in most places” in the rural south); *id.* at 65 (stating that “arrests surged and fell . . . in tandem to the varying needs of buyers of labor”); *id.* at 69, 79–80, 136–38 (stating that private-public partnerships created a “criminal system” to process and satisfy demand for leased convict labor); *id.* at 75 (finding that in Alabama’s fourth year of convict leasing 45% died).

75. *See id.* at 87, 97.

76. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 21 (2019).

77. Jonathan Simon, *The Origins of America’s Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. L. REV. 1625, 1638 (2017).

78. *See Ossei-Owusu, supra* note 37, at 1183.

79. *Id.* at 1170–73.

people were predisposed to criminality and that Black participation in litigation, not only as parties but also as witnesses and jurors, was not appropriate. Subject to these social forces, the Criminal Committee could draw on prior legal templates designed to serve the goal of white supremacy. These potent features of the Jim Crow period are discussed, in turn.

B. The Strong Association Between Race and Criminality

In 1884, Harvard Dean of Sciences Nathaniel Shaler wrote that a Black person was “unfit for an independent place in a civilized [world]” and that to wish for baseline improvement among Black people would be to wish upon every white person the attainments of Milton.⁸⁰ At that time, there was hope among whites that experiments of phrenologists would reveal a biological explanation for racial difference.⁸¹ When these efforts faltered at the turn of the century, social science disciplines took on the mantle of proving race’s correlation to crime.⁸² This effort was largely successful; by 1941, when the Criminal Committee met to discuss the future of criminal litigation, the narrative of Black criminality would be constantly recycled in the academy, the press, and political circles. This section begins at the opening of the twentieth century, as social science techniques took center-stage in proving the connection between race and criminal propensity.

Indicative of the intensity of belief in Black criminality in 1901, an editorial in the *Boston Globe* complained of the incessant attacks on Black character:

[O]ne must admit that it is not an easy task to answer or refute the many false statements and ingenious arguments so persistently foisted upon the public of late in regard to the negro. He is claimed to be intellectually inferior, criminal propensities greater and moral turpitude and degeneracy stronger than the white race.⁸³

Representative of the *Globe*’s editorial complaint, a Pennsylvania newspaper concluded the “‘negro crime problem’ is one of the most menacing in the South.”⁸⁴ The *Nebraska State Journal* in 1903 observed:

Constant irritation of the southern whites is caused by the . . . criminal license of the negroes. The negroes are constantly committing petty thefts; they cannot in general be depended upon to tell the truth [T]hey have succeeded in terrorizing the white women of the south to such an extent that the wives and daughters dare not go out of the sight of white men.⁸⁵

80. Nathaniel S. Shaler, *The Negro Problem*, ATLANTIC, Nov. 1884.

81. MUHAMMAD, *supra* note 7; Thomas Dichter, *Violent Convictions: Punishment, Literature, and the Reconstruction of Race* 113 (2015) (unpublished Ph.D. dissertation, University of Pennsylvania), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=3471&context=edissertations>.

82. MUHAMMAD, *supra* note 7.

83. John A. Homans, *Differs with Mr. Tillman*, BOS. GLOBE, Aug. 25, 1901, at 27.

84. *The Penalty of Idleness*, WILKES-BARRE SEMI-WKLY. REC. (Pa.), Mar. 3, 1908, at 4.

85. *Lynchings in the South: A Statement of Causes and Remedies*, NEB. ST. J., June 9, 1903, at 5.

A South Carolina paper in 1906 reported:

The crime for which Isaac Knight paid the death penalty was the most heinous of all the diabolical crime, so frequently committed by the criminal class of his race. [As to the Northern woman who brought Knight in as a lodger, to extend such a courtesy], would thrill with horror the . . . Southern woman, who has long since learned the brute instinct common to the negro . . .⁸⁶

Political leaders in the early 1900s found traction in this fanning of white racial fear. In 1906, Governor James K. Vardaman called on officers “in every town and village and city in Mississippi” as to recent “race trouble in Atlanta” which proved to be:

another painful reminder of the menace which the . . . negroes about the cities and towns . . . are to the peace and purity of our homes and the good order of society . . . [T]he negroes congregate . . . [and] undertake to live by all manner of theft, gambling and other dishonest methods, while at the same time they are fomenting and planning for the commission of greater crimes.⁸⁷

In 1907, when the Arkansas Legislature passed a law requiring the sheriff of every county to purchase bloodhounds to run down “criminals,” a newspaper clarified the law referred to “Negro criminals.”⁸⁸ These racist scripts were not reserved for the Southern politician. President Teddy Roosevelt addressed Congress, observing that “every [Black] man should realize the worst enemy of his race is the negro criminal.”⁸⁹

Crime data provided empirical proof of this belief. Well-circulated books, such as *Race Traits and Tendencies of the American Negro*, relied on crime statistics to reinforce “a well-nigh universal opinion that crime among the American Negroes is increasing with alarming rapidity.”⁹⁰ Cornell Professor Walter F. Willcox, President of the American Statistical Association in 1912, wrote the foreword to Alfred Stone’s *Studies in the American Race Problem*. He asserted that the statistician, “knowing little of the problem beyond what he may read in his figures,” could only confirm that, due to the objective measure of the high Black crime rate,

86. *A Fiend Hanged*, MANNING TIMES (S.C.), Nov. 7, 1906, at 10. False accusations of rape or attempted rape led to lynchings across the nation, legal and extra-legal white supremacist interventions that reflected white commitment to the maintenance of Black criminality. See STEPHEN KANTROWITZ, *BEN TILLMAN AND THE RECONSTRUCTION OF WHITE SUPREMACY* 168–69 (2000).

87. WKLY. DEMOCRAT-TIMES (Miss.), Sept. 20, 1906.

88. *The Arkansas Legislature: Busily Engaged Stabbing at Afro-Americans*, N.Y. AGE, May 16, 1907, at 5.

89. *The Negro Problem*, TREMONT TIMES (Utah), Dec. 13, 1906, at 3. In correspondence, Roosevelt reflected, “Now as to the negroes! [A]s a race and in the mass they are altogether inferior to the whites.” THOMAS GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 268–69 (1997). Roosevelt was corresponding with Owen Wister, biographer of General Ulysses Grant. *Id.*

90. STONE, *supra* note 60, at 446. Stone revealed his bias in his Dedication: “To My Father and Mother, Connecting Links with the Old Régime.” *Id.* at v.

“the North and South, figures and concrete experience, are approaching a unity of conviction.”⁹¹

These narratives continued unabated through the interwar period. References to the “dangerous negro” or “degenerate negro” were constant.⁹² By 1933, leading sociologists were reading much into the crime statistics. Northwestern Law Professor Andrew Bruce, President of the American Institute of Criminal Law, interpreted the meaning of high crime rates thusly:

In the cities the negro is . . . out of his element . . . and has little guidance from the white man He has the desires and the appetites and the passions of a man but the mind of a child and by far the greater number of the murders which are committed by him are crimes of sudden temptation or of passion⁹³

In 1935, sociologist Harrington Brearly concluded “reliable scientific tests” demonstrated Black people were “more impulsive and less self-controlled than is the white.”⁹⁴ Recognizing a unity of such views among scholars in the 1930s, sociologist Thorsten Sellin wrote, “writers, Negro or White, who have studied the question of Negro criminality have admitted the existence of an apparently higher crime rate for the Negro than for the white,” the typical explanation for the data being “race inferiority” and “inherited depravity.”⁹⁵ Sellin concluded it is “unfortunate that the belief in the Negro’s excessive criminality has made students

91. *Id.* at xv–xvi.

92. In the first 30 years of the 20th century, searches of “dangerous negro” returned 1,006 hits on the newspaper.com database with barely a mention of “dangerous white.” “Degenerate negro,” returning 119 hits, described a Black convict, whereas “degenerate white” (this appears twice as much, white population was five times as large) described whites who disrupted the color line. *See, e.g.*, WARD CTY. INDEP. (N.D.), Nov. 27, 1913, at 2 (“[R]obberies by [Black persons] . . . are almost of daily occurrence [because] so many *degenerate white* people flock with and make bosom companions of these Black scoundrels, which naturally causes them to feel that they can do with impunity that which, under other conditions, they would not dare attempt.” (emphasis added)); *The Race Problem*, TIMES-DEMOCRAT (New Orleans), Mar. 3, 1908, at 4 (describing a *degenerate white* in article against miscegenation); *Lynching at Dumas*, NASHVILLE NEWS (Ark.), Sept. 30, 1911, at 2 (describing strung up *degenerate white* had “two mullato sons”); *Consistency*, STANDARD-SENTINEL (Okla.), June 24, 1915, at 2 (“[T]ake it from us, we will be at the picnic . . . riding the merry-go-round, tossing balls at the chained monkey, hurling decomposed hen fruit at the degenerate *white man* with a Black face”); “*The Clansman*” *Tonight*, ALLENTOWN DEMOCRAT (Pa.), Mar. 24, 1908; *At New Castel’s Playhouses*, NEW CASTLE HERALD (Pa.), Apr. 22, 1908, at 4; CLAYTON RECORD (Ala.), June 11, 1909; CHARLOTTE OBSERVER, Feb. 29, 1908; *Types in “The Clansman,”* AUSTIN AM.-STATSMAN (Tex.), Oct. 10, 1907, at 8; *Types in “The Clansman,”* NEODESHA REG. (Kan.), Mar. 26, 1909. Also, 21 references were to “degenerate white pine,” a disfavored arboreal hybrid. In the 1930s one finds frequent references to the “crazed Negro.” *See* Jeffrey S. Adler, *The Killer Behind the Badge: Race and Police Homicide in New Orleans, 1925-1945*, 30 L. & HIST. REV. 495, 516 (2012).

93. Andrew Bruce, *One Hundred Years of Criminologic Development in Illinois*, 24 J. CRIM. L. & CRIMINOLOGY 11, 47 (1933).

94. Adler, *supra* note 92, at 515 (quoting Harrington C. Brearly, *The Pattern of Violence*, in *CULTURE IN THE SOUTH* (William T. Couch ed., 1935)).

95. Thorsten Sellin, *The Negro Criminal: A Statistical Note*, 140 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 52 (1928).

of Negro crimes expend so much energy in attempts to verify the charge.”⁹⁶ Sellin’s insight suggests that white belief in Black criminality exceeded its statistical representation. Indeed, in the media, facts were manufactured to fit the narrative. For example, William Pickens, editor of the *Associated Negro Press*, complained how the *New York Evening Journal* “reported” a crime: where a female told police that her purse was stolen and that she did not know the perpetrator’s race, the headline read, “Pretty Clerk Beaten by Negro”—a fictional account that recycled fears of white females being terrorized by Black men.⁹⁷

The Wickersham Commission, convened by President Hoover, issued a report on policing and prosecution in 1933 that asked: “Is it sufficient to conclude that excessive criminality characterizes the Negro as a race in the United States?”⁹⁸ The Commission decided that propensity to criminality was a contributing factor, as well as race-based propensities that led to poor economic conditions, which the Commission also attributed to the higher crime rate.⁹⁹ The FBI’s Uniform Crime Reports (“UCRs”) encouraged what Khalil Gibran Muhammad describes as an “era dominated by hereditarian and retrogressionist theories about Black inferiority and savagery.”¹⁰⁰ The UCRs tied violent crime to Blackness.¹⁰¹ The UCRs also collapsed its “foreign born” category—previously a second suspect group—into the “white” category, and therefore “simplified the racial crime calculus . . . Blackness now stood as the singular mark of a criminal.”¹⁰² According to Muhammad, the idea of Black criminality “shaped the ‘public transcript’ of the modern urban world.”¹⁰³

As Criminal Committee members met in 1941 to determine how the criminal courtroom would operate, they did so amidst a pervasive association of criminality and Blackness. And yet there is another contextual piece to this moment of reform to consider: development in legal design to maintain racial ordering.

C. Legal Strategies to Achieve Racial Ordering

After the Civil War, a new constitutional order promised to Black persons the right to participate in litigation. And yet the exclusion of Black litigants, witnesses, and jurors remained a durable feature of the Jim Crow period. As conceptions of formal equality placed new constraints on state action, race-neutral strategies emerged to ensure persons of color were excluded from legal participation. This section explores these procedural strategies that were broadly deployed and available to drafters of the criminal rules during reform.

96. *Id.*

97. *Pickens Writes Letters*, PITTSBURGH COURIER, Jan. 24, 1931, at 7.

98. U.S. WICKERSHAM COMMISSION REPORTS, *supra* note 37, at 222.

99. *See id.* at 252–53.

100. MUHAMMAD, *supra* note 7, at 271; *see* Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1390 (2019) (describing a focus on “alien criminality” at opening of 20th century).

101. Paul Knepper, *The Alchemy of Race and Crime Research*, in THE SYSTEM IN BLACK AND WHITE: EXPLORING CONNECTIONS BETWEEN RACE, CRIME AND CRIMINAL JUSTICE 15, 15–29 (Michael W. Markowitz & Delores Jones-Brown eds., 2000) [hereinafter THE SYSTEM IN BLACK AND WHITE].

102. MUHAMMAD, *supra* note 7, at 271.

103. *Id.* at 273.

The prohibition on Black participation in the courtroom was a feature of Antebellum life. For example, Black testimony against whites in the nation's capital and most states was prohibited.¹⁰⁴ This bar on testimony privileged whites to perpetrate harm against Black persons with impunity. *Blyew v. United States* illustrated this dynamic.¹⁰⁵ When Jack Foster, his wife, and his mother-in-law were dismembered, Foster's son Richard (17) made a dying declaration implicating John Blyew, and Richard's surviving sister (13) also identified Blyew. Neither of these statements could be admitted, however, as the witnesses were Black and the defendant white—Blyew was immune from state criminal sanction.¹⁰⁶

A core tenet of white status was a sole claim to credibility. The affront that a Black person might undermine the reputation of a white person was given voice in the 1840 controversy involving Lieutenant George Hooe, in which the Navy permitted testimony of two Black seamen allegedly whipped by Hooe.¹⁰⁷ The prospect of a white man punished on the word of a Black man shook whites: “[H]ow low and degraded must that [white] man be, who will wear a uniform which can, at any moment, be stripped [based on] negro testimony If the negro be competent

104. James Forman, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 910 n.83 (2004) (“In many states, North and South, an African American, slave or free, could not serve as a witness against a white person.”). “We know of no State in the union, except, perhaps New York, and Pennsylvania, in which negroes are allowed to testify in Courts.” *More Love for Free Negroes*, WIS. EXPRESS, Aug. 1, 1840, at 2. The *Illustrated Paper* was criticized for making:

a ludicrous blunder . . . [it professes] to represent the grand jury assembled . . . a negro witness is before them, when it is a well-known fact that negro evidence is no evidence at all in [Washington D.C.]. Negroes are not summoned there to give evidence, either before grand juries or courts, any more than horses are.

Telegraphic Items, JANESVILLE DAILY GAZETTE (Wis.), Apr. 19, 1859, at 2. “If [the court] was trying the negro [as a party], he could not give evidence in his own case—if [the court] was trying [a white party], the negro’s testimony [as a witness] was not admissible.” *The Hooe Case*, RICHMOND ENQUIRER (Va.), Oct. 27, 1840, at 1.

105. 80 U.S. 581, 592 (1871) (determining whether a federal action could be brought under the Civil Rights Act of 1866, because a murder committed by whites with only Black eyewitnesses could not be prosecuted under Kentucky law, which stated “that a slave, negro, or Indian shall be a competent witness in the case of the commonwealth for or against a slave, negro, or Indian or in a civil case to which only negroes or Indians are parties, *but in no other case*” (emphasis added)).

106. After the Civil War, states began to lift some limitations on Black testimony. In Texas, for example, a Black person could testify against a white person that harmed him, to prevent the type of injustice permitted in *Blyew*. TEX. CONST. of 1866, art. VIII, § 2.

107. These circumstances, a southern paper noted, one might expect in New York, but not where the ship was moored, Pensacola, a territory that “excludes negro testimony in cases where white men are concerned.” RALEIGH REG., Oct. 23, 1840, at 2. As to Navy practice generally, the *Raleigh Register* recounted this exchange between two Naval officers: “I remember no case, in the course of my military services, which embraced many years of my life, in which any person of color was permitted to give evidence before a court-martial against any white man, officer or soldier, in the service of the United States.” *Id.*

at all, he is just as much so as a white man.”¹⁰⁸ Not competent to testify, Black persons were also barred from judging evidence.¹⁰⁹

After the Civil Rights Act of 1875¹¹⁰ and the 1880 Supreme Court decision in *Strauder v. West Virginia* prohibited the use of race as a bar to participation in litigation,¹¹¹ jurisdictions instituted race-neutral rules to accomplish similar results. Chief among these procedural strategies were rules that afforded unreviewable discretion to white officials to assess character, morality, and intelligence—nonracial categories deployed to obtain discriminatory outcomes. For example, a registrar would assess eligible voters—both Black and white—and determine on a case-by-case basis that only white individuals had the competence to vote.¹¹² In the legal forum, a jury commissioner would assess eligible jurors—both Black and white—and determine that only white candidates had the moral compass to serve.¹¹³

These race-neutral strategies were key to maintaining racial inequality. At the turn of the twentieth century, Gilbert Stephenson surveyed Southern jury commissioners to assess whether, after Congress and the Supreme Court required equal access to the jury box, Black citizens actually served.¹¹⁴ In, for example, Alabama: In County No. 1 (10,000 whites, 13,000 Blacks), “Negroes are not allowed to sit upon juries in this county;” in County No. 2, (5,000 whites, 21,000 Blacks), “[W]e have never had a Negro juror . . . nor do I ever expect to see one;” and, in County No. 3 (5,000 whites, 27,000 Blacks), “Negroes do not serve on juries in our courts . . . The Lord defend us from having jurors of a race of people who are absolutely without regard for an oath.”¹¹⁵

108. *From the Log Cabin Hero*, BOON’S LICK TIMES (Mo.), Aug. 1, 1840, at 1. The case would spark national outrage. President Van Buren, refusing to intervene in the incident, earned the moniker “negro witness Chief,” and during re-election, “the negro witness candidate.” GEORGE FREDRICKSON, *BIG ENOUGH TO BE INCONSISTENT: ABRAHAM LINCOLN CONFRONTS SLAVERY AND RACE* 55 (2008).

109. The first instance of a law permitting a Black man to be a juror was in 1860 in Massachusetts. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 884 (1994); see also STEPHEN KANTROWITZ, *MORE THAN FREEDOM: FIGHTING FOR BLACK CITIZENSHIP IN A WHITE REPUBLIC, 1829–1889*, at 44 (2013) (observing that in the 1820s, Massachusetts excepted free Blacks from serving on juries).

110. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336, 336 (stating no qualified person “shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race”).

111. 100 U.S. 303, 310 (1879) (holding citizens eligible to serve on a jury regardless of race).

112. See Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 372–73 (2014).

113. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 168–92 (1997); MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 39–42 (2004); NEIL VIDMAR & VALERIE HANS, *AMERICAN JURIES: THE VERDICT* 71–72 (2007).

114. GILBERT T. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 253 (1910).

115. *Id.* at 253–54. Stephenson received similar results from commissioners in Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina,

Another strategy was to identify race-neutral features of litigation that, deployed in particular ways, would result in racially disparate outcomes. Fugitive Slave Act procedures, for example, were race neutral: rules permitted the *plaintiff* to rely on attestation (paper) to prove his claim, whereas the *defendant* could not test the paper's authenticity or call witnesses.¹¹⁶ Because the Act structurally pitted a white plaintiff against a Black defendant, the race-neutral rules had a racially disparate effect. The very neutrality of the rules, in turn, worked to legitimize the outcome, however discriminatory.

Thus, race-neutral strategies could achieve racial discrimination in at least two ways.¹¹⁷ First, by using a white gatekeeper to exercise unreviewable discretion according to nonracial categories that could be racially deployed. Second, to capitalize on underlying litigation structures, that, if deployed in a certain way, would maximize discriminatory outcomes. At the same time, the race-neutral approach complied with principles of formal equality and signaled fairness, even as they facilitated discrimination.

These features—facially race-neutral rules that exploited structural disparities or empowered white officials with unreviewable discretion—can be identified in the construction of civil and criminal federal procedure. Still, there is a final contextual piece to consider in understanding the social and political forces to which drafters were subject: certain racist ideologies that had traction within the legal and criminal law community.

D. Some Prevalent Beliefs Within the Criminal Justice System

In civil reform, the innovation of a discovery period had been subject to careful consideration by the Civil Committee. And yet over the course of four days, the Criminal Committee scrapped the *entire* formal discovery phase from criminal litigation.¹¹⁸ How could the Committee be so cavalier in dismissing a defendant's ability to actively participate in the factual development and assessment of his case? This lack of consideration for the agency of a Black litigant, however, would be expected during this period. In fact, it would be much more shocking if the Committee had preserved formal discovery, thereby giving Black litigants a voice.

Oklahoma, South Carolina, Tennessee, Texas, and Virginia. *Id.* at 254–71. Some commissioners deemed one or two Black jurors eligible to demonstrate compliance with federal law; others found no Black citizens eligible. One Texas commissioner affirmed he would never do so, and that of 700 Black, eligible citizens in his district, none had been called. *Id.* at 251.

116. Forman, *supra* note 104, at 900, 905–06. Fugitive Slave Act, ch. 60, § 6, 9 Stat. 462, 463 (1850) (“In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence; and the [affidavit of the moving party] shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory . . .”).

117. To be clear, colorblind approaches in an array of policy, legal, educational, and workplace forums result in racially discriminatory results. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992) (“[A]bstract principles lead to legal results that harm Blacks and perpetuate their inferior status.”); Harris, *supra* note 12, at 1777–78 (observing that principles of neutrality are embraced by those who benefit from an oppressive regime).

118. Meyn, *supra* note 2, at 712.

Moreover, denying a Black litigant agency would not be understood as discriminatory, but rather as burdensome on white officials to ensure that the Black litigant's interests were fairly represented.¹¹⁹ In addition, removing a discovery period increased efficiency; and efficiency in process was increasingly being called for by whites in order to prevent the prevalence of lynching.

In 1925, Thomas Woofter, in *The Basis of Racial Adjustment*, attributed unequal treatment of Black persons in litigation to the unreliability of a Black person's testimony.¹²⁰ Many whites thought permitting Black persons to participate would undermine the quality of case outcomes; taking this line of thought further, they argued that permitting a Black litigant to contribute to the record would be unfair to the Black litigant.¹²¹ Whites did not view such exclusions as a deprivation visited on Black persons, but rather viewed them as a burden on whites to represent the interests of Black persons.¹²² White narratives even portrayed Black persons grateful to whites for administering a Black litigant's claims or defenses.¹²³

There was another "progressive" view prevalent at the moment of reform: calls for "efficiency" that often related to race.¹²⁴ Among many whites, any procedural delay would only inflame expectations of retribution, community, and status that immediate punishment otherwise satisfied. After all, as *The New York Age*, a Black newspaper, wrote: a Black man accused "acted on whole communities like a bloody piece of meat acts on a cage of tigers."¹²⁵ Calls for procedural efficiency were intended to accommodate this bloodlust; rules that minimized delay

119. See, e.g., STEPHENSON, *supra* note 114, at 246, 254–56.

120. THOMAS WOOFTER, JR., *THE BASIS OF RACIAL ADJUSTMENT* 134–36 (1925). A reviewer commented the "book is the result of much research and the facts are stated generally with the coolness of scientific investigation." E. Franklin Frazier, *Book Review*, 4 SOC. FORCES 418, 442 (1925).

121. In 1860, presidential candidate Stephen Douglas asserted Black persons were entitled to only rights of "which he is capable of exercising consistent with the safety of society." MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 30 (1998). The *Austin American-Statesman* in 1903 praised an address by a Black attorney who "realizes that conditions do not justify an equal recognition of both races in all matters, and seems to regard the rights and privileges of the negro equal to those of the white, in so far as he is capable of discharging the duties of citizenship." *The Negro on Race Problem*, AUSTIN AM.-STATESMAN (Tex.), July 27, 1903, at 4.

122. See, e.g., *DRAFTING HISTORY OF THE FEDERAL RULES*, *supra* note 62 ("[I]t is an Augean task for the white lawyer to obtain from [black defendants] a clear account of the facts in the criminal transaction in which they are said to be involved.").

123. In an Arkansas county of 30,000 Black residents and 14,000 whites, and where no Black person served as a juror, the commissioner wrote, "I believe the Negroes are fairly well pleased with the verdicts of all white jurors." STEPHENSON, *supra* note 114, at 254–55. A Florida commissioner opined, "Negroes are not regarded as good jurors, and I believe it to be a fact that a Negro would prefer being tried by a white jury than a mixed jury, or a jury composed wholly of Negroes." *Id.* at 255.

124. See CUMMINGS, *supra* note 16, at 199 (discussing that Attorney General Cummings opined that Americans demanded the "efficient disposition of criminal cases," concerns that found footing in racism, as well as immigration concerns).

125. *Courts, Authorities and Public Sentiment Conspire to Shield Mobs*, N.Y. AGE, Oct. 25, 1906, at 4.

were viewed as essential to placating whites predisposed to lynching.¹²⁶ Blame for white mobs killing Black defendants was often laid at the foot of delay. An Indiana paper advocated a “very strict” approach in confronting “negro crime” to mitigate what was described as an unacceptable, however understandable, impulse to lynch wrongdoers: “We must improve the process of our courts, so that with quick justice and the testimony of surviving victims . . . is heard in chambers with the minimum of cross examination.”¹²⁷ A Mississippi paper observed that the argument “most frequently used in favor of lynch law is that the course of judicial procedure is too slow,” leading the editors to propose procedures that permitted a criminal to “be indicted, tried, convicted and executed within a week after the commission of the crime.”¹²⁸ A swift process that avoided lynching and satisfied rage would trump concerns over accuracy; by 1941, Jim Crow conditions had “metastasized,”¹²⁹ and “discourse of Black criminality” often rendered “matters of innocence, truth, or justice superfluous.”¹³⁰

It was within these social forces and racist narratives, beliefs, policy proposals, and procedural designs from which federal reform would emerge. And unsurprisingly, the Criminal Committee’s construction of the new criminal rules would reflect these norms and strategies of white supremacy.

E. Constructing Separate and Unequal Courtrooms

In 1938, federal reform transformed civil courtrooms. The new rules provided white litigants with discretion and power to interrogate and factually develop claims and defenses. As the civil rules ushered in modern expectations of fact development, notice, transparency, and deliberation, the criminal courtroom would also undergo a different transformation (beginning in 1941). The prosecutor would be empowered, the defendant disarmed. The new criminal rules removed the

126. Objectives included the maintenance of racial oppression through terror, clearing enclaves of Black residents, ensuring Black people showed deference to whites, suppressing civil rights efforts, and exploiting labor from Black men. EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 29–39 (3d ed. 2017).

127. *The Cairo Trouble*, HANCOCK DEMOCRAT (Ind.), Mar. 10, 1910, at 3. This sort of reform might from one perspective be viewed as “progressive”—it was proposed to prevent lynching. The compendium of “good intentions” that underlie features of racist regimes is discussed in Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 848–49 (2014).

128. *The Remedy for It*, JACKSON EVENING NEWS (Miss.), July 14, 1903, at 4. Even the attempt to investigate a criminal case involving a Black defendant could lead to violence. NAACP President Walter White traveled to Phillips County, Arkansas in 1919 to investigate *Moore v. Dempsey*, which had involved a mob-run grand jury and left in its wake 200 Black persons killed by white vigilantes. A mob almost lynched White during his investigation. Klarman, *supra* note 10, at 87.

129. Brian Purnell & Jeanne Theoharis, *Introduction: Histories of Racism and Resistance, Seen and Unseen: How and Why to Think About the Jim Crow North*, in THE STRANGE CAREERS OF THE JIM CROW NORTH, *supra* note 72, at 4.

130. Dichter, *supra* note 81, at 111. Historian Shannon King writes of the white media and political apparatus as being obsessed with a Black crime wave in New York in the 1930s and 1940s. Shannon King, *A Murder in Central Park: Racial Violence and the Crime Wave in New York During the 1930s and 1940s*, in THE STRANGE CAREERS OF THE JIM CROW NORTH, *supra* note 72, at 43–62.

judge as the gatekeeper, imbuing the prosecutor with unreviewable discretion to make racially discriminatory sorting decisions that served societal norms. The new rules permitted prosecutors to stack charges in a single case to increase leverage. Unlike the civil regime, criminal rules not only deprived defendants of the opportunity to discover information and interrogate witnesses, but also reserved to the prosecutor the unitary power to decide the relevance, credibility, and weight of the evidence. From the perspective of a criminal defendant, the rules cloaked proceedings in darkness, rendering him dependent on the representations of his opponent.

Civil and criminal procedure thus contributed to the constitutive ends of racial hierarchy by benefitting white-occupied roles and destabilizing the status of the one litigant who often was a person of color. In effectively constructing separate and unequal courtrooms, federal reform reinforced the racial hierarchy.

1. Neutral Rules That Have Racially Disparate Results

When the Court appointed drafting committees, the Civil Committee considered a world of white litigants and lawyers. In contrast, the Criminal Committee considered a world in which a white state official litigated against defendants who included persons of color, immigrants, and working-class individuals.¹³¹ Because of these demographic differences, any procedural variations between civil and criminal cases would potentially have racially disparate effects. And they did.

Similar to the Fugitive Slave Act, in which race-neutral procedures had racial consequences due to who occupied the roles of plaintiff and defendant, the structure of criminal litigation provided an opportunity to maximize racial disparity through race-neutral distinctions. In a criminal case, the moving party was always the State, and the defendant always an individual. At the time, the State exercised prelitigation police powers free from any significant due process constraints.¹³² A prosecutor initiated the case with a repository of facts on hand. The absence of discovery rules in criminal cases structurally favored the state. Compare this to civil litigation. What if the criminal rules had been applied to civil disputes? There, the lack of a discovery phase might sometimes benefit the plaintiff, sometimes the defendant; *who* received the benefit would depend, in that case, on who possessed more facts relevant to the outcome.

Thus, though the new federal civil and criminal rules were facially race neutral, when applied to differences in demographics (civil disputes were almost always between whites, whereas criminal disputes were often between a white prosecutor and defendant of color) and differences in institutional design (the criminal rules favored the moving party, who was always the prosecutor), the rules had racially disparate consequences. Under the race-neutral rules, civil litigants and

131. Ossei-Owusu, *supra* note 37, at 1175–76.

132. Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1369–70 (2004) (observing that before the 1960s, “[a]s a practical matter . . . the only constitutional protections that mattered for the vast majority of criminal defendants were those available in state, as opposed to federal, courts”); Klarman, *supra* note 10, at 63.

the prosecutor would be given the most discretion and power, whereas the criminal defendant—the only litigant who was often a person of color or racially disfavored—was procedurally deemed a spectator.

2. *Affording a White Official with Unreviewable Discretion*

Procedural systems that confer discretion to an official empower the official to act on prejudice. A core feature of the Criminal Committee's new template was its expansion of prosecutorial discretion: the new rules eased the prosecutor's ability to initiate proceedings by removing the judge as the courthouse gatekeeper; increased prosecutorial leverage by permitting the joinder of claims; and relieved the prosecutor (who, by institutional design, possessed information relevant to the dispute) from any obligation to disclose information to defendant however exculpatory.

Before these rule changes, a prosecutor already exercised significant discretion—it was up to the prosecutor whether and what criminal charge might be brought against a defendant, and in some jurisdictions, the legislature took discretion away from the trial judge and gave it to the prosecutor by setting fixed penalties for some offenses.¹³³ By the turn of the twentieth century, “the administrative apparatus of public prosecution—meaning the dominance of police initiation, the discretion of policemen and public prosecutors, the end of the fee system, and the structural separation of law enforcement and judicial activity—was in place.”¹³⁴ Though prosecutorial discretion was an accepted feature of criminal practice, the appropriate scope of that discretion was not determined. The risks of conferring discretion to a prosecutor had been acknowledged by the Wickersham Commission in 1931, which bemoaned the state of affairs in some state prosecutor offices: “Nowhere is prosecution as well organized as in the Federal Government, and by and large the State systems are much less efficient and much less satisfactory.”¹³⁵ Despite warnings from the Commission about the potential to misuse or abuse prosecutorial discretion, federal reform would significantly reinforce and empower prosecutorial decision-making by making it easy to initiate a case and consolidate claims, while relieving the prosecutor from any pretrial obligation to provide information to the judge or to defendant.

While reform to civil procedures sought to balance the adversarial interests of the parties, reform to criminal law only further consolidated prosecutorial power at the very time it was on the rise.

3. *Prosecutorial Discretion: The Power to Sort*

Consistent with the practice of affording unreviewable discretion to a state officer who made claims to the fair administration of law as he made racially

133. Daniel Pulecio-Boek, *The Genealogy of Prosecutorial Discretion in Latin America: A Comparative and Historical Analysis of the Adversarial Reforms in the Region*, 13 RICH. J. GLOBAL L. & BUS. 67, 137 (2014).

134. Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 584 (1984).

135. U.S. WICKERSHAM COMMISSION REPORTS, *supra* note 37, at 9.

discriminatory decisions, the new rules afforded unilateral power to initiate a case, to stack charges, and to disclose or suppress information based on the defendant's skin color. The federal rules allowed a prosecutor to supply a favored litigant, an Anglo-Saxon defendant for example, input as to the interpretation of the case record. The rules also permitted a prosecutor, as to a disfavored litigant, a Black defendant for example, to suppress any facts that might be exculpatory and to divulge only seemingly inculpatory facts. There did not exist any procedural counterbalance to this grant of discretion. As to this type of procedural regime, Chief Justice Warren later expressed worry in *Terry v. Ohio*, which afforded officers unreviewable discretion to detain civilians on the street, that the decision would result in the "wholesale harassment by certain elements of the policed community, of which minority groups, particularly Negroes, frequently complain."¹³⁶

The grant of unreviewable discretion allowed the prosecutor to favor or disfavor defendants based on a whole host of characteristics, not just along a white–Black binary. At the time, Latinos, Asians, Native people, and European immigrants were all singled out for exclusion.¹³⁷ White fears ran hot regarding "immigrants in the North, 'free' Black citizens in the South, and . . . citizens in the conquered Mexican territories."¹³⁸ Disfavored whites were characterized as "the most degenerate of races," the Irish, "cross-bred German and French," and "Italians of even more doubtful stock"¹³⁹ who were subject to "lawless passions," some "as bad as negroes."¹⁴⁰ A columnist captured the preoccupation with racial sorting among whites: "The moment a Teuton or a Celt achieves fame . . . he is hailed as a new product of 'Anglo-Saxon' civilization! But if he winds up in the police court in the morning, he is regarded simply as a drunken German or Irishman."¹⁴¹ Membership in the favored white diaspora being conditional, the prosecutor under the federal template could determine when a disfavored white was eligible for uplift and when a disfavored white was condemned to a "savage" nature with "no inherited instincts" for any "respect for law," only responding to the "club of the policeman."¹⁴²

The new rules empowered the prosecutor to police this porous color line, using the awesome power of crime and punishment to reaffirm and legitimize these vicious narratives.

136. *Terry v. Ohio*, 392 U.S. 1, 14 (1968).

137. JACOBSON, *supra* note 120, at 20; MICHAEL PFEIFER, *LYNCHING BEYOND DIXIE: AMERICAN MOB VIOLENCE OUTSIDE THE SOUTH 2* (2013) (observing that persons of color, including Blacks, Latinos, Native people, and Asians were targeted by lynching mobs).

138. Simon, *supra* note 77, at 1637.

139. JACOBSON, *supra* note 121, at 44 (citing ARTHUR COMPTE DE GABINEAU, *THE INEQUALITY OF HUMAN RACES* (1855)).

140. *Chief Hennessy Avenged*, N.Y. TIMES, Mar. 15, 1891, at 1; *The New-Orleans Affair*, N.Y. TIMES, Mar. 16, 1891, at 4. Disfavored whites were attributed biological features of racism; for example, one observer described how the "features" of an Irish person were consistent with "barbarism." JACOBSON, *supra* note 121, at 46.

141. PILOT (N.C.), Mar. 25, 1899, at 1.

142. Francis Walker, *Restriction of Immigration*, 77 ATLANTIC MONTHLY 822, 828–29 (1896); *see also* JACOBSON, *supra* note 121, at 41 (noting Irish portrayed as "savage"); *id.* at 54 (noting comparisons of Irish to "Minnesota savages" (Native people)).

4. Prosecutorial Discretion: The Power to Manage Case Efficiency

Federal reform also spoke to calls for more efficiency to ensure carceral outcomes and to prevent the incidence of lynching mobs. A prosecutor could employ discretion to speed up proceedings, imposing the full coercive power of the State while suppressing any exculpatory information. Upon the new template's introduction to the public, Holtzoff wrote:

[The Rules of Criminal Procedure] must be conducive to a simple effective, and expeditious prosecution of crimes Criminals should not go unwhipped of justice because of technicalities having no connection with the merits of the accusation. The protection of the law-abiding citizen from the ravages of the criminal is one of the principal functions of government.¹⁴³

Holtzoff's racially coded message suggested the new rules provided a carceral substitute for whipping.¹⁴⁴ Holtzoff justified this move to greater procedural efficiency with the notion that the criminal justice system had professionalized. Holtzoff thought prosecutorial obstacles had made sense when criminal law was "savage in its ferocity," and opined that any claim that the modern criminal system was savage was "risible."¹⁴⁵ That the newly efficient procedures might compromise accuracy was not considered. In the not uncommon scenario of a false charge of sexual assault made by a white woman against a Black defendant, the new rules permitted quick proceedings that would nevertheless serve to legitimize the false conviction and subsequent incarceration or execution. But the notions that a white woman would lie, or that a Black person would tell the truth, would meet immediate resistance. And Holtzoff's claim that the system was not savage in its ferocity reveals his normalization of Jim Crow cruelties.

Unlike the civil rules, which counter-balanced notice pleading and the joinder of claims with a discovery period that would permit defendant to launch a formal, judicially sanctioned investigation that tested the integrity of his adversary's assertions, the criminal rules stripped out any countermeasures for defendant, even as they tore down the courtroom door to let a prosecutor initiate charges based on vague allegations and threats of severe punishment. From the defendant's

143. Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 12 GEO. WASH. L. REV. 119, 121 (1944).

144. For example, in 1835, South Carolina law punished any white or Black person involved in the crime of teaching a Black person to read and write: the white person was subject to imprisonment, the Black person up to "50 lashes." Black Codes would follow a similar template of race-based punishment, reserving whipping for Black persons found in violation of the law. Delores Jones-Brown, *Race as a Legal Construct: The Implications for American Justice*, in *THE SYSTEM IN BLACK AND WHITE*, *supra* note 101, at 143. Accounts of punishing Black people via whipping for nonconformity are pervasive. *See, e.g., Women and Negro Whipped with Barbed Wire*, GARDNER GAZETTE (Kan.), Apr. 30, 1903, at 1 ("[T]hirty-eight unmasked men . . . broke into a house . . . [and] the negro was whipped with a barbed wire."). Holtzoff would regularly assert that rule efficiency was to the benefit of the defendant. *See Advisory Committee Hearing*, *supra* note 31, 709–10 (arguing that inefficient proceedings would only result in a defendant languishing in pretrial detention).

145. Holtzoff, *supra* note 143, at 123.

perspective, this was a set of highly retroactive procedural conditions. From the perspective of meeting Jim Crow objectives, these changes constituted success.

5. Prosecutorial Discretion: The Power to Determine and Judge Facts

In granting the prosecutor discretion over the pretrial record, the new rules could operate to deny a defendant of color the opportunity to discover, interrogate, and judge the credibility of information. This transfer of unilateral power to a white official to determine the factual record was consistent with prevailing racial ideologies of the time. This asymmetry of access to information would not be viewed as unfair. To represent a Black person's interests was viewed as a burden on the white official, flowing from the white narrative that Black people were prone to distort the record and unable to represent their interests. In its circulation of a draft of the federal rules to the public in 1943, the Criminal Committee published these attending comments:

It is an [A]lleged task for the white lawyer to obtain from [Black defendants] a clear account of the facts in the criminal transaction in which they are said to be involved. Many of [the Black defendants], even when innocent, through fear of the courts, or distrust of their lawyer, in their panic conceal or misrepresent material fact.¹⁴⁶

Under this belief, denying a defendant of color agency did not subtract from, but improved, the factual integrity of outcomes. And as whiteness itself was viewed as a proxy for credibility, reform's unilateral transfer of power to a white prosecutor over the factual record would be viewed as reasonable.

There is a counterfactual to consider: what would have happened if federal reform had granted formal discovery powers to a criminal defendant? How would doing so have comported with the existing racial order? A litigant's agency—the power to exercise discretion over what facts are relevant, to extract and interrogate information, to shape a case—is currency in litigation. To permit a Black criminal defendant to question the state's theory of the case would be viewed to undermine white status. If criminal procedural reform had embraced a discovery phase, state jurisdictions considering importing the federal template would confront the prospect of a Black defendant challenging the representations of a white prosecutor—a prospect that historically would strike many whites as unacceptable.

The Civil Committee transformed common law procedure by empowering white litigants to discover facts and question their adversary and witnesses before trial. The Criminal Committee would also transform criminal procedure by selectively incorporating strategies from the civil rules to create a system of litigation that dramatically increased prosecutorial discretion and decreased defendants' agency. Compared to the civil template that afforded parties symmetrical power, the new criminal rules shifted power to one party—the prosecutor. The Criminal Committee exhibited little concern for the careful balancing civil reformers considered in creating an ecosystem that recognized competing interests. Under the criminal template, a prosecutor ruled the board. The criminal template removed the judge from the pretrial equation to reduce

146. DRAFTING HISTORY OF THE FEDERAL RULES, *supra* note 62.

transparency as it granted unilateral control over facts and law to the prosecutor. In rejecting a discovery phase, the rules permitted the prosecutor, in the absence of judicial supervision, to suppress information relevant to the case. A wholly new—and from the criminal defendant’s perspective—retrogressive model of litigation emerged.

This new procedural regime empowered prosecutors to use their discretion to discriminate on the basis of race, ethnicity, immigration status, and even class—unaccountable to the judiciary, but accountable to social norms. The public prosecutor would serve as a fiduciary to entrenched prejudice. Favored whites might receive prosecutorial dispensations that led to declinations, reduced liability, or mitigated sentences, whereas disfavored whites and defendants of color could be deprived of information, subjected to multiple charges, and issued a more severe sentence. This approach was already entrenched in the American legal system: resistance to Black litigant participation, especially when such participation was expected to be averse to white interests, was a durable feature from the antebellum period and through the Jim Crow period.

II. THE LACK OF COMMITTEE RESISTANCE TO JIM CROW NORMS

People are trapped in history and history is trapped in them.

- James Baldwin¹⁴⁷

Subject to the currents of Jim Crow, the Committee’s proposal to embolden the white prosecutor and strip agency from criminal defendants seemed foregone; any procedural template would be expected to facilitate entrenched norms or face resistance.¹⁴⁸ And though prejudice is subject to disruption,¹⁴⁹ a review of lectures, articles, judicial opinions, and personal papers of Criminal Committee members finds no indication of resistance.¹⁵⁰ Reporter James Robinson did, notably, draft the original proposal that mirrored the civil template, an approach that would permit a

147. James Baldwin, *Stranger in the Village*, HARPER’S MAG., Oct. 1953.

148. See, e.g., Corinna Barrett Lain, *Three Supreme Court “Failures” and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1022 (2016) (“*Plessy*, *Buck*, and *Korematsu* . . . show how historical context can constrain the Justices’ proclivity to protect. The Justices . . . decide cases in a particular historical moment, and as such, are subject to the panoply of attitudes, assumptions—even prejudices—that define that moment.”).

149. See, e.g., TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63* (1988) (observing how individuals can effectuate social change, despite seemingly intractable resistance); Rachel Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 509, 530 (2006) (recognizing a diversity of outcomes in cases brought by whites against Blacks, and yet, recognizing the explanatory power of structural theory). *But see, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2* (2012) (contending that despite disruptions of entrenched power, the underlying social norm persists, seeking a new form of social legitimacy and expression).

150. As to each Committee member, the Author and research assistants contacted state historical societies to access personal papers; secure college yearbooks; assess whether there was a record of Ku Klux Klan membership between 1915–1925; and attempt to collect articles and speeches. Searches on ProQuest and newspaper.com databases were also conducted.

Black litigant to challenge the assertions of the white prosecutor.¹⁵¹ During the first Criminal Committee meeting, Robinson expressed a desire to mirror the civil rules as much as possible, including discovery tools.¹⁵² Robinson complained that the Committee's approach upset the balance achieved by the civil template, and communicated dismay as the Committee tore down provisions that conveyed agency to defendants.¹⁵³ Committee member George Medalie supported aspects of Robinson's proposal, including discovery provisions.¹⁵⁴ The resistance of these two members, however, was decisively overrun by other members.

It should also be noted that no Committee member made any mention of race during the meeting in September of 1941 that transformed the criminal template.¹⁵⁵ The absence of such concerns is, in one sense, deafening. Despite the drumbeat of Black criminality, an emerging legal aid movement that was fueled by immigration and race concerns, and the Court's due process intervention over the exertion of State power to terrorize Black defendants,¹⁵⁶ no Committee member expressed concern that increasing State leverage over defendants might exacerbate such conditions.¹⁵⁷ This nonrecognition of race reflected alignment with prevailing

151. Meyn, *supra* note 2, at 698–99.

152. *Id.* at 711–12.

153. *Id.* at 711–13.

154. *Id.* at 721.

155. Committee member Seth did make mention of defendants with respect to race and immigration status when he spoke of the need for appointed counsel:

Out our way we have a lot of Mexican immigrants who are prosecuted so often for coming across the line from Mexico, and it created a havoc. They keep them on the border in jail, and the judge goes down there, and they plead guilty, and they put them in jail. There are Indians who cannot sign except with thumb marks.

Advisory Committee Hearing, supra note 31, at 251.

156. Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 63 (1996) (stating the few federal constitutional protections were primarily limited to addressing “Southern Jim Crow courts’ dispensation of mob-dominated justice to Black criminal defendants”).

157. If class or immigrant status was mentioned, it was often to strip defendant-protective rules from the template, under the guise of protecting that very defendant. For instance, Holtzoff argued against notice requirements that would require poor codefendants to share copies of motions. *Advisory Committee Hearing, supra* note 31, at 91. Also arguing against a notice rule, Medalie stated:

[T]here are some defendants who are exceedingly unimportant, who cannot afford to spend money, who cannot afford to get good defense counsel, and their lawyers cannot even afford to do all the stenographic work and the typewriting that goes with the case. It is a burden which ought not to be imposed on poor defendants who cannot get that service.

Id. at 92.

views.¹⁵⁸ And within the consensus over racial hierarchy, there would be little need to comment on its requirements.¹⁵⁹

This is not to say that members did not express views on race. A review of archival documents indicates three of the Committee's most influential members found a logic to the racial order. Committee Secretary Alexander Holtzoff was by far the most influential member: he dominated discussion, and by way of intellect, command of law, and position held others in his sway.¹⁶⁰ NYU Law School Dean Arthur Vanderbilt chaired the Committee; he determined the agenda—including the fateful decision that the Committee proceed rule by rule (favored by Holtzoff) without discussing the template as an interdependent ecosystem (favored by Robinson). An ally of Holtzoff, Vanderbilt's position as Chair buttressed Holtzoff's opinions. Harvard Professor and nationally respected criminologist Sheldon Glueck forcefully argued against any rule that afforded a defendant agency.¹⁶¹ Vanderbilt, Holtzoff, and Glueck are presented in order of an increasing alliance with racist ideology.

A. Arthur Vanderbilt

In 1998, attorney Alan Lowenstein told his audience at the *43rd Arthur T. Vanderbilt Lecture* that Vanderbilt “was the foremost spokesman in this century for court reform and the improvement of our American judicial system for all citizens—rich and poor, regardless of race, color, gender, or religion.”¹⁶² Lowenstein thus asserted Vanderbilt worked to achieve racial equality. There is little evidence of

158. See Devon Carbado, *[E]racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 (2002) (observing that the Court “has not explicitly articulated colorblindness as a guiding principle of Fourth Amendment law. This ideology has to be excavated . . . to reveal precisely what [is] obscure[d]: the racial allocation of burdens and benefits of the Fourth Amendment”).

159. Overt agitation over race hierarchy tends to surface when the hierarchy is threatened. See NUMAN V. BARTLEY & HUGH D. GRAHAM, *SOUTHERN POLITICS AND THE SECOND RECONSTRUCTION* 51, 84–85 (1975) (describing white backlash to 1947 Civil Rights Commission Report); IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 344–48 (2007); GOSSETT, *supra* note 89, at 261–62 (describing white backlash during Reconstruction); Michael Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 111 (1994) (describing white backlash to *Brown*). And it is within silence that racial hierarchies find an environment for replication. Carbado, *supra* note 158, at 977–78 (showing how absence of discussing race can signal allegiance to a racial ideology: “officers in [*Florida v.*] *Bostick* . . . selected Bostick, who was seated at the back of the bus, for questioning . . . [Justice O’Connor does not] entertain the possibility that Bostick may have been targeted because he is Black. In fact, Justice O’Connor does not even mention Bostick’s race. Nor does she mention the race of the officers . . . [W]hile it is fair to say that Justice O’Connor’s analysis ignores the fact that Bostick is Black and the officers are white, it is more accurate to say that her analysis constructs Bostick and the officers with the racial ideology of colorblindness”).

160. Meyn, *supra* note 2, at 726–27.

161. See generally *id.* As to other influential members allied with Holtzoff—Frederick Crane and Aaron Youngquist—no archival records reviewed provide insight into their views on race. See *infra* note 204.

162. Alan Lowenstein, *The Legacy of Arthur T. Vanderbilt to the New Jersey Bar*, 51 RUTGERS L. REV. 1319, 1320 (1999).

this.¹⁶³ Biographies of Vanderbilt provide no discussion of Vanderbilt's racial views.¹⁶⁴

Vanderbilt was outspoken about criminal justice. In his address in 1937 as the American Bar Association's President, Vanderbilt expressed alarm at the criminal system's leniency.¹⁶⁵ As Chief Justice of the New Jersey Supreme Court, he was considered a strong "law and order" proponent, and his opinion in *State v. Tune* is emblematic of this ideology.¹⁶⁶ It is in *Tune*, a case denying discovery to criminal defendants, that Vanderbilt's race-based beliefs surface.¹⁶⁷ Penning the majority opinion, he initially staked out a traditional law-and-order position, which addressed whether a criminal defendant was entitled to a copy of his confession:

In criminal proceedings . . . discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. . . . [T]he criminal who is aware of the whole case against him will often procure perjured testimony [Furthermore,] the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves¹⁶⁸

But it is in Vanderbilt's reply to the dissent of future Supreme Court Justice Brennan that Vanderbilt's racial ideology is revealed. Brennan thought courts should be guided by procedures in England, where defendants were permitted to examine witnesses before trial.¹⁶⁹ Vanderbilt countered that the law-abiding instincts of the English created a different laboratory. In the United States, "disrespect for law" had not "disappeared as the criminal statistics indicate in certain segments of the American population."¹⁷⁰ To afford discovery power required the responsibility to wield it, which in the United States, according to Vanderbilt, certain statistically significant "segments" of the population lacked. Who were these "segments"? Not Anglo-Saxons—according to Vanderbilt's analysis it would be appropriate to furnish facts to them. Vanderbilt's choice of language resonated with the convention of academia and government that viewed Black persons and disfavored whites as predisposed to criminality. His opinion in *Tune* reveals his alignment with entrenched norms that relate to his role in shaping rules of criminal

163. A broker of Essex County politics in New Jersey, Vanderbilt did support the campaign of the state's first Black assemblyperson in 1920. EUGENE GERHART, ARTHUR VANDERBILT: THE COMPLEAT COUNSELOR 67 (1980).

164. One gets the sense these treatments tend toward hagiography. *See, e.g., id.*; VOORHEES E. DUNN, CHIEF JUSTICE ARTHUR T. VANDERBILT AND THE JUDICIAL REVOLUTION IN NEW JERSEY (1987). All mention Vanderbilt attended Amherst in 1908, but none mention, for example, a ritual of his fraternity at the time: the incoming cohort dressed up as caricatures of Jews, gorillas, KKK members, and in Blackface. Copies from Amherst yearbooks are on file with the Author.

165. Arthur Vanderbilt, *The Bar and Public*, 23 A.B.A. J. 871, 872 (1937); GERHART, *supra* note 163, at 99–100.

166. Lowenstein, *supra* note 162, at 1340.

167. *State v. Tune*, 98 A.2d 881 (N.J. 1953); Robert Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 299 (1960).

168. *Tune*, 98 A.2d at 884.

169. *Id.* at 889; *id.* at 895 (Brennan, J., dissenting).

170. *Id.* at 889.

procedure. Incidentally, John Henry Tune, who was Black (a fact not mentioned in the opinion), was executed by electrocution three years later, at the age of 24.¹⁷¹

B. Alexander Holtzoff

After his service in the DOJ's executive suite, Holtzoff was appointed to the U.S. District Court for the District of Columbia.¹⁷² Holtzoff penned opinions that frequently raised alarm with the Associated Negro Press ("ANP"). In 1953, the ANP reported Holtzoff ruled in favor of a "Jim Crow Housing Project."¹⁷³ The NAACP had attempted to enjoin the government from financing a race-based housing project. Holtzoff wrote, "It is entirely proper and does not constitute a violation of Constitutional rights for the Federal Government . . . to require people of the white and colored races to use separate facilities provided equal facilities are furnished to each."¹⁷⁴ The facts belied Holtzoff's telling: Black residents were to be forced out, the building razed, and improved facilities to be built for whites. Lawyer for plaintiffs, Thurgood Marshall, remarked Holtzoff broke new ground in expanding segregation by permitting federal financing of racially unequal housing. The day after the decision, Georgia Representative Tic Forrester praised the decision in the Congressional Record, stating, "Judge Holtzoff is completely correct," and "[s]egregation will never be abolished by law. It would seem that everyone should realize that simple fact."¹⁷⁵

In 1947, in an article entitled *Jim Crow School Suit Dismissed*, the ANP reported Holtzoff denied relief to a Black student seeking admission to a white junior-high school in Washington D.C.¹⁷⁶ The ANP reported in 1948 that Holtzoff denied a lawsuit by parents of Black children sent to overcrowded, underfinanced elementary schools.¹⁷⁷ An ANP article published in 1962 entitled *Federal Judge Asks 'Who is Dr. Martin Luther King?'* reported Holtzoff asked the titular question that "startled his courtroom audience."¹⁷⁸ Holtzoff was also disrespectful to W.E.B. DuBois, who in 1951 faced charges for not registering as a "foreign agent" under

171. M. WATT ESPY & JOHN ORTIZ SMYKLA, EXECUTIONS IN THE UNITED STATES, 1608–2002: THE ESPY FILE (2016).

172. JOHN T. ELLIFF, ASPECTS OF FEDERAL CIVIL RIGHTS ENFORCEMENT: THE JUSTICE DEPARTMENT AND THE FBI, 1939–1964, at 611 (1971).

173. *Plan to Appeal Decision Upholding Jim Crow Housing Project*, ASSOCIATED NEGRO PRESS (Chi.), Apr. 29, 1953, at 4.

174. *NAACP Will Appeal Housing Bias Ruling*, N.Y. HERALD NEWS.

175. 99 CONG. REC. 3586 (1953); *Forrester, Elijah Lewis (1896–1970)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000283> (last visited Feb. 18, 2021). Rep. Forrester signed the Southern Manifesto, a racist tome in favor of Home Rule. *Southern Manifesto on Integration*, THIRTEEN: MEDIA WITH IMPACT, https://www.thirteen.org/wnet/supremecourt/rights/sources_document2.html (last visited Feb. 5, 2021).

176. *Jim Crow School Dismissed*, ASSOCIATED NEGRO PRESS (Chi.), Dec. 31, 1947, at 19.

177. *Negroes Lost Fourth Petition in School Transfer Case*, ASSOCIATED NEGRO PRESS (Chi.), Apr. 8, 1948, at 21.

178. *Federal Judge Asks 'Who Is Dr. Martin Luther King?'*, ASSOCIATED NEGRO PRESS (Chi.), Aug. 8, 1962, at 3.

the McCarran Subversion Act.¹⁷⁹ A flyer distributed in the vicinity of the courthouse showcased quotes from the writings of DuBois.¹⁸⁰ Holtzoff immediately accused DuBois of attempting to influence the jury: “You have handed out a statement on your case. That’s contempt of court.”¹⁸¹ A cursory investigation revealed DuBois had nothing to do with the matter. The case was transferred to another judge who issued a directed verdict in favor of DuBois.¹⁸²

In *Potomac Electric Power Co. v. Washington Chapter of Congress of Racial Equality (WCCRE)*, Holtzoff enjoined the WCCRE from launching a protest in which consumers could affix to the utility’s billing envelopes a stamp reading: “We Believe in Merit Hiring.”¹⁸³ It was possible a stamp could cover the envelope’s window, interfering with billing. Holtzoff characterized the WCCRE’s actions as criminal sabotage, encouraging “people to deface plaintiff’s property.”¹⁸⁴ Though WCCRE was protesting racially discriminatory hiring, Holtzoff portrayed the protest as “mischief for mischief’s sake.”¹⁸⁵

In the 1955 case *In re Adoption of a Minor*, where D.C. law permitted a judge to determine whether adoption was “for the best interests of [the child],” Holtzoff found race dispositive.¹⁸⁶ The appellate court described the facts:

The child was born out of wedlock in 1949. The natural father, who is white, has never supported the child and his whereabouts are unknown. The mother . . . is white; . . . the stepfather [Black], whom she married in 1951. . . . Two children have been born of . . . [the] marriage. The couple are ‘equally fond of the three children,’ all of whom ‘appear well cared for.’ . . . The stepfather attended law school for three years . . .¹⁸⁷

Holtzoff denied the petition. He acknowledged adoption of a child born out of wedlock was ordinarily “encouraged,” but here:

The situation gives rise to a difficult social problem. The boy when he grows up might lose the social status of a white man by reason of the fact that by record his father will be a negro if this adoption is

179. See *DuBois’ Trial Near Panic: Arguments Continue This Week*, PITTSBURGH COURIER, May 5, 1951, at 1, 4 [hereinafter *DuBois’ Trial Near Panic*].

180. *Judge Threatens to Jail Peace Information Official*, ALA. TRIBUNE, May 11, 1951, at 3.

181. *DuBois’ Trial Near Panic*, *supra* note 179; *Judge Threatens to Jail Peace Information Official*, *supra* note 180.

182. I.F. Stone, *Meaning of the DuBois Decision*, GAZETTE & DAILY (Pa.), Nov. 24, 1951, at 15.

183. *Potomac Elec. Power Co. v. Wash. Chapter of Cong. of Racial Equal.*, 209 F. Supp. 559, 560–61 (D.D.C. 1962).

184. *Id.* at 560.

185. *Id.* at 561.

186. *In re Adoption of a Minor*, 228 F.2d 446, 447–48 (D.C. Cir. 1956); D.C. CODE § 16-203 (1951) (repealed).

187. *In re Adoption of a Minor*, 228 F.2d at 446.

approved. I feel the court should not fashion the child's future in this manner.¹⁸⁸

The appellate court found Holtzoff focused on race to the exclusion of relevant considerations and reversed Holtzoff in a unanimous decision, directing him to grant the petition.¹⁸⁹ An Oklahoma newspaper, hoping the Supreme Court would step in to intervene, provided this headline: "Boy May Lose Social Status: Court Authorizes Negro Cab Driver To Adopt Child Of His White Wife."¹⁹⁰

In decisions that favored the Black litigant, Holtzoff avoided race-based reasoning to avoid a "win" for racial equality. In *Graham v. Southern Railway*, he enjoined a union from discharging black firemen.¹⁹¹ He declined to address the race discrimination practiced by the union, which designated all Black employees "non-promotable."¹⁹² Holtzoff based his decision on the union's failure to exercise its duty of representation to all employees.¹⁹³ He clarified his opinion had nothing to do with "the baffling problems and complex situations arising out of race relations" and that the controversy did not implicate "a matter of race distinction in social relations between man and man"—language inspired by *Plessy*.¹⁹⁴ Thus, in a case about race discrimination, he asserted race had no bearing, but in dicta, credited race distinctions. He acknowledged, in *Roberts v. Curtis*, the centrality of race.¹⁹⁵ But in *Roberts*, precedent provided a straitjacket. *Shelley v. Kraemer* deemed racially restrictive covenants unenforceable, and in accordance Holtzoff declined to award damages for the violation of a racially restrictive covenant. One sensed his resignation: "[I]t seems inescapable that the motion to dismiss must be granted."¹⁹⁶

As Second Reconstruction efforts of the late 1950s and 1960s emerged, Holtzoff embraced a states' rights ideology.¹⁹⁷ In his former role as a DOJ executive, Holtzoff was aligned with segregationists espousing Home Rule in discussions of civil rights.¹⁹⁸ As a judge, Holtzoff attempted to invalidate a key section of the

188. *Id.* at 447; Alice A Dunnigan, *U.S. Court Hears Arguments on Negro to Adopt White Stepson*, ASSOCIATED NEGRO PRESS (Chi.), May. 2, 1955, at 3.

189. *In re Adoption of a Minor*, 228 F.2d at 447–48.

190. *Boy May Lose Social Status: Court Authorizes Negro Cab Driver to Adopt Child of His White Wife*, MIAMI DAILY NEWS-REC. (Okla.), July 7, 1955.

191. *Graham v. Southern Ry. Co.*, 74 F. Supp. 663, 665–66 (D.D.C. 1947).

192. *Id.* at 665.

193. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207 (1944); *Brotherhood of Locomotive Firemen & Enginemen v. Tunstall*, 163 F.2d 289, 292 (4th Cir. 1944).

194. *Graham*, 74 F. Supp. at 665.

195. *Roberts v. Curtis*, 93 F. Supp. 604, 604 (D.D.C. 1950).

196. *Id.*

197. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); Civil Rights Acts of 1960, Pub. L. No. 86-449, 74 Stat. 86; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73; *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (holding that the regulation of businesses by the federal government to prohibit racial discrimination under the Civil Rights Acts is valid under the Commerce Clause).

198. MARIA PONOMARENKO, *THE DEPARTMENT OF JUSTICE AND THE LIMITS OF THE NEW DEAL STATE, 1933–1945*, at 288–89 (2010).

Voting Rights Act of 1965 (“VRA”).¹⁹⁹ The provision was aimed to correct injustices especially salient in New York, which in the 1920s prohibited Puerto Ricans who did not speak English from voting.²⁰⁰ The VRA preempted this law and enfranchised hundreds of thousands of Puerto Rican New Yorkers, allowing American citizens to participate in their own government.²⁰¹ Because the Fifteenth Amendment addressed voting rights, Holtzoff reasoned Congress could not turn to other amendments (like the Equal Protection Clause of the Fourteenth) to protect the franchise. The Supreme Court overruled Holtzoff.²⁰²

C. *Sheldon Glueck*

Harvard Professor Sheldon Glueck, a Harvard-trained lawyer and sociologist, established the “Glueck Prediction Model” designed to identify factors correlated with criminality among juveniles. His socio-economic factors—like derelict housing and broken families—served as proxies for race, tracking rationales used to explain Black criminality.²⁰³ In his classroom, Glueck made his coded categories explicit, defending biological determinism of crime. His course “Criminality” celebrated Césaire Lombroso, the nineteenth-century criminologist determined to prove criminality was inherited.²⁰⁴ Lombroso’s theories had given rise to a wave that carried the career of many academics, including Glueck.²⁰⁵ For example, as to just the *head*, Glueck described the following:

The [criminal] head is alleged to be anomalous (Corre, Laurent, Lydston, Talbot, Benedickt, Lauvergne, Debierre, Pitard, Bordier, Héger, Dallemagne, Ferri, Winkler, Van der Plaats, Berends, Tenchini, Pellacani, Marimo, Gambara, Mingazzini, Vans Clark) in shape and dimensions. Dimensionally, there are two types of criminal heads: the one larger, the other smaller than the normal type. In shape, five types are described: the head of the criminal may rise, founded like a dome; or it may be depressed, like a roof that is flat and low or its fault may be keel-shaped, from premature union of the median

199. Morgan v. Katzenbach, 247 F. Supp. 196 (D.D.C. 1965).

200. *Id.* at 199–200.

201. *Id.*

202. Katzenbach v. Morgan, 384 U.S. 641 (1966).

203. See, e.g., STONE, *supra* note 60, at 447, 457–58 (attributing to Black persons “defective family life and training,” and based on economic statistics, concluding Black persons lack “industrial virtues which have made the white man what he is” and will thus lose ground in a newly competitive milieu, where the “Negro driftwood is likely to feel sore toward the whites,” unlocking criminal urges).

204. CHARLES GORING, *THE ENGLISH CONVICT: A STATISTICAL STUDY* 11 (1913) (writing that following the Classical and Correctionist periods of Criminology, the “pretensions of criminal to rank as a science were not recognized until . . . the Positive School” whose “methods and aim claimed to be those of the positive sciences. The founder . . . the creator, and most famous exponent of its doctrine, was the late Professor Cesare Lombroso”).

205. For a close reading of Lombroso, see generally MARY GIBSON, *BORN TO CRIME: CESARE LOMBROSO AND THE ORIGINS OF BIOLOGICAL CRIMINOLOGY* (2002) and Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Counties to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2134 (2006).

suture; or it may be a bulging type of head, with the protuberance on one side, or on both sides, or in front, or behind; or it may have a sugar-loaf appearance—the true Satanic type. In other words—to quote Lombroso—the head of the criminal is oxy-cephalic, trigono-cephalic, scapho-cephalic, plagio-cephalic, hydro-cephalic and sub-micro-cephalic.²⁰⁶

Glueck refers to Lombroso as “the master.”²⁰⁷ Glueck lectured that Lombroso’s detractors conflated flaws in his methods with the potential validity of his conclusions. For example, the “skulls measured and studied by Lombroso” deserved to be reevaluated “in light of modern statistical technique.”²⁰⁸ Glueck reflected:

Certain people decided there is no relation between cranial capacity and criminality on the basis of the study of the size of the heads of living criminals; but nobody in the world can tell the size of the brain of a person alive . . . It would be perfectly possible to get Lombroso’s and the other [phrenologists’] collections and apply modern methods and correct for racial, stature and age differences, and come to some conclusions.²⁰⁹

Perpetuating “foreign-born” suspicions of the time that commonly cast Italians as disfavored whites, Glueck credited studies of heads:

Many investigators found the criminal showed smaller horizontal circumference than in general would be found among the average population, which would indicate a smaller brain case generally. . . . [Studies show] that the horizontal circumference of normal male European skulls is 521 mm[;] . . . criminals are stated to average 509.3; an[d] Italian gets 509.5.²¹⁰

Note the use of a decimal point; a detail that suggests exactness and validity. Cultivating this atmosphere of objectivity, Glueck critiqued the work of some phrenologists, such as a study on prostitutes that found a high correlation of persisting Wormian bones.²¹¹ By discounting the work of some phrenologists, he lent credibility to his affirmation of Lombroso.

Glueck was particularly drawn to the promise of racial determinism. “One must get a certain racial homogeneity in a group of criminals he studies If there are criminal characteristics, we may expect them to follow racial characteristics.”²¹² Glueck referred students to an “excellent description of Lombroso’s work” in a

206. Sheldon Glueck, Law School Lectures in Criminology and Penology, Sheldon Glueck Papers, Folder 001771-009-0103, at 14 (Harvard Special Collection) [hereinafter Glueck Papers].

207. *Id.* at 51.

208. *Id.* at 5. Glueck also argued that there were not a sufficient number of skulls preserved to constitute a statistically valid sample size.

209. *Id.* Folder 001771-009-0007, at 3.

210. *Id.* at 4.

211. *Id.* at 16. The theory: One would expect the Wormian bone to recede with maturity, but not so as to women born to be prostitutes.

212. *Id.* at 7.

selected reading, noting its “good illustrations of crania” with “comparisons of principal cranial data in Caucasian, Oceanic, Eskimo, African, Mongolian, Gorilla, Idiots, etc.”²¹³ He told his students, “One finds the highest development of the frontal area of the brain and skull in the most civilized groups.”²¹⁴ Glueck cautioned restraint, however:

[I]f there were any such ordinary prevailing difference between criminals and honest man that was constant as between the European and Indian, the matter of criminal type would be settled then and there. But you probably have to hunt long through jails and pens before you find many chaps with [a] primitive, sloping forehead.²¹⁵

Yet Glueck could not contain enthusiasm for Lombroso’s study that found a “[v]ery great weight of the lower jaw in relation to the [skull cap] is a sign of inferiority.”²¹⁶ Much ink had been spilled describing the delicate bone structure of Anglo-Saxons. According to Glueck, the heavier the jaw, the more energy was reserved for the “chewing apparatus” than for brain function, resulting in “inferiority.”²¹⁷ At the same time, Glueck cast doubt on Lombroso’s thesis that a small U-shaped palate correlated with criminal urges; it so happened a number of Europeans displayed this characteristic. How did Glueck partially invalidate Lombroso’s work marking some whites as criminals? Glueck concluded Lombroso missed an alternative explanation as to Europeans, where the prevalence of a U-shaped palate was “owing to palatal degeneration” because Europeans “don’t exercise jaws much.”²¹⁸ In this move, Glueck preserved Lombroso’s U-shaped palate theory to the extent it condemned nonwhites to criminality.

“Racial questions,” Glueck asserted, “are bound up with crime more than is supposed.”²¹⁹ In a lecture on statistics, he explained the “method of association” thus:

30.6% of total prisoners and juvenile delinquents [in 1910] were negroes; while [the percentage] of negroes in total population is only 10.7—if [the percentage] of negroes in [the] whole prison population is [in] excess of negroes in the population as a whole, there is positive association between negro race and crime.²²⁰

These statistics served as the foundation for Glueck’s theories tying race to crime. He asserted “sexual offenders . . . are excessively dark in skin color.”²²¹ Glueck asked this question of his students: “Why do civilized peoples get more bald than savages?” His answer: “In civilized communities it is related to the nervous system and possibly connected with mental work of one sort or another. Nervous

213. *Id.* at 11.

214. *Id.* at 12 (emphasis in original).

215. *Id.*

216. *Id.* at 19.

217. *Id.*

218. *Id.* at 20–21.

219. *Id.* at 59.

220. *Id.* at 32.

221. *Id.* at 60.

activity has tendency to bring about defects of nutrition in the scalp.”²²² He also stated, in expressing the correlation between tattoo art and criminality: “It is a very painful operation . . . The habit savages have of mutilating themselves shows it is probable that they have a relatively slight sensibility to pain in connection with low mental organization and great recuperative power.”²²³

Glueck critiqued the work of Charles Goring, author of the *English Convict*, for his failure to account for racial difference.²²⁴ Goring, who studied 3,000 inmates in England and found no data linking physical characteristics to criminal behavior, stated: “The recent application of exact . . . methods to the study of anthropology has revealed the extent to which this science has been dominated and confused by conventional prejudices and unfounded beliefs.”²²⁵ Glueck inserted into his lecture a passage from Goring’s book that criticizes the assertion that criminal activity is racially grounded; Glueck wrote in the margin: “But if large percentages are congenitally feeble-minded are they not indeed ‘racial degenerates’?”²²⁶ Glueck made further notes: “All uninstructed people believe slavishly in environment as molding and making a man.”²²⁷ Glueck thought he had landed on the balanced view, attributing criminality to “constitutional as well as environmental factors.”²²⁸ Race played a central role in the “constitutional” factors.²²⁹ Glueck thought Lombroso’s conclusions, if supported by sufficient sample sizes, and if subjected to statistical models, had explanatory power. Glueck failed to discuss in his classroom the alternative theories to explain crime rates, like environmental factors or corrupted data.²³⁰

By their own words, Glueck, Holtzoff, and Vanderbilt held various degrees of allegiance to Jim Crow norms, views considered unremarkable at the time.²³¹ And

222. *Id.*

223. *Id.* Despite his refrain that sample sizes must be large to produce significant meaning, he recounts a story of a Black person that “got on the railway line and had his legs cut off close to his body . . . [H]e only had his own medical care and was around again in a short time.” *Id.*

224. *Id.* Folder 001771-009-0103, at 46 (stating Goring “[f]ails to correct for race. Scotch, Welsh, Irish, English lumped”).

225. GORING, *supra* note 202, at 9.

226. Glueck Papers, *supra* note 206, Folder 001771-009-0103, at 56.

227. *Id.* at 63.

228. *Id.*

229. *Id.* at 71 (“[T]here is much more complicating influence [as to the propensity to commit crime] that comes about through racial differences within the population, than come about through differences of age or stature.”).

230. *See, e.g.,* Sellin, *supra* note 95, at 64 (writing that racist policies and exclusion is at the root of the crime rate for Black persons).

231. During the interwar period, there was little contestation among whites over being the beneficiaries of racial hierarchy, and the fierce ideology that gave rise to these conditions was mainstreamed. *See* THOMAS R. PEGRAM, ONE HUNDRED PERCENT AMERICAN: THE REBIRTH AND DECLINE OF THE KU KLUX KLAN IN THE 1920S, at 8 (2011) (discussing that local Klan representatives “glad-handed their way through the meeting halls of the Masons, Elks, Odd Fellows, Red Men, and other fraternal clubs,” and by 1924, the KKK claimed “thirty thousand Protestant ministers had taken the hood”); Rick Seltzer & Grace Lopes, *The*

despite the Court's due process concerns over the State's abuse of discretion as to Black defendants, no Criminal Committee member wondered aloud whether further emboldening the prosecutor would not undermine the Court's efforts. Certainly, no member indicated any intent to resist the racial order. Rather, the Criminal Committee's most influential members ascribed to the very hierarchy that the resulting rules reinforced.

III. A RENEWED LOOK AT THE COURT'S JIM CROW ACCOMMODATION

The interwar period has been portrayed as a due process moment in which the Supreme Court heroically curbed Southern abuses visited on Black criminal defendants.²³² In leaving its perch of nonintervention, the Court articulated a doctrine “of a dynamic due process” that no longer reflexively deferred to state criminal practice.²³³ The Court implicitly acknowledged that conceptions of universal due process were embedded in the Constitution, a doctrine that would form the foundation for the Warren Court's broadside against federalism in the 1960s.²³⁴ Within this doctrine, Professor Tracey Meares observed that innocence and guilt no

Ku Klux Klan: Reasons for Support or Opposition Among White Respondents, 17 J. BLACK STUD. 91, 92 (1986) (stating that millions joined the KKK in the 1920s, including in the North—for example, in Suffolk County, New York, one in seven adults were members).

232. See RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 90 (2d ed. 2005) (discussing cases that represent the Court's concern about protecting against racist policies as well as its commitment to accurate outcomes in the criminal justice context); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 49 (13th ed. 2012) (asserting that civil rights abuses of African Americans led the Supreme Court “to assume a more active role in the regulation of the criminal justice system”); MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE 127–28 (2014); RIC SIMMONS & RENÉE McDONALD HUTCHINS, LEARNING CRIMINAL PROCEDURE 696–98 (3d ed. 2014) (noting that “in 1936, most sections of the Bill of Rights had not yet been incorporated. . . [h]owever . . . the Court was unwilling to let a state use such extreme measures as were found in this case,” and so the Court in *Moore* ensured states acted consistent with “fundamental principles of liberty and justice”); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1306–06 (1982) (“[T]here can be little doubt that [*Moore*, *Powell*, and *Brown*] made new criminal procedure law in part because the notorious facts of each case exemplified the national scandal of racist southern justice.”); Eskridge, *supra* note 9, at 2378 (“[*Moore*, *Powell*, and *Brown*] formed the basis upon which the New Deal Court suggested the outlines for a new kind of individual rights activism just as it was abandoning the old liberty of contract activism.”); LeRoy Pernell, *Racial Justice and Federal Habeas Corpus as Postconviction Relief from State Convictions*, 69 MERCER L. REV. 453, 461 (2018) (portraying *Powell* as the “fountainhead for much of what we know today as procedural due process in criminal procedure”).

233. Klarman, *supra* note 10; see also Eskridge, *supra* note 9, at 2206; Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 5 GA. L. REV. 721, 751 (2011).

234. Robert Burt, *Brown's Reflection*, 103 YALE L.J. 1483, 1490 (1994).

longer occupied the primary goal of due process, as the Court elevated concerns of fair process to the forefront.²³⁵

A contradiction, however, emerged. If the Court's constitutional intervention limited the exercise of State power in exceptional instances, its nonconstitutional reform reinforced the exercise of State power in all cases. As the Court announced a due process doctrine that unsettled state autonomy, it proposed a template to shore up and legitimate state efforts to increase control over criminal proceedings. Where the Court's constitutional intervention sought to expose certain state practices to judicial review, its nonconstitutional proposal served to reduce pretrial transparency, remove the judge from a supervisory role, and render a defendant more vulnerable to the exercise of prosecutorial power. This contradiction, however, is smoothed over by recent reframing of the Court's due process approach during Jim Crow.

Recent scholarship has downgraded the Court's due process approach as accommodationist—an Atticus Finch intervention.²³⁶ “[T]he Court was willing to take [an interventionist] leap only when confronted with cases in which defendants were brutally tortured . . . or the appointment of defense counsel in a capital case was a complete sham.”²³⁷ Constraining its intervention to cases it *perceived* to be at the margins of state practice, the Court's approach according to Professor Michael Klarman did not actually disrupt Jim Crow norms but was consistent with majoritarian sentiments as to how the racial order should be managed.²³⁸ This reading understands the Court as a majoritarian institution: as Professor Matthew Lassiter explains, the Court sometimes acts in a way “more democratic than the legislative choices of elected representatives.”²³⁹ Klarman concluded, “It turns out that *none* of these [due process] rulings had a very significant direct impact on Jim Crow justice;” mob-dominated trials in the 1930s continued to proliferate, confessions obtained through torture continued through the 1940s, and

235. Tracey Meares, *Burying the Lede: Why Teaching the Due Process Cases Is Critical to Investigations in Criminal Procedure*, 60 ST. LOUIS U. L.J. 497, 502 (2016).

236. Like the Court, Finch has been lionized for racial intervention in the deep South, but subject to a reassessment that reveals accommodation of the racial order. The real life Atticus Finch (Amasa Lee, Harper Lee's father) in fact supported the prosecution of the Scottsboro Boys. Casey Cep, *The Contested Legacy of Atticus Finch*, NEW YORKER, Dec. 17, 2018.

237. Klarman, *supra* note 10, at 48–49; Klarman, *supra* note 156, at 63 (citing *Moore v. Dempsey*, 261 U.S. 86 (1923)) (addressing mob domination during a trial); *see also* *Brown v. Mississippi*, 297 U.S. 278 (1936) (excluding physically coerced confessions); *Norris v. Alabama*, 294 U.S. 587 (1935) (requiring fair cross-section in juries); *Powell v. Alabama*, 287 U.S. 45 (1932) (requiring counsel in capital cases).

238. Klarman, *supra* note 10, at 93–95.

239. Matthew Lassiter, *Does the Supreme Court Matter? Civil Rights and the Inherent Politicization of Constitutional Law*, 103 MICH. L. REV. 1401, 1405–06 (2005); *see also* Mary Dudziak, *The Court and Social Context in Civil Rights History*, 72 U. CHI. L. REV. 429, 432 (2005) (“Klarman strikes a blow at the countermajoritarian thesis, for Klarman imagines a court without significant agency. The Court does not shape American society. Instead, the Court follows the flow of cultural mores, reflecting changes that have their source elsewhere.”). For a critique of Klarman's “consensus constitutionalism” view, *see* Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 797–99 (2011).

constitutional exhortation to permit Black jurors to serve were “defied without repercussion for an entire generation.”²⁴⁰ If the Court’s due process intervention is understood to legitimate racially oppressive state practices, the Court’s constitutional and nonconstitutional interventions can be reconciled. As the Court’s due process intervention legitimated the majority of state practices that escaped federal scrutiny, the Court’s reform of nonconstitutional procedure further empowered the State to maintain racial norms. One wonders whether the Court’s due process intervention implicitly satisfied any concern within the Committee over emboldening state actors. Any concern that the State would abuse newfound power to unilaterally control pretrial case proceedings would be mitigated by the promise of constitutional intervention should that power be abused.

The procedures that emerged from the Jim Crow period that empowered white litigants (civil parties and the prosecutor) as they made criminal defendants, often persons of color, more vulnerable to the expression of state power, are still largely in place. This Article does not contend present conditions constitute a “new” Jim Crow.²⁴¹ Rather, it contends that separate and unequal courtrooms, constructed by government in the 1930s and 1940s, reproduced Jim Crow principles that still influence disputes today. The nature of procedural rules that have governed pretrial litigation since federal reform has remained remarkably stable. Criminal courtrooms still reduce the criminal defendant and the judge to spectator status, where an emboldened prosecutor is permitted to selectively distribute facts to leverage advantage.²⁴² Comparing the civil and criminal forums reveals how the architecture of structural racism is reinforced within race-neutral language.²⁴³ Neither the federal rules of procedure nor the Constitution places upon a prosecutor any pretrial obligation to disclose critical information to preparing any semblance of a defense to the State’s case.²⁴⁴ As litigants in civil courtrooms compel the disclosure of information well in advance of trial, criminal defendants do not. Constitutional doctrine provides no relief; in *Brady v. Maryland*, the Court left the pretrial zone (in which 95% of all cases settle) free from influence.²⁴⁵ As those cases that advance to trial, *Brady* promises little and provides less, and in any event, pales in comparison to the transparency, notice, interrogation, and deliberation provided to civil litigants.²⁴⁶ The exercise of prosecutorial discretion under these conditions continues

240. Klarman, *supra* note 10, at 49, 95 (emphasis added).

241. James Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 35, 61 (2012) (warning that comparing present conditions to past injustices for the sake of raising an alarm risks sacrificing important nuance, while diminishing the actual cruelties of historical conditions).

242. Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39 (2014).

243. Carbado, *supra* note 158, at 965–66 (stating that “race and Fourth Amendment scholarship fails to examine the nexus between the development of Fourth Amendment doctrine on the one hand, and ideological notions about what race is and should be on the other,” and as to “the relationship between the construction of race in judicial opinions and the production and legitimation of racial inequality,” scholars have “failed to consider the race constructing role the Court performs in the Fourth Amendment context”).

244. Ion Meyn, *Flipping the Script on Brady*, 95 IND. L.J. 883, 889–90 (2020).

245. *See id.*

246. *See id.* at 889–91.

to produce racially disparate charging, plea bargaining, and sentencing decisions.²⁴⁷ As Professor Angela Davis closely observes, Supreme Court doctrine only insulates the prosecutor from being legally challenged for engaging in racially discriminatory decision-making.²⁴⁸

As to the current racial salience between these separate and unequal courtrooms, there is little research that provides insights into the racial distribution of benefits and burdens across civil cases.²⁴⁹ In a 2003 study by the DOJ, “African-Americans tend to have distinctly lower evaluations than do Whites of the performance, trustworthiness, and fairness of courts.”²⁵⁰ Where approximately 50% of white litigants find outcomes “usually fair,” only 15% of Black litigants come to a similar conclusion.²⁵¹ Approximately 60% of white litigants find procedures to be “usually fair,” where only 25% of Black litigants come to a similar conclusion. As compared to white litigants, approximately “64% of African Americans feel that the courts treat them worse.”²⁵²

The picture of the present criminal courtroom, however, is clear; it disproportionately processes people of color. Although Black people comprise only 13% of the population, state and federal prisons house more Black inmates than white inmates,²⁵³ with inmates of color representing over two-thirds of the total prison population.²⁵⁴ Urban police target persons of color—in New York, almost

247. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 32 (1998) (“These decisions may or may not be intentional or conscious. Although it may be difficult to prove intentional discrimination when it exists, unintentional discrimination poses even greater challenges.”).

248. *Id.* at 31, 41, 49 (discussing doctrine that renders such legal challenges, in application, futile, including: *Washington v. Davis*, 426 U.S. 229 (1976), *Armstrong v. United States*, 517 U.S. 456 (1996), and *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

249. As to civil courtrooms and race, see Rebecca Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 *ANN. REV. SOC.* 339, 350 (2008) (“[N]o work from the contemporary national surveys has yet focused on measuring and explaining race differences in the incidence of problems, in disputing behavior, in how problems are handled, or with what results.”). There is some research that focuses on *representation rates* in civil cases that are based on race. Amy Myrick et. al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 *N.Y.U. LEG. & PUB. POL’Y* 705, 713–20 (2013) (finding Black plaintiffs are 2.5 times more likely than white plaintiffs to appear in the absence of counsel in civil rights disputes).

250. DAVID ROTTMAN ET AL., *NAT’L CTR. FOR ST. CTS., PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY* 10 (2003).

251. *Id.* at 36 tbl.3.1. This study did not differentiate between criminal and civil court; participants were prompted with the following language: “I would like for you to think about the courts in your community. By courts, I mean the judges, their staff, and clerks who work in the courthouse, but not the police, prosecutors, or lawyers in court representing clients.” *Id.*

252. Richard Brooks & Haekyung Jeon-Slaughter, *Race, Income, and Perceptions of the U.S. Court System*, 19 *BEHAV. SCI. L.* 249, 256 (2001).

253. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, *PEW RES. CTR.* (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-Blacks-and-whites-in-prison/>.

254. *Id.*

nine of ten stops are of a person of color. In New Jersey, a 2013 statewide report found “77% of the state prison population is racial and ethnic minorities.”²⁵⁵ For white people nationally, the incarceration rate is 380 per 100,000; for Black people, 2,207 per 100,000.²⁵⁶ In New York City, the rate of incarceration for Black persons to white persons is 12 to 1; for Latinx persons, 5 to 1. Areas with the highest incarceration rates correlate to areas with the highest concentration of the Black population.²⁵⁷

As procedural efforts continue to shunt litigants to and from criminal and civil courtrooms, these conditions create a feedback loop that reinforces racial bias. Colorblind formalism²⁵⁸ continues to dominate constitutional jurisprudence and the popular imagination, even as many people continue to associate criminality with race.²⁵⁹ Current social psychology studies “demonstrate that most individuals of all races have implicit, i.e. unconscious, racial biases linking Blacks with criminality.”²⁶⁰ If we have made progress in chipping away at these modalities of racial hierarchy, it is poor.²⁶¹ Racial disparity continues to persist along every

255. Bruce Stout & Bennett Barlyn, *The Human and Fiscal Toll of America's Drug War: One State's Experience*, 6 ALB. GOV'T. L. REV. 525, 535 (2013) (citing OFF. OF POL'Y & PLANNING, N.J. DEP'T OF CORR., OFFENDER CHARACTERISTICS REPORT 1 (2013)).

256. *U.S. Incarceration Rates by Race and Ethnicity (2010)*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/graphs/raceinc.html> (last visited Feb. 18, 2021).

257. Felony exclusion statutes are most strict in states with the highest concentration of Black residents. If jury pools are selected through voter rolls, this too disproportionately excludes Black jurors, and even if Black jurors are called to the venire, exclusion from the petit jury is routine. *See generally* *Batson v. Kentucky*, 476 U.S. 79 (1986); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); Thomas Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018); Adam Liptak, *Exclusion of Blacks from Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2015), <https://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html>. If a Black juror is called to the venire, prosecutors use for cause and peremptory strikes to remove Black jurors at much higher rates. Frampton, *supra*, at 1622–33. In Georgia, prosecutors brought “peremptory strikes against 46 percent of the Black potential jurors who remained, and against 15 percent of others.” Liptak, *supra* (stating reasons for strikes included “young or old, single or divorced, religious or not, failed to make eye contact, lived in a poor part of town, had served in military, had a hyphenated name, displayed bad posture, were sullen, disrespectful or talkative, had long hair, wore a beard”).

258. Harris, *supra* note 12; *see* Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 692 (2018).

259. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 286–87 (1987) (noting that Georgia prosecutors sought death penalty in 70% of cases involving Black defendants/white victims and in 19% of cases involving white defendants/Black victims); Michael Pinard, *Poor, Black, and “Wanted”: Criminal Justice in Ferguson and Baltimore*, 58 HOW. L.J. 857 (2015) (demonstrating how jurisdictions use the criminal system to exploit the Black population).

260. L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 75 (2017).

261. Studies in the 1960s indicated the depth of the Black criminality perception: subjects shown photos of a white man brandishing a razor in an argument with a Black man recalled the Black man with the razor. R.L. MCNEELY & CARL POPE, RACE, CRIME, AND CRIMINAL JUSTICE 37 (1981). In the late 1960s, social scientists were still reifying race-as-

intercept point of the criminal system—policing, intake, adjudication, sentencing, and probation.²⁶²

CONCLUSION

If we were to imagine a country free from racial discrimination, could we say that the existing system of procedure treats civil and criminal litigants differently for rational and legitimate reasons? The answer is arguably yes. But we don't live in such a world. The result of federal reform in 1941—two courtrooms, constructed during Jim Crow—still influences how justice in the United States is dispensed. When civil and criminal law litigants walk through a courthouse door, they do so with different expectations of what process constitutes a just outcome. Anyone who takes account of proceedings in civil courtrooms and criminal courtrooms today may fairly conclude that litigation, facts, agency, and dignity are reserved for white people—by design.

criminality, like University of Pennsylvania Professor Marvin Wolfgang who concluded the existence of a “Black subculture of violence” that contributes to a high “criminal display of the violence value among minority groups such as Negroes.” Liqun Cao et al., *The Empirical Status of the Black-Subculture-of-Violence Thesis*, in *THE SYSTEM IN BLACK AND WHITE*, *supra* note 101, at 47; MUHAMMAD, *supra* note 7, at 271. Muhammad’s study of the first part of the twentieth century observed the tenacity of these beliefs. These beliefs are still widely held. *See, e.g.*, Butler, *supra* note 11, at 1455 (“Polls suggest that the majority of white people think that Blacks are violent. Another study found that white people imagined men with stereotypically Black names like ‘Jamal’ or ‘Darnell’ to be larger, more dangerous, and violent than men with stereotypically white names like ‘Connor’ or ‘Wyatt.’”).

262. Andrew Kahn & Chris Kirk, *What It’s Like to Be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015), <https://slate.com/news-and-politics/2015/08/racial-disparities-in-the-criminal-justice-system-eight-charts-illustrating-how-its-stacked-against-Blacks.html> (reviewing studies that show disparate treatment of Black persons at every intercept point in the criminal justice system).